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Who Owns the Animals?
Sustainable Commercial use of Wildlife and Indigenous Rights in Australia.

The question I pose in the title to this paper sits somewhat ill at ease with conventional conceptions of indigenous relationships to natural resources. Customary indigenous law is usually characterised as not prescribing ownership rights, but rather rights and responsibilities to use and sustain natural resources such as wild animals. In Australia, these 'soft' conceptions of property rights are now pitted against two different forces. On the one hand is a trend to sustainable use of wildlife through commercial use, which is beginning to lead, for the first time, to the allocation of private property rights in native animals. On the other hand are the practical difficulties that indigenous people have in realising native title rights to hunt native animals. The question of 'who owns the animals' is increasingly pertinent.

Australia's native animals, particularly its mammals, are icons of the continent's status as one of the planet's regions of mega-biodiversity. Indigenous peoples have close cultural and economic relationships with this fauna and their land management practices are commonly held to be responsible for sustaining it over tens of thousands of years. While commercial exploitation of virtually all of Australia's other natural resources is well established, with little provision for benefit to return to indigenous peoples, commercialisation of this fauna (and of native plants) is at an early stage. The animals represent something of a last frontier in natural resource development in Australia. Indigenous rights to this fauna, including 'ownership' of real and/or intellectual property in it and customary rights to use it, may potentially provide some bargaining power for indigenous people to share equitably in the benefits of sustainable management, such as through negotiated co-management regimes.

The question of who owns this fauna is not one for which I can confidently present any answers - either on the basis of exhaustive legal analysis or from extensive empirical research into indigenous viewpoints. In both cases there is little relevant research to draw on. However, some analysis of both sources of information is provided here together with an exploration of current issues in wildlife management that make the question relevant. From this basis, the paper addresses what might be done in Australian policy to reconcile different answers to this question in a way that promotes social justice for indigenous people.

The discussion in this paper focuses on terrestrial vertebrates and aquatic mammals and reptiles, such as crocodiles, dugong and turtles. When I use the terms 'animals', 'fauna' and 'wildlife' I am referring to these species. This focus stems from the way these animals are categorised together in non-indigenous wildlife law, and distinguished from other animals that are also of importance to indigenous people (fish and invertebrates). This distinction is artificial - many of the issues raised here are also relevant to indigenous interests in plants and other natural resources. Generally, indigenous peoples would like to see such natural resources managed holistically, but (in a similar situation to that which applied for land holding groups - see Kathy Whimp's paper in this session), they do need to come to terms with the ways that the state manages natural resources if they are to find practical realisation of their rights.

This paper first looks at some indigenous viewpoints on 'who owns the animals'. It then examines government frameworks for wildlife ownership and the implications of the recognition of native title for these. Moves to privatise wildlife resources are examined through the case of the commercial kangaroo industry in South Australia. The paper concludes by outlining some measures that would promote indigenous equity in commercial wildlife industries.

Indigenous perspectives

Anthropological accounts from northern Australia suggest that in indigenous customary law, animals are sovereign to themselves in the same way that people are. Each species may be assumed

> *to be made up of conscious and thinking individuals who speak, fight, plan, joke, perform rituals (men's and women's) according to their own law.*
> (Rose 1992: 46).

Relationships between people and animals are established by the 'Dreaming' - a shorthand term for the basis of the customary law of Australian Aboriginal peoples - encompassing ceremony, song, story, mapping of country and correct behaviours between people and the land, people and the land and people and each other. In this body of law, the landscape as we now know it was shaped by the actions of ancestor beings, who are considered simultaneously as human and animal. Most had a basically human shape, but could change their shapes at will and at the end of their journeying they usually change their form to become the animals (or plants) that they are now. People are linked to animals (and plants) through totemic relationships to a species and to places from that species' Dreaming (Rose 1992).

> *The Dreamings are our ancestors, no matter if they are fish, birds, men, women, animals, wind or rain. It was these Dreamings that made our Law. All things in our country have Law, they have ceremony and song and they have people who are related to them...*
> Mussolini Harvey, Yanyuwa man, (Bradley 1988 in Rose 1996: 27)

Unlike land, traditional ownership of animals has not yet been reconciled at law with non-Aboriginal conceptions of 'ownership'. For any native species there are likely to be at least two groups of relevant people with interdependent relationships to the resource - people who 'own' the animals through having totemic relationships to them and people who 'own' the

land where the animals live. An example from Northern Territory indicates the practical impact this can have - here Aboriginal people with a totemic relationship to crocodiles were not happy about commercial harvesting by Aboriginal land owning groups and the harvest had to be suspended so that the conflict could be sorted out (Peter Cooke 1997 in Higginbottom 1998).

Generally Aboriginal people see use of the land's resources, including wildlife, as a good thing and a necessary thing if the country is to be kept alive (Rose 1995: 90). A traditional owner of land is defined in some legislation, such as the South Australian *Pitjantjatjara Land Rights Act*, 1981 as a person who has a right to forage over land. Customary law restricts the timing and intensity of the harvest; the rights of individuals to foraging areas, their rights to hunt and gather particular species; and the distribution of the harvest. Killing of animals must be for a purpose - no-one has a right to kill animals wantonly and wastefully. This attitude also extends to Australia's many species of introduced feral mammals. Aboriginal people are usually happy to harvest them for economic benefit but frequently oppose control programs in which the animals are not utilised (Wilson et al. 1990; Rose 1995).

As well as rights and responsibilities in land, an Aboriginal person may have totemic relationships to several species. Speaking in English, Aboriginal people may say about their relationships to native animals 'I am kangaroo' or 'I am emu' (Morton 1991) or that they are 'boss' for kangaroo or emu, to indicate that they belong to that totemic group or that they have the animal as a personal totem, associated with their own birthplace or conception. They may also say they 'own' the animal of their Dreaming. However while traditional ownership of land includes hunting rights, this traditional 'ownership' of animals may mean that people cannot hunt the animal. Frequently people will not kill or eat their own totemic animal (see, for example, Rose 1992: 83) or they will not kill or eat animals where a person of that totem has recently died (see, for example, Bennett 1983; Baker 1993). Traditional 'ownership' of animals implies responsibilities for care and maintenance of the animals, because they embody people. Feral species, are distinguished by (usually) not having a 'Dreaming' associated with them, so that no people have a special totemic relationship with them or responsibility to care for them. When asked by Bruce Rose (1995: 111) about ownership of feral animals, Aboriginal people in Central Australia most commonly said that no-one owns them, they belong to the land on which they live.

For many indigenous people, self-identity as eaters of wild animals is a powerful and enduring emblem that clearly distinguishes them from other Australians. However little research has been undertaken which quantify the actual extent of indigenous hunting in Australia and its relationship to economies and to wildlife population dynamics (Altman and Allen 1992; Altman et al. 1996; Davies et al. forthcoming). In some remote settlements hunting and gathering of bush foods has been shown to contribute significantly to local economies - eg up to 64% of total income and 72% of total productive work effort (Altman 1987) and 74% of protein intake (Devitt 1988). These figures represent the high extreme of the range of subsistence production by indigenous people. Nevertheless Altman and Allen (1992) estimate that subsistence production from small remote communities in 1986 was 3% of total national indigenous income.

27% of Australian indigenous people live in major cities and 41% in small cities and rural towns (ATSIC 1996). Most of these people have very poor access to wildlife for subsistence hunting. This in turn has led to hunting skills being difficult to acquire. Urbanised lifestyles

also leave most indigenous people with little time, financial resources or active interest in subsistence hunting. Nevertheless, bush meats are in high demand for food with one survey (of both indigenous and non-indigenous people) in Northern Australia indicating that most indigenous people would buy wild foods in supermarkets if they were available (Vardon et al. submitted).

It appears that the indigenous tradition of eating wild animals remains, but for most of Australia, only a very small proportion of indigenous people actually hunt. Amongst one small community of wombat eaters (approx 50 adults), located in the agricultural districts of western coastal South Australia, in the midst of prime wombat hunting country, only 2 people go hunting. As one hunter commented:

> *not a lot of people are prepared to go to the trouble to kill and cook wombat, but everyone will eat it.*

This community has recently been established on a property purchased with government funding on behalf of Aboriginal traditional owners. The property includes cropping paddocks and natural grasslands and shrubland which is good wombat habitat. In this region, Southern Hairy-nosed wombats *Lasiorhinus latifrons* are a common fossorial marsupial. They are regarded as a pest by non-Aboriginal farmers because of the damage they cause to crops and their impact on livestock carrying capacity. They are valued by Aboriginal people as a food source and for their cultural significance. Whenever possible, the Aboriginal hunters who live here try to hunt outside the land they own in order to preserve their local wombat populations. It seems that most wombat hunting happens on farms in non-Aboriginal ownership.

I recently asked a sample of Aboriginal people in this region 'who owns the wombats'. All of those interviewed are wombat eaters, some are hunters, and about half live on this Aboriginal land. The question elicited three different viewpoints:

- Landowners own the wombats.

  They are like livestock. If they are on your property then you have some claim to them. Aboriginal people have no particular claim to wombats.
  (that is, Aboriginal people only own the wombats where they own the land the wombats live on - not where non-Aboriginal farmers own the land)

- No-one owns the wombats. You can't apply ideas of ownership to them.

  Wombats.. they have always been there ...before Aboriginal people even. Farmers come and go but the wombats are always there and always will be there.

- Aboriginal people own the wombats, regardless of land tenure, because they have a cultural tradition of harvesting and a totemic or symbolic relationship to them.

  The farmers don't own them - they think they are a pest. If someone has to own them they belong more to Aboriginal people because they are part of the culture and Aboriginal people still think its important.

  Aboriginal people own them - they are the only ones who eat them.

This sample was small (10 people) but the responses are nevertheless illustrative of the range of views that may exist in any one locality. In this region Aboriginal people speak English as a first language and are very familiar with 'whitefella' conceptions of ownership of land and resources from a hundred year history of alienation of land for agriculture. This conception of ownership has undoubtedly influenced the first of the three responses. Two other things are notable about the responses:

- The enduring influence of elements of Aboriginal customary law in the second and third responses - the notion that anima species are sovereign to themselves, and that Aboriginal people have 'traditional ownership' because of responsibilities to care for the animals and the practise of using them. The third response resonates with attitudes expressed by many other indigenous people in discussions about attitudes towards Australian native animals. It suggests that people consider native animals are part of Aboriginal peoples' intellectual property, if not their real property.

- None of the people interviewed advanced the view that the government owns the wombats, nor that 'all Australians' own them with the government having a guardianship role. Yet this is the situation in non-Aboriginal law and was the most common response of non-Aboriginal farmers in the district to the same question.

Government perspectives

In non-indigenous law, governments claim ownership or full guardianship of wildlife. Sovereignty over wildlife is vested in State and Territory governments in Australia's Federal system of government. In the common law of England, as transferred to Australia, wild animals are not the absolute property of anyone, so long as they continue in their wild state. If killed they become the property of the landowner (McPherson 1998: 7). These common law rights have been substantially regulated by governments, particularly over the past 50 years (Wilson 1987).

Following unregulated commercial harvest of many species in the 19th and early 20th centuries, almost all killing of, or trade in, wildlife was progressively prohibited by Australian governments. Government protection was a necessary response to the critical decline of populations of many species caused by loss of habitat and the impacts of the widespread establishment of introduced animals. Wildlife management became characterised by preservationist philosophies and these are now overwhelmingly dominant amongst the majority, urbanised, population of Australia. The city has customarily characterised the attitudes of the 'bush' towards wildlife and habitat as 'if it moves shoot it...if it doesn't chop it down'. Strict protection of wildlife and maximum reservation of habitat as protected areas became influential policy goals by the 1970s, pushed by a strong urban based conservation movement.

In some States, such as Queensland (Fitzgerald 1998; McPherson 1998) statute law specifies that ownership of all wildlife is vested in the Crown. In others, such as South Australia, wildlife is not owned by the Crown, but is under its guardianship (Alexander in Higginbottom 1998). The effect is much the same - individual landowners do not 'own' the animals on their land, no matter what its tenure. They have no right to hunt wildlife, cull wildlife, capture, use or sell wildlife or even to have injured wildlife in their care without a permit or licence. Where

wildlife is to be killed under permit or licence, further regulation and codes of practice apply with the aim of ensuring killing is humane.

In Australia there has been no attempt to fundamentally reconcile indigenous and non-indigenous laws for use and management of wildlife, let alone for ownership. The Australian Law Reform Commission (1986) examined how Aboriginal customary laws for hunting could be recognised by amendments to statute law, but did not look at the 'ownership' issue. It did set out a number of principles for recognition of customary rights to hunt, including:

- indigenous traditional subsistence use should always have priority over commercial use
- indigenous hunting should not be required to be undertaken using indigenous technologies, such as spears and boomerangs, in order to be classed as 'traditional'
- restrictions on indigenous hunting are justified where the conservation of wildlife species is threatened.

These principles have not been consistently implemented by governments (Crawford 1992). Nevertheless a number of accommodations have been made between customary and statute law in some states of Australia (but not in the longest settled states of NSW, Victoria or Tasmania). These typically involve exemptions for indigenous people from provisions of the statute law which otherwise prohibit taking, killing or being in possession of wildlife or they authorise the grant of special licences to indigenous people. There is least statutory regulation of indigenous hunting in the Northern Territory - the relevant act allows for traditional hunting to be regulated in order to conserve wildlife, but no such provisions are in force. The impact of the recognition of native title on these laws remains unclear (see below).

In all states, statute law requires that any exemptions on indigenous use of wildlife that are provided only apply for subsistence or cultural purposes which do not involve sale. Indigenous commercial wildlife users operate under the same rules as apply for any other commercial user of the resource. Even in the Tasmanian mutton bird industry, where all commercial harvesters are Aboriginal, this is not from any special right that is recognised by governments, but has resulted because the industry grew out of Aboriginal traditions and because low economic returns from the harvest have not made it attractive to others (see Skira 1996).

Indigenous people commonly make and sell arts and crafts which incorporate parts of animals - typically using by-products from animals killed for food. For example, kangaroo leg sinews are used as binding on classical-style hunting artefacts; echidna quills, feathers and turtle shell are used in jewellery manufacture. This demonstrates how indigenous people have interwoven subsistence and cash components in their economies. Nicolas Peterson in his paper for this session refers to turtle shell trade between northern Australian Aboriginal peoples and Macassan visitors, showing that the interdependence between subsistence and market economies has prehistoric antecedents. However today, even if subsistence use of animals is legal, commercial use of the by-products of subsistence harvest is not.

Native title and wildlife

Recognition of native title by the High Court in the 1992 Mabo case has necessitated fundamental rethinking of government approaches to indigenous land rights but the legal implications for 'who owns the animals?' have had little attention and remain unclear. Prior to

the Mabo case it was simply assumed, except by indigenous people, that governments had the right to regulate the way that indigenous people, as everyone else, used wildlife and other natural resources. Arguing from a professional perspective in land valuation and land use planning Wensing and Sheehan (1997: 17) now warn that

> *caution needs to be exercised in assuming that the property rights of native title holders can be made subject to the usual planning and land use controls that apply to other forms of title. At this stage the situation is not clear ...(T)he extent to which native title can be made subject to the same kinds of controls embedded in Anglo-Australian planning and environmental protection legislation is unknown.*

Native title derives from indigenous customary law and not from any other system of law. The nature and extent of native title rights are determined by reference to the traditional uses and customs of Aboriginal peoples. Nevertheless, as Meyers (1994) argues, they can be seen as analogous to Western notions of property. The majority judgements in the Mabo case recognised that the rights encompassed by native title may be proprietary rights or usufructuary rights - encompassing full beneficial ownership of the land, or rights of use, such as for the purpose of obtaining food.

In most of the claims lodged for recognition of their native title, Aboriginal groups include a claim to the right to hunt, either specifically or as part of a claim to more broadly defined rights. Linked to this is a right to access land for purposes such as hunting. These rights have had considerable attention in legal and political debates, particularly since the High Court judgement in the Wik case in 1996 found that native title could co-exist with pastoralists' rights on pastoral leases, which cover 40% of Australia.

In recognising native title, the High Court in Mabo also reiterated that because the Crown has sovereignty over Australia it also has the power to extinguish native title. The legitimacy of the acquisition of sovereignty by the British Crown is a fundamental question at the heart of Australia' national identity (Reynolds 1996). However it is not a question that can be resolved by legal process - the High Court in Mabo reiterated earlier findings that it cannot make a finding in relation to the legitimacy of the acquisition of sovereignty. Like other aspects of Crown sovereignty, the validity of governments' powers to make laws over wildlife and other natural resources, which may restrict or impair native title, cannot be challenged in any Australian court. Native title is extinguished by past actions of government if these display a clear and plain intention to do so. For future government actions, the *Native Title Act*, 1993 together with the *Racial Discrimination Act*, 1975 provide some protection: Aboriginal native title rights must not be treated differently from non-Aboriginal property rights and Aboriginal people now have a statutory 'right to negotiate' on proposals which may impair or extinguish native title rights.

The *Native Title Act* seems to be quite clear in its insistence that native title no longer encompasses rights to commercial use of wildlife, even if it once did. The Act provides that native title holders are exempt from statutory restrictions on subsistence hunting but not those covering the sale of wildlife and wildlife products. So even though comparison with other countries whose legal systems draw on British common law indicates that native title potentially does encompass rights to commercial use of wildlife (Sweeney 1993), in Australia these rights may well have already been legislated away.

The meaning of the exemption that the Native Title Act (s211) provides to native title holders from regulations that would otherwise prohibit subsistence hunting is from restrictions on subsistence hunting is not clear. This provision was recently tested in Queensland where, in 1994, Murandoo Yanner was charged with killing and eating two crocodiles without the permit required under the *Fauna Conservation Act* 1974. The case was dismissed on the grounds that Yanner was a native title holder and that the *Native Title Act* (s211(2)) exempts native title holders from the requirement to hold a permit where a hunting activity is carried out for personal or non-commercial communal needs. On appeal by the Queensland government one judge found the charge was correctly dismissed (Fitzgerald 1998). However the majority of two disagreed (McPherson 1998; Moynihan 1998). They found that Yanner's native title right to kill crocodiles was extinguished when the Crown passed the *Fauna Conservation Act* 1974 since this act vests ownership of crocodiles (together with all indigenous birds and mammals) in the Crown. They argued that this vesting of ownership constitutes a clear and plain intention to extinguish native title since continued killing of animals by indigenous people is inconsistent with Crown 'ownership' unless the Crown has given permission through the statutory permit. Because of this Yanner's rights as a native title holder do not include a right to kill crocodiles without a permit. Yanner has subsequently signalled his intention to take the matter of whether his native title rights have precedence over this statute law to the High Court.

If the results of this appeal stand, recognition of native title - at least in Queensland - will make no difference to whether Aboriginal people have the right to hunt wildlife. Native title may grant a right to access land for hunting, but will not encompass a right to actually hunt, unless statutory requirements, such as obtaining a licence, are complied with. However, this will not necessarily apply in other states, such as South Australia, where legislation does not vest ownership of wildlife in the Crown but puts the Crown in a guardianship role. Other issues are raised by this situation. If the Crown is a guardian, does it not have a duty to guard the animals for the benefit of Aboriginal people, since it makes no sense for native title holders to have a right to hunt animals if there are no animals to hunt? (Meyers 1994). Analogous issues have been argued in New Zealand and North American and cases there may have application to Australia (Wickliffe 1996; Wood 1996). A further possibility is that Aboriginal native title rights to wildlife might be shown to persist even though native title rights to access land have been extinguished. This would be consistent with parallel existence of traditional ownership for species and for land in Aboriginal customary law in which people have totemic relationships to and responsibilities for animals without necessarily having traditional ownership of all the land where the animals occur.

Argument over questions of legal interpretation in any of these complex issues is likely to continue for some time. Although the chances of outcomes in favour of indigenous rights over wildlife from adversarial proceedings seem remote, such arguments may prove to be useful for Aboriginal people in negotiations with governments for a stronger say in the management of wildlife and in seeking some return from the trend to commercialisation.

Commercialisation of wildlife industries

With an estimated annual value in domestic and export trade of $A100 to $A156 million (Callister and Williams 1995), Australia's commercial wildlife industries are not large. However their development is currently receiving considerable encouragement from some governments and from wildlife management professionals, both as a measure for conservation

through sustainable use (see, for example, Grigg et al. 1995; Webb 1997), and as a strategy for diversifying and encouraging rural industry (Ramsay 1994; Parks and Wildlife Commission of the Northern Territory 1995; Macarthur Consulting 1996; ACIL Economics Pty Ltd 1997). Most proposals are for ranching (emus and crocodiles are newly established industries), and for captive breeding of various birds and reptiles that are in demand for aviary trade.

Commercialisation also involves wild harvest of some species. The largest wild harvest (2-3 million animals per year) is of some of the larger species of kangaroo and wallaby, for skins and meat (Ramsay 1994). Other species where commercial wild harvest have recently started or are proposed include crocodiles, red-tailed black cockatoos, magpie geese and flying foxes. The overall aim is species conservation and adoption of farming systems more in tune with the Australian natural environment than much current livestock production. Advocates of commercial use through government regulated harvest consider it will promote landowners' awareness of the value of the animals, and thereby provide incentives for conserving populations and habitat on private lands.

There is considerable interest from indigenous people in commercial wildlife industries as a way of providing culturally appropriate employment and enterprise opportunities in rural and remote communities (Wilson et al. 1990; Williams et al. 1995; ATSIC 1997). Aboriginal people were early pioneers in the development of emu and crocodile ranching in Australia, with special encouragement from government. However deregulation of ranching of these species has seen non-Aboriginal operators quickly eclipse Aboriginal people as industry leaders - undoubtedly largely a result of greater experience and resources for commercial operations. Although further deregulation of wildlife exports to allow development of wildlife ranching has been recommended as a measure that would advance Aboriginal economic development (Wilson et al. 1990; ACIL Economics Pty Ltd 1997), the prospects are that Aboriginal people would be, at best, minor players in an industry whose economic benefit would return mostly to non-Aboriginal people.

Overall, commercial harvests of wildlife make no significant contribution to the Aboriginal economy at a national scale. However there is a notable localised exception in the commercial wild harvest of crocodile eggs (for raising in ranches) and live crocodiles in the Northern Territory (Webb et al. 1996; Webb 1997). Most of this harvesting occurs on Aboriginal land and Aboriginal people are significant players in the industry - because they are major freehold landowners in the region. Some Aboriginal people participate in harvesting operations directly and some add value by incubating hatchlings from eggs. All landowners are paid a royalty for eggs collected on their land by other people. In contrast, in the much larger commercial kangaroo industry, there are virtually no indigenous owned enterprises and few indigenous people working in harvesting.

Indigenous people have virtually no role in the government regulation and management of any commercial harvest, notwithstanding the tremendous value of animals such as crocodiles, muttonbirds and kangaroos in cultural practice and in subsistence economies (Davies et al. forthcoming). As a result, indigenous people have had very little role to date in decisions about the commercialisation of Australian wildlife, decisions which are now starting to recognise wildlife as the property of landowners, for the first time.

Privatisation of wildlife - kangaroos in SA

The kangaroo industry in SA provides the lead example of privatisation of wildlife. What does privatisation mean? As put by a recent commissioned report into deregulation of export controls on Australian wildlife:

> *Other goods or assets are regarded as owned and private property when there are minimal regulations restraining market activity and the following rights apply: the right to use or decide how to use; exclude others from using; to earn income from use, to transfer ownership and enter contracts*
> (ACIL Economics Pty Ltd 1997: 102-3)

In the application of these concepts to wildlife complex questions of the interface between native title rights and ownership of a resource arise.

Even though Australian mammals have suffered significant extinctions in the past two hundred years, some species of kangaroo and wallaby have thrived in the predator free environments that occur where dingos (native Australian dogs) are controlled because of their impact on sheep and where development for livestock has increased water sources (Caughley et al. 1980). Regulated commercial harvest of these species began in the 1970s, with aerial monitoring of populations, harvest quotas, and tagging, licensing and reporting systems for landowners and commercial kangaroo shooters and processors. For two decades policy aimed merely to reduce the impact of unnaturally high kangaroo populations on rangeland carrying capacity for livestock, thereby minimising political outcry from graziers and reducing the likelihood of illegal culling. Commercial harvest was treated as a marginal side-effect.

This policy climate hampered industry development. Since the harvest brought no return to landowners there was no financial incentive to allow commercial shooting on their properties. Alternatives were to cull high populations themselves under ‘shoot and let lie’ permits, or illegally. Nor was there any incentive for them to maintain a ‘breeding stock’ of kangaroos for future harvest.

In 1992 governments agreed to work towards removing policy impediments to development of a sustainable commercial kangaroo industry (Australia 1992). The rationale for this change is that, since kangaroos have less impact on range condition than equivalent numbers of sheep, it is in the interests of sustainable management of the rangelands to encourage landowners to run more kangaroos and less sheep (Grigg 1995; Grigg 1995). This requires incentives for landowners to see kangaroos as a resource rather than a pest. Private property rights to kangaroos have recently begun to be allocated as part of this new policy framework.

In 1996 South Australia became the first jurisdiction to modify its kangaroo management system to overtly recognise the potential value of kangaroos to landowners. Its kangaroo management plan now includes the aim of managing kangaroo species as renewable resources as well as aiming to preserve viable populations across their range even in drought years and preventing the ecological impacts of very high populations that can develop in seasonally good conditions (Kangaroo Management Task Force 1997). Land owners in those parts of the state that are within commercial harvest zones are granted a ‘right to harvest’ a specified number of kangaroos. This right may be sold on to commercial kangaroo processors. It may also be traded to other landowners within the same region. The total number of kangaroos allowed to be harvested in each region under this system amounts to 12-15% of each of the three species for which commercial harvest is authorised and is known as the ‘Sustainable Use Quota’.

Additional harvest rights may be released in any regions where kangaroo numbers are higher than the target densities set for the region (on the basis of range carrying capacity), and where seasonal conditions indicate that these high populations will otherwise continue. This is known as the 'Land Management Quota'.

The two quotas are set centrally for each region on the basis of aerial survey, but the trading of harvest rights is decentralised and controlled only by market forces. Some further decentralisation of the management system has occurred through the use of District Soil Conservation Boards, which consist of landowner representatives, to advise State government officers on kangaroo grazing impacts in order to inform decisions about the release of these additional quotas.

Partial privatisation of kangaroos is returning quite small, though welcome, additional income to landowners. Low demand for kangaroo products restricts the value of the landowners' tradeable rights (Macarthur Consulting 1996). Since regulated commercial harvesting began, kangaroo harvests have rarely reach the quotas set by management authorities (Ramsay 1994). Thus, McCallum (1995) argues, commercial kangaroo harvesting has operated essentially as an open access harvest. However as part of policy reform, sale of kangaroo meat for human consumption has now been legalised in all states (subject to compliance with meat handling regulations). Continued effort in marketing and improving availability of kangaroo products and in industry development can be expected to increase domestic and potentially export demand (Macarthur Consulting 1996). Under the South Australian system, this will flow on to landowners in increasing monetary value of their harvesting quotas.

Although its effect is hardly yet being felt in practice, the impact of this partial privatisation is nevertheless a change to interpretations of 'who owns the kangaroos' - from full government ownership to the situation where landowners have a stake in kangaroos as being their property. What is it likely to mean for indigenous interests in animals?

Privatisation and indigenous rights in wildlife

Privatisation of wildlife resources is of direct advantage to Aboriginal landowners who are in a position to engage in commercial wild harvest from their land, such as those who own crocodile habitat in the NT and those who own land within the commercial kangaroo harvesting zones in the semi-arid rangelands of southern Australia. However these are a relatively small proportion of Aboriginal people. On a national scale, the distribution of Aboriginal land is spatially uneven and it is negatively correlated with the distribution of Aboriginal population. Much Aboriginal land is in arid regions of central Australia where wildlife such as kangaroos and emus, far from being sufficiently abundant to harvest commercially, are now in such low populations near settlements that even subsistence hunting is difficult.

The principle that subsistence use should have precedence over any commercial use (ALRC 1986) is not being considered in changes to management of commercial wild harvests. For many Aboriginal people, subsistence hunting areas are on land owned by non-Aboriginal people, including pastoral leases. For these people to actually realise their rights to hunt wildlife, whether these are statutory or common law native title rights, they must have access to hunting areas and there must be wildlife available for them to hunt. Access can already be problematic. It is frequently actively discouraged by landowners, even where statutory and

native title rights exist. The prospect of wildlife being privately owned and commercial valuable would present further reason for landowners to discourage Aboriginal hunters from hunting on their land.

Countering such assertions is the argument that privatisation of wildlife will have negligible impact because the species that are being harvested commercially are abundant and harvest quotas are conservative, thus assuring that there will always be kangaroos available for Aboriginal people to hunt for subsistence use. Certainly, on a regional scale, harvesting quotas mean that this is true, but it does not follow that there will not be reduced populations on a sub-regional level or on some properties, with consequent impact on the native title rights of particular Aboriginal groups. A further argument that the impact of commercialisation on indigenous people will be negligible is that it would appear that only a small proportion of indigenous people actually engage in hunting. Commercialisation will make it easier for other Aboriginal people to eat wildlife, by making it more generally available in shops. While there are certainly Aboriginal people who support commercial sale, particularly where the alternative is waste of meat, as currently occurs through low demand for kangaroo meat, there are others who oppose commercialisation on social and cultural grounds. As one wombat hunter put it:

> *Buying meat can make the young people lazy. People don't keep their culture if they get into the cash economy too much.*

While the practical impact of the policy trend to privatisation of wildlife is arguable, it is certain that Aboriginal people, if fully aware of the policy shifts, would be justified in being angry that decisions continue to be made about resources of prime importance to them, without any consultation or negotiation about the impact on their interests.

There is also a point of law that appears to need attention. The granting of tradeable rights to landowners, such as for kangaroos on pastoral leases in South Australia, may well have breached the *Native Title Act* since the South Australian governments did not negotiate in good faith with native title holders, as required by the Act, before allocating these rights. This action may well be legal if the current Australian Federal government's proposals to severely restrict native title rights on pastoral leases become law. One change proposed is that governments would no longer be required to negotiate with native title holders when granting additional rights to pastoral lease holders as long as those activities fall within the Income Tax Act's broad definition of primary production. Allocation of property rights to kangaroos would be such an activity. However, under the present provisions of the Native Title Act, it appears that indigenous peoples should have had 'a right to negotiate' about this decision.

Towards equity

While the impact of privatisation will vary with the wildlife species involved, as well as spatially and according to land tenure, there is a need to address the principles of indigenous equity in commercial wildlife industries if these are to contribute to sustainable development and to overcoming indigenous economic disadvantage (Altman et al. 1997). The question of what happens to indigenous rights to wildlife when common property becomes private property has hardly begun to be discussed in Australia. As a result there has been little investigation of issues. There is also a critical lack of data about indigenous wildlife use and range of interests that indigenous people have in wildlife and its management. The strong interest of indigenous Australians in establishing industries based on wildlife is being used to

suggest that commercialisation of wildlife will in itself promote social justice (see, for example, ACIL Economics Pty Ltd 1997). It is also being suggested that indigenous interests in wildlife will be protected simply by recognising subsistence rights and encouraging indigenous people to use commercial use as a vehicle for economic development (see, for example, Webb and Turner 1998). However, as Altman et al (1997) suggest there is also likely to be a need to protect existing and potential indigenous property rights in species, if commercial use of wildlife is to effectively promote social justice.

The issues could remain endlessly bogged in legal argument, or concerns could be addressed through the negotiation of co-management for wildlife between indigenous people and other stakeholder groups. The latter is preferable but opportunities are hampered by the lack of any precedents in Australia for effective power sharing over natural resource decision making, outside of co-managed national parks. There is a also real limit on indigenous people's capacity to bring governments to the negotiating table on these questions, while data and analysis is so scant. A proposed study of Aboriginal equity in the kangaroo industry (ATSIC and DPIE 1997) may provide some information to inform strategy. Some bargaining power may also be provided from the moral force of arguments raised earlier in this paper or from points of law. Other less-tangible bargaining power comes from the possibility of marketing benefits from co-management of commercial wildlife use. Indigenous equity in the industry and in management of commercial harvests would allow Australian wildlife products to be promoted as part of an industry that safeguards human rights as well as ecological sustainability. This may provide a moral counter to animal rights' lobbyists objections to commercialisation of wildlife.

Should co-management negotiations be achieved, what kind of agreements would provide indigenous people with an equitable sustainable role in Australian wildlife industries? In the interests of equity amongst Aboriginal peoples, these would need to balance benefits between the 'haves' (holders of land and of wildlife resources) and the 'have nots' (those who have no land or whose land has no appreciable wildlife resources); as well as between commercial rights and subsistence uses. Three complementary strategies with potential to provide for social, economic and ecological sustainability through co-management of commercial wildlife industries are:

- local agreements to ensure that indigenous access rights for subsistence hunting can be realised by native title holders. In South Australia, native title holders and their representative bodies, state government and the peak farmers representative organisation are currently negotiating a protocol for the conclusion of such agreements.

- at a regional level,
  - the reservation of part of the quota for each commercial wildlife harvest to indigenous native title holders, such as has occurred with Maori fishing rights in the South Island of New Zealand (Wickliffe 1996). Such a quota would facilitate indigenous people to develop their own industries or joint ventures in commercial industries, or to invest in aspects of the industry

  and
  - a strong indigenous voice in policy and planning and the allocation of harvest rights for commercial wildlife use, on the model of wildlife co-management boards in Canada.

- at a national level
    - a levy on commercial sale or export of wildlife products. The aim of this measure would be to redress the spatial imbalance between the distribution of indigenous people and of commercial harvesting opportunities and to provide some return to indigenous people from their intellectual property in wildlife. Receipts could be allocated to support indigenous wildlife management, such as through a fund to which any indigenous group could apply for assistance with projects related to the social, cultural or ecological values of wildlife. This would help to address a critical lack of resources for indigenous groups for such projects. The provisions of the *Aboriginal Land Rights (Northern Territory) Act* 1976 for the distribution of mining royalty equivalents paid for mining on Aboriginal land provide some analogy. Part of these payments provide grant funding available to any Aboriginal person in the Northern Territory, regardless of whether or not mining happens to be occurring on their land. This helps to promote equitable distribution of benefits from mining between those who have mining on their land and those who do not.

Conclusion

Indigenous people have significant rights and interests in Australian wildlife. Some characterise these rights as 'ownership' although they may not readily fit non-indigenous conceptions of property. At present recognition of indigenous peoples' native title rights to subsistence harvest of wildlife is problematic and the prospects of indigenous people being recognised as having native title rights to commercial harvest seem remote. In pursuing their strong interest in development of commercial wildlife industries, indigenous people will be subject to the same rules as apply to non-indigenous operators. They are likely to play, at best, a marginal role in industry development due to lack of capital and of experience and skills in commercial enterprise. In addition, opportunities for direct economic benefit from commercial use of wildlife will be inevitably distributed between indigenous groups in an inequitable way, because of the spatial imbalance between indigenous populations and harvestable wildlife resources.

Recent moves to allocate private property rights in the wildlife 'commons' to landowners have not taken account of indigenous rights and interests. There are opportunities for promoting sustainable use of wildlife in a way that also enhances social and economic aspects of sustainability, through the development of co-management structures at various local, regional and national scales. However there is currently a lack of awareness of these opportunities, related to a lack of previous research into indigenous relationships with wildlife and of investigation into native title rights to animals. This adds to the obstacles for negotiating co-management that are presented by the current climate of antagonism from governments and rural industry towards the recognition of indigenous rights in Australia.

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