

Black and green revisited

Understanding the relationship between indigenous
and environmental political formations

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Abstract

In Australia in recent years considerable attention has been given to a supposed rift in the historical affinity between environmental and Indigenous priorities as material gain from mining, forestry and other resource-based development is weighed against impacts on the environment and communities.

In this issues paper David Ritter explores the contemporary nature of the 'green'–'black' relationship, both internationally and in the Australian context. He discusses the experiences of Greenpeace's successful alliances with indigenous peoples in the Americas and the sub-Arctic before turning to Australia and the underlying dynamics — for example, the limitations of future act negotiations and the powerful influence of the resources sector — that can contribute to disputes between Aboriginal and Torres Strait Islander groups and environmentalists.



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David Ritter¹

Introduction

Reports of a fractious ‘green’–‘black’ relationship have featured among the stories du jour of Indigenous affairs over recent years, regularly popping up on the media menu. These conflicts, it is often said or implied, mark a break from the historical affinity between environmentalists and Indigenous people. In truth, though, contrary to the convenient narrative of rupture, relations between environmentalists and Indigenous people have always been complicated and taken multiple forms.

This paper revisits the complexities of the ‘green’–‘black’ relationship by undertaking four tasks. First, the question of whether there is a fundamental clash in values between ‘green’ and ‘black’ will be explored, with some particular reflections on the global Greenpeace experience of working with indigenous peoples. Second, some features of the Australian context that condition and may have contributed to some of the high-profile clashes between ‘greens’ and ‘blacks’ will be analysed. Third, some of the prospects for future dialogue and relationships will be considered. Fourth, the specific case of the coal industry — which is uniquely destructive of the global climate and constitutes Australia’s greatest contribution to global greenhouse gas emissions — will be considered.

The intent is to present a complex perspective that avoids both easy binaries and assumed synergies between ‘greens’ and ‘blacks’. This paper also has clear normative foundations and is written in the spirit of both hope and humility. Given the scale of the challenges that face the people of our shared continent, it is incumbent upon all who share concern for the country and the future to seek common ground where possible and to acknowledge and accept differences constructively and with respect.²

The categories of ‘green’ and ‘black’, of course, are not in any way fixed or uniform in their ideals and frequently overlap. Whatever reactionary commentators may sometimes imagine, neither ‘greens’ nor ‘blacks’ are opposed to development, let alone modernity per se. It is perhaps trite to observe that the Indigenous population of Australia is characterised by immense geographic, cultural and linguistic diversity as well as a very different historical experience. The same might be said of the ‘environmental movement’, which includes not only the large national and international environmental non-government organisations (NGOs) but also the conservation councils and a plethora of other smaller entities; various think tanks and digital campaigning organisations; numerous quasi-governmental and wholly private initiatives; and, of course, individual citizens who may become involved in a particular environmental issue.

1 The author would like to thank AIATSIS, and especially Pauline McGuire, Toni Bauman and Pamela McGrath, for both inviting this issues paper and waiting so patiently for its completion. He would also like to thank Jessica Panegyres and Alix Foster Vander Elst for their assistance with the paper’s preparation, and the numerous current and former colleagues who have generously given their time to read and comment on various drafts or contributed their time and energy to conversation on the issues.

2 I want to be extremely up-front about my motives for writing this paper. My background is as a native title lawyer, but for the last seven years or so I have been a public environmentalist working first in the UK and now in Australia. Like many people, for my entire adult life I have both respected Indigenous people’s rights *and* been concerned with protecting the environment, both as matters of personal conviction. At times, I have experienced first-hand the conflict between the rights and aspirations of Indigenous people and the imperatives of environmental groups; indeed, I have acted for native title groups in some such instances. On returning to Australia in 2012, I found the intensity of the public conflict between some traditional owners and Indigenous leaders and some environmentalists to be, frankly, troubling. This paper is an honest and preliminary attempt to understand the dynamics behind the disputation and to modestly suggest some ways forward.

The presence of the Australian Greens as Australia's third political force, but without any affiliation with the independent environmental NGO sector, adds another layer of complexity. Although all within the environmental movement presumably share common concern for the future of life on earth, there are significant and legitimate differences in priorities, methods and underlying notions of the functioning of society. Environmentalism can take numerous political and organisational forms, underpinned or influenced by the full ambit of ideological possibilities.

Finally, it should also be observed that, in terms of both social realities and normative preferences, there is no hard and fast border between 'greens' and 'blacks' so much as a liminal space that contains potential for both cooperation and dispute; frustration and ambition; despair and hopefulness.

A fundamental clash of values?

There would be little hope for common ground within the interactive space of 'greens' and 'blacks' if, at base, there existed an essential and irreconcilable conflict between the values underpinning Indigenous land rights and aspirations on the one hand and environmental imperatives on the other. Arguably, the two fundamental values driving most environmentalism are enlightened self-interest and a belief in the transcendent or intrinsic worth of nature. Enlightened self-interest, as David Suzuki points out, necessitates environmental protection, as all humans have the same biophysical needs for clean air, clean water, safe food and a safe climate.³ If those needs are not met we cannot survive. A functioning biosphere is thus a precondition for all human life. One analytical and ideological consequence is that incremental environmental destruction can rightly be viewed as a human rights violation.⁴

In his 2012 Oxford lecture on climate change and human rights, Kumi Naidoo, one-time anti-apartheid activist and now Executive Director of Greenpeace International, argued that far too often the suffering of people and serious environmental problems have been seen as unrelated.⁵ Yet the grim reality is that the same political, social and economic forces are often responsible for human rights abuses, socio-economic inequalities *and* environmental degradation. Frequently it is the poorest and most disenfranchised communities — including marginalised indigenous peoples — that are the first and worst affected by environmental ills. In Australia, as globally, the risks to Indigenous people from environmental degradation, whether from biodiversity loss, land conversion, pollution or other impacts, are starkly apparent.

Climate change in particular presents dire prospects for Indigenous and non-Indigenous Australians alike, but it is the former who are likely to suffer sooner and disproportionately more from the consequences of a warming world.⁶ A 2009 Australian Government study examined the likely effects of climate change on Indigenous settlements and communities across tropical northern Australia, including the Torres Strait Islands and the Pilbara in Western Australia.⁷ Approximately 50 per cent of this Indigenous population lives within 20 kilometres of the coast or on offshore islands. The report found that, while magnitudes were uncertain, impacts that are certain to occur include 'increasing atmospheric carbon dioxide levels that will alter plant growth; increasing temperatures that will affect human and natural systems; rising sea levels that pose threats to low-lying settlements and

3 See, for example, D Suzuki & M McConnell, *The sacred balance: rediscovering our place in nature*, Mountaineers Books, Seattle, 1999. See also F Diller, 'An interview with David Suzuki', *American Scientist*, Sigma Xi, the Scientific Research Society, <http://www.americanscientist.org/bookshelf/pub/david-suzuki>.

4 J Nickel, 'The human right to a safe environment: philosophical perspectives on its scope and justification', *Yale Journal of International Law*, 18: 281–96, 1993.

5 K Naidoo, 'Green rights are human rights', Oxford Amnesty Lectures, 10 May 2012.

6 O Milman, 'Climate change: Indigenous Australians "face disproportionate harm"', the *Guardian*, 14 October 2013, <http://www.theguardian.com/environment/2013/oct/14/indigenous-face-disproportionate-harm-climate-change>.

7 D Green, S Jackson & J Morrison, *Risks from climate change to Indigenous communities in the tropical north of Australia*, Department of Climate Change and Energy Efficiency, Canberra, 2009.

estuarine ecosystems; and ocean acidification that will endanger coral reefs and affect marine food chains.⁸

It has been rightly recognised that the consequences of rising concentrations of greenhouse gases violate Indigenous peoples' rights⁹ — a claim that is at the heart of the Declaration of Indigenous Peoples on Climate Change.¹⁰ As Patrick Dodson said in his 2012 Gandhi Oration, 'There is a need for ecological and social balance to be restored, not only to ensure our own resilience but our very survival as human beings.'¹¹ Far from a clash between Indigenous rights and environmental protection, a safe environment is a precondition for the recognition of Indigenous rights — and, indeed, for the flourishing of all human civilisation.

Aside from this basic matter of biophysical needs, many wish to protect the environment because of a belief in nature's intrinsic value.¹² Whatever the rational preoccupation with targets or quotas, communicated in the banal language of 'sustainability', 'biodiversity' and 'ecosystem services', the underlying truth is frequently one of motivation by love for the miracle and experience of the living world and a sense of deep sadness when confronted by the loss of nature. Love for 'the environment' is not reducible to the dry calculus of basic needs satisfaction.¹³ In many cultures, deep feeling for place and nature is embodied in a set of customs, laws and institutions that bind the people to the land and other living things. To give but one example, the following words are those of Kuninjku man Ivan Namirrkki talking about his traditional land, as quoted in a recent AIATSIS publication:

This place, the creek and water, we love this country, we Aboriginal people. We love it. The old people were the same, attached to the water and this land. The old people, our grandfathers and grandmothers, great grandparents, our ancestors, they lived here in this place, put here for them. That's how we talk about our land.¹⁴

It seems safe to begin from the proposition that there is no intrinsic and irreconcilable conflict between the values of Indigenous and heritage rights on the one hand and environmental protection on the other. Indeed, in practice in Australia, such interests not only have often been reconciled but also the mechanisms of deeply practical reconciliation have produced conspicuous successes, including Indigenous protected areas, joint management of national parks and the Indigenous ranger program.¹⁵

Nevertheless, there are two possible well-known scenarios where 'greens' and 'blacks' may in practice enter into a conflict over principle. The first would be where an environmentalist believed that protecting the environment meant preserving untouched 'wilderness' by sealing an area off from any human contact. The origins of the idea of 'wilderness' lie in anachronistic perceptions that country, when 'discovered' by Europeans, was in a wild or natural state. In reality, almost all such areas of 'wilderness' generally had a long history of human contact which generally continued into present use and occupation by Indigenous peoples.¹⁶ In Australia, the discourse of terra nullius underpinned the idea of wilderness just as it did the denial of Indigenous land ownership. However, such archaic

8 *ibid.*, p. 1.

9 RA Tsosie, 'Indigenous people and environmental justice: the impact of climate change', *University of Colorado Law Review* 78: 1625–77, 2007; S Aminzadeh, 'A moral imperative: the human rights implications of climate change', *Hastings and International Comparative Law Review* 30: 231–62, 2006–07.

10 Second International Indigenous Forum on Climate Change, *Declaration of Indigenous Peoples on Climate Change*, The Hague, 15 November 2000.

11 P Dodson, inaugural Gandhi Oration, University of New South Wales, 30 January 2012, <http://www.abc.net.au/tv/bigideas/stories/2012/02/08/3422644.htm>.

12 E Katz, 'Searching for intrinsic value: pragmatism and despair in environmental ethics', *Environmental Ethics* 9(3): 231–41, 1987.

13 D Jamieson, 'Justice: the heart of environmentalism', in RD Sandler & PC Pezzullo (eds), *Environmental justice and environmentalism: the social justice challenge to the environmental movement*, MIT Press, Cambridge, Massachusetts, 2007.

14 Quoted in L Taylor, 'Connections of spirit: Kuninjku attachments to country', in JK Weir (ed.), *Country, native title and ecology, Aboriginal History Monograph 24*, ANU E Press and Aboriginal History Incorporated, 2012, p. 21.

15 There is an extensive literature, but see, for example, J Altman & S Kerins, *People on country*, Federation Press, Sydney, 2012.

16 CJ Baird, 'A critique of and an alternative to the wilderness idea', in A Light & H Rolston (eds), *Environmental ethics*, Blackwell Publishing, Oxford, 2003.

views are rarely to be found or articulated within the contemporary Australian environmental movement, which rightly accepts that what is experienced as ‘nature’ in our continent is actually the product of millennia of Indigenous occupation.¹⁷ The other instance where there may be some inherent conflict would be over endangered species, where environmentalists took the view that any killing of the animals was wrong and therefore objected to Indigenous hunting rights. In practice, given the comity of underlying interests — namely, that the species in question does not become extinct — it is to be hoped that any such dispute is capable of practical resolution.¹⁸

Certainly it is the Greenpeace experience that there is no irresolvable values conflict between Indigenous rights and interests on the one hand and ecological protection on the other and, indeed, that there are substantial opportunities for mutual endeavour. Undoubtedly, and as Kumi Naidoo has acknowledged, Greenpeace has historically made mistakes in engaging with indigenous peoples.¹⁹ However, having learned from some difficult experiences, we have gone on to work collaboratively with indigenous communities around the world and have shared a number of notable victories. A few examples must suffice.

The Deni are an indigenous people from Brazil whose traditional country falls within the Amazon rainforest. The Deni have long fought to have their rights recognised by the government.²⁰ After a transnational logging company purported to purchase their territory from the Brazilian government, the Deni requested Greenpeace’s help. Greenpeace then approached two other Brazilian organisations with appropriate experience and all three began to work collaboratively with the Deni to self-demarcate their land, which was officially recognised by the Brazilian government in 2003. As a consequence, the Deni have been able to protect 3.5 million hectares of their rainforest from commercial logging. However, crucially, ‘protected’ does not mean ‘untouched’. In 2003, leader Kubuvi Deni was quoted as saying: ‘We will never leave our land. We need this land to survive. We need to hunt and fish to have food. To do that, we need a lot of space.’²¹

Other noteworthy examples of alliances between Greenpeace and indigenous peoples include our work with Komi peoples in the sub-Arctic documenting the effects of oil spills on their land and water.²² This activity led to local authorities taking action against the fossil fuel companies. Similar work is occurring in other areas of the Arctic and sub-Arctic, and Greenpeace is currently assisting with alliance building among 35 indigenous peoples of the far north. The result of the work Greenpeace did with Komi peoples was the strong declaration against oil extraction in the Arctic made in 2012 and which is now guiding the campaign.²³

Yet another example is our joint effort with 30 First Nations people of the Great Bear Rainforest and other NGOs to conserve high-value forest from logging.²⁴ This work resulted in conservation agreements in 2006 and 2007, under which 70 per cent of the old growth forests were protected and logging controls implemented. In yet another case, Greenpeace has worked with the indigenous

17 I have not conducted any empirical inquiry, but in the 18 months I have spent as CEO of Greenpeace Australia Pacific I am yet to hear a single utterance of this kind.

18 The Greenpeace perspective on such matters is that both Indigenous land and hunting rights should be respected and that, indeed, both are often a precondition to sustainability.

19 K Naidoo, REDDIT, 2013, <http://www.reddit.com/r/IAMa/comments/1jyek5/>. However, there are none that I am aware of in an Australian context.

20 Greenpeace International, *The Deni celebrate victory in fight for land rights*, media release, 6 August 2003, <http://www.greenpeace.org/international/en/press/releases/the-deni-celebrate-victory-in/>.

21 Greenpeace International, ‘Deni savor Amazon victory’, webpage, 6 August 2003, <http://www.greenpeace.org/international/en/news/features/community-celebrates-amazon-de/>.

22 Greenpeace International, ‘Black ice: Russia’s ongoing oil spill crisis’, webpage, <http://www.greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/The-dangers-of-Arctic-oil/Black-ice--Russian-oil-spill-disaster/>.

23 Arctic Indigenous Peoples’ Conference, *Joint Statement of Indigenous Solidarity for Arctic Protection*, 2013, <http://www.greenpeace.org/international/Global/international/publications/polar/2013/IndigenousSolidarityStatement.pdf>.

24 Greenpeace International, ‘Great Bear Rainforest: a forest solution in the making’, webpage, 2012, <http://www.greenpeace.org/international/Global/international/code/2012/greatbearrainforest/gbr.html>.

people of Point Hope, Alaska, whose livelihoods are threatened by climate change, to jointly protest Shell's oil drilling.²⁵ In each of these cases there is respect and shared purpose between the goals of indigenous peoples and environmental groups.

Of course, Greenpeace is not the only environmental organisation that recognises the interdependence of indigenous rights and ecological values. For example, in the emerging international system to reduce emissions from deforestation and degradation (REDD), the rights of indigenous and forest peoples is one of the most hotly contested issues.²⁶ Tropical deforestation is responsible for approximately 10 per cent of annual global carbon emissions, and REDD contemplates that funding will be made available for the developing world to reduce emissions from deforestation and degradation of forests.²⁷ International indigenous peoples' organisations remain deeply concerned that REDD will function to legitimate a land-grab or the appropriation of other indigenous rights.²⁸ Many in the global environmental movement have stood by indigenous peoples on REDD, recognising that forest peoples' rights not only should be respected but have proved to be essential in maintaining both carbon stocks and biodiversity values.

The Australian context: why do 'green' and 'black' conflict?

Although there is no fundamental clash of principle and it is notable that in practice 'green' and 'black' interests are often reconciled to mutual advantage, it is a matter of public record that there have been a number of high-profile conflicts that have played out in the media over recent years, largely over proposed mining or industrial developments in northern Australia. This paper will not delve into the specifics of any of those conflicts because all are no doubt complicated and it is beyond the scope of this paper to establish any empirical or forensic basis for understanding what has transpired in each case. It is all too easy and not terribly helpful to sit in judgment of a clash over land use without a proper appreciation of the circumstances. However, there are a number of structural dynamics that, it seems, are likely to contribute to the occasioning of disputation between Indigenous groups and environmental interests. Six general observations can be made.

There is no single Indigenous position

First, the variety inherent in granting full recognition to expressions of Indigenous agency should be considered as paramount. Aboriginal and Torres Strait Islanders may — and are certainly entitled to — hold a wide range of views regarding contests over land and resources. Traditional law and custom will of course play a significant part, but other influences, including matters of personal predisposition, will also be relevant. We must respect the full diversity of Indigenous people.

In a previous paper I argued that political disputation over native title in Australia can be understood through the interaction of a range of well-known normative frameworks, including liberalism, social democracy, conservatism, nationalism, socialism and transcendentalism.²⁹ Each of these six ideologies (defined as referring to a system of belief about what constitutes the good society)

25 Greenpeace International, 'Point Hope, Alaska and Shell's offshore drilling plans', webpage, 2012, <http://www.greenpeace.org/usa/en/multimedia/videos/Point-Hope-Alaska-and-Shells-offshore-drilling-plans/>.

26 See, for example, RE Llanos & C Feather, 'The reality of REDD+ in Peru: between theory and practice', Forest Peoples Program, November 2012, <http://www.forestpeoples.org/sites/fpp/files/publication/2011/11/reality-redd-peru-between-theory-and-practice-website.pdf>.

27 UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD), 'About the UN-REDD programme', webpage, 2009, <http://www.un-redd.org/AboutUN-REDDProgramme/tabid/102613/Default.aspx>.

28 C Lang, "'Stop the Indonesia–Australia REDD+ project": indigenous peoples' opposition to the Kalimantan Forests and Climate Partnership', *REDD Monitor*, 15 June 2011, <http://www.redd-monitor.org/2011/06/15/stop-the-indonesia-australia-redd-project-indigenous-peoples-opposition-to-the-kalimantan-forests-and-climate-partnership/>. See, for example, Llanos & Feather, above n 26.

29 DL Ritter, 'The ideological foundations of arguments about native title', *Australian Journal of Political Science* 45(2): 191–207, 2010.

furnishes rationales both for and against native title by focusing on different elements or preoccupations within the respective ideological traditions. A key conclusion of that article is that there is no single 'Indigenous position' on native title.³⁰ The same applies to the 'Indigenous position' on environmental goods and may pertain to any specific question over use of land or waters.

Disputes between 'greens' and 'blacks' are influenced by third-party reporting

Second, it is significant that the national debate has clung so obsessively to instances of high-profile conflict. Unquestionably, accounts of red-hot blues between 'greens' and 'blacks' with no room for shades of grey can make for purple prose. Yet we must remain alive to the fact that reporting of these clashes is refracted through the prism of the media and the agendas of a range of third-party commentators. This is not to deny the reality of some disputation or the genuine strong feelings that are involved, but it is conspicuously apparent that a frame of conflict between environmentalists and Indigenous peoples can act to render other parties — including mining companies and governments — neutral bystanders. Disputes between 'greens' and 'blacks' do not take place in a vacuum; however, without implying any lack of agency on the part of the actors or making assumptions about the facts in any given case, it is reasonable to ask: who has the most to gain from magnifying conflict between Indigenous people and the environmental movement?

The resources sector exerts a powerful influence on outcomes

A third and related observation is that the power of the resources sector in the Australian political and cultural imagination conditions these debates. It is perhaps the case that too often the literature about Indigenous affairs in Australia assumes the primacy of the symbolic and the cultural and pays insufficient attention to political economy. Yet, to drive home the reality of the resource industry's influence, it is only necessary to recall two distinct but key battles in Australia's recent policy history — the first over native title and the second over climate change policy — in which the political outcome was significantly influenced by the mining lobby.³¹ Following *Mabo v Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1, the mining industry waged an extensive campaign against the recognition of native title. When that initial campaign was lost, political effort shifted to weakening the statutory native title regime — a result that was achieved in 1998 following a change of government.

Nearly a generation later, the mining industry's heavily resourced campaigns against a carbon price were key factors in both Kevin Rudd and Malcolm Turnbull losing the leadership of their respective parties in 2010 and thus the postponement of emissions reduction efforts. Whatever occurs between Indigenous and environmental interests, the context is that of the power and influence of the mining industry giving rise to a set of prevailing political and ideological formations that are overwhelmingly in favour of certain kinds of natural resource development.

Indigenous peoples lack veto over 'future acts'

Fourth, the *Native Title Act 1993* (Cth) (the NTA) creates a specific statutory context that must be appreciated in any case where native title groups and environmentalists find themselves at loggerheads. Under the NTA registered claimants and holders of native title do not possess a veto over 'future acts' but only (at best) a right to negotiate.

In practice, the right to negotiate contains two distinct phases for native title claimants and holders. In the first, the native title party — acting rationally — will seek to extract the best possible deal from the future act proponent.³² Once agreement in principle has been reached between native title party and developer, the second phase of negotiation casts Indigenous people as contracted parties

30 I elaborate on this point in D Ritter, *Contesting native title*, Allen & Unwin, Sydney, 2009.

31 A Lavelle, 'The mining industry's campaign against native title: some explanations', *Australian Journal of Political Science* 36(1): 101–22, 2001; G Pearce, B Burton & D McKnight, *Big coal: Australia's dirtiest habit*, NewSouth Publishing, 2013, pp. 130–33.

32 D Ritter, *The native title market*, UWA Press, Crawley, 2009.

who are now effectively in the position of facilitators of, and in all probability beneficiaries from, the development. As a matter of practice, the contractual instrument formalising the agreement between the parties will often contain provisions preventing or restricting any member of the native title claimant group from resisting the progress of the development on other grounds, including broader environmental concerns.

It is true that, in theory, the NTA provides that native title parties may hold out and attempt to obtain a determination from the National Native Title Tribunal that the future act not be done. However, in practice this has almost never occurred, largely because a history of adverse rulings has created a reasonable perception that resistance is ultimately useless.³³ As noted above, in the early years of the NTA's operation the right to negotiate was regarded as politically and economically unpalatable by the resources industry. However, given time and significant legislative amendment, the procedure has become entirely normalised, creating the basis for the emergence of a de facto market in which developers are effectively able to 'purchase' the necessary permissions from traditional owners as vendors.³⁴ In practical terms, then, the functioning of the native title system means that native title claim groups are seldom able to refuse a development on their land but are able to negotiate for the best possible payment for the project going ahead. If a native title group elects to hold out, it risks obtaining nothing at all from the development.

Where Indigenous groups are concerned about the environmental impact of a development on their land, their position is usually restricted to seeking a 'better deal', including, for example, enhanced environmental protections, 'green jobs' or greater compensation for the damage that will be caused. As Marcia Langton said in the fourth of her 2012 Boyer Lectures: 'If Indigenous people in Australia had a full, domestic legal right to the United Nations principle of free, prior and informed consent, the situation would be different in relation to mining. But this is not the case.'³⁵ Institutional structures that reflect the realities of underlying political economy have proven determinative.

Corporate support for Indigenous people is an incident of business strategy

The fifth matter, which is related to the fourth, is that, while since 1998 many mining companies have become erstwhile supporters of the right to negotiate as an orderly means of obtaining social licence to operate from traditional owners, the basis of that support does not reflect some kind of corporate Damascene conversion but, rather, concern for the bottom line. Corporations are amoral, profit-maximising entities, and well-publicised (and promoted) cases of corporate support for Indigenous development must be understood in that context. This is not a radical view but an analytical position that is both realist and legalist: business corporations are legally mandated to optimise returns for shareholders, and all enterprise activity must be interpreted within that rubric. Professed corporate 'support' for Indigenous people must always be understood as an incident of business strategy.³⁶

Immediate needs of Indigenous communities influence negotiations on development

The sixth point is that the stakes in development negotiations can be very high indeed. Levels of disadvantage, unemployment and illness in some Indigenous communities remain infamous and render the prospect of revenue from resources projects — and of employment, health and educational opportunities — very attractive indeed; possibly the only hope for economic development for a given

33 I argue more fully the perception of the futility of seeking an order that an act not be done before the National Native Title Tribunal in Ritter, *ibid.* Others have made similar arguments. A defence of the National Native Title Tribunal's position is offered in CJ Sumner & L Jackson, 'The National Native Title Tribunal's application of the Native Title Act in future act inquiries', *University of Western Australia Law Review* 34: 191–226, 2009.

34 Ritter, *ibid.*

35 M Langton, 'The quiet revolution: Indigenous people and the resources boom', *Boyer lectures 2012*, Harper Collins, Sydney, 2013, p. 106.

36 I have gone into these dynamics at length in Ritter, above n 32, and Ritter, above n 30.

community and a matter, perhaps literally, of life and death for individuals. In context, the pursuit of what may appear abstract or inchoate environmental goals can seem remote or perverse. How, for example, is the maintenance of biodiversity or concern about rising carbon emissions caused by a new mine to be balanced against a community's immediate need for a dialysis machine? As Patrick Dodson said in 2012:

In the midst of the mining boom many Aboriginal people are finding immediate relief from the poverty besetting many of our communities by gaining employment in the mining industry. But I question whether in the long term our participation in unbridled exploitation is not in fact adding to the diminishment of our custodial responsibilities to humanity, global sustainability and resilience.³⁷

There is an evident incommensurability in such choices and there is real cruelty in the dilemma being posed. Ultimately, we should reflect on the state of a nation that imposes such predicaments; Indigenous people should not be in the position of having to choose between two forms of egregious harm.

Approaches to future dialogue

What the foregoing discussion suggests is that, at a macro level, it is possible to identify areas of common interest and shared ground where renewed dialogue between Indigenous people and environmentalists can prove fruitful. Above all, both 'black' and 'green' interests crave a greater share of decision-making power within Australia's democracy. For example, greater media diversity, more open and accountable government, the fiscal decoupling of the resources industry from state treasuries and attention to matters of structural inequality should all be matters of common and current concern for Indigenous peoples and environmentalists. Although the provisions of the NTA create a recurring dynamic for the legitimate divergence of interests in relation to specific projects, both 'greens' and 'blacks' have a shared interest in restraining the mining industry from exercising undue influence over our political decision makers and, more generally, in relation to the over-concentration of power in Australian society.³⁸ In short, both Indigenous people and Australia's environment would benefit from better forms of governance that enhance the ability of Aboriginal and Torres Strait Islander peoples to realise self-determination and rights protection and that prioritise protection from dangerous climate change, biodiversity loss and other potentially catastrophic problems.³⁹ In terms of solutions, there is also a deep, shared interest in the green economy and the structural transitioning away from fossil fuels.

Nonetheless, it is also safe to assume that, from time to time, there will be differences of opinion between Indigenous people and non-Indigenous environmentalists over how to reconcile ecological goods with other matters, just as there are differences of opinion on these matters within Aboriginal and Torres Strait Islander communities and, indeed, within broader society. Key to maintaining respect and long-term relations in such circumstances is a proper appreciation of institutional context and differences in roles and responsibilities. As a matter of normative preference, environmentalists should respect Indigenous peoples' right as traditional owners to make deals, particularly given the widespread statutory absence of any ability to veto development.

Equally, though, in a liberal democracy it is entirely appropriate for environmentalists to prosecute the public case for a project not to proceed, even where the proper consent of the traditional owners has been given for the development to go ahead. It would be a strange and perverse outcome if Indigenous people not having the right to refuse a project under Australian law had a chilling

³⁷ Dodson, above n 11.

³⁸ D Ritter, 'Australia, land of market domination', the *Guardian*, 27 August 2013, <http://www.theguardian.com/commentis-free/2013/aug/27/australia-power-duopoly>.

³⁹ See J Rockström et al., 'Planetary boundaries: exploring the safe operating space for humanity', *Ecology and Society* 14(2): 32, 2009, <http://www.ecologyandsociety.org/vol14/iss2/art32/>.

effect on the wider politics of development.⁴⁰ Open contestation over the proper disposition of public goods is, after all, at the core of all democratic societies. However, contest can be conducted respectfully and within appropriate limits. In the event that a difference of view does emerge between 'black' and 'green' interests, particular responsibilities fall upon the latter in the context of the legacy of colonisation. Like all non-Indigenous interests seeking to engage with traditional owners, environmentalists should be respectful and constructive, adhering to established best practice. Indigenous decision-making structures should be respected and appropriate standards of cross-cultural communication observed as a matter of essential practice. Environmentalists should regard themselves as bound by the same considerations of courtesy, fairness and propriety as other non-Indigenous interests seeking to engage with traditional owners in relation to their land and waters.

On a practical level on the Indigenous side of the street, native title claimants and their legal representatives should be alive to climate change related risks on their territory and take such threats into account when negotiating agreements. Native title negotiators may also wish to seek full disclosure of the climate impacts of a proposed development, particularly for fossil fuel extraction. Environmental groups may be helpful sources of expert assistance in these circumstances.

Sadly, the threat of climate impacts is no longer remote. For example, Robert Muir-Wood, chief scientist at Risk Management Solutions, a US company that undertakes modelling for insurance companies to calculate risk, has been reported as saying, 'I personally wouldn't invest in beachfront property anymore...And if you're thinking about it, I'd calculate quite carefully how far back you'd have to be in the event of a hurricane.'⁴¹ Given the vulnerability of Indigenous land holdings in northern Australia in particular, claimants and holders should be demanding risk assessment, insurance and mitigation against climate change related phenomena in all relevant contracts and agreements.

Ending the age of coal

Coal is the greatest fossil fuel accelerant of climate change,⁴² accounting for 44 per cent of world CO₂ emissions from fuel combustion in 2011.⁴³ Professor James Hansen has described coal as 'the single greatest threat to civilisation and all life on our planet'.⁴⁴ Historically, the opening up of coal deposits in Australia has involved the dispossession and oppression of the traditional owners, and risks remain. The attempted opening up of the Galilee Basin in Queensland has already thrown up examples of what native title groups have to lose if they hold out against mining companies.⁴⁵ Following the Wangan and Jagalingou people's ultimately unsuccessful assertion that Adani Mining had failed to comply with the statutory obligation to negotiate in good faith,⁴⁶ the National Native Title Tribunal decided that the mining lease for Adani's proposed Carmichael coalmine could be granted without conditions.⁴⁷ Of course, heritage is also at risk: in the case of Clive Palmer's Waratah Resources, it was reported that an independent survey found that work building the China First

40 Indeed, I am aware of instances where a native title group, although lacking the ability to prevent a future act itself, has then actively barracked for conservationists who have attempted to prevent the development from proceeding.

41 J Stromberg, 'How the insurance industry is dealing with climate change', *Smithsonian Magazine*, 24 September 2013, <http://blogs.smithsonianmag.com/science/2013/09/how-the-insurance-industry-is-dealing-with-climate-change/#ixzz2mfrQ43Yq>.

42 Coal has the highest carbon intensity of all fossil fuels: International Energy Agency, executive summary, *Resources to reserves 2013: oil, gas and coal technologies for the energy markets of the future*, International Energy Agency Publications, 2013, p. 18.

43 International Energy Agency, *Key world energy statistics 2013*, <http://www.iea.org/publications/freepublications/publication/KeyWorld2013.pdf>.

44 J Hansen, 'Coal-fired power stations are death factories. Close them', the *Observer*, 15 February 2009, <http://www.guardian.co.uk/commentisfree/2009/feb/15/james-hansen-power-plants-coal>.

45 For the significance of the Galilee Basin, see Greenpeace Australia Pacific, *Cooking the climate, wrecking the reef: the global impact of coal exports from Australia's Galilee Basin*, Sydney, 2012, <http://www.greenpeace.org/australia/en/what-we-do/climate/resources/reports/Cooking-the-climate-Wrecking-the-reef/>.

46 *Adani Mining Pty Ltd / Jessie Diver on behalf of the Wangan and Jagalingou People / State of Queensland* [2013] NNTTA 30.

47 *Adani Mining Pty Ltd / Jessie Diver on behalf of the Wangan and Jagalingou People / State of Queensland* [2013] NNTTA 52 (7 May 2013).

mine had begun in areas not cleared by the Wangan and Jagalingou people under applicable cultural heritage provisions.⁴⁸

Equally, though, in the contemporary legal and regulatory environment coal expansions and new projects may represent a genuine means for Indigenous communities to obtain benefit. A coalmining company acting prudently and in accordance with best practice will seek to reach a comprehensive agreement with all traditional owners for their project area. Without knowing any detail of the substance of the arrangement, it appears that at least one new coalmine in the Galilee Basin in Queensland is already subject to an Indigenous Land Use Agreement (ILUA) to enable extraction to occur with the consent of the traditional owners, presumably in exchange for some benefit.⁴⁹

However, while some future act agreements may offer helpful amelioration of the negative direct impacts of the project in question in terms of caring for country by placing more effective environmental conditions on development than would be available under the general law, such an outcome is not possible in relation to climate change. It could be theoretically feasible for an agreement over a coalmining development to require that the material only be sold to companies employing fully functioning carbon capture and storage, but, given the complete and lamentable failure to achieve commercial viability for carbon capture and storage thus far, such an outcome appears remote. It is hard not to see troubling historical resonances to any benefits that accrue to Indigenous people as a consequence of new coalmining. Short-term payments from coalmines may yet turn out to be tokens of a new climate change driven dispossession. As a 2005 petition to the Inter-American Commission on Human Rights on behalf of Inuit of America and Canada explained, 'Because Inuit culture is inseparable from the condition of their physical surroundings, the widespread environmental upheaval resulting from climate change violates the Inuit's right to practice and enjoy the benefits of their culture.'⁵⁰ The same year, Inuit leader Sheila Watt-Cloutier told COP 11 that 'climate change has become the ultimate threat to Inuit culture.'⁵¹

It is in this context that Whitehaven Coal's proposed new coalmine at Maules Creek in the Gunnedah Basin in New South Wales has given rise to controversy and brought together Indigenous and non-Indigenous interests in united opposition to the development. At the time of writing, Whitehaven is Australia's largest domestic coalmining company and Maules Creek is the biggest new coalmine currently under construction anywhere in Australia. The building of the mine is wholly unjustifiable on climate grounds, but as an added perversity it involves clearing swathes of critically endangered box gum woodlands. Maules Creek is located in the traditional country of the Gomeroi people, who have raised repeated concerns about the project and now appear implacably opposed. In a formal agreement signed in February 2014, members of the Gomeroi community, Greenpeace and other leading environmental organisations, including 350.org and Lock the Gate, made mutual promises to work collectively to address the threat from the Maules Creek mine, including in relation to 'climatic change, food security and the wellbeing of our local, regional and global communities'.⁵²

48 M McKenna, 'Palmer coalmine "ignored" indigenous consultation requirements', the *Australian*, 8 September 2012, <http://www.theaustralian.com.au/national-affairs/state-politics/palmer-coalmine-ignored-indigenous-consultation-requirements/story-e6frgczx-1226512580783>.

49 Hancock Alpha Coal Pty Ltd & Birri Native Title Claim Group Indigenous Land Use Agreement, QI2011/004, National Native Title Tribunal, 11 July 2011, <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/ILUA%20Register/2011/QI2011.004/ILU-ARegisterExport.pdf>.

50 S Watt-Cloutier on behalf of all Inuit of the Arctic regions of the United States and Canada, *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005, http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf.

51 S Watt-Cloutier, speech introducing the Inuit *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 11th Conference of the Parties to the UN Framework Convention on Climate Change (COP 11), 7 December 2005, <http://mailman.fsr.com/pipermail/vision2020/2007-October/049013.html>.

52 The full text of the agreement between Gomeroi Traditional Owners, Maules Creek landholders, Lock the Gate and conservation groups is available at www.lockthegate.org.au/leard_forest_protection_treaty.

Conclusion

This paper has made four arguments. First, there is no irreconcilable clash between ‘green’ and ‘black’ interests, a conclusion supported by the evidence of Greenpeace’s international experience of working with Indigenous peoples. Second, without delving into the specifics of the quarrels in question, an appreciation of some of the significant underlying dynamics may assist with understanding the nature of some of the high-profile disputes between Indigenous peoples and non-Indigenous conservationists. Third, at the macro level there remain very significant interests in common between Indigenous people and environmentalists, while at the issue-specific level attention to process realities and the functioning of different roles and responsibilities can assist with maintaining a climate of respect, even when differences emerge. Fourth, as the greatest global driver of climate change, the case of coal is singular and new political formations are emerging as Indigenous and non-Indigenous people seek to hasten the transition away from dirty fossil fuels. On the current trajectory, climate change presents a grim community of fate for Australia and the world — one that is shared by Indigenous and non-Indigenous people alike. Humanity can survive and emerge from even the darkest tyranny so long as there is a healthy biosphere, but there is no such thing as civilisation if the environmental conditions for life break down. Ultimately, we should be confident in the knowledge and the conviction that justice and sustainability are mutually reinforcing.

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