Threatened Aboriginal country and the right to proper redress

By Jon Altman*

In this article I raise the complex question of what legal recourse to redress Aboriginal land owners might have when they get their ancestral land back but then find that these lands are subject to multiple threatening processes.

One might argue that this is just a 21st century version of the contract law principle of caveat emptor or 'let the claimant beware'. But in the case of Indigenous Australians who have been forcibly dispossessed by colonisation, land is returned for social justice reasons after illegal alienation.

What is the value of native title rights to hunt, fish and forage on the land if threatening processes have impaired, or continue to impair, the availability of resources? Having proven continuity of connection and customary practice and been guaranteed rights to natural resources for domestic use, what recourse do land owners have if these resources that are important for sustaining their lives and livelihoods have disappeared?

In Australia today, land repossession always comes with a colonial environmental legacy. So, I ask why is it that the environmental justice question of redress is absent in public discourse? What form might such redress take to enhance post-colonial possibilities for those Aboriginal people trying to live on their land and off its natural resources and seeking to restore their land's environmental and cultural values?

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Two recent events rekindled my long-term interest in these questions.

The first occurred in October 2014 when I was visiting a senior ranger and friend Terrah Guymala living in the Warddeken Indigenous Protected Area in Western Arnhem Land.

Terrah and I were chatting about species loss and the devastating impact of the invasion of the poisonous cane toads on wildlife, especially reptiles. Terrah bemoaned the absence of goannas which were an important and highly desired foodstuff, especially in the early dry season when goannas are fat. He also reminded me how in the early dry season goannas could be seen standing up on their tail and hind legs, peering over high grass facing the east wind and how this action has a role in ceremony. Now, he lamented, young men who may be related totemically to goanna do not have the experience of seeing this seasonal behaviour, they are losing important ecological and ritual knowledge. And to add another dimension to the loss, artists used to paint goannas on bark and sell them for cash. This is rare today because the current generation are unfamiliar with the detailed anatomical features of several goanna species.

In 2002, I was in Arnhem Land when I saw first-hand what local Kuninjku people referred to as the invasion of djati nawarreh, "the rubbish frog", the cane toad. There was little information provided, certainly none in local language, about whether the toad was dangerous. As people living on country, Kuninjku quickly learnt that the toad was deadly for native species, especially goannas.

In 1979 and 1980 when I lived with these same people I documented the hunting and consumption of goannas on a regular basis. By early 2003 when I undertook more fieldwork quantifying wildlife use I recorded only one water monitor hunted and eaten. In the 15 years since, I have not seen a single monitor or goanna on Kuninjku country despite numerous visits.

The absence of this resource represents a livelihood loss to people who are cash poor and reliant on hunting for survival when living at homelands. To this economic loss can be added the spiritual dimension as described by Terrah. There has been no consideration in Australian law of providing any redress, in cash or nutritional equivalent, for this loss. Nor for the loss inter-generationally of ecological and religious knowledge important for ceremony, artistic production and as a key seasonal and biodiversity indicator species.

The second event occurred in June 2015 when I was engaged to provide expert evidence as an economic anthropologist in the Timber Creek Native Title Compensation case *Griffiths and Jones v the Northern Territory*. This was a government-funded test case before Justice Mansfield in the Federal Court seeking to calculate just terms compensation for the loss of native title rights and interests over land in the township of Timber Creek.

In my report I used the hybrid economy framework that I had developed over many years to try to mediate between the views of the economics experts who sought to equate just terms with something less than the freehold value of the land in question; and the anthropology experts who reported

Benny Barndawungu and Jimmy Djarrbbarali with fat goannas, Mimanjar, May 1980.

the feelings of deep hurt and loss experienced by traditional owners who has lost access to important sacred sites in the cultural landscape, had seen some desecrated and felt a degree of responsibility for these losses.

My approach argued to the court that just terms compensation should be calculated inclusive of the usually unrecognised market replacement value of bush foods. I referred to the customary right to hunt, fish and gather that in my view gives native title land a higher value than freehold because it is inclusive of Indigenous rights to resources unlike standard freehold title. I also suggested that compensation recognise the loss of access to economic resources owing to an influx of competing non-Indigenous recreational fishers reducing wildlife stocks.

I tried to give a sense of the scale of such values with reference to quantitative work undertaken in a similar environment to Timber Creek and the Victoria River at nearby Daly River by CSIRO researchers. This evidence was disallowed because Timber Creek is not Daly River. This was despite key traditional owners demonstrating extensive knowledge of wildlife in the Timber Creek environment. My interlocutors were adamant that they had lost access to very specific locations where resources could be exploited; and from the competition for resources they experienced from visitors to, and residents of, Timber Creek.

Justice Mansfield was not swayed by my line of argument. While His Honour found my evidence consistent with other anthropological evidence, he chose to overlook it, preferring to deploy a binary approach in his reasoning: economic losses would be calculated with reference to the real estate value of the land and less tangible "cultural" losses as an additional payment legally termed "solatium".

In calculating solatium at $1.3 million, over twice the real estate value of the land, Justice Mansfield found a means to compensate for the pain and suffering in relation to traditional owners' spiritual detachment from the land and the impact of loss of a relationship with country on a person's sense of self. But the loss of customary rights to gain a non-market customary livelihood was deemed embedded in real estate value. Justice Mansfield's broad approach was upheld by the full bench of the Federal Court and is now heading to the High Court for final consideration.

My key point here is that when a legal mechanism to calculate just terms compensation is available, loss of access to natural resources for livelihood is not considered compensable owing to the absence of location-specific facts. This contrasts with West Arnhem Land where quantitative and qualitative data on loss are available, but there is no legal mechanism to claim redress.

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I want to scale up now from these two illustrative vignettes to the continental scale.

Since the early 1970s land rights and native title laws have seen more and more territory legally repossessed by Indigenous peoples. With land rights, a homelands movement emerged in the 1970s, as ancestral land was re-occupied. Today there are about 1000 small homeland communities on the 43 per cent of the continent that is under some form of Indigenous title, although the exact number of homelands occupied, and an accurate estimate of their population is difficult to make owing to the mobility of residents and absence of official enumeration effort.

What we do know from the 2016 census is that there are about 150,000 Indigenous people living in remote and very remote Australia covering 86 per cent of Australia—about half this number living on Aboriginal titled land, with maybe 20,000 living at homelands. We also know that people living on the land have deep spiritual and relational connection to it, as at Timber Creek, and seek to use the land's resources for sustenance, as in West Arnhem Land.

According to the *Native Title Act*, rights and interests include unrestricted access to the land's resources for non-commercial (domestic) purposes. However, as I have noted elsewhere, it is difficult to differentiate commercial from non-commercial use rights, especially in relation to an identical resource, be it fresh water or a barramundi both of which must be licensed for commercial purposes but are unlicensed, unregulated and unlimited for native title domestic purposes.

Let me now make just three brief observations from past research on the environmental significance of Indigenous lands.

First, when a template of the spatial extent of Indigenous lands is laid over a series of resource atlas maps much of it is shown to be environmentally intact. This has allowed the survival of many species that have declined or become extinct in other parts of Australia.

Second, despite being relatively intact, Indigenous lands are increasingly subject to threatening processes including changed fire regimes, the introduction and spread of feral animals and invasive weeds, land disturbance including vegetation clearing, marine debris and pollution—not to mention the likely impacts of global climate change on species abundance.

Third, historically and today there is underinvestment on environmental management of Indigenous lands, in part because of extreme remoteness, in part because of low populations, in part because they are viewed as "unproductive". More recently funding has slowly increased, but it is still inadequate: there is no systematic assessment of restoration need and no long-term funding commitment.

In the last 20 years, 75 dedicated Indigenous Protected Areas (IPAs) have been declared over Aboriginal lands with high biodiversity value. These IPAs now constitute nearly half the conservation estate encompassing some of Australia's most biodiverse regions. And they fulfil a significant element of the nation's international obligations under the Convention on Biological Diversity.

Yet, as with everything in Indigenous policy, the approach to funding is ad hoc and often conflicted—the flagship IPA and Working on Country Programs sit in the Department of Prime Minister and Cabinet and not in the Department of Environment. And funding is provided on a short-term contractual basis with much bureaucratic accountability owing to the rationale that funding is provided for the public good rather than as environmental justice redress.

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Let me return now to West Arnhem Land and where I have worked since 1979, witnessing considerable transformations over four decades.

When I first worked in this region, I was interested in how people made a living and I found that hunting, fishing and wild food gathering was the dominant component of domestic economies when people lived on country. I collected evidence about this using several techniques. This form of economy, that I subsequently called "hybrid", was very dependent on local agency: when people got land rights in the 1970s they moved back onto their land and began to live on its wildlife, goannas inclusive.

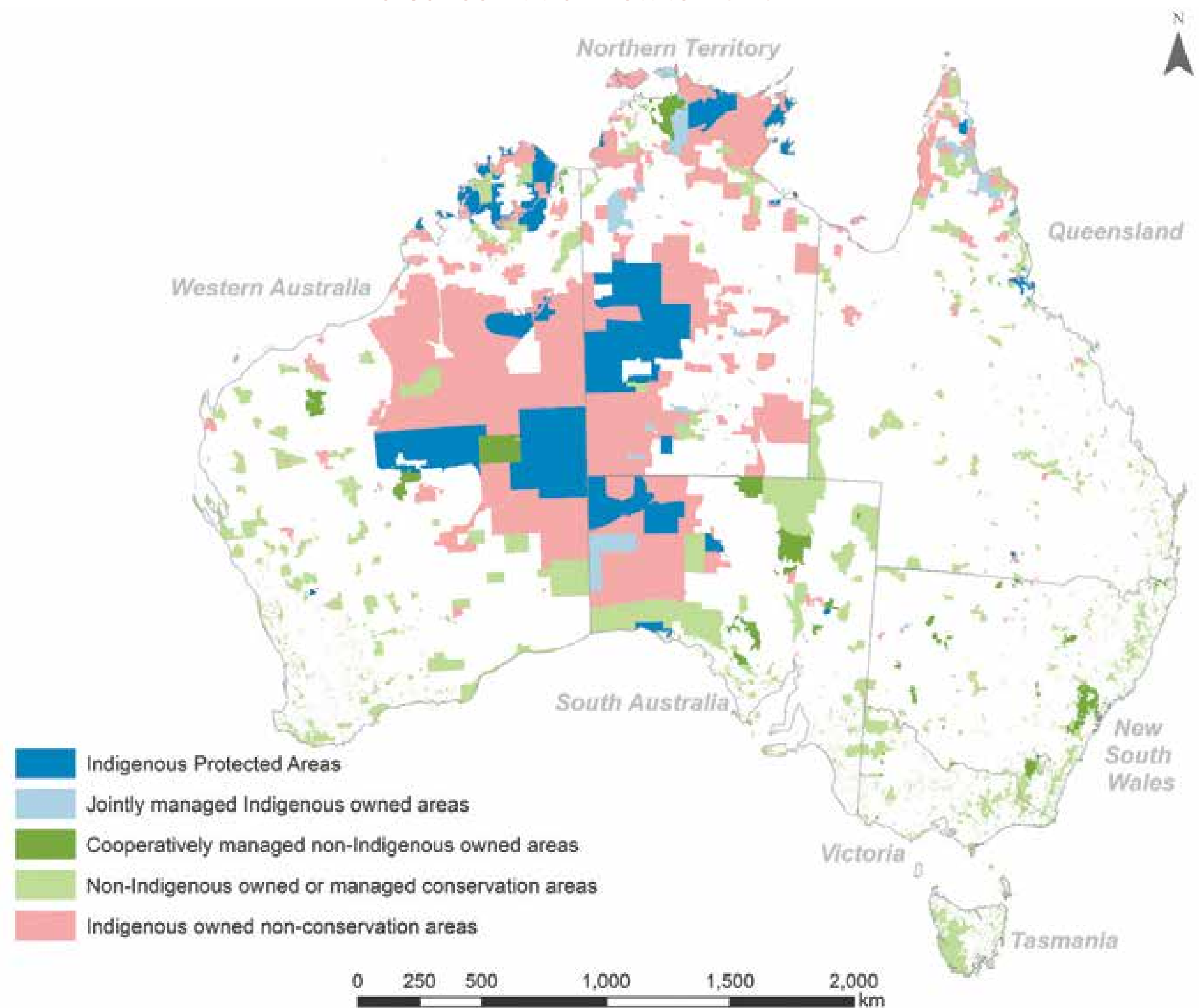
Over time it became apparent to traditional owners that even in remote parts of Arnhem Land without a commercial footprint, colonisation had left a toxic environmental legacy: exotic weeds, feral animals and uncontrollable wild fires in uninhabited places. Over time people found that the land that they had repossessed faced escalating environmental challenges, including from hunted and highly valued species like feral water buffalo of which there are an estimated 100,000 in Arnhem Land today.

In the 1990s, people whom I had previously described as "hunter-gatherers today" also became community-based wildlife managers, setting up first the Djelk ranger group in Maningrida in 1991 and then the Manwurrk rangers on the Arnhem Land escarpment from 2002. Much of their work involved collaboration with biologists from Darwin and petitioning the Australian government for support to address environmental threats.

In September 2009, the Warddeken and Djelk areas of environmental management were formally declared as Indigenous Protected Areas recognised as significant elements of the National Reserve System managed in accord with International Union for the Conservation of Nature criteria. The two IPAs cover a massive area of 20,000 sq kms.

Ranger groups are required to produce management plans to ensure compliance with IPA program requirements. Let me focus on the management plan produced by Warddeken Land Management Ltd because I work closely with this group.

The Conservation Estate 2015



The Warddeken Plan of Management 2016–2020 has a clear aim: "Our vision is to have healthy people living on healthy country in the Kuwarddewardde [stone country]. We want the management of our country to be in our hands now and into the future".

The plan lists the assets of the IPA and the threats it faces. Assets include Indigenous ecological knowledge and language, rock art sites, sacred places, the use of fire in the landscape, wildlife, food and medicinal plants, freshwater places and endemic escarpment forests of Anbinik (*Allosyncarpia ternata*). Threats include empty country,

loss of Indigenous ecological knowledge and language, lack of support for homelands, feral animals—cats, cane toads, buffalo and pig—wildfires and weeds.

The WLML annual report for 2016–17 shows it expended $3.7 million on addressing these threats, employing 120 Aboriginal people (mainly part-time) in land management work. Income came from a wide range of sources including from the Australian Government's IPA and Working on Country programs and from other sources including as a key member of Arnhem Land Fire Abatement (NT) Ltd; and from environmental philanthropy. Such diversity of support is sensible risk management especially as crucial core support from the Australian government is always uncertain—funding has only recently been committed for the next triennium, but there is no longer-term commitment beyond 2021.

Significantly, there is no link between the amount of support that is needed and what is available. I am acutely aware of this as a foundation director of the Karrkad-Kanjdji Trust, a company set up to support conservation work in West Arnhem. Our fund-raising efforts in collaboration with WLML have already resulted in generous philanthropic responses that help to finance several important gaps—a school (The Nawarrdeken Academy), a women's ranger coordinator, regular delivery of supplies by air and biodiversity monitoring. Working jointly with WLML and other groups there is a need to continually expand our efforts to match pressing regional needs.

Let me flag three possibilities to grapple with these hard questions.

First, the UN Declaration on the Rights of Indigenous Peoples now supported by the Australian Government refers to redress and compensation on several occasions in relation to natural resources. Three articles are of relevance:

Article 11(2). States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 20 (2). Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 28 (1). Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

This all sounds very promising—it could even cover the goannas eliminated by cane toads. But finding effective domestic mechanisms to mobilise such international standards for proper redress remains a great challenge.

A buffalo exclusion fence protected a significant Warddeken rock art site at Kamerrhdjabdi.

Let me link this case to my argument for proper redress. Why should ranger groups like Warddeken regularly petition for funds via complex bureaucratic processes to address environmental threats that are not of their making? Furthermore, given that much of the fire management work undertaken by the Warddeken rangers is helping to address global warming, why is such important work funded on an ad hoc basis by governments? And even as WLML moves to sophisticated monitoring of its efforts, what likelihood is there that they will be entirely effective in addressing the deep colonial legacy of environmental damages and threats?

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I want to end by asking how do Indigenous land owners and their conservation allies and supporters challenge the settler state disposition to ignore issues of environmental justice? How can Indigenous land owners challenge a dominant state that allows unalienated land to be claimed but without any guarantee of redress for environmental damage? How might imposed forms of neoliberal environmentalism, based on market logic, be challenged?

Second, in Aotearoa/New Zealand the Parliament passed the Te Awa Tupua Act in 2017. By this Act, the entity Te Awa Tupua was granted legal personhood of the Whanganui River system. In the settlement, the Crown recognised its acts and omissions in relation to the Whanganui River and its failure to protect the interests of the Whanganui Iwi (tribe). The Crown gave a form of personhood to the river, formally apologised for Treaty of Waitangi breaches in relation to the river and set about to atone for past wrongs. A settlement including financial redress of $NZ80 million has been committed to Whanganui Iwi to help them advance the inter-twined health and wellbeing of both the Whanganui River and its people. The settlement acknowledges that the exercise of customary activities by Whanganui Iwi is an integral part of their relationship with the river.

The spiritual and physical connection of the Whanganui Iwi to the river is encompassed in the tribal proverb: "Ko au te awa. Ko te awa ko au", which means "I am the river, the river is me". This mirrors the Warddeken notion of relationality between healthy country and healthy people. This raises the prospect that IPAs could be granted legal status as persons and be paid redress for environmental damages. At a time when Australian governments increasingly treat Aboriginal people who want to live on their ancestral lands with some disdain as second-class citizens, a strong case for proper duty of care redress by the state might be mounted if both people and environment were given personhood. What is emerging in Aotearoa/New Zealand in a practical sense is that the Crown recognises the relationship between Maori wellbeing and environmental wellbeing; and is guaranteeing financial resources over long timeframes as compensation for both social and environmental injustices.

Finally, in his recent book *Treaty and Statehood*, Aboriginal activist and lawyer Michael Mansell raises the prospect for the parliamentary creation of a new state under s121 of the Constitution. Using my maps spatially delineating the massive Indigenous estate of over three million sq kms, Mansell asks if a First Peoples State might be established in Australia. While Mansell does not specifically mention Canada's Nunavut that separated from the North-West Territories in Canada in 1999, there are some potent similarities. More than 80 per cent of the population of the land rights and native title exclusive possession estate in Australia is Indigenous. A reconfiguring of the national geography, as Mansell proposes, could give majoritarian political authority to Indigenous peoples and deliver a form of self-determination never experienced before in settler-colonial Australia.

With national revenue sharing as currently occurs via the Commonwealth Grants Commission and the division of GST, a First Peoples State (or Territory) might be very differently financially positioned to pay proper redress for environmental injustices. It might also pay a guaranteed minimum income to Aboriginal land owners who wish to live on their land and engage in the grand project of environmental repair. This would be a lot more productive than the punitive and damaging Community Development Program currently preferred by the Turnbull government.

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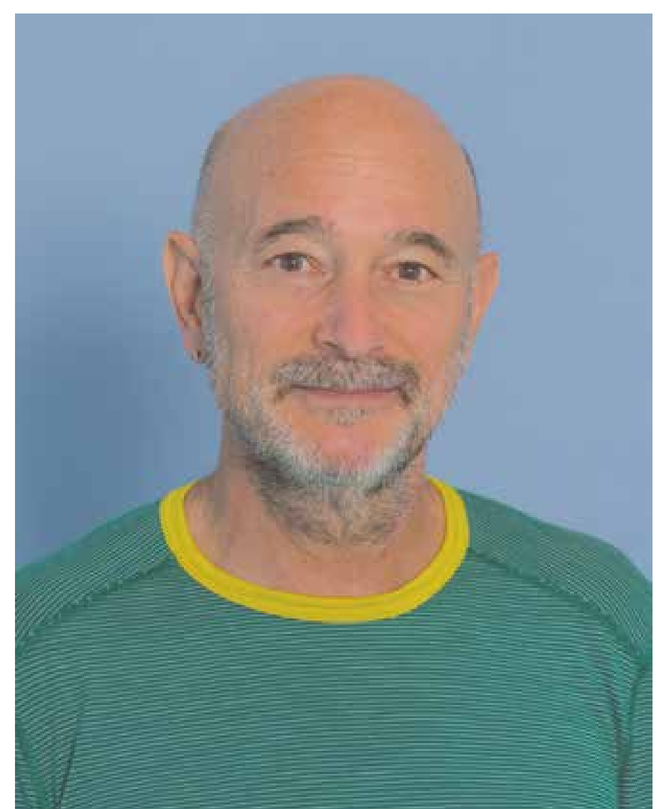
I started by referring to a case where there is considerable evidence of species loss owing to the invasion of poisonous cane toads, but where no mechanisms for proper redress exist. I then looked at another case where a legal mechanism for just terms compensation does exist, but where all native title rights and interests have not been included in calculating redress. I examine three possibilities that might be deployed for environmental justice. The matter is urgent for people looking to live on their country, for endangered places and for endangered natural species.



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