

- 21 *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') s 8. This provision states that native title rights are not affected by the EPBC Act or other laws in relation to the operation the *Native Title Act 1993* (Cth) s 211.
- 22 Charles Lawson and Jay Sanderson, 'The Evolution of the CBDs Development Agenda that may Influence the Interpretation and Development of TRIPS' in Justin Malbon and Charles Lawson (eds), *Interpreting and Implementing the TRIPS Agreement: Is It Fair?* (Edward Elgar, 2008) 132.
- 23 Ibid, 133.
- 24 Ibid 150.
- 25 Jody Broun, 'Follow-up to the Recommendations of the

Permanent Forum (health, education, culture)' (Speech delivered at the United Nations Permanent Forum on Indigenous Issues, 12th sess, New York, 18-31 May 2013) National Congress of Australia's First Peoples, *Agenda Item 3: Follow up to the Recommendations of the Permanent Forum* (18-23 May 2013) <<https://www.nationalcongress.com.au/wp-content/uploads/2013/05/UNPFIIICongressStatementHealthEducationCulture.pdf>> .

26 Ibid.

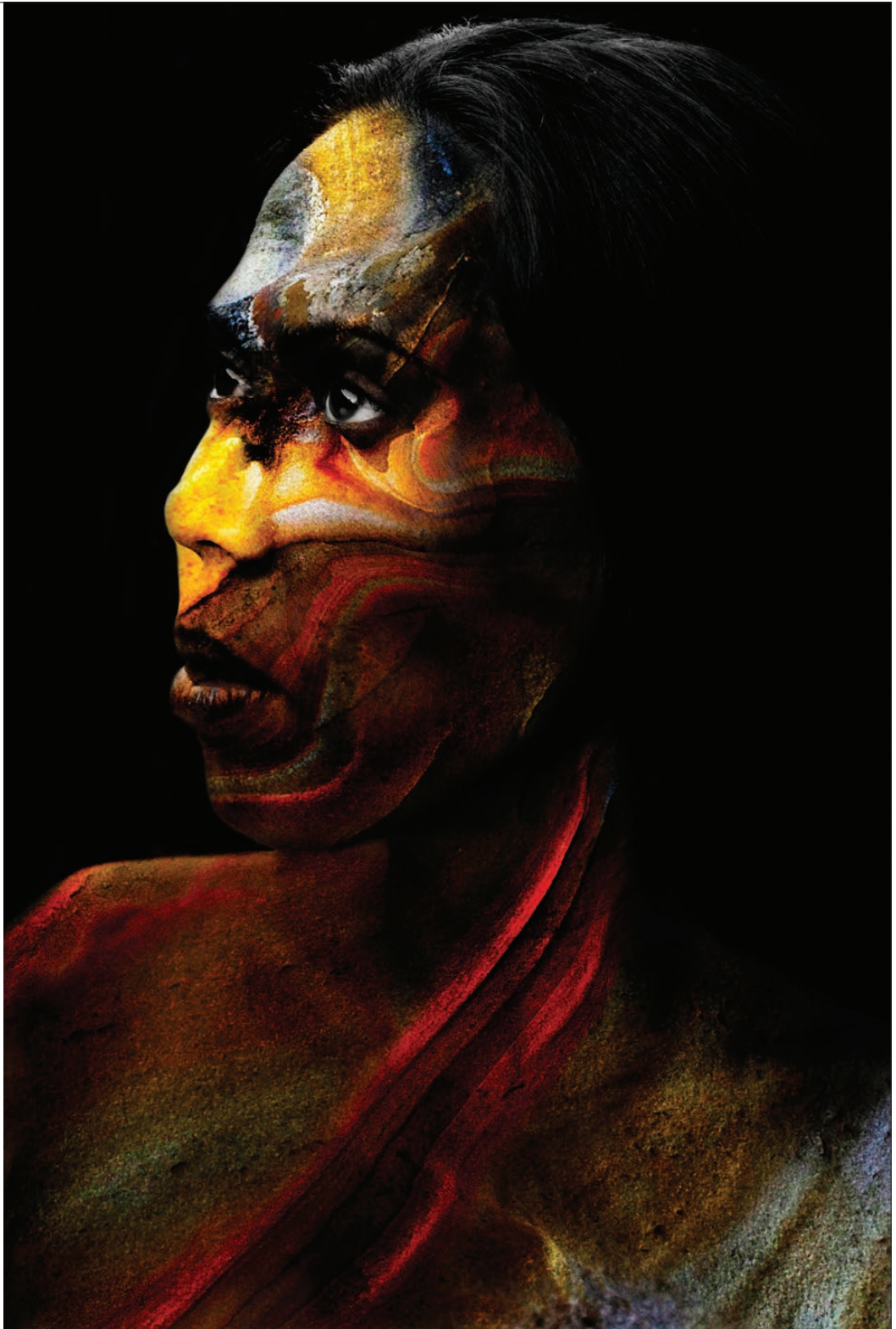
27 Ibid.

28 Kirby J in High Court decision in *Western Australia v Ward* [2002] 191 ALR 1.

A love of Guriwal

Sharon Brown,
woman of La Perouse,
NSW

Kaleesha Morris



INDIGENOUS PROPERTY RIGHTS AND LARGE SCALE

NATURAL RESOURCES EXPLOITATION:

THE CHALLENGE OF LAND-BASED CARBON PROPERTY RIGHTS

by John Sheehan

INTRODUCTION

Most land-based sequestration of carbon will occur through vegetation (forests) growing on customary or traditional lands in the world. There is a high chance that Indigenous landowners will experience a further wave of dispossession arising from the global thrust to decarbonise as an offset to climate change. In Australia, judicial recognition of Indigenous land tenure (native title) includes property rights in natural resources, however rising prospects for carbon sequestration has placed native title law in direct conflict with the emerging Australian climate change mitigation agenda. This article identifies policy issues and alternative courses of action, rather than further dispossession of Indigenous land rights.

The commodification of forests to permit carbon sequestration and hence trading in the resultant carbon rights represents an emerging dispossession of customary and traditional owners' rights and interests in many parts of the world. Property rights in biota are an important incident of many Indigenous land rights, and the disregard of such ownership by nation states when creating freestanding legal rights to carbon, raises the twin issues of extinguishment and liability for compensation. As many nations move towards carbon offsets and decarbonisation, the unforeseen costs are increasingly being borne by Indigenous peoples throughout the world, notably in developing nations. Arguably, this amounts to a further wave of Indigenous dispossession, a seemingly neo-colonial by-product of industrialisation.

However, crucial lessons can be drawn from the recent Australian experience where a direct conflict already exists between emerging carbon legislation and the *Native Title Act 1993* (Cth) and this issue is canvassed below.

EXISTING SITUATION

Since the establishment of land rights in the Northern Territory, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.), similar statutory rights have also been created in various Australian States, such as the *Aboriginal Land Rights Act 1983* (NSW). Subsequently, the

High Court decision in *Mabo and Ors v Queensland (No 2)*¹ ('*Mabo*') and the enactment by the Federal Parliament of the *Native Title Act 1993* (Cth), affirmed recognition by the common law that Indigenous property rights and interests existed and arise from the survival of native title. Subsequent to the watershed *Mabo* decision, there has been further jurisprudence which greatly settled native title law such as *Western Australia v Ward*² ('*Ward*') and *Yorta Yorta v Victoria*³. These cases characterise native title as a multifarious "bundle of rights" markedly susceptible to extinguishment. There has also been a notable understanding of the ambit of 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.

Of great importance, the High Court decision in *Yanner v Eaton*⁴ ('*Yanner*') revealed that Indigenous property rights can exist in biota, specifically wild fauna such as crocodiles. Similarly, flora is an intrinsic part of rights and interests, and indeed management of tracts of land 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.⁵

Further, they pointed 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.⁶

Given the strength of Indigenous rights and interests in flora, the creation of freestanding property rights in

carbon and vegetation arguably represent a subsequent stage in the ongoing dispossession of Australian Indigenous, commencing with the presence of British settler society on 26 January 1788.⁷

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 Australia's ratification of the Kyoto Protocol in December 2007, now provides an opportunity to test the genuineness of existing recognition of Indigenous land rights.

Given the remarkable complexity of Indigenous land rights, it is almost certain where native title is determined by the courts to have survived colonisation, Indigenous carbon property rights will also have survived in many parts of Australia. The establishment of a free-standing carbon property rights regime by the state 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 which is yet to be understood.

KEY POLICY 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 reforestation 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.

The Food and Agricultural Organisation ('FAO') World Summit on Food Security in November 2009 revealed that 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, albeit 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 Indigenous 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.

John Sheehan is Deputy Director, Asia Pacific Centre for Complex Real Property Rights, and Adjunct Professor with the Faculty of Design Architecture and Building, University of Technology, Sydney, Australia.⁸

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.

However, the key point raised in this article is that the price of carbon gained from sequestration in vegetation must include an allowance for compensation for the Indigenous interests extinguished.

- 1 (1992) 175 CLR 1.
- 2 (2002) 191 ALR 1.
- 3 (2002) 194 ALR 538.
- 4 (1999) 201 CLR 351.
- 5 Helen Ross, Elspeth Young, and Lynette Liddle, 'Mabo: An Inspiration for Australian Land Management' (1994) 1(1) *'Australian Journal of Environmental Management'* 29.
- 6 *Ibid.*
- 7 Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1878-1868* (Collins Harvill, 1987).
- 8 In November 2010 the author was invited to be one of the 35 members of the Expert Meeting convened in Rome by the Food and Agriculture Organisation of the United Nations (UNFAO) to consider and report on *Land Tenure Issues and Requirements for Implementing Climate Change Mitigation Policies in the Forestry and Agriculture Sectors*. The subsequent report of the Expert Meeting was submitted to inform the Cancun Conference.

A love of her Aboriginality

Shonta Morris, Gumbaynggirr, NSW

Kaleesha Morris

