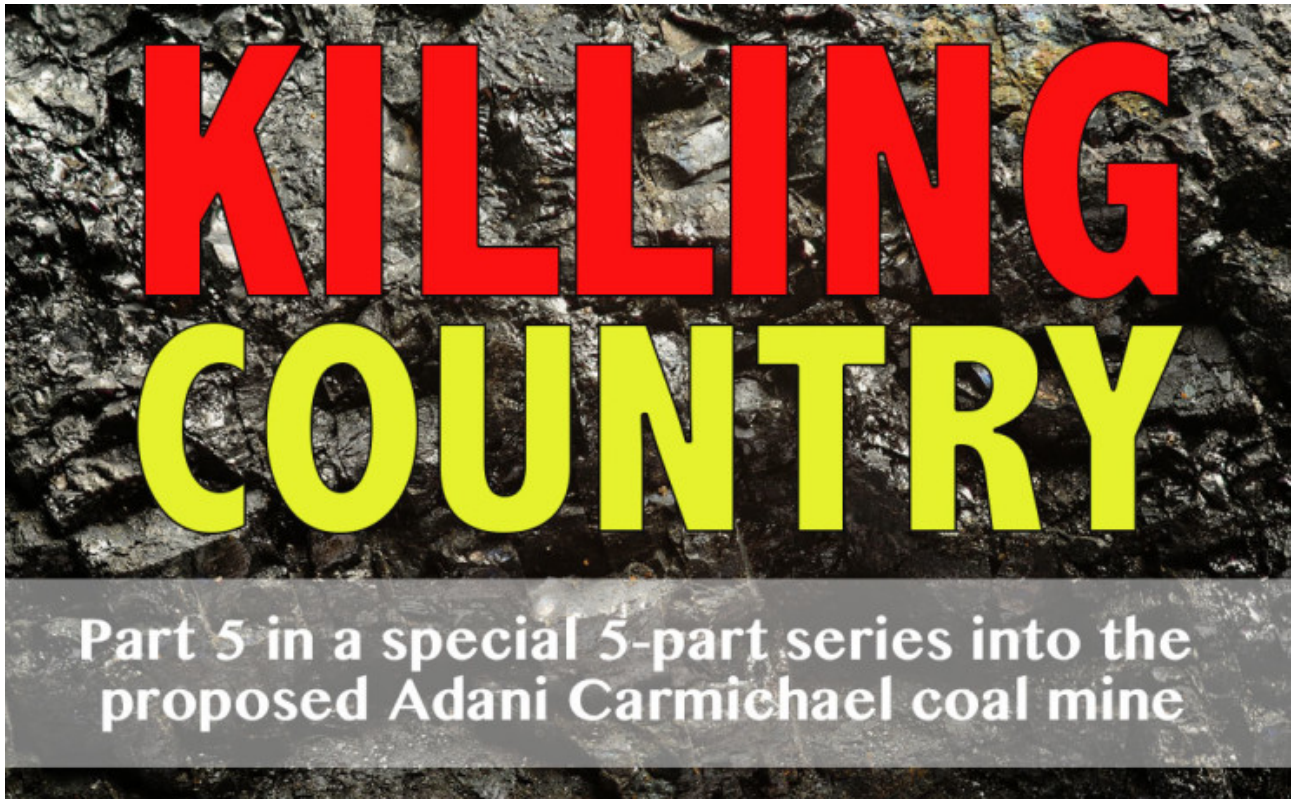

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Killing Country (Part 5): Native Title Colonialism, Racism And Mining For Manufactured Consent

By Morgan Brigg on January 30, 2018 Aboriginal Affairs

In the final of a five-part series on the battle by the Wangan and Jagalingou people of Central Queensland to halt the construction of the Carmichael coal mine by Indian mining giant Adani, Dr Morgan Brigg explains the problems with a native title system that continues to dispossess and disempower Australia's First Peoples.

Wangan and Jagalingou people are the traditional owners of a vast swathe of Central-Western Queensland that is critical for the proposed Adani Carmichael mine, including a 2,750-hectare area over which native title rights must be extinguished for Adani to convert the land to freehold tenure for the infrastructure for mine operations.

The Wangan and Jagalingou are native title applicants with a prima facie claim to their lands, but the Wangan and Jagalingou Traditional Owners Family Council (W&J) are not following the establishment script of playing along with mining interests. Instead, they are vehemently resisting the proposed Adani Carmichael mine, including through native title law.

The fact that their rejection of Adani through four claim group meetings is not an open-and-shut case which sends the miners packing goes to the heart of what native title is and how it works in Australia.

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Queensland Premier Annastacia Palaszczuk shakes hands with Gautam Adani, Port of Townsville, 6 December 2016. (IMAGE: AAP)

Native title deals with Indigenous people's rights to land and waters, but it does so on 'white' terms that do little to advance 'rights' in the wholesale sense of an incontrovertible moral political principle. Rather, it carries a European 'toughness' forged on the colonial frontier that denies Indigenous rights and is deeply embedded in Australian political institutions.

Native title reflects an Aboriginal observation, offered to Bill Stanner by an old Aboriginal man, that Europeans are 'very hard people'. Of course, native title does afford some rights to Indigenous Australians, but these are very limited – nothing like those envisaged by Mabo, the Wik people and others, when they won their famous fights. After 25 years of administration the native title regime is predominantly a vehicle for the ongoing subjugation and assimilation of Indigenous peoples, in line with the logics of the settler-colonial state upon which Australian law is built.

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At the heart of the matter is that the native title regime is not a strong vehicle for the pursuit of Indigenous rights, including because it does not enable a veto, the possibility of which is the only true test of whether it can be said that free, prior and informed consent has been given. As W&J say, 'no means no'.

Instead, native title facilitates the interests of state and capital by manufacturing consent through processes stacked against Indigenous people and backed up by the option of compulsory state acquisition of land.

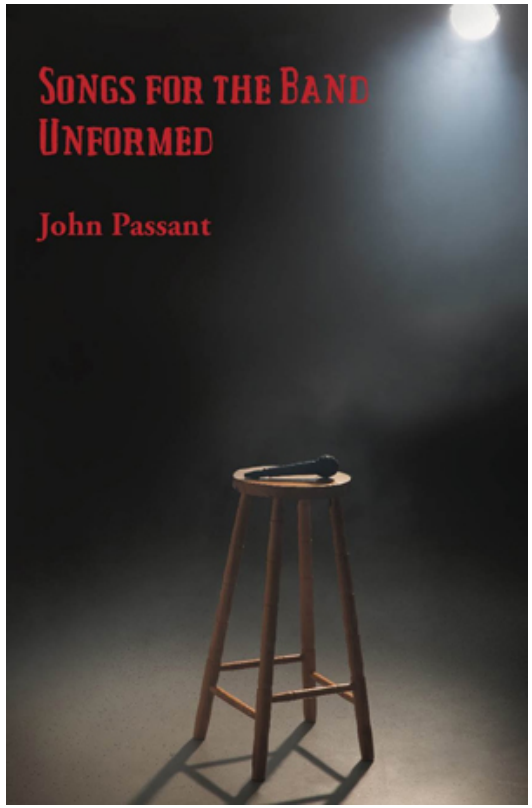
The Australian establishment is accustomed to a highly inequitable approach to race politics. But the immorality of such legal deprivation is readily recognised on the world stage. The racially discriminatory nature of native title has previously been called out by the United Nations Committee on the Elimination of Racial Discrimination, and as the W&J's recent submission to the CERD states, "a consultation process that conforms to international law is almost impossible under Australian law".

Despite having the odds stacked against them, W&J are challenging Australia's native title system and the notion that compliance with colonial-derived law and the imperatives of industrial projects is the way forward for Indigenous people.

Native Title as Colonial Law

Native title law in Australia is the legislated response, through the 1993 Native Title Act, to the celebrated 'Mabo case' in which Eddie Koiki Mabo and other Murray Islanders from the Torres Strait asserted ownership of their island. The 1992 Mabo v Queensland (No 2) High Court case decided in favour of the islanders, overturning the idea of terra nullius (land of nobody) as a legal fiction and thereby altering the hitherto received foundations of settler land law in Australia.

Along with other forms of Aboriginal title, native title has its origins in colonial law. It is part of common law, which has its origins in English law and spread to British colonies. Aboriginal title involves the recognition of customary tenure framed in the terms of the coloniser. So, while it is routine to say that



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native title is based in traditional laws and customs, the way in which these laws and customs are framed in Australian settler law, and in particular, the Native Title Act, is not controlled by Indigenous people.

Unsurprisingly, then, native title does not disrupt or challenge the legality or validity of the original coloniser's claim to sovereignty – the chain of succession remains unbroken. It is also a very thin and weak form of title – it can be and in many cases is 'extinguished' by all previous freeholding, by contemporary government action, or by 'surrender'. It can only be claimed in certain areas where other legal title (such as freehold) does not exist. And native title rights are typically non-exclusive, giving little opportunity to control access to land or its use.

The effect of native title is to consolidate and extend colonial control of land law on the Australian continent rather than substantially recognising Aboriginal prior rights of ownership. 'Native' is somewhat of a misnomer, as native title operates on settler-colonial rather than Aboriginal terms. It is not truly a 'native' title for it is not reflective of the original ownership under Aboriginal law and custom, but merely a reluctant and very minimal accommodation of it.

The fact that native title secures long run settler-colonial interests was underscored early in the operation of the native title regime with the response to the 1996 High Court Wik Peoples v Queensland case (Wik). Here the court ruled that the granting of pastoral leases did not deliver exclusive possession to settlers.

Rather than accepting this ruling, establishment interests and key politicians cried outrage, leading to the Native Title Amendment Act 1998 (Cth) – or the '10 Point Plan'. The measures adopted, including restricting the scope of native title claims, required the substantial suspending of the Racial Discrimination Act 1975 (RDA) to enact legislation to limit or extinguish the property rights of one group through a distinction based on race (see this recent report for discussion of a more recent change to the NTA directly affecting W&J efforts to oppose the Adani Carmichael mine).

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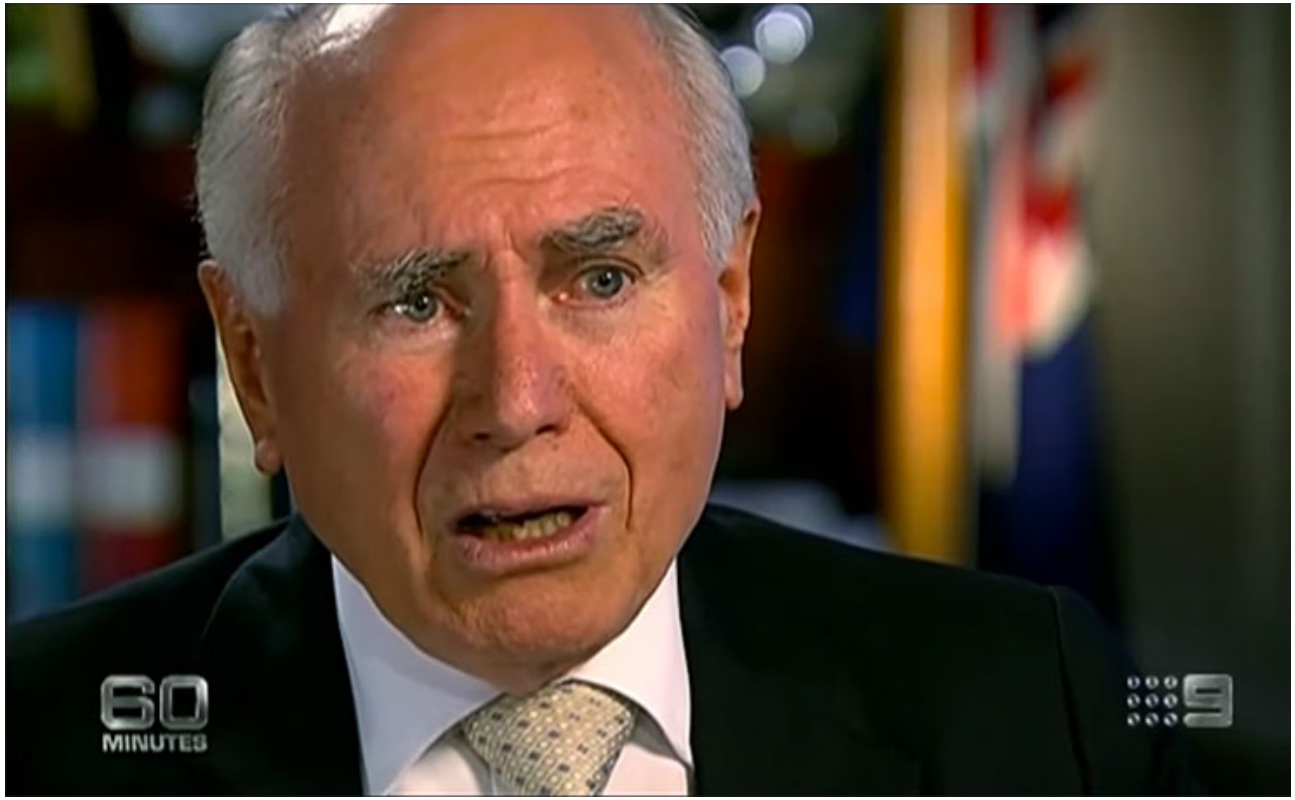

Former Australian prime minister, John Howard in 2012. He introduced a '10 Point Plan' in 1997 designed to weaken Native Title rights.

Equally or perhaps more destructive than the embedding of racially discriminatory political impulses in Australian law is their operationalisation in native title. By involving many Indigenous people, supporters and allied professionals – anthropologists, archaeologists, and lawyers – in costly, labyrinthine and difficult processes for little gain, native title has helped establishment interests in Australia to operationalise a system for subjecting and assimilating Indigenous people. In the process, fundamental questions about Indigenous land rights are routinely sidestepped.

Wangan and Jagalingou need to be involved in native title processes – they cannot afford not to be – but the W&J challenge native title on their own terms and raise fundamental questions about Indigenous rights. As spokesperson Adrian Burragubba has stated, "Adani has the benefit of a system that does not respect our rights as Aboriginal peoples" but "as First Nations people, we will defend our rights as

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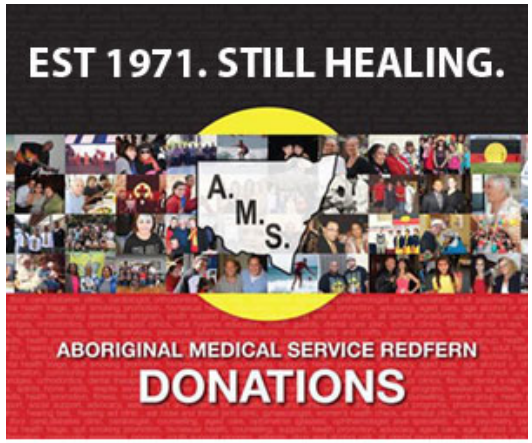

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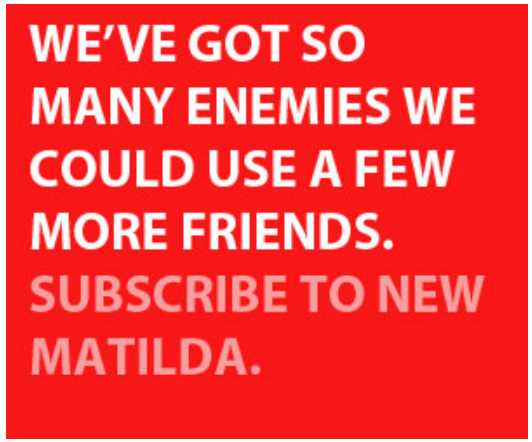

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sovereign owners and custodians, protect our ancestral land inheritance, and maintain our rights and interests in and on our Country".

Even as native title works against the W&J, they assert Indigenous rights grounded in their law as the Aboriginal people of that land.

Native Title at Work

The 1993 Native Title Act created a stable and predictable environment for business, clarifying the legal situation and enabling industry to negotiate over lands that could otherwise be, in the wake of Mabo, subject to complicated and competing claims. It also did this while allowing miners and others to benefit from agreements before a determination of native title is made. This can and does result in people who are not the 'right people for country' signing away land and resources over which they do not have authority under traditional law and custom.

The operation of this system, through the National Native Title Tribunal (NNTT) and Native Title Representative Bodies (NTRBs) that were established under the NTA to help Indigenous people prepare and run their claims, is especially pertinent to W&J's case.

In a trial in March the W&J will argue that Adani cannot claim to have consent, or a valid agreement to its mine, including because many of the people it relies upon in its claim to have an agreement with traditional owners are not rightful owners. The W&J will argue that the NNTT therefore should not have registered this agreement because of deep flaws in native title processes.

In the early days of native title, many existing land councils took on the statutory functions of NTRBs in efforts to deal with the challenge of how to quickly establish NTRBs across the country. Land councils were crucially important vehicles of self-determination, and they stand in a remarkable lineage of Indigenous resistance to colonisation punctuated by key events such as the famous Wave Hill walk-off and the Mabo court case.

Land councils were – and some remain – strong advocates of Indigenous rights, but before native title they had previously worked with a patchwork of legislative and administrative schemes. Native title could be claimed much more widely and this upset the status quo because miners and other established interests didn't appreciate the accompanying requirement to negotiate with Indigenous peoples.

This was brought out very clearly in the Wik amendments which saw, among other measures, the truncation of the Indigenous right to negotiate (to a 6 month period before a development proponent can seek a determination in the NNTT) and the creation of Indigenous Land Use Agreements (ILUAs) to help broker and formalise agreements that bind all parties to it as contract, even where Traditional Owners have refused, or never signed. No other form of property or contract law in Australia would allow for this.

In the context of limited rights to negotiate and an imbalance of power and resources against traditional owners in negotiations, NTRBs do their work of progressing native title claims. Over time, though, the strong advocacy of land councils has in many cases faded. The stronger land councils retain commitment to Indigenous rights and land rights aspirations, but even these have been gradually eroded, and those NTRBs that have less strong bases of traditional owners are more prone to Canberra's influence, including its power to appoint and approve NTRBs.

In some instances, traditional land councils have been replaced by government-appointed service bodies. Queensland South Native Title Services (QSNTS), who currently administer the Wangan and Jagalingou claim, were federally recognised in 2005, taking over the functions and claims of several smaller land councils. QSNTS is now one of the largest NTRBs by geographical area – it services more than half the state of Queensland, encompassing nearly all of the gas and coal rich areas of the state. It is a powerful organisation.

QSNTS badges itself as facilitating traditional owner aspirations and self-determination, but W&J's experience with QSNTS does not reflect this. Closer to the truth is that QSNTS is guided by the Native Title Act and is sensitive to the policies of the Federal Government from whom they receive most of their funding.

There is no representation of traditional owners in the governance structures of QSNTS. There are no representatives of traditional owner groups on the board. They do not have a membership, nor do they

derive a mandate from anywhere at the grassroots level from any traditional owner group – they owe their existence and allegiance to the NTA rather than to traditional owners.

US Ambassador Timothy Roemer is greeted by Gautam Adani, Chairman, Adani Group at Adani House in Ahmedabad, Gujarat. (IMAGE: U.S. Embassy New Delhi, Flickr)

QSNTS also works in an area where local politics and processes are clearly driven by the resources sector, and the W&J have experienced this as involving a truncation of their right to negotiate and a bias against their wishes to say 'no' to the proposed Adani mine. QSNTS also derives direct benefits from supporting proponent-led 'authorisation meetings', and through the certification of processes for making ILUAs, which often lead to mining.

As a powerful organisation, and in a context in which most traditional owner groups do not have their own resources to hire legal and other professional assistance, QSNTS gets to decide a raft of substantive and procedural questions about how a claim is progressed. Among the most contentious of these among traditional owners is who is part of the claim, and who is not. Central here is the expert input in the form of an anthropologist's report.

In theory, traditional owners are able to provide additional or contrary evidence to reports, to have disputes about claim membership mediated by NTRBs, and to decide about the decision-making processes that they use to manage such issues and their overall governance. But because NTRBs exercise de-facto control of the governance of the group's claim, the commissioning of reports, the flow of information, and the provision of dispute management and decision-making processes, they exert much influence on how the claim process proceeds, and consequently, who is empowered or disempowered inside Indigenous groups.

The W&J point out, for instance, that they have been unable to get access to anthropologists' reports, and that QSNTS-led processes lean toward democratic processes – everyone getting a voice – rather than support for traditional modes of decision-making, especially over specified parts of country. They also argue that QSNTS has pursued a 'societal' approach to their claim which, in the interpretation of native title law, enables a broader group of people to be part of the overall 'claim group' without corresponding differentiation of rights at the level of traditional ownership and clan estates.

They maintain it is easy for a rich company like Adani to bankroll a large group of people from across a region, with some language and familial ties, to attend a meeting and vote *en masse*. But as the Federal Court recognises in relation to the matter to be tried in March 2018, the issue rests not only with exclusion in key decision-making processes, but also with who was – *and shouldn't have been* – included. In other words, authorisation meetings can be stacked with people who have no right to speak for country.

W&J suggest it is no coincidence that of five authorisation meetings held since 2012, the only one to turn up a 'yes' vote was the one paid for and organised by Adani. Large parts of the claim group, who have consistently said 'no', refused to attend this meeting.

The societal approach to native title claims can be justified by NTRBs as more inclusive and, in some cases, as more likely to deliver a positive result for the claim. But the W&J point out that in their case it has diminished the rights of those with strongest connections to country, and that this looser approach to who is part of the group has been mobilised by Adani, with QSNTS complicity or support, to generate a false impression of support for an ILUA to allow the mine to proceed.

The W&J argue that QSNTS has also managed the governance of the claim in ways that advantage false support for the Adani mine. While the basis for the claim lies in the entire claim group, this group is represented, through structures suggested and put in place through QSNTS, by a combination of a representative group linked to the identifiable ancestors connected to country and an 'applicant' who is empowered to represent and make decisions on behalf of the claim group in formal native title processes.

The composition of the representative group and the applicant has changed several times throughout the claim process. Throughout these changes the W&J point out that QSNTS have consistently supported the actions of a nominal majority of the applicant, including in legal action and the calling and running of meetings who have acted against the stated wishes of the claim group, and in collusion with Adani, to negotiate an illegitimate ILUA. Some of these actions are also the subject of the court case, brought by the W&J, which is slated to be heard in March.

Manufacturing Consent, Denying Traditional Owners

Wangan and Jagalingou people rejected Adani's proposals in December 2012 and October 2014. However, Adani went to the NNTT in 2013 and 2015, the Tribunal allowed the mining leases to be granted over the rejections of the claim group, and the Queensland Government duly complied. This is the most direct way in which native title facilitates the denial rather than the protection of Aboriginal rights.

There was no consent, and no requirement on Adani to continue to negotiate, or to accept a refusal.

In addition, and against Wangan and Jagalingou decisions in 2012 and 2014, QSNTS has continued to facilitate Adani's ongoing efforts to seek agreement, through an ILUA, to the surrender of native title

rights in up to 2,750 hectares of land that are necessary for infrastructure critical to the mine. QSNTS declined to in any way facilitate a 'self-determined' meeting of the claim group that was run in March 2016 – a meeting that once again rejected an ILUA with Adani, as well as any further dealings with them. They also refused to attend, or share the notice of the most recent claim group meetings in December 2017 – meetings to address the progress of the native title claim. These meetings also revisited, and as it turned out, de-authorised the ILUA that Adani was seeking to have registered.

However, QSNTS did share notice of, and attended a meeting organised by Adani in April 2016 that voted in favour of an ILUA. The W&J, who expressly protested this meeting by not attending, point out in their submission to the CERD that the vast majority of the participants in the meeting appear not to be members of the Wangan and Jagalingou native title claim group.

The attendance register for the meeting indicates that 60% of the participants had never attended any of the prior claim group meetings and were not recorded in a database of Wangan and Jagalingou' members maintained by QSNTS encompassing the then 12 years of the claim. Others still did not name an ancestor from whom they were descended.

Despite these striking and egregious anomalies, and the NTA requiring that an ILUA be authorised by members of the claim group, QSNTS certified this meeting process.

The W&J point out, again in their CERD submission, that QSNTS has either stood by or actively facilitated Adani as they have excluded the W&J authorised senior spokesperson from meetings and "challenged his right to represent our people's views, decided to consult with people other than those we have chosen as our representatives, stacked meetings in its favour, presented false information to the public about our people's position on the mine, and questioned our people's independence by asserting we are acting at the behest of outside activists".

Queensland Premier Annastacia Palaszczuk. (IMAGE: NREL, Flickr)

Meanwhile, the Queensland Government has remained silent in public while consistently joining court actions on the side of Adani, and actively facilitating the mine through the actions of the Coordinator-General. In this way, they prosecute an out-dated resource-intensive developmentalism at the expense of Indigenous rights, without publically saying that they oppose Indigenous rights.

As noted in a previous article in this series, "The ILUA process, in effect, enables the State Government to abrogate its responsibilities to mining companies in negotiations with Traditional Owners, despite the obvious unequal access to power and information that shapes both negotiation processes and their outcomes".

However, depending on the outcome of the upcoming court case, the Queensland Government may be called upon to more explicitly deny the rights of Indigenous people as enabled by the native title regime.

Compulsory Acquisition and the Continuation of Colonial Violence

Should the objections of the W&J to the Adani ILUA process be upheld in the March 2018 court case, and if potential further Adani efforts to seek an ILUA are unsuccessful, the Queensland Government can compulsorily acquire the 2,750 hectares that Adani seeks. This action, which would be initiated through the Coordinator-General and require a decision of the Governor in Council, would see the state extinguish the native title rights of Wangan and Jagalingou people.

Contemporary governments are usually wary of being positioned as explicitly against Indigenous rights, but the Queensland Government has countenanced this option before. The Queensland ALP did rule it out in principle in the recent election campaign, but continues to rely on the machinery of native title ILUAs as the measure of consent. The Wangan and Jagalingou people, already dispossessed once by the state, live with the threat of compulsory acquisition of their native title rights – or more insidiously, the manufacture of their consent.

The principle at play here, which is reflected throughout the native title regime and the actions of the dominant players, is that nothing in the limited common law recognition of Indigenous rights through the NTA is to compromise the British assertion of sovereignty and the overarching politico-legal order, including a system of private property rights, that extends from it.

Compulsory acquisition thus speaks to the broader political and legal landscape in which the W&J pursue their struggle. While the Indigenous rights claim at the heart of the Mabo case overturned the principle of terra nullius, leaving no defensible basis for the unfettered claim of settler sovereignty, neither the High Court decision nor the legislated response in the form of the NTA have broken with the untenable claims, or violence, of the imposition and continuation of colonial rule.

Conclusion

The best that might be said of native title today, despite its potential to radically and justly shake the existing order of the tenure system in Australia and the relations between the first peoples and the settler society, is that it is a small step in responding to the Indigenous rights claims that inform the Mabo decision.

In time, the NTA must be judged as a sub-par legislated response to Mabo – an unedifying crystallization of racially discriminatory impulses that are embedded deep in Australian institutional memory, and continue Australian colonialism in the 21st century.

No doubt native title is some form of attempt to wrestle with the facts of history and the accompanying incontrovertible justice claims. There are also rights – albeit very thin and limited ones – to be grasped through native title, and there is no doubting the good intentions and efforts of many who work within it. However, the regime falls short such that native title must be a stepping stone rather than a destination in the pursuit of Indigenous rights. The risk, though, is that it involves a co-option of Aboriginal people that undermines or leads to the cessation of their rights struggle.

W&J stand on the conflict-ridden frontier of these issues in real time where powerful forces – the state, miners, big money, and the established media – seek to overcome Aboriginal resistance that operates through the 'right to say no' that inspires older and rising generations of Aboriginal rights leaders.

The W&J are pushing the limits of native title to prosecute their rights while opposing Adani's proposed mine and making claims through Aboriginal law on their own terms. In doing so they are helping to show how native title is manifestly inadequate.

They are also helping all of us to ask questions of native title, and requiring us to ask what might be an alternative meaningful step in advancing Indigenous rights in Australia.

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Morgan Brigg

Morgan Brigg blends theory and practice in examining the interplay of culture, governance and selfhood in conflict resolution, peacebuilding and development studies. He is an experienced mediator (nationally accredited) and facilitator, with conflict resolution training experience in Aboriginal Australia, Solomon Islands and Indonesia. His research aims to develop ways of knowing across cultural difference which work with local and Indigenous approaches to political community. Current projects examine intercultural forms of governance in Indigenous health and the promise of ideas of relationality for making the field of conflict resolution a genuinely global endeavour.

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