Frontier Extractivism: Climate Change and Indigenous Dispossession

Lee Godden[1]

But how shall we fix things in their proper place and how shall we ground them twixt heaven and deep earth? The land has no markers of possession and no boundaries of division, it is terra nullius whispered the Strange God who sat on the right hand of the Sovereign: the Sovereign who was no longer God but merely King. Ah, replied the Sovereign, we shall ground and fix it in law (Godden 2003: 61).

1 Introduction

In the above fable of the colonisation of Australia, the 'Strange God' was an allusion to Marx's analysis of the rise of capitalism as coincidental with European colonialism (Marx 1946). The colonisation of Australia rationalised by international law doctrines of terra nullius – a land whose inhabitants had 'no law' – was entangled with the emergence of modern capitalist forms (Scott 1995: 192). Various capitalist forms of extraction have precipitated the imperial transposition of colonial governance into the spaces occupied by Indigenous peoples (Miller et al. 2012). The desire for resources driving successive European waves of colonisation, and the legal rationalisations for their extraction from 'other peoples' is well documented (Anghie 2005).[2]

Historic waves of colonialism and extraction of resources find

parallels in more recent global geopolitical, legal and economic interdependencies (Dehm 2022b: 103) that facilitate the extractive regimes that are major contributors to climate change (Dehm 2022a: 75). Extractivism has emerged as an organising concept for a set of 'socio-ecologically destructive processes' that subsume appropriation, non-reciprocity, depletion, and subjugation (Chagnon et al. 2022: 762). The ideology and practices of extractivism are entwined with the histories and legacies of colonialism and imperialism and 'extractivism, as an increasingly prominent modality of capital accumulation, has now become a way of world-making, determining, and making demands on most aspects of modern societies' (Chagnon et al. 2022: 761). Extractivism involves the taking of resources from nature for human use in an unsustainable manner (Dehm 2022a: 75) as well as denoting a non-reciprocal relationship to nature that facilitates accumulation 'for distant capital without generating benefits for local people' (Scott 2021: 124).

The specific resources to be extracted have varied across time, but the European sovereign imprimatur for extraction of resources was integrally aligned to the legal categorisation of territories (Anghie 2006, Mickelson 2022: 160, Storr 2022: 180). Discovered lands, upon assertion of sovereignty, could be readily exploited.[3] Peoples with legal systems cognisable to Europeans were to be encountered through treaty. To 'treat' was to trade, and trade regimes were linked to sea power and mercantile acuity in the era of European expansion into the Australasian-Pacific region. Cook's purported 'discovery' of south-eastern Australia (then New South Wales) occurred in this context.[4] Cook's first voyage across the Pacific was premised on finding land, resources to extract, and commodities to trade – ahead of the French (Cameron-Ash 2018).

Captain Cook's (secret) instructions from the British Admiralty (Cameron-Ash 2018: 2) were to sail westward from Tahiti in search of Terra Australis Incognito (NSW State Library 2024) in order that Britain should claim the mythologised southern continent.[5] Earlier European contact had resulted in mapping of the north-west coast

of Australia (Hill 2012), although that region was regarded as not favourable for 'extraction'.[6]

Pitched against this narrative of geopolitical trade rivalry, classifications of territory at international law, a now strongly contested sovereign acquisition, and the European desire for resources, this article contends that the early colonial forms of extraction in 'frontier' Australia have enduring continuities with more recent forms of extraction of carbon-based resources. The disparate eras are fused by the colonial dispossession of Aboriginal peoples and the exclusion of Indigenous sovereignty over most resources in Australian law. The colonial modality of sovereign acquisition and title to property and resources provides a legal continuum with current fossil fuel extraction projects in the energy rich Northern Territory. Aboriginal dispossession remains integral to Australia's extraction of carbon resources.

The following section, Colonial Encounters and Resource Extraction, outlines the concept of frontier encounters in the context of prevailing international law, and the transition from mercantile imperialism to more distinctly modern capitalist forms of extraction. It turns to a retrospective reading of *Mabo v Queensland* [No 2] (*Mabo No 2*) to demonstrate how the colonial imposition of sovereign title over resources has provided the underlying legal property form, including the derivate native title regime, that bridges colonial dispossession and Australia's continuing contribution to climate change via export of carbon resources in the Northern Territory.

Section 3, Reading In: Indigenous Peoples, Property, Law and Nation, discusses how the fixing of property in resources through sovereign title and the concomitant dispossession of Aboriginal peoples has shaped the evolution of resource extraction laws within the Australian nation. The evolution of property law in its iteration with the rise of market capitalism enabled resources to become progressively more fungible and extractable.

Section 4, Energy Resource Extraction in the Northern Territory, illustrates how the above phenomenon is given contemporary expression in the extraction and export of energy resources in the Northern

Territory that contribute strongly to climate change. The native title regime offers Aboriginal Peoples the capacity for only limited resistance to that extractive impetus.

The final section, Reading in Aboriginal Dispossession in the Anthropocene, presents an overview of debates around whether the Anthropocene is congruent with the rise of Industrial capitalism. It concludes that the underlying knowledge system is part of an ideology and set of scientific and consequent legal practices that are entwined with the histories and legacies of colonialism and imperialism, as well as the shifting parameters of capitalism across time.

2 Colonial Encounters and Resource Extraction

A Colonial Desire for Resources

The article adopts a decolonial lens in articulating the frontier encounters between Indigenous Peoples, and those held to 'discover' them in the era of advancing colonialism in the Australasian region. Given such a lens, it suggests that despite the prevailing international law classifications of territory, it is possible to understand European colonisation as propelled as much by an initial desire for trade and resource extraction as by a drive for formalised colonies and land settlements. A disjunction existed between the in-place encounters between peoples (Povinelli 2016) and the artificial classifications of international law. Aboriginal people were clearly in possession of resources when first encountered by Europeans (Macintyre 2020: ch 1) but that possession was negated by the Eurocentric construct of 'territory in international law [which] presumes objectification of 'nature' necessary for the propertisation and commodification of Earth' (Storr 2022: 180). The Europeans' search for readily moveable resources and commodities in which the property was made alienable either through trade exchanges, agreement (treaties) or at times via violent and forcible extraction of a resource was consistent with such European propertisation of the Earth. These forms of resource alienability often characterised the actual encounters between Aboriginal peoples and Europeans (as opposed to a formal legal designation) in the

establishment of settler colonies in Imperial expansion (Butterly 2023: 188). Further, Australia's early colonial frontier encounters occurred in a period of transition from mercantile capitalism and its associated extractive regimes, towards modern industrial capitalism that prioritised carbon, mineral (gold) and pastoral exploitation (Macintyre 2020). Currently, Australia's dependency on an extractive natural resource economy is ineffectually mediated by a federal legal system that is bifurcated in its response to climate change, with relatively rapid transition to renewables in some sectors but the retention of significant extraction of carbon resources in the export sector (Godden 2023).

The suggestion of pluralist frontier zones of encounter between European colonisers and Indigenous communities stands in contrast to an overriding narrative of Westaphalian-inspired, unilateral sovereign state formation (Povinelli 2016: 5) as defining British colonialism in early Australasian colonisation. Instead, a standpoint of encounters can generate new ways of understanding discrete colonial acquisition 'events' as legally immediate, but factually occurring over an extended spatio-temporal scale. Articulating international law as a law of encounter highlights how the emergence of the colonial state is iterative (Pahuja 2013: 64). From a pluralist vantage, legal moments of colonial formation take on the character of an extended encounter in frontier zones; meetings and fluid exchanges between peoples that retrospectively manifest in law by reference to the categorisations of colonies that embed international recognition doctrines (*Mabo No 2*: 32, Mickelson 2022, Storr 2022: 181).

In Australia, now legally designated as a settler nation, much attention has focused on the history of land occupation and pastoral settlement as central modes of colonial and postcolonial extraction, and consequently as the platform for a predominantly capitalist, extraction-based resource economy. By contrast, the focus here turns to two phases of frontier contact: extraction and Indigenous dispossession.

B Case studies: Frontiers and Encounters

Having introduced the concept of encounter, this section now traverses the frontier of early phase colonial contact immediately following sovereign acquisition in Australia to explore encounters 'in place'. The concept of encounters has been applied to first contact between Indigenous Peoples and Europeans as well as to redescribe the violent acquisition of sovereignty in international law (Evans et al. 2013: 3). Adopting an encounter perspective challenges the imposition of a universal legal modernity, encompassing the globe (Rodríguez-Garavito et al. 2005). Situating an analysis of extractivism and Aboriginal dispossession in encounter thus seeks to confound legal modes of both territory-as-sovereignty and territory-as-jurisdiction (Storr 2022: 187) in favour of a place-centred understanding of First Nations' sovereignty – a distinction McNeil (2012: 37-38) makes between colonial de jure sovereignty and de facto sovereignty.

The focus on the frontier phase of early Australian colonisation and encounter is read through the legal filter of *Mabo No 2*. It re-reads that narrative of legal history from a perspective altered by an interval of 20 years, punctuated by the existential threat posed by dangerous anthropogenic climate change. Accordingly, it focuses on how the law in *Mabo No 2* in its retrospective account of the colonisation of Australia secured a colonial property form of Crown radical title that continues to enable carbon-based resources to be 'moveable', i.e. it is the legal foundation for the transfer of the Crown resources to holders of carbon resource titles (extraction licences). That sovereign legal form, by making energy resources highly extractable and transferable, especially in international trade, has contributed significantly to Australia's emissions profile in respect of climate change.

The second exploration of frontier encounter contrasts with the first re-reading of an originary assertion of sovereignty in a land 'owned by no one' by discussing a contemporary case study of developments in resource extraction in the frontier zone of the Northern Territory, Australia. Extraction of the carbon resources, at its foundation, continues to use the colonial legal form (Godden 2003, Cushing 2024).

In each instance, there is a postcolonial 'reading in' of the dispossession of Aboriginal Peoples and Torres Strait Islanders in the colonial era and in a contemporary world impacted by climate change. As Seuffert et al. indicate, 'postcolonial theory arises with the fall of grand theory and the destabilisation of history 'as it actually was' or chronological 'facts', creating space for a dynamic theorisation of colonisation and the construction of nations…'. The concept of discrete historical eras signified by the postcolonial is problematised. Nonetheless, the heuristic of postcolonial inquiry as 'writing against the colonial, and of everyday life' (Seuffert et al. 2011: 1) remains pertinent.

3 Writing against the Colonial

In writing against the colonial, this article makes visible the persistence of a colonial legal form of sovereign title in the concrete and material conditions of property law and resource extraction in Australia. It opens the space for a dynamic theorisation of encounters and frontier zones of progressive colonisation in the construction of nations (Godden 2020: 133). In turn, it reads against another legal principle significant in the postcolonial construction of developing nations. In 1954, the United Nations General Assembly resolution 523 (V1) recognised the right of underdeveloped countries to determine freely the use of their natural resources. The consolidation of the principle of permanent national sovereignty over natural resources at international law was integral to the mid-twentieth century decolonisation movement (Mensi 2023b, Storr 2022: 180), which precipitated the emergence of nations in former colonial territories in Asia, Africa, Latin America and the Pacific.

That principle is part of the matrix of contemporary national sovereignty over territory and resources that in nations such as Australia facilitates a highly extractive energy resources regime (Godden 2024: 351). Such regimes clearly contribute to dangerous anthropogenic climate change (*United Nations Framework Convention on Climate Change* 1994 article 2, Intergovernmental Panel on Climate Change 2023). That fact, rather than signifying a rupture with colonial legal

orders, reinforces the modernist parameters of international law and domestic law by its emphatic reinstitution of conventional modes of national territorial sovereignty.

A Colonial Sovereignty over Resources

The period from the late eighteenth to early nineteenth centuries, when Australia was 'discovered' and colonised, marked a global transition from the predominance of mercantile sovereignty in colonial expansion (Wallerstein 2011) to a focus on economic productivity instituted by colonial governmentality (Scott 1995: 191). Commodity trading regimes based on maritime power were a signature value extraction mode under mercantile sovereignty. The Dutch and British East India companies exemplified that mode, although such regimes did, in effect, formally and informally colonise large territories. Other commentators, while acknowledging increasing attention by Imperial governments to facilitating modern economic activities in the early nineteenth century, play down decisive breaks with earlier legal orders (Laidlaw 2005).

Mercantile sovereignty modes thus operated alongside plural, cultural forms of internal governance in British imperial expansion (Casinader et al. 2018). Attention to plurality in governance confounds the 'history as progress' model, which emphasises the progressive character of European institutions. The view that global change emanates exclusively from the dynamics of Western material history is strongly contested (Benton 2001: 6, Chakrabarty 2000). Such pluralism facilitated a zone of encounter focused on extraction of resources by European individuals and companies, which occurred in advance of colonial public law institutions. Canadian historic treaties, for example, typically reflect the earlier importance of the Indigenous-coloniser exchanges that happened in the highly extractive fur trade, but also Indigenous sovereignty over such resources (McNeil 2012: 38, 49). Nonetheless, positivist hegemony in international law served Imperial powers well from the late eighteenth century onward, in an insistence upon unilateral sovereignty, authority and territorial control as a prescriptive metaphor for the 'occupation' of peoples and lands that

were being colonised (McNeil 2013: 49).

Questions of legal pluralism were transmuted by increasing emphasis on economic development and desire for wealth (Beard 2007). This orientation to international law was an iterative development across the seventeenth to nineteenth centuries, articulating between a juridical discourse of natural rights, a political economy (of escalating capitalist accumulation), and modes of political organisation that actualised class power reinforced by state hegemony (Kochi 2017: 24). Conceiving modern international law in these terms has 'the benefit of resisting 'economic determinist' critiques of international law in which all juridical and political relations and all forms of normativity are reduced to an economic mode of production' (Kochi 2017: 24). It nuances the reading of international law as an expression of capitalist imperialism founded on the merging of territory and sovereignty. Indeed, the naturalisation of sovereignty and territory has been questioned (Storr 2022: 82).

Even so, the assertion of sovereignty, inaugurated under international law, [often with attention to the Strange God at its elbow], brought within its ambit an array of natural resources. Prevailing colonial definitions of territory encompassed compendious views of constituent land and waters. A more segregated view of territory was to issue later as Eurocentric accounting and management forms sub-divided and categorised its component value elements. Scott (1998: 11) articulates how modern states, particularly in the Westphalian tradition, rely on science and mathematics as reductionist knowledge forms in which to make phenomena legible by reducing complexity. When phenomena (such as the constituent parts of territory) become legible to the state, then they are susceptible to measurement, management and extraction (Scott 1998: 25-26).

B Property and Resources

In any retrospective examination of history, diverse and complex factors must be considered. Even so, the legal property form for extracting resources that is dependent on sovereign title was firmed up as European colonialism, and more specifically British derived colonial

institutions, advanced into the Australasian-Pacific region, fuelled by imperialistic ambitions (Butlin 1972, 1993). While much scholarship has examined the trajectories of settler property in land in Australia and consequent Indigenous dispossession (for other settler states, see Blomley 2023), the iterative association between international law, colonialism, property and resource extraction until relatively recently has received comparatively less attention (Dehm 2022a). Accordingly, the focus is on exploring frontier zones where there is a progressive move from pluralist forms of resource extraction and exchange (Aboriginal and colonisers) to a singular sovereign legal form, which makes resources more freely moveable beyond the immediate place of extraction through greater attention to alienability to third parties.

Of course, all things designated as property, by invocation of law, can be made alienable (Graham, Davies and Godden 2022: 4). The search for resources in which the property was more readily moveable beyond the extraction point (and which coincidentally dispossessed Indigenous people of those resources) typically preceded the formal establishment of settler colonies, which tended to be based on more fixed, stable forms of extraction (Godden 2018).

Moreover, the characterisation of a property interest has changed over time – it is now typically regarded as a bundle of aggregated rights held by a private property owner (Graham, Davies and Godden 2022: 2). Consequently, there is less emphasis on conceiving the grant of resource property as a Crown 'delegation' to a third party of its sovereignty over resources. Nonetheless, even in contemporary frontier zones in Australia (and in most former British colonies), sovereign title over resources still underpins the statutory models that disperse rights to 'private' extraction of mineral and petroleum resources, echoing colonial antecedents (Tehan and Godden 2012: 112). The legal form built on sovereign title links colonial law to postcolonial frontier zones of energy resource extraction. The 'frontier' is both literal and legally figurative.

4 Reading in: Indigenous Peoples, Property, Law, and Nation

The Imperial sovereign's 'fixing' of property in Australia was integral to the evolution of the nation state. Fitzpatrick has shown that the 'type of law prominent in *Mabo No 2* was the common law, so called; and the conjoined avatars it produced or reproduced in this transformation were property and nation' (Fitzpatrick 2002: 234). The re-production of property and nation as retold in *Mabo No 2* however reads in Aboriginal Peoples and Torres Strait Islanders into the legal narrative of property and nation in a highly constrained way. Technically, this is achieved by distinguishing the Sovereign's (now) radical title to land and its resources from Crown beneficial property ownership.[7] Prior to *Mabo No 2*, legal doctrine had assumed that Crown title to territory was a form of beneficial property. Beneficial property ownership is held to subsume the value and use of the property, even if the rights are highly abstracted (Gray 1991). *Mabo No 2* ushered in a history where the common law had to recognise an encounter with other peoples, whose rights predated that of the British Sovereign order.

A Property and Sovereignty

Fitzpatrick identifies how the ability of God, but later the sovereign, to transcend nature came to be conferred upon the individual as a property right:

> Let us take property as an instance. As an external reified object it is suffused with the palpable and the specific. Yet it is also elevated in terms no less extensive than those attributed to the transcendence of myth. It is to summarise various formulations of the Enlightenment, the foundation of civilisation, the very motor-force of origin and development of society, the provocation to self consciousness and the modality of appropriating nature (Fitzpatrick 1992: 50).

Such perceived transcendence over nature was integral to the evolution of Eurocentric private property law (Vandevelde 1980), including a progressive trend toward more fungible rights (Gray 1991: 256).

Contract-based models of property proliferated in the late

eighteenth and nineteenth centuries concomitant with the rise of the modern corporation (Rose 1986). In the free-contract model of property alienation, a separation of an entitlement, and hence a property object, from its holder takes place when it is transferred to another. 'The separation is viewed as constitutive or expressive of the market system' (Radin 1993: 193, see also Porras 2014: 642). Marx (1946) described this process of alienation in terms of the fetishisation of commodities.

An increasing trend to lodge property in market economics over the nineteenth century can be contrasted with the identification of Aboriginal Peoples and Torres Strait Islanders as holding 'mere subsistence rights'. European colonisers largely regarded Aboriginal peoples to be savages, dependent on nature and thus as lacking sovereignty, civilisation, law and property, but also not to appreciate the qualities of nature that could produce wealth from the environment (Ryan 1996: 169).

Alongside proliferating forms of fungible, contract-oriented property, there were the common law doctrines of estates and tenure that were transposed as received law in the colonial sphere.

B Linking Colonial and Postcolonial Property

Thus, Australian legal history could only be revised so far in 1992. The common law doctrine of tenure with the Sovereign as the apex title holder is the skeletal colonial principle that *Mabo No 2* retained. That doctrine remains the constitutive public law foundation of resource property in Australia, founded on sovereign title (*Mabo No 2*: Brennan J, 29). In effect, that retention of principle acknowledges that in the Australian continent across the nineteenth century there was a tightening of the alignment of sovereignty, property, and law via the instigation of colonial states. Admittedly, this simplifies the factual instantiation of the state through the reification of sovereignty against a complex circumstance of sporadic encounter and resistance by colonised peoples (Watson 2015).

Plural legal orders including Aboriginal systems of land and resource exchange remained evident in advance of expanding colonial

states (Godden 2019). Many Europeans arriving on the fringe of an unfamiliar continent, and needing to survive in a hostile nature, followed a violent approach to securing resources at the frontier (Macintyre 2020: ch 1). Progressively, Aboriginal peoples and Torres Strait Islanders became actively excluded from frontier exchanges around resources such as water, food sources, fishing, and timber, (see, e.g. Karstens 2020). As colonisation in Australia expanded, Aboriginal Peoples were precluded from participating in emergent fossil fuel regimes, such as coal (Davies and Lawrence 2024: 70).[8] These patterns were replicated elsewhere in the British Empire where, '[a]t the intersections of the imperial circuits of industrialisation, colonised peoples were unavoidably impacted and involved, but they also resisted' (Conor 2024: vi).

In synchronisation, Crown control over resource alienation was intensified as fixed settlement expanded over the Australian continent. Colonial states through the doctrine of Crown pre-emption reinforced controls on trading in land (and thereby resources). In the expanding colonial frontier, the disposition of property interests to third parties became tightly aligned to the Crown prerogative, for example only the Crown could sell or grant land and resources such as minerals at the point of first alienation. For example, in the later gold rush period from the 1850s, extraction of gold required a licence from the Crown, as the Crown held title to the resource. The plural modalities in frontier zones which might have circumvented Crown control of resource transactions by direct exchange or trade of land and resources with Aboriginal peoples were progressively captured by the state – at least in a formal sense.

5 Making Sovereignty 'Ordinary': Pluralism in Resource Utilisation

Accordingly, the heuristic of encounters in frontier zones is an important means to read in not just the factual presence of Aboriginal Peoples and Torres Strait Islanders in respect of resource rights and their progressive exclusion from resources, but to suggest that

Indigenous resource sovereignty could now be regarded as 'a little more ordinary'. If plural resource governance for First Nations is to be more fully acknowledged, 'there is a possibility that the idea of sovereignty becomes a little more ordinary and that competing claims become a less intimidating challenge to a conception of national sovereignty' (Harris 2017: 391). Legal pluralism and greater acceptance of Aboriginal sovereignties offers a potential for enhanced Indigenous participation in governance. The intent is not to '… diminish the character or quality of Aboriginal sovereignty, but rather to use the connected concepts of property and sovereignty to reveal something about the historical processes of dispossession that diminished Aboriginal property and sovereignty' (Harris 2017: 391).

The foregoing analysis of colonialism, property and sovereignty also has revealed the processes of dispossession that diminished Aboriginal property and resource sovereignty in Australia.

A Postcolonial Sovereignty and Extracting the Wealth of the Earth

Even to propose a postcolonial era is contestable, but the term postcolonial is useful 'for engaging with the imprints and effects of colonisation' (Seuffert et al. 2011: 1). In postcolonial jurisdictions, hybrid forms of national government retain embedded features of the colonial era – including the way ownership and distribution of resources as a property entitlement are arranged and legally entrenched (Storr 2022: 181). A postcolonial narrative illuminates the colonial-contemporary continuum of competing interests between Aboriginal peoples and the postcolonial state in resources (Tehan and Godden 2012: 531).

That continuum is significant also in terms of exploring the contribution that Crown resource sovereignty in Australia makes to the complex socio-legal matrix that is climate change.[9] Australian laws continue the public law mechanism of Crown vesting of carbon energy resources. Under this measure, the Crown holds resources, ostensibly in the public interest, but simultaneously facilitates extensive alienation to third parties, including multinational corporations. Property in

resources remains distinctly 'colonial' within the postcolonial nation. Aboriginal Peoples and Torres Strait Islanders are still largely excluded from sovereign governance of resources and held to occupy a realm of non-property (Wagner 2023).[10]

The nature of resource sovereignty and associated regulation of the distribution of carbon energy resources is critical to how Australia as a nation configures its climate change obligations. Australia is highly dependent upon resource extraction and energy projects to economically support the nation state (Godden 2024: 350). This reliance plays out again and again in the reluctance of most national and state governments to more fully curb greenhouse gas emissions. It is evident in judicial reluctance to override ministerial approvals of major energy resource projects (see *Environment Council of Central Queensland Inc v Minister for the Environment and Water*). Few analyses of the difficulties in setting robust Nationally Determined Contributions under the 2015 Paris Agreement to reduce greenhouse gas emissions in Australia (particularly scope 3 emissions)[11] identify Aboriginal dispossession as a factor – even though energy resource extraction often takes place on traditional lands and waters.

6 Energy Resource Extraction in the Northern Territory

Accordingly, we turn from consideration of encounters in the historical frontier to the contemporary 'frontier' of Northern Australia. In one way this is a quantum leap chronologically, but it brings into scope the complex colonial patterns around law, property, sovereignty, territory, and resource extraction that remain at play in the Northern Territory. The very name echoes its colonial history and its present. Within Australia, Aboriginal peoples comprise a relatively small percentage of the overall population, but with significant population concentrations in the northern parts of the country – where much resource and energy extraction occurs – and has done so for many years.[12] Aboriginal communities have been strongly impacted by the energy boom in Australia (Langton and Mazel 2012: 26). Large scale mineral and energy projects in the Northern Territory occur on or

adjacent to Aboriginal lands, with project activity directing benefit flows to some Aboriginal communities – but the patterns are highly variable (Langton and Mazel 2012). Many Aboriginal communities in the Northern Territory have borne the costs of energy and resource projects on their lands, largely without compensation, until relatively recently.[13] The Northern Territory was the setting for *Milirrpum v Nabalco Pty Ltd*, the case that confirmed Australia as terra nullius, two decades before the *Mabo No 2* decision.

Ironically, in terms of legal pluralism, the Territory is where there has been the most extensive recognition of Aboriginal peoples' property through land rights legislation and native title laws.[14] Moreover, the Northern Territory has figured prominently in the evolution of the jurisprudence of resource extraction in Australian law.[15]

Periodically, the resources of the Northern Territory are eyed by national policy and productivity agencies as a panacea for resource perceived shortages or as a fresh field of resource development. These aspirations have given rise to extensive resource projects and/or massive infrastructure projects such as rail, road and port development integral to the apparent free alienability of energy resources. Increased resource extraction once again is in the ascendancy in the frontier zone of the Northern Territory.

Intensification of the extraction of water and energy resources (offshore natural gas and shale gas on shore) in the Territory has escalated over the last decade (Godden 2024: 337). As a backdrop from a climate change perspective, the unconventional gas sector has been successful in presenting gas as a 'transition bridge' in decarbonisation policy debates. The Northern Territory Government initially imposed a moratorium on shale gas extraction and fracking in that jurisdiction. An Inquiry chaired by Justice Pepper of the NSW Land and Environment Court in 2018 recommended shale gas exploration occur over 50 percent of the territory – albeit with rigorous conditions (Northern Territory of Australia 2018). In May 2023 the Northern Territory government announced that it would allow large scale onshore gas extraction to proceed in the Beetaloo Basin (Fitzgerald and Spina-

Matthews 2023). While the government insists that the Pepper Inquiry recommendations will be rigorously implemented, scientists contest that claim, specifically in respect of the unconventional gas impacts on groundwater. The unconventional shale gas production in Beetaloo Basin which has been approved is on Aboriginal lands, and it will contribute significantly to global emissions.

As the Betaloo Basin extraction approvals exemplify, conventional protections for Aboriginal interests such as land rights regimes and native title are limited in their capacity to protect these interests. Barriers faced by traditional owners speak to an entrenched history of mediating Aboriginal interests through a colonial modality of extraction (Anantharajah 2021). Aboriginal Country under the inherited colonial model of sovereign recognition is conceptualised as 'burdened' by Aboriginal interests, as the precursor to mining, energy extraction and exploitation on Aboriginal lands.

Also, the adoption of an extractive regime based on Crown vesting of resources is very partially tempered by Aboriginal constraints as statutory exceptions to resource alienability in petroleum and mineral extraction legislation.[16] These laws also limit the capacity of Aboriginal law and custom to connect and unify Aboriginal communities, non-human beings and their cultural lifeworld. By contrast, the Aboriginal and Torres Strait Islander 'sovereign' narratives that tie Aboriginal connection to Country offer a more integrative vision of resources (Langton 2002).

Within the hybrid postcolonial regime that facilitates expansive resource extraction in Northern Australia, a 'resource curse' occurs where Indigenous communities whose traditional territories are in resource rich areas largely fail to benefit from the resources but instead such communities are burdened disproportionately with the impacts of the extraction (Langton and Mazel 2012) including climate change.

A Native Title and Energy as an Extractive Paradigm

The colonially instituted resource property model that remains underwritten by Crown sovereign title requires Aboriginal people to

preserve cultural connection and values, within the terms of a resource economy which allows minimal forms of independent governance to Aboriginal communities. Thus, the colonial resource property model in the Northern Territory has remained largely intact despite the institution of the two Commonwealth Aboriginal land claims schemes since the mid twentieth century – the *Aboriginal Lands Rights (Northern Territory) Act* 1976 (Cth) and the *Native Title Act* 1993 (Cth) (hereinafter *Native Title Act*). Most native title rights, for example, are excluded from the realm of exclusive property ownership and commercial interaction such as rights to trade in resources. This position may be challenged following *Commonwealth of Australia v Yunupingu* [2025] HCA 6. Simultaneously these schemes contain legal and administrative platforms and consent protocols for approvals of various forms of resource and energy extraction by non-Indigenous parties.

A critical issue then is to what extent Aboriginal peoples can negotiate the purported benefits of energy and miningextraction from traditional lands, while circumventing environmental degradation, including climate change impacts. Agreement-making under the two land claims frameworks is the central legal mechanism for negotiating approvals for energy projects, and for securing benefits/compensation for Indigenous communities when energy and resource projects are developed. The *Native Title Act* as the statutory successor to judicial recognition of native title was invested with the aspirations of Aboriginal and Torres Strait Islander communities as a means for securing long-term economic, social, and cultural sustainability. But the opportunities for Aboriginal peoples to participate in conventional extraction-based property regimes in the Northern Territory remain largely constrained. Under the *Native Title Act*, for example until 2025 Aboriginal claims to energy resources such as coal and gas are extinguished, while Crown sovereign title allows for alienation of such resources in Aboriginal lands to third parties – many of which are multinational corporations involved in global energy export. In addition to the sovereign extinguishment regime, the legislation provides for agreement-making in relation to 'future acts', such as

energy and resource projects by governments or third parties that may 'affect' native title (*Native Title Act* 1993: s. 227).

The *Native Title Ac*t makes clear that the purpose of the future act regime is to enable – not prevent – development. Negotiations must be undertaken 'with a view to reaching an agreement about the act' (*Native Title Act* 1993: s. 25). For future acts that relate to the exploration, exploitation, or extraction of minerals, oil, or gas, the Act provides traditional owners who have registered native title claims or already determined native title rights with some procedural protection. The legislative framework – the 'right to negotiate' – requires resource companies to negotiate with traditional owners with native title interests, typically giving rise to an Indigenous Land Use Agreement. The right to negotiate is a good faith procedural right but it is not a right of veto for Indigenous communities. The Act does provide a framework for some compensation to communities affected by energy and resource projects, but agreements remain characterised by significant power imbalances, as a legacy of the enduring Crown resource model which overlays the statutory regime in specific ways (Brennan et al. 2004). In terms of a postcolonial reading, the *Native Title Act* and its future acts model still largely link the frontier zone of resource extraction to national sovereignty. The Act reinforces the stance of the Australian nation state suspended between postcolonialism and neoliberal resource economics, framed against a splintering but reshaping geopolitical context that is reconfiguring international trade in resources, and which are major contributors to climate change.

B Energy Extraction in the Frontier

The sheer scale of energy projects in the Northern Territory now impacting Aboriginal lands and affecting their traditional territories and marine resources offshore reinforces the immense scope of the carbon resource extraction that is happening on this frontier. An indicative project is the Santos-owned Barossa project 300 kilometres north of Darwin, Northern Territory. The project comprises a floating production storage and offloading facility, a subsea production system, supporting infield subsea infrastructure and a gas export pipeline.

Santos is intending to drill eight wells in the gas field. The project is nearing completion, with first gas exports expected in 2025.

The Barossa project sits alongside other major offshore gas projects in northern Australia such as the Gorgon LNG Project: Stage Two, in Barrow Island and the proposed Woodside Scarborough Gas Project, off the Burrup Peninsula, Western Australia. The latter, if approved, will be the largest gas project in the southern hemisphere. Aboriginal people have been part of legal challenges that have sought review of the approvals for this massive carbon extraction that is taking place and the associated infrastructure that enables export.[17] Such projects also can explain why Australia on a per capita basis remains a major global emitter when its scope three emissions are included in global carbon budgets (Godden 2024: 338). Thus, given many major extractive energy projects occur on Aboriginal lands and waters, Aboriginal dispossession remains fundamental to Australia's contribution to climate change. Yet the historic dispossession and current resource curse impacts for Aboriginal people are largely ignored in policy considerations to develop Nationally Determined Contributions under the Paris Agreement (Godden 2024: 335-6).

7 Reading in Aboriginal Dispossession in the Anthropocene

In writing against the grain of postcolonialism, in respect of contemporary resources and property law in the Northern Territory, and in the context of Australia's contributions to global climate change, the narrative briefly engages the Anthropocene. The Anthropocene thesis 'controversially proposes the inauguration of a new geological epoch, acknowledging that the impact of the *anthropos* – or human – has assumed geological proportions' (Matthews et al. 2022: 435). In a retrospective commentary on the Anthropocene concept as developed by Will Steffen and collaborators, Steffen describes how that concept evolved from a planetary boundaries model of the Earth System. That system comprises 'the interacting physical, chemical and biological processes that operate across, and link, the atmosphere, cryosphere

(ice), land, ocean and lithosphere (Steffen et al. 2021: 1299). These processes create 'emergent properties – that is, properties and features of the Earth System as a whole, which arise from the interaction amongst these spheres' (Steffen et al. 2021: 1299).

The planetary boundaries framework assesses the requirements for maintaining the Earth System in a stable Holocene-like state, given the potential for global disruptions. Holling (1973) coined the term resilience to refer to the level of disturbance a system could absorb before the processes controlling the system were flipped to a new set of characteristics, networks, and relationships. As efforts to contain dangerous anthropogenic climate change proved largely ineffectual, the language of tipping points arose. Subsequently, the planetary boundaries group estimated that the earth system was entering a new geological epoch (Steffen et al. 2021: 1299). The group identified control variables, measuring the degree of human perturbation and a response variable that measured the changes in the Earth System (Steffen et al. 2021: 1299). When climate modelling estimated that four of the nine boundaries had been transgressed, the conclusion was drawn that this situation was consistent with the scientific evidence showing that the Earth System had entered the Anthropocene (Steffen et al. 2021: 1299).

A Indigenous Resource Sovereignty in the Anthropocene

Vociferous debate has since ensued as to whether the Anthropocene has emerged, its links with liberal capitalism (see Povinelli 2016: 9) and what was the tipping point of the escalation to a new state of the Earth System. Matthews suggests the particular period 'one favours lends itself to distinct political narratives and commitments' (2021: 23). Moreover, in respect of situating the onset of the Anthropocene, 'those dating from the colonial period … draw attention to patterns of violence, which are materially connected to environmental and social inequities today' (Burdon 2023: 18). Other Australian commentators date the Anthropocene from the industrial revolution and focus on the rise of industrial capitalism. Indeed, Hamilton argues that misreadings which seek to separate the Anthropocene from industrialisation and the burning of fossil fuels simply reinforce the view that this is a

'continuation of the kind of impact people have always had' (2016: 251). Other commentators suggest that '[t]hese recalibrations disrupt several of the modernist tenets that inform dominant legal norms and mechanisms, including the conventional privileging of the sovereign nation state and the rights bearing sovereign subject, now contextualised within the planetary' (Matthews et al. 2022: 435).

From the heuristic of the postcolonial, if we seek to read in issues of the loss of Indigenous resource sovereignty historically, and in contemporary terms, how might we hold together human impact on the Earth that is aggregated at a planetary scale, while ensuring that Indigenous communities are not disproportionately impacted by the Anthropocene? Indigenous communities operate at multiple levels, including in global trade regimes, but also have highly localised connections to places. Those local places are at risk from extractivism via environmental degradation in the short-term extractive period, and longer term due to climate change effects on traditional lands and waters. Further, how might Indigenous knowledge traditions and world views stand alongside the scientific methods on which the Anthropocene is predicated?

Accordingly, this article reads Aboriginal resource dispossession into the debates around the onset of the Anthropocene and the periodicity implicit to the scientific methodology that underpins the modelling of the Anthropocene. It seeks to make the Anthropocene more receptive to issues of equity and culturally differentiated impacts of colonisation and climate change. It queries an unequivocal dependency on science as an unchallengeable methodology, institutional and social practice (Sibley 2011). Relatedly, it considers what ramifications ensue for Indigenous sovereignty if the Anthropocene is determined to be initiated by Eurocentric industrialisation – and colonisation. Critiques of the Anthropocene concept by Indigenous scholars suggest that 'the Anthropocene is not a new event but is rather the continuation of practices of dispossession and genocide, coupled with a literal transformation of the environment' (Todd and Davies 2017) that have decimated Indigenous peoples over many hundreds of years.

B Indigenous Knowledge, Scientific Method and the Anthropocene

If we bring this alternative perspective to the lens of Eurocentric dependency on scientific knowledge systems by the nation state, it flushes out as an assumption implicit to validations of the Anthropocene (Burdon 2023). While there is sympathy here for measures to address climate change based on the 'incontestable certainty of the findings of earth system science' (Burdon 2023: 6-7), such incontestability of scientific findings introduces a level of predetermination of supposedly objective facts into the Anthropocene methodology. This reductionism inherent to the Anthropocene methodology is significant for how the governance of socio-legal phenomena is viewed in the Anthropocene. Such scientific reductionism involves using geological methodologies to observe empirical facts e.g. polar ice core samples have alarming levels of emissions (and consequently that robust climate mitigation responses are required) within an Earth systemic view. If the earth systemic view and its assumptions of new geological eras is accepted, then the facts founded in observing ice cores both 'confirm' the advent of the Anthropocene and that its existence can be held to be objectively determined.

Moreover, the manner whereby certain facts are objectively aggregated around natural science methodologies also directs attention to a wider postcolonial challenge to the Grand Theories of the natural sciences. Many such theories are built around the methodologies of geological time epochs and evolutionary models of natural systems. In the nineteenth century, these theories underpinned derivative historical progress models that proclaimed the vaunted superiority of Eurocentric civilisation over other races. The discovery doctrine under which Australia was claimed for the British sovereign was justified by religious and ethnocentric ideas of European cultural superiority that were sanctioned by various scientific methods, including geological evolutionary framings (Tuhiwai Smith 2021). Those framings supported, for example, eugenics-related assumptions of racial superiority – a philosophical position that Hannah Arendt identified as intrinsic to British Imperialism (Arendt 1958). Such assumptions

were given legal manifestation in the assertion of sovereignty over what became colonial possessions, justified by an impulse to confer civilisation on 'backward races' (Arendt 1958).

More recent scholarship has begun to tie more closely the concerns about climate change that generated the Anthropocene construct, with British Imperialism, colonisation and modern capitalism. The insistence of those postcolonial countries who are not major emitters on the necessity for differentiated responsibilities in respect of climate change, and 'debates around decarbonisation necessitates a closer examination of the historical connections between processes of unequal appropriation during colonialism and the emergence of the fossil economy' (Siebert 2024: 2). Unequal appropriation was due to the embedded hierarchical positioning of Europeans in international law, which provided that when Britain encountered other peoples, then by authority of sovereign assertion that nation acquired political, property and commercial trading rights to the lands and resources of Indigenous peoples. That process of unequal appropriation, integral to the fossil fuel economy, was enlivened by the colonial desire that promoted British extraction in frontier Australia.

The analysis above has demonstrated how the legal foundation for the problematic extraction of energy resources that contribute to climate change through major global energy exports from Australia were in place well before the escalation of factors such as mid twentieth century urbanisation and globalisation – factors which it is hypothesised have precipitated the planetary boundary crossing associated with the Anthropocene. Further, while the effects of climate change may resonate globally, the sovereign nation state as the designated actor under international law remains stubbornly lodged in the legal responses by which climate change impacts are both created and (hopefully) contained. The centrality of natural resource sovereignty to climate change remains – not withstanding the significance of United Nations efforts at collective redress of climate change, and the advocacy for change from civil society.

8 Conclusion: Making Energy Resources Fungible Property

Drawing together the discussion of linked frontier zones of extraction in Australia has sought to demonstrate the colonial and postcolonial legal processes by which resources such as coal and gas become a form of fungible : property, once alienated from the Crown. Currently, that fungibility is manifested through a highly complex statutory law and administrative procedure that draws on a colonial legacy. At the heart of that legal process lies the enduring colonial form of resource vesting in Crown title consequent to the colonial assertion of British sovereignty that dispossessed Aboriginal people. That colonial legal form and its continuing institution in late liberalism via extractive market capitalism transcends the stratification of the Anthropocene (Povinelli 2016: 168–169). That continuity of sovereign resource title across colonial and postcolonial frontiers is integral to the difficulties of containing climate change within the Australian legal system. In turn, the embedded intersections of property in resources with global trade and colonisation underscore the challenges that extractive ecologies pose at international law.

Australia's long-term reliance on primary resource exports such as coal and gas remain a daunting barrier to a substantial energy transition. The pattern of Australia's emissions profile continues to reflect both colonial and contemporary transnational economic dependencies and fungible property law regimes, as well as multinational resource and trade structures. As Liz Conor has shown, colonised peoples were unavoidably impacted by Imperial resource extraction (Conor 2024: vi). Yet Indigenous Peoples in Australia also resisted extraction of their resources.

Historically, Australia as a nation state did not come into effect fully formed in Eurocentric colonial expansion. The colonial state(s) underwent an iterative process beginning with encounters between Aboriginal peoples and 'discoverers' at the frontiers of extractive activity and enterprise. Mercantile sovereignty was a significant initiating modality for Indigenous resource dispossession. Aboriginal peoples' exclusion from resource sovereignty and governance has continued

into the contemporary resource frontier, as exemplified by the massive gas extraction occurring in the Northern Territory. The postcolonial resource crumbs now offered under the *Aboriginal Land Rights Act* and the *Native Title Act* largely re-entrench resource exclusion for Aboriginal peoples. The received legal forms of property law and resource entitlement still provide defining institutions that impact Aboriginal connection to country, and which shape the legal pluralism of the Australian nation.

In the Northern Territory frontier zone, the possiblities for legal pluralism in respect of carbon resource extraction that is offered to Aboriginal peoples under native title land rights laws is weak and co-opted by national and international economic imperatives. Aboriginal resource sovereignty as currently embedded in law is a 'little too ordinary' to counter the weight of national sovereignty, as expressed in resources laws that facilitate development and extraction rather than valuing Indigenous knowledges and connections to local places. A different vision of property in resources is required that is genuinely plural and relational in its governance of shared resources (Davies, Godden and Graham 2023: 4) – a vision that may assist in addressing the invidious aspects of the resource curse for Aboriginal people in northern Australia. An energy transition away from carbon resources is required, to more fully recognise Aboriginal interests in resource sovereignties in a way that can temper the influence of the Strange God at the elbow of the colonial (and postcolonial) Sovereign.

Endnotes

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2 Anthony Angie's scholarship is seminal in providing a decolonial account of international law. His critique finds resonance in substantial scholarship that challenges the hegemony of western-centric perspectives on international law.

3 'Discovered' lands were held to be without an owner ie as terra nullius.

4 There is a voluminous literature on Cook's voyage including the journals of Cook and Banks in state historical collections, as well as First Nations' challenges to that history. While acknowledging the history of Australia's discovery as contested, the focus is to explore how extractivism was influential in that contested history.

5 Terra Australis incognito was a 'myth' given tangible expression in cartographic representations from at least the sixteenth century.

6 Although there were early maps of north-west Australia it was not confirmed that the west and east sections were one continent until later explorers mapped more of the eastern coastline.

7 The distinction between Crown beneficial ownership and radical title is explored in detail in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 48, 50.

8 Much steam power for industrialisation relied on timber extraction rather than coal until the mid-twentieth century.

9 The relevant Crown includes the Crown in right of the Commonwealth and in right of the various states.

10 *Commonwealth of Australia v Yunupingu* [2025] HCA 6, the Australian High Court decided whether the grant of a pastoral lease in 1903 by the Governor of South Australia under the *Northern Territory Land Act* 1899 (SA) had the effect of extinguishing any non-exclusive native title rights over minerals on or under the subject land. The Court held the lease did

not have the effect of extinguishing any non-exclusive native title rights over minerals on or under the subject land. This finding is significant in establishing that Native Title may comprise non-exclusive rights to minerals. Previously it had been held that Native Title did not extend to rights to mineral resources.

11 Scope 3 Greenhouse gas emissions arise when exported energy resources are utilised outside the country of origin.

12 Concurrent with the writing of this article, the High Court was hearing the Yunupingu appeal (see note 10).

13 The Yunupingu case is seeking redress in respect of the Commonwealth grant of aluminium leases at Gove Peninsula in the Northern Territory.

14 In *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75, the court held that, native title rights and interests are proprietary in nature and constitute property for the purposes of s. 51 (xxxi) of the Constitution. This position was affirmed by the High Court.

15 See e.g. *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513. Most recently, the High Court affirmed the proprietary nature of Native Title in *Commonwealth of Australia v Yunupingu* and held that the extinguishment of such rights was compensable..

16 Generally, resources and energy legislation will require consultation with Indigenous communities and/or include Indigenous cultural heritage considerations in project development assessments.

17 See, e.g. *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121, *Munkara v Santos NA Barossa Pty Ltd* [2023] FCA 1348, *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9.

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