

Indigenous Law Speaker Series 2014

**The political ecology and political economy of the Indigenous land titling ‘revolution’ in
Australia**

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Introduction

This paper begins with a brief grim history of indigenous continental dispossession and its colonial logic. I then present recent and more optimistic maps of re-possession, what I term an Indigenous land titling ‘revolution.’ I also present some mapping of the contested values of various resources on indigenous lands. As the maps show, there is a clear tension between the frames of political economy and political ecology on how newly re-acquired lands and resources might be productively deployed. This is a tension between national growth (as measured by gross domestic product dependent on industrial extraction of minerals and commodity exports) and local and regional development for Indigenous land owners. This tension is based on a different focus on livelihoods and wellbeing and the potential for the commodification of the provision of environmental services. I use the frame of economic hybridity in an attempt to both elucidate and mediate this tension at local and regional levels, and the ecological economics framework to do similar work in national and global debates.

Some history

In *The Cartographer’s Eye: How Explorers Saw Australia*, Simon Ryan shows how the ideological construction of Indigenous Australians was used as justification for legally/illegally and often violently dispossessing them of their lands, from 1788 up to the 20th century.² This was despite some accurate empirical descriptions of how Indigenous societies owned and used the land and its resources according to their laws and customs. Interestingly Ryan’s early cartographers rarely produced cadastral maps except for Matthew

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Flinders who quickly circumnavigated the continent in a race against Nicolas Baudin and produced a surveyed map of sorts that allowed the entire Australian continent of 7.7 million sq kms to be claimed by the British crown.

This land grab was justified at the time for a variety of reasons including:

- that native Australians were regarded as too savage or primitive to be land owners;
- these peoples had no notion or practice, what we term today institutions, of land ownership in the western way and no government, again in western terms;
- the land was deemed unoccupied although clearly this was not the case; and
- finally and most importantly it was argued that as hunter-gatherers, indigenous Australians did not employ agricultural practices and so a Lockean logic, the labour theory of property was mobilised to justify dispossession—those who did not till the land productively had lesser ownership rights in it.³

Historian Patrick Wolfe uses 'settler colonial' theory to explain the links between dispossession and the project to eliminate native societies. Wolfe argues that the principal settler colonial logic of market capitalism was to gain unrestricted access to territory; he notes further that as European colonisers came to stay, invasion and dispossession is both a structural and ongoing process. 'Invasion' is not some historical event restricted to a particular place like Sydney at a particular time like 1788. All the natives had to do to get in the way was to stay at home and compete for resources.⁴

Settler colonialism's negative dimension is its goal to dissolve native societies, but more positively perhaps an option emerges from the logic of elimination. This is the possibility of integration of indigenous peoples as citizens of the Australian nation state. This is often referred to today as 'normalisation' or 'mainstreaming,' measured statistically using the normative values of the colonisers and regularly deploying the ubiquitous idiom of Closing the Gap with its loaded deficits connotation that can be highly offensive.

In this paper I want to engage with this historical snapshot in two ways.

First I want to deploy the cartographer's eye cadastrally to demonstrate what has happened across the Australian continent around Indigenous and non-Indigenous land titling from 1788 to the present. This is illustrated synoptically in Figure 1.

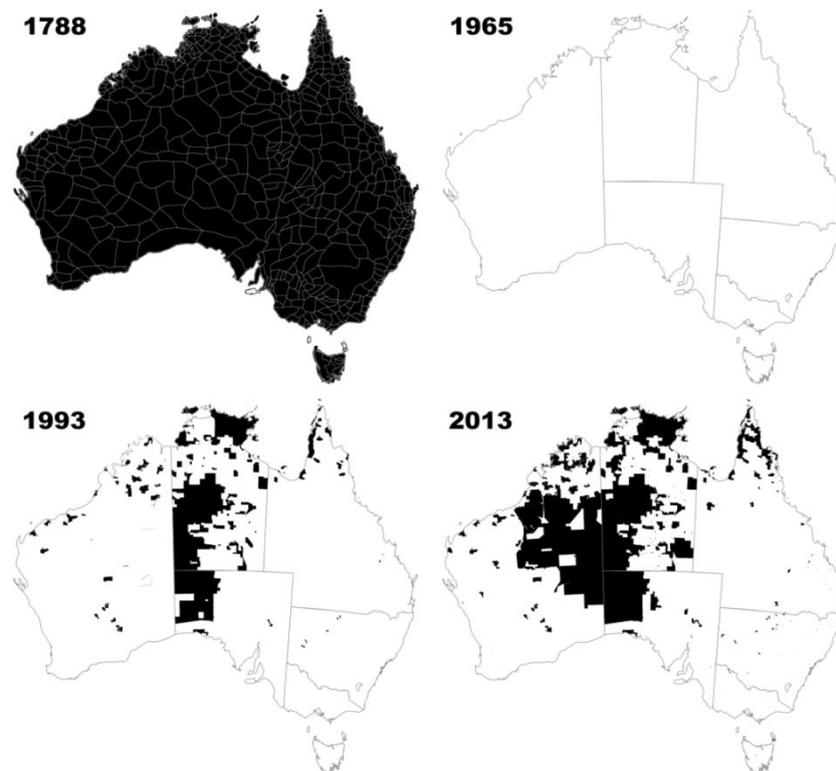


Figure 1: A snapshot of Indigenous held land 1788–2013.

In 1788 Indigenous nations possessed the entire continent. Then during a prolonged period of land grab from 1788 to the late 1960s Indigenous peoples were dispossessed. But then, from the late 1960s, there has been an extraordinary period of rapid legal repossession and restitution that is ongoing. This has not occurred as part of some coherent policy framework, but rather as a somewhat ad hoc land titling 'revolution' driven intermittently by political, social justice and judicial imperatives.

Second I want to engage with this paradox of legal repossession: if the logic of settler colonialism and market capitalism is dispossession, which I believe is the case, why have powerful state and corporate interests tolerated legal repossession? This is a complex issue, but part of the answer to what appears as a competing logic of 'giving back' land is provided by the workings of capitalism that dispossesses what is of market value. Historically, and today, that has been arable land and sub-surface minerals. But market values and technologies for extraction are dynamic. The very remote country of the past that was unalienated and regarded as holding no commercial value is today not just mineral prospective

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and hyper mineral productive, as industrial mining gets more and more efficient; Indigenous lands also have high environmental and biodiversity values.

In later analysis I will elucidate this paradox of value that erupts from time to time into violent political contestation at iconic sites like James Price Point in the Kimberley, Solomons Hub in the Pilbara and Wild Rivers on Cape York. I will do so using the competing frames of the political economy of mining/capitalist/state interests and that of political ecology of Indigenous land owner and conservation interests. I realise that this representation is idiomatic, binary and somewhat reductionist. It can be similarly seen in a tension between dominant neoliberal ontology that focuses on individualism, materialism and the market and a subordinate Indigenous relational ontology that focuses on relations to kin, country and a sentient landscape.

Mapping Indigenous land titling

I want to make a couple of epistemo-methodological comments about the cartography used here.

First, the maps I have produced with Francis Markham, a GIS expert, are all based on official statistics that are deployed here in a particular way focusing on the macroscopic and continental rather than on the regional and local. But these maps are inclusive of Indigenous cultural mapping. This is because, by and large, to repossess their lands Indigenous claimants and their legal and anthropological teams have had to provide evidence, sometimes in court, of continuity of customs and traditions observed and continuous connection to the land, to sacred places and continuity of economic practices like hunting, fishing, gathering. This onus of proof sometimes requires the deployment of 'strategic essentialism' (a term coined by the Indian literary theorist Gayatri Chakravorty Spivak⁵). It has been termed 'repressive authenticity' by Patrick Wolfe and the 'cunning of recognition' by Elizabeth Povinnelli⁶. An earlier legal fiction of *terra nullius* has to be replaced by a contemporary legal fiction of un-invadedness. Working on land repossession in Asia and beyond, Tania Murray Li highlights the cruel irony that to get their land claims recognised as legitimate colonised people need to use the idiom of tradition despite new aspirations, new practices and new customs.⁷

Second, it goes without saying that maps are highly political; as James Scott argues in *Seeing like a State* modern cadastral mapping is central to the very concept of the modern state and focuses on dimensions of land and its values as a productive asset or commodity for sale.⁸ Just how political has been demonstrated in debates over native title, with the Prime Minister of Australia in 1997 suggesting that as much as 78 per cent of Australia might be locked away from commercial development when he knew very well that owners of native title have no right of veto.

I want to draw a distinction between what geographer Harm de Blij terms ‘maps of bad intent’ as deployed by the state to counter judicial findings and as instruments of governmentality⁹; and ‘maps of good intent’ that might open up discussion about the transformative potentiality of legal repossession, a geopolitical purpose that aims to explore the range of economic possibilities available to those indigenous Australians fortunate enough to get their land back. I realise of course that any ‘good’ and bad distinction is both contingent on framing and is subjective.

Spatial information: A land rights revolution?

In this section I look to provide a number of maps and figures in a somewhat positivist manner. The focus is principally on lands where there have been determinations of exclusive Indigenous possession and land rights. All the maps are produced using information from official government sources. The data are current at 31 December 2013.

Figure 2 provides information on land titling under three tenures:

- land claimed or automatically scheduled¹⁰ under land rights law (an estimated 969,000 sq kms);
- 92 determinations of exclusive possession under native title law totalling 752,000 sq kms; and
- 142 determinations of non-exclusive possession under native title law totalling 825,000 sq kms.

The last category often provides a weak form of property right that needs to be shared with other interests, most commonly commercial rangeland pastoralism.

These three categories total 2.5 million sq kms or roughly 33 per cent of terrestrial Australia.

Figure 3 provides information about Indigenous land interest in nearly 700 Indigenous Land Use Agreements (ILUA) that cover 1.6 million sq kms as well as information about more than 300 native title claims registered with the National Native Title Tribunal. The outer boundaries of these claims cover 3.2 million sq kms but recent history indicates that determinations, especially of non-exclusive possession, rarely include the entire claim area. Note that there is some overlap between ILUAs and registered claims.

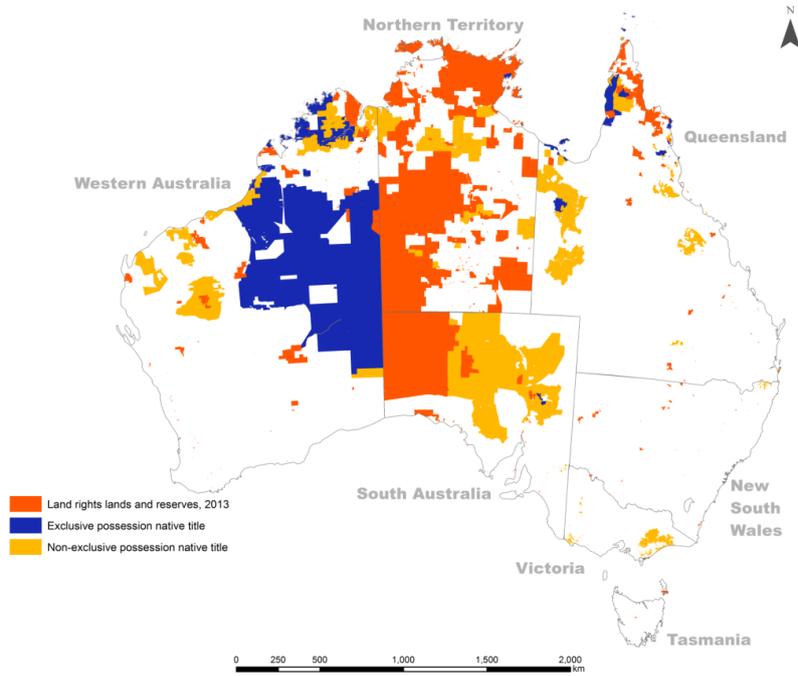


Figure 2. Indigenous land titling under three tenures

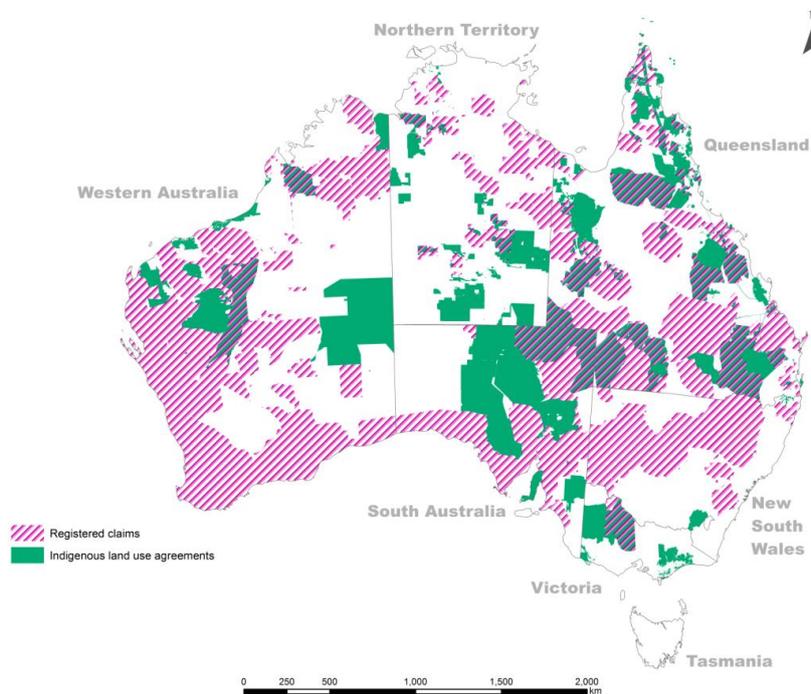


Figure 3. Registered claims and Indigenous Land Use Agreements

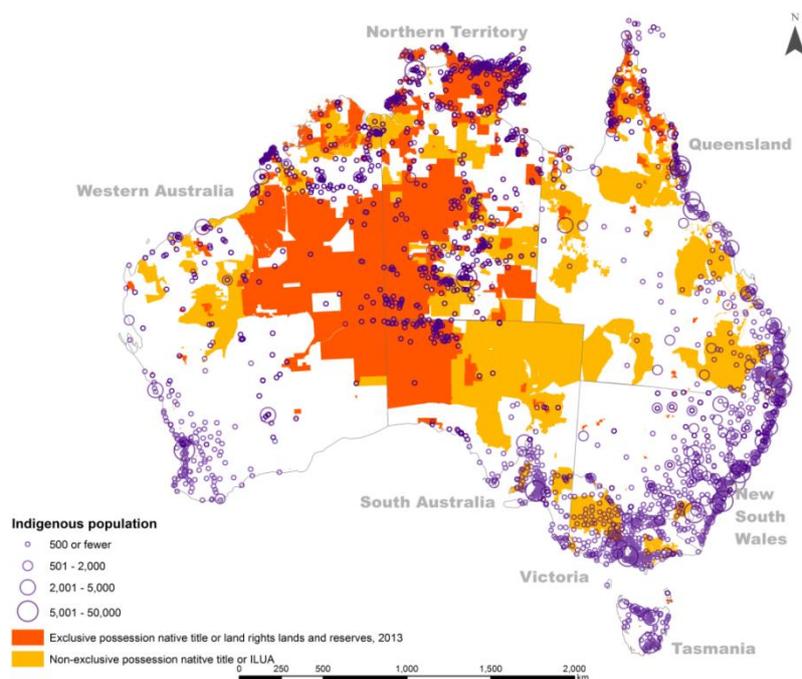


Figure 4: Distribution of the Indigenous population from the 2011 Census and Indigenous land titles (2013)

This figure (4) shows diagrammatically that most Indigenous Australians do not in fact live on Indigenous titled land; less than 100,000 of a total population estimated at 660,000 live on these lands. It is not clear how many of these are traditional owners (as defined in a statutory sense) or how many traditional owners live off their lands. What is clear, correlating population with land title, is that where there is land rights or exclusive possession native title, over 80 per cent of the population in these jurisdictions is Indigenous compared with a national proportion of the population of just on 3 per cent. If hypothetically all native title claims were successful, as much as 70 per cent of Australia could be under some form of Indigenous title and as much as 40 per cent of the Indigenous population could be resident on these lands.

In Figure 5 population is presented a little differently. There is a category in Australia's census geography termed discrete Indigenous communities. These communities are extremely small and scattered. The larger ones that number between 500 and 3,500 persons were historically missions and government settlements during the colonial era. The smaller ones that number under 200 are generally outstations or homelands. There were 1,200 such communities when last estimated in the 2006 Census, with 1,000 having populations under 200. Most are located on lands that are under 'exclusive' Indigenous title.

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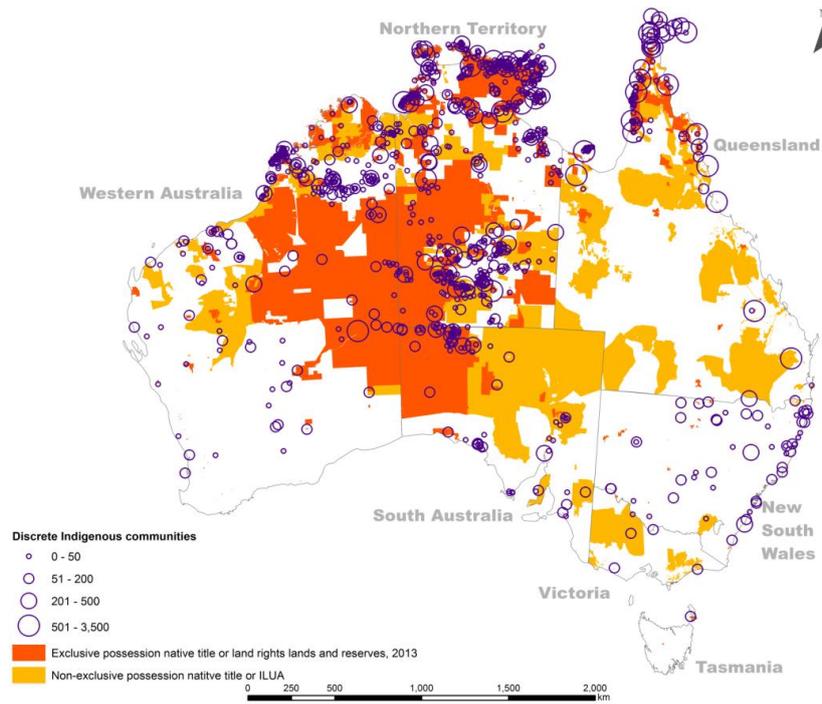


Figure 5: Discrete Indigenous communities on Indigenous lands

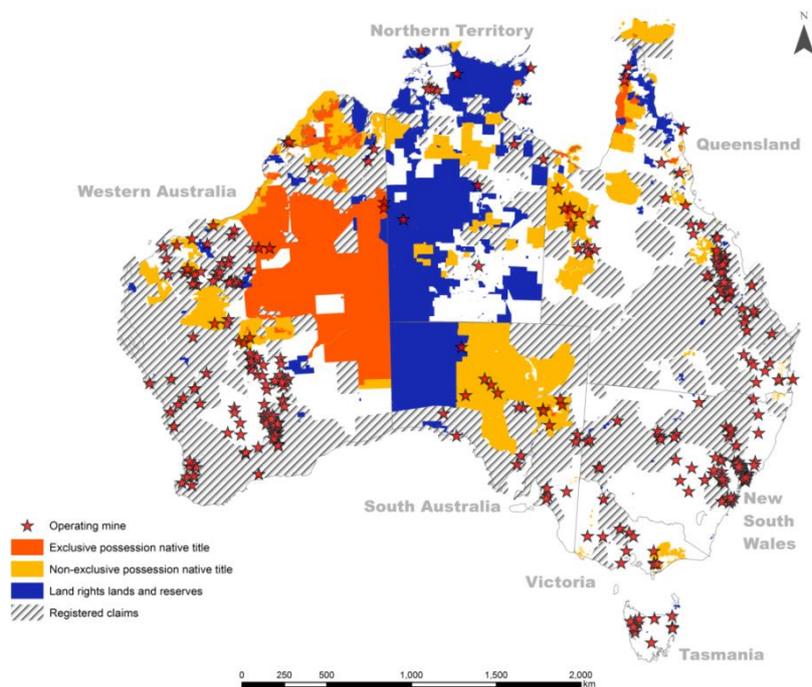


Figure 6: Operating mines (2012) and Indigenous lands

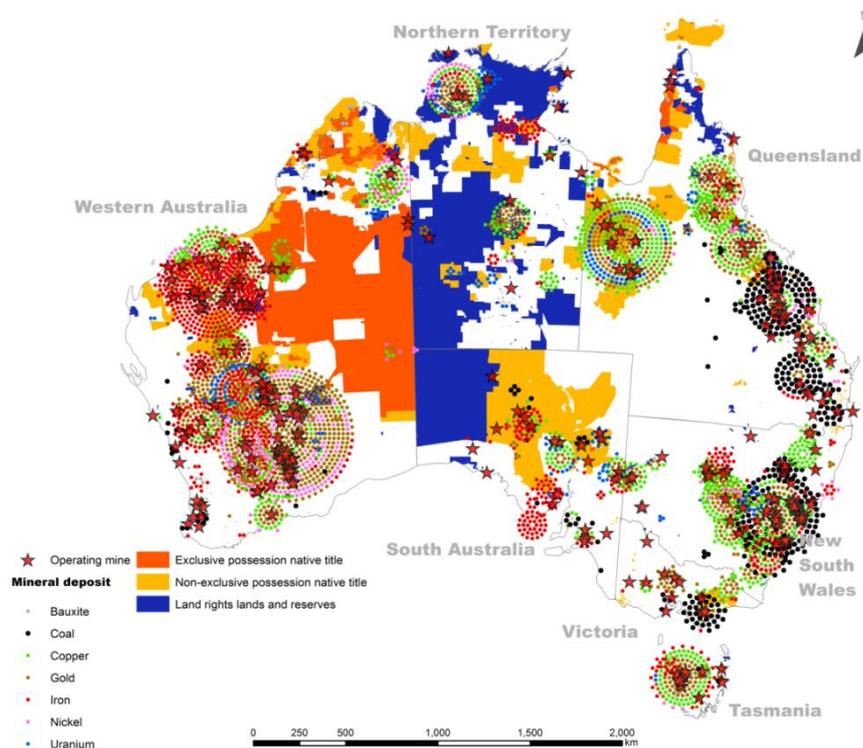


Figure 7: Known mineral deposits (2006) and Indigenous lands

Figures 6 and 7 relating to mining and mineral exploration and refer to political economy. It can be seen that about 20 of Australia's 400 operating mines are on Indigenous lands, although many more are near discrete communities. More significantly, there are existing and emerging mineral provinces that are either located on Indigenous land, especially in the Pilbara, or adjacent to Indigenous lands. There is also a distinct possibility that Indigenous lands that are under-explored to date, because of remoteness, may be of greater mineral worth than Figure 7 suggests. What is significant is that native title determinations of exclusive possession and registered claims trigger a right to negotiate over any mineral extraction project, while rights available under non-exclusive determination and ILUAs are generally weaker.

Figures 8, 9 and 10 focus on environmental values overlaying a template of lands of exclusive land rights and native title possession over three resource atlas maps. Figure 8 shows a marked contrast between these remote lands and more settled and densely populated and farmed regions in terms of vegetation condition. Figure 9 similarly shows that official threatened species counts indicate a marked difference between Indigenous lands and more densely settled areas in the south east and south west of the continent. Figure 10 shows that the riparian zones of rivers, so crucial to biodiversity and water quality, show a high river disturbance indicator in the south east and south west. This is especially along the Murray Darling system. There has been low disturbance in the remote tropical savannah, although this is not to suggest that these jurisdictions are threat free.

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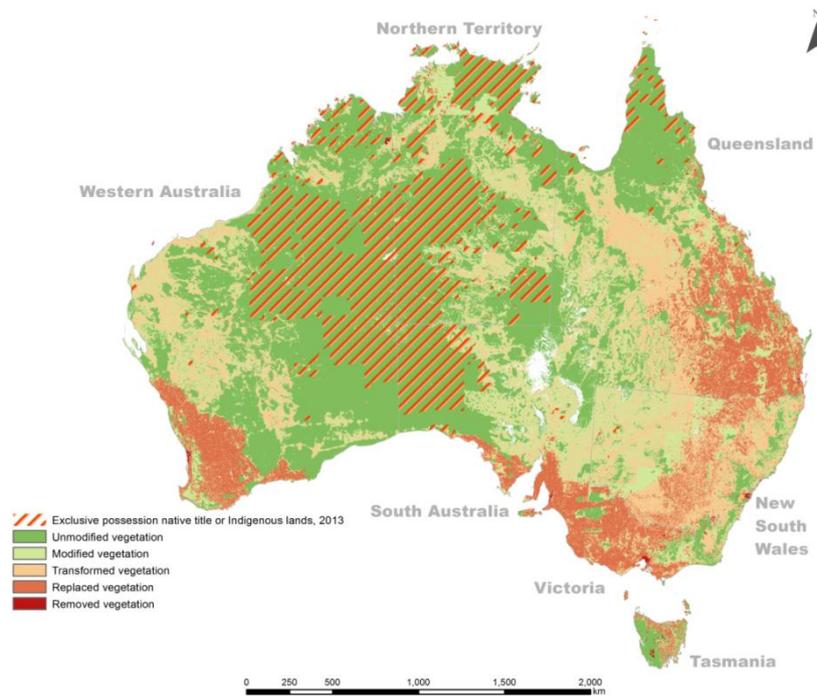


Figure 8: Vegetation condition (2006) and Indigenous lands of exclusive possession

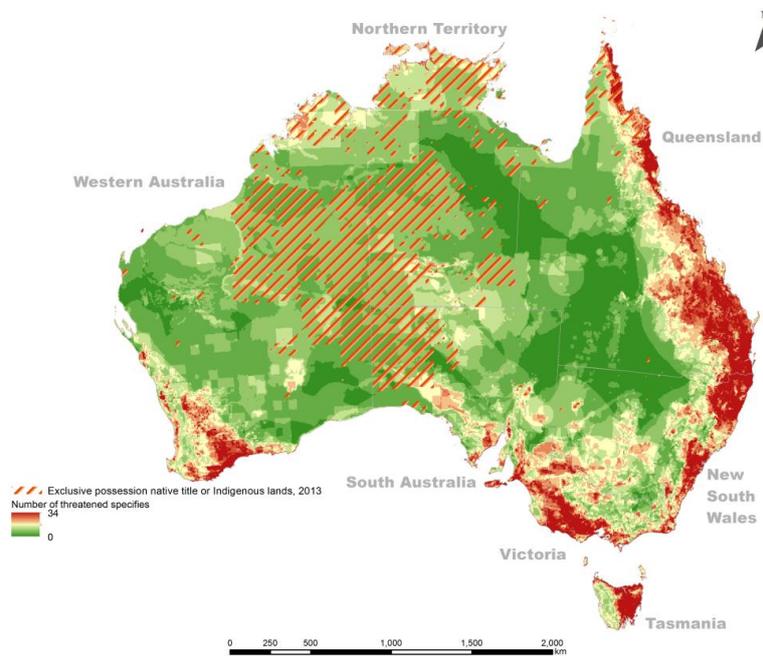


Figure 9: Threatened species count (2008) and Indigenous lands of exclusive possession

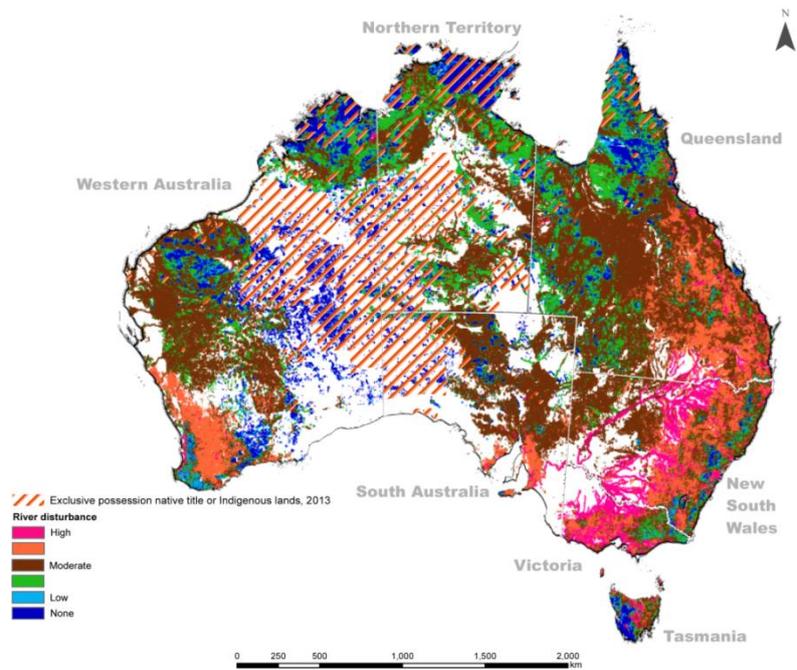


Figure 10: Disturbance of riparian zones (2008) and Indigenous lands of exclusive possession

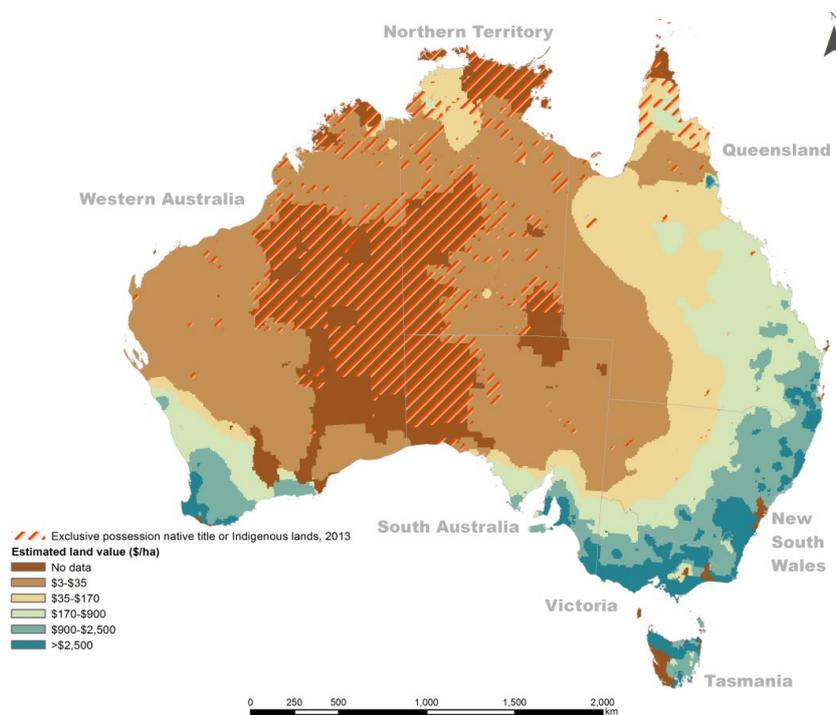


Figure 11: Estimated property values and Indigenous lands of exclusive possession

In Figure 11 the converse of the story of land degradation is provided with reference to the estimated value of land according to real estate criteria. Most Indigenous land either has no data because it is not traded or else it has a very low market value.

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The environmental value of Indigenous land is resulting in more and more of this land becoming incorporated on the initiative of traditional owners into the Australian National Reserve System (the conservation estate), especially since the mid-1990s. In 1996 the Howard Government established an Indigenous Protected Areas programme that allows traditional owners of land to enter agreements with the Australian government to promote biodiversity and cultural resource conservation. Environmental agencies are keen to expand the conservation estate cost effectively, while traditional owners are keen to either maintain the environmental and cultural values of their land or actively engage in their rehabilitation to address damage by postcolonial invasive threats including feral animals and exotic weeds.

Figure 12 shows cadastrally the extent of this coverage. There are currently 60 protected areas declared covering 6.2 per cent of the Australian land mass, while a further 170,000 sq kms of the conservation estate is either jointly managed Indigenous land or co-managed by traditional owners on state land. This current situation is shown diagrammatically in Figure 13. What is significant about this figure is that there is potential for much more Indigenous land to be included in the conservation estate if traditional owners so wish.¹¹

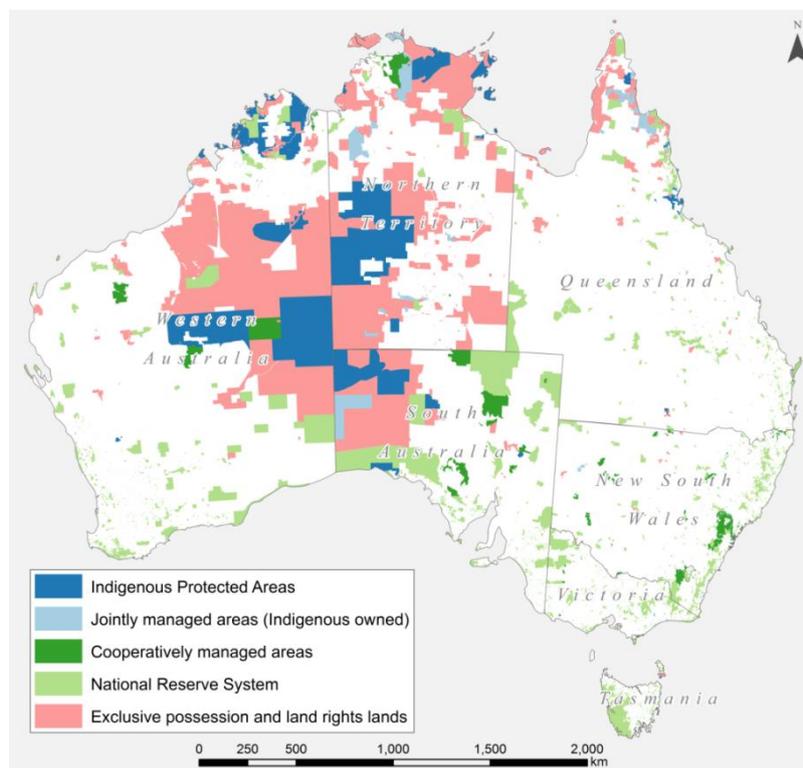


Figure 12: Mapping Indigenous and national conservation lands

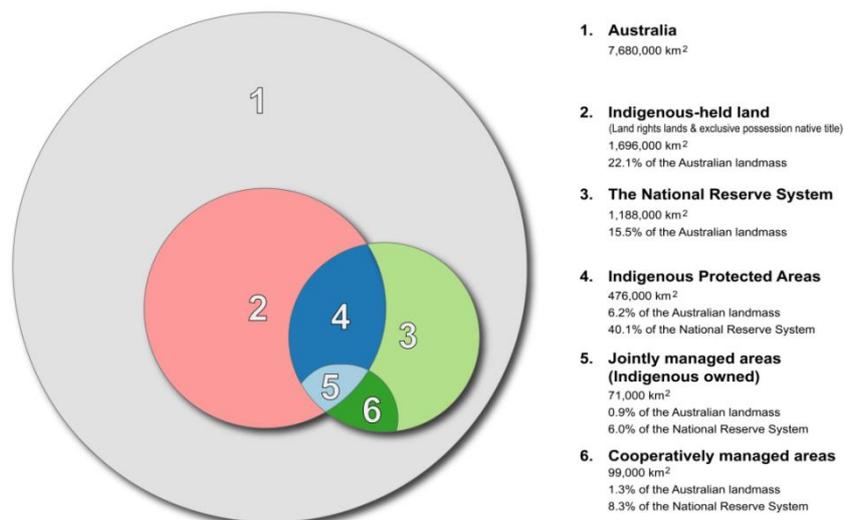


Figure 13: Indigenous and other components of the terrestrial conservation estate

Analysis and conclusion

In my recent research I have sought to ask how indigenous Australians, mainly living very remotely, can benefit from the land titling revolution, the sudden repossession that I have documented. I am also interested in the ‘unfinished business’ of land justice for the majority of Indigenous Australians who have no land rights but will leave this issue in this article.

My analysis is greatly influenced by the hybrid economy model (Figure 14), a construct that I have deployed over the past decade or so to develop a general framework for understanding economic encounter on Indigenous-owned land: hybrid economy theory recognises that where custom has to have been legally proven to get back land then that custom usually exists so that almost everything in the production, distribution and consumption realms and in resource governance on Indigenous land is intermingled with the customary.

At the core of my hybrid economy project is an attempt to advocate for diversity between inter-dependent state, market and customary sectors of existing local economies; and recognition of interdependence between capitalist and non-capitalist economic relations.¹²

My political project is to dilute over-bearing corporate and state power and inform Indigenous land owners of potential for alternatives especially where they enjoy free prior informed consent rights.

Production regimes in remote Australia are not just limited to segments 1 and 3, the market and the state, or the intersection (5) between them, they can encompass a range of possibilities where the customary (2) is deployed alongside state, market or state and market articulations.

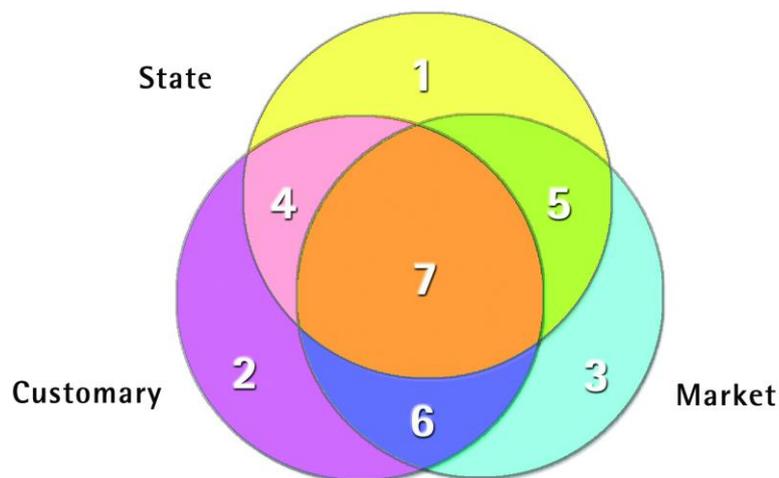


Figure 14: The hybrid economy model

The maps above suggest some cause for spatial triumphalism from an Indigenous standpoint, at least for the 22 per cent of the continent where there is 'exclusive' possession and where the proportion of the population is 80 per cent plus Indigenous. In such jurisdictions one might expect that distinct indigenous ways of being that are today economically hybrid or mixed might prevail. To adapt from political ecologist Arturo Escobar these are 'territories of potential difference' where alternate futures might be envisioned.¹³

But this economic hybridity and different forms of development do not flourish for three key reasons that I summarise as follows:

- 1 The property rights that native title and land rights laws bequeath are made up of 'bundles of rights'. These bundles generally exclude rights to commercially valuable resources like all sub-surface minerals. Only in the Northern Territory under Aboriginal land rights law do people enjoy free prior informed consent rights at the exploration stage that constitute a de facto property right in minerals. However, where Indigenous native title owners are granted 'exclusive possession' they are not actually granted any right to exclude, just a time-limited right to negotiate. Increasingly though High Court of Australia judgments are making it clear that native title rights can include customary rights that remain exercisable irrespective of state regulation (*Yanner v Eaton* [1999] HCA 53, *Karpany v Dietman* [2013] HCA 47) and a right to trade in fisheries (*Akiba v Commonwealth* [2013] HCA 33). However, all this jurisprudence proceeds as if property rights can be neatly divided into commercial and non-commercial domains even if exercised over the same resource, something that makes little economic policy sense.

- 2 There is a clash of expectations (and ontologies) about how repossessed land might be used, with the state flexing its absolute power to promulgate a project of moral restructuring based on neoliberal cultural hegemony, a project given moral authority by some powerful elite Indigenous voices. This can be understood as a component of the neoliberal project to bring all human action into the domain of the market, despite the vesting of land rights and native title based on tradition and custom. This policy inconsistency can be understood again referring to the work of Tania Murray Li as the ‘communal fix’ being deployed to deliver land rights that are inalienable; and then the market fix being required to deliver standard forms of western development in situations where the institutional architecture has been designed for different purposes.¹⁴
- 3 And then there is the clash between the two frames of political economy and political ecology. On one hand, there is political economy where corporate global power dominates and where state regulation is weak owing to the rapid growth of state dependence on mineral exports and resource rentals, a domination very apparent in the discourse war between the Minerals Council of Australia and the 2010 Rudd government over resource rents. On the other hand there is the frame of political ecology emphasising environmental values and providing a means for Indigenous land owners to challenge state and corporate power. On rare occasions the two competing frames mesh, as when environmental services that deliver carbon abatement, clear air, fresh water and biodiversity conservation and small-scale cultural tourism are marketised and corporatised.

These three qualifiers explain in part ongoing Indigenous socio-economic disadvantage alongside ownership of massive tracts of land, and so explain in part the paradox of land repossession that I referred to earlier.

Let me conclude by posing how ecological economics might mediate the clash between political economy and political ecology that frames my analysis?

To simplify considerably, it strikes me that the focus of ecological economics on the embedding of the economy in society in the environment, is a line of reasoning that resonates with the relational ontology of many Indigenous land owners’ focus on kin, ancestral country and the sentience of resources. Ecological economics makes the distinction between economic growth—that even quantifies depletion of non-renewable resources as a positive in national accounts—and economic development that focuses more on qualitative analysis of well-being that can be harmed by the negative impacts of resource extraction on cultural and environmental landscapes.

There are aspects of the ecological economics approach that might assist Indigenous land owners who will face increasing political and commercial pressures from market capitalism and industrial mineral extraction:

- the need for a heterodox approach and healthy techno-scepticism;
- the need to consider the relationship between human and non-human worlds;
- the need to address questions of equity and environmental justice;
- the need to vigilantly deploy the precautionary principle; and
- the need to set a proper price on extraction or prohibit extraction if the risks are too great. (what price does one place on desecrated sacred sites embedded in a sacred landscape?)

As ecological economist Joan Martinez-Alier argues, too often the real social and cultural costs of resource extraction, abstractly referred to as negative externalities, are shifted to the poorest and least powerful.¹⁵

My focus in this paper has been continental. I seek to raise some of the hard questions faced by Indigenous land owners who are keen to see transformative potentiality embedded in the extraordinary land titling revolution of the past 40 years that might be harnessed for diverse, relatively autonomous and environmentally sustainable economic futures. To borrow a phrase from Erik Olin Wright, how might 'real utopias be envisioned' on Indigenous lands for those fortunate enough to repossess them? This seems to me an especially pertinent question at a time when there is so much uncertainty about the future and viability of post-industrial late capitalism. The hopeful answer based on notions of economic hybridity might see those who were dispossessed as too 'primitive' to own land from 1788 to the late 20th century exporting lessons to the occidental global north in the 21st century.

¹ Jon Altman is a research professor in economics/anthropology at the Centre for Aboriginal Economic Policy Research, The Australian National University, where he was inaugural director 1990–2010. He would like to acknowledge the extraordinary contributions of Francis Markham over the last year, dependent on his GIS mapping skills, and Craig Linkhorn for comments on this paper, based on a seminar delivered in the Māori Law Review's Indigenous Law Speaker Series, at the Faculty of Law, Victoria University of Wellington on 13 February 2014. An earlier version of the paper was delivered as a keynote address to The Australia New Zealand Society for Ecological Economics annual conference 'Opportunities for the Critical Decade' at the ANU in Canberra in November 2013.

² Ryan, S. (1996) *The Cartographer's Eye: How Explorers saw Australia*, Cambridge University Press, Melbourne.

³ Locke, J. (1993) [1713]. *Two Treatises of Government*, 4th edition, Dent, London.

⁴ Wolfe, P. (2006) 'Settler colonialism and the elimination of the native', *Journal of Genocidal Research*, 8 (4): 387–409.

⁵ I use the term as deployed by Karen Engle (2010) *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, Duke University Press, Durham.

⁶ Povinelli, E. (2002) *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*, Duke University Press, Durham.

⁷ Li, T.M. (2010) 'Indigeneity, Capitalism and the Management of Dispossession', *Current Anthropology*, 51 (3): 385–414.

⁸ Scott, J.C. (1998) *Seeing like a State: How Certain Schemes to Improve the Human Condition have Failed*, Yale University Press, New Haven.

⁹ De Blij, H. (2012) *Why Geography Matters More than Ever*, Oxford University Press, Oxford, see pp.65-66.

¹⁰ In 1976 with the passage of the Aboriginal Land Rights Act (NT) all existing Aboriginal reserves were transferred to Aboriginal land trusts. This comprised 19% of the Northern Territory. Since then another 30% of unalienated Crown land and Aboriginal-owned pastoral leases has been claimed.

¹¹ For a discussion of this see Altman J.C. and Jackson, S. (2014) 'Indigenous land and sea management: Recognition, redistribution, representation' in David Lindenmayer, Stephen Dovers and Steve Morton (eds) *Ten Commitments Revisited*, CSIRO, Melbourne. Note: in the first published version of this article (March 2014) this paragraph mistakenly described Indigenous Protected Areas as covering 15.5% of the Australian land mass. This was a typographical error through mis-transcription of the total area in the national reserve system. It has been corrected through this reprint (April 2015).

¹² My most recent exposition of this construct is in Altman, J.C. (2013) 'Land rights and development in Australia: Caring for, benefiting from, governing the indigenous estate' in L. Ford and T. Rowse (eds) *Between Indigenous and Settler Governance*, Routledge, Milton Park, UK, 121–34; a summary of my hybrid economy research in Australia 2001–2011 is provided in Russell, S. (2011) *The Hybrid Economy Topic Guide*, CAEPR, ANU, available at

http://caepr.anu.edu.au/sites/default/files/cck_misc_documents/2011/06/Hybrid%20Economy%20Topic%20Guide_2.pdf viewed 24 February 2014. For a wider discussion of hybrid possibilities see Wright, E.O. (2010)

Envisioning Real Utopias, Verso, London.

¹³ Escobar, A. (2008) *Territories of Difference: Place, Movement, Life, Redes*, Duke University Press, Durham.

¹⁴ Li, T.M. (2010) 'Indigeneity, Capitalism and the Management of Dispossession'.

¹⁵ Martinez-Alier, J. (2002) *The Environmentalism of the Poor: A Study of Ecological Conflict and Valuation*, Edward Elgar, Cheltenham, UK.