
Impossible dreaming – does Australia’s water law and policy fulfil Indigenous aspirations?

Poh-Ling Tan and Sue Jackson*

Despite provisions in the National Water Initiative (NWI) to the effect that Indigenous Australians should have greater participation in water planning, they are still excluded from participating in management involving water governance and economic development. This article examines the success or otherwise of State legislation and policy and of native title claims in the overall context of fulfilling the goals of the NWI. It argues that the implementation of the NWI gives a low priority to Indigenous needs in over-allocated catchments, that its goals are prejudiced by delay and difficulties in native title determinations, that consultations with Indigenous peoples are either lacking or outdated, and that outcomes generally preclude economic development. It is argued that the adoption of co-management models, especially in northern Australia, where the Indigenous land estate is substantial, may better satisfy the goals of the NWI.

INTRODUCTION

The Dreaming is the foundation of Indigenous Australians’ ancient relationship to land and water. While the rich heritage of knowledge associated with Indigenous customary systems of resource governance and management is increasingly recognised for its value in managing the terrestrial environment,¹ until recently Indigenous knowledge of water has been largely overlooked in the major legal and policy reforms of Australia’s water sector.²

Over the last 100 years, water policy in Australia has been shaped by the imperative to supply water for irrigation.³ When it became apparent during the 1970s that in the heavily irrigated States of Victoria and New South Wales, water had been over-allocated, its quality degraded, and land rendered saline, the economic viability of irrigated agriculture became a contentious issue.⁴ Subsequent structural reform to water management focussed less on sustainability than on economic instruments, such as property rights and water markets.⁵ Despite recognition of native title by the historic *Mabo* decision by the High Court in 1992, followed by the *Native Title Act 1993* (Cth), which affirmed recognition of native title rights to water as well as land, the 1990s water reforms hardly considered Indigenous societies and their rights to resources.

Changing attitudes towards social cohesion and cultural diversity have elevated the importance of improving relations with Indigenous communities, as evident in the reconciliation movement and

* Poh-Ling Tan, LLB (Hons) (Malaya), LLB (Hons) (QUT), PhD (ANU), IWC Professor of Water Law and Governance, Griffith Law School. Sue Jackson, BSc (UNSW), PhD (Macquarie), Principal Research Scientist, CSIRO and Adjunct Fellow, Australian Rivers Institute, Griffith University.

¹ Jackson S and Altman J, “Indigenous Rights and Water Policy: Perspectives from Tropical Northern Australia” (2009) 13 *Australian Indigenous Law Review* 27.

² Langton M, “Freshwater” in Lingiari Foundation (eds), *Background Briefing Papers: Indigenous Rights to Waters* (Lingiari Foundation, 2002) pp 43-64; Behrendt J and Thompson P, “The Recognition and Protection of Aboriginal Interests in NSW Rivers” (2004) 3 *Journal of Indigenous Policy* 37; Hill R and Williams L, “Indigenous Natural Resource Management: Overcoming Marginalisation Produced in Australia’s Current NRM Model” in Lane M, Robinson C and Taylor B (eds), *Contested Country: Local and Regional Natural Resources Management in Australia* (CSIRO, 2009) pp 161-178.

³ Pigram JJ, *Issues in the Management of Australia’s Water Resources* (Longman Cheshire, 1986); Powell JM, *Watering the Garden State: Water, Land and Community in Victoria 1824-1988* (Allen & Unwin, 1989); Smith DI, *Water in Australia* (Oxford University Press, 1998).

⁴ Davidson BR, *Australia Wet or Dry? The Physical and Economic Limits to the Expansion of Irrigation* (Melbourne University Press, 1969).

⁵ Connell D, Dovers S and Grafton R, “A Critical Analysis of the National Water Initiative” (2005) 10(1) *AJNRLP* 81.

some recognition of past injustices. Recent Commonwealth policy has highlighted the need to address the severe socioeconomic disadvantage faced by marginalised Indigenous communities.⁶ Nevertheless, in relation to the exercise of Indigenous rights and interests in water, Indigenous commentators such as MacAvoy, Langton, and Berhendt have found government policy – federal, and State and Territory – wanting.⁷ These criticisms are considered below.

The States maintain primary constitutional responsibility for land and water management,⁸ and while each of Australia’s eight jurisdictions has implemented its own water reform package with varying rates of progress,⁹ only two States – New South Wales and Queensland – expressly recognised the interests of Aboriginal people and Torres Strait Islanders in their water statutes reforms of the early 2000s.¹⁰

The first part of this article examines current national policy on Indigenous access to water and discusses reasons why the interpretation of the current water policy is failing to meet Indigenous needs. Part two briefly analyses access to water under the land rights model of legislation, as well as the limited protection given to Indigenous access to water under native title legislation by contrasting Australia’s approach with that of Canada. Relevant factors for policy development are then canvassed, before new mechanisms for Indigenous access are discussed. By drawing analogies from fisheries management, the final section explores co-management, a model that has been successful in other post-settler states such as Canada and New Zealand.

CURRENT NATIONAL POLICY ON INDIGENOUS ACCESS TO WATER

The objectives of the National Water Initiative (NWI) provide for sustainable use of water, increasing the security of water access entitlements, and ensuring economically efficient use of water. These objectives are to be achieved principally by strengthening environmental flow provisions, removing barriers to markets in water, and providing for public benefit outcomes through water planning mechanisms. Since 2004, when the interests of Indigenous peoples were first placed on Australia’s NWI agenda,¹¹ government parties have agreed that water planning frameworks should recognise Indigenous needs in relation to access and management.

Improved regional water planning underpins the NWI. While water planning can take many forms, the NWI focuses on water allocation.¹² In preparing surface and groundwater management plans for areas of concern, State and Territory jurisdictions are to follow nationally consistent guidelines for undertaking transparent statutory planning relying on best available information.¹³ Jurisdictions are expected to consult and involve communities, including Indigenous groups.¹⁴ Tradeoffs between competing outcomes for water systems are to be considered and settled using the best available science, social and economic analysis and community input.¹⁵

⁶ Council of Australian Governments (CoAG), *National Integrated Strategy for Closing the Gap in Indigenous Disadvantage* (CoAG, 2009).

⁷ See also First Peoples Water Engagement Council, *Advice to the National Water Commission* (May 2012), http://nwc.gov.au/_data/assets/pdf_file/0004/22576/FPWEC-Advice-to-NWC-May-2012.pdf viewed 24 January 2013.

⁸ Gardner A, Bartlett R and Gray J, *Water Resources Law* (Lexis Nexis, 2009).

⁹ National Water Commission (NWC), *Australian Water Reform 2009, Second Biennial Assessment of Progress in Implementation of the National Water Initiative* (NWC, 2009).

¹⁰ Tan PL, *National Indigenous Water Planning Forum: A Review of the Legal Basis for Indigenous Access to Water* (report prepared for the National Water Commission, 2009).

¹¹ Council of Australian Governments, *Intergovernmental Agreement on a National Water Initiative* (National Water Commission, 2004).

¹² Hamstead M, Baldwin C and O’Keefe V, *Water Allocation Planning in Australia – Current Practices and Lessons Learned* (National Water Commission, 2008).

¹³ *National Water Initiative*, cl 23(ii).

¹⁴ *National Water Initiative*, cll 52, 95.

¹⁵ *National Water Initiative*, cll 36, 97; Hamstead et al, n 12.

Water plans to allow for Indigenous interests

Given the historical neglect of Indigenous water rights, the NWI provides a much needed impetus for considering and addressing Indigenous peoples' requirements for water, as well as enhancing their participation in water management systems. The NWI provides that Indigenous access is to be achieved principally through planning processes that incorporate Indigenous social, spiritual and customary objectives. These processes must take account of the possible existence of native title rights to water in the catchment or aquifer area, as well as account for any water allocated to native title holders for "traditional cultural purposes".¹⁶ Statutory water plans will provide "environmental and other public benefit outcomes", which include "Indigenous and cultural values".¹⁷ However, up until the last few years, these provisions have received relatively little attention from policy makers, water managers and researchers and are arguably the least developed aspects of the NWI.¹⁸

In light of Australian government commitments to overcome Indigenous disadvantage, it is significant that no explicit obligation is placed on parties to utilise the market-based water policy framework to advance Indigenous peoples' economic standing.¹⁹ This feature of the NWI contrasts with the New South Wales water policy framework discussed below, which includes objects in legislation designed to provide benefits to Aboriginal people in relation to their spiritual, social, customary and *economic use* of land and water.

Though it is not made mandatory in the NWI, some of the new multi-stakeholder advisory bodies established to provide community input into water planning have Indigenous representatives. Of the jurisdictions, only New South Wales specifically requires Indigenous representatives to be included on water management committees (see *Water Management Act 2000* (NSW), s 13(1)). Nonetheless, a 2009 assessment of the implementation of the NWI found that most jurisdictions are not yet effectively engaging Indigenous peoples in processes, and that Indigenous water requirements are only rarely explicitly included in water plans.²⁰ In the most recent assessment of the implementation of the NWI it was again noted that "most jurisdictions have improved consultations with Indigenous communities in water planning and management, but have generally failed to incorporate effective strategies for achieving Indigenous social, spiritual and customary objectives in water plans".²¹ In what appears as a backward step, the legal provision in Queensland that required consultation via a community reference panel representing cultural, social and economic interests has been recently repealed, and substituted for consultation arranged at the discretion of the Minister.²² This supports the finding that the cultural and economic expectations of Indigenous Australians remain an "unmet demand on the water system".²³

There is little incentive to correct these issues. No penalties are imposed on States for non-compliance with the NWI. In contrast to the approach adopted between 1994-2004 where financial incentives to States were withheld for non-compliance, current assessment relies on public "naming and shaming" through National Water Commission biennial assessments. Further, States

¹⁶ *National Water Initiative*, cll 52-54.

¹⁷ *National Water Initiative*, cl 25, Sch B(ii).

¹⁸ Tan, n 10.

¹⁹ Jackson S and Morrison J, "Indigenous Perspectives on Water Management, Reforms and Implementation" in Hussey K and Dovers S (eds), *Managing Water for Australia: The Social and Institutional Challenges* (CSIRO, 2007) pp 23-41; Jackson S, "Aboriginal Access to Water in Australia: Opportunities and Constraints" in Grafton Q and Hussey K (eds), *Water Resources, Planning and Management* (Cambridge University Press, 2011) pp 601-627.

²⁰ NWC, n 9.

²¹ National Water Commission (NWC), *The National Water Initiative – Securing Australia's Water Future: 2011 Assessment* (NWC, 2011) p 46.

²² *Water Act 2000* (Qld) repeals s 41, and provides for new s 39.

²³ NWC, n 21, p 9. See also National Water Commission, *Indigenous Access to Water Resources* (Position Statement, June 2012).

appear to have based their general approach on mere compliance with the native title regime, despite the NWI call to incorporate Indigenous objectives in water plans and actively engage Indigenous people in water resource assessments.

Over the past decade, Indigenous aspirations in water have been articulated through several forums and organisations, principally in Victoria, New South Wales and northern Australia. More recently, at the first national Indigenous water forum convened in 2009, and through the First People’s Water Engagement Council formed in 2010, national Indigenous issues have been canvassed and recommendations made.²⁴ Indigenous people have articulated a desire: to effectively participate in water planning and management; that Indigenous values in water be taken into account in management; and, to reverse past injustices, to have access to water through special Indigenous water allocations for purposes to be determined by themselves, including cultural and economic purposes.²⁵

The NWI in practice

In its 2009 report the National Water Commission recommended that processes should also make clear how Indigenous groups can pursue their legitimate economic objectives.²⁶ However, four features of the NWI itself have tended to restrict the expression of those and other objectives:

1. the low priority given to Indigenous needs in over-allocated catchments;
2. State government pressures, which result in a lack of clear guidance on balancing competing priorities;
3. procrastination while awaiting native title determinations; and
4. consultations that do not result in equitable access to valuable economic resource rights.

These, combined with the restrictions of the native title regime, affect both the degree to which Indigenous people can benefit from the Initiative, as well as the broader benefit the nation may derive from Indigenous participation in key NWI activities.

Low priority given in over-allocated catchments

A critical impediment to Indigenous access is the constrained state of water resources particularly in south-eastern Australia. In New South Wales, for example, which arguably has the most over-allocated water systems in Australia,²⁷ embargoes on new licences were put in place as early as 1976,²⁸ thus precluding substantial Indigenous access.²⁹

In times of water scarcity use must be prioritised. Beyond trading mechanisms and an expectation that tradeoffs will be informed by socioeconomic analysis and best-available science, the NWI provides no guidance as to how to proceed in addressing competing claims, eg between State provisions and native title. As noted by McKay,³⁰ there is nothing in the *Water Management Act* for example, which quarantines water for the purpose of protecting native title interests. Under New South Wales legislation, native title rights are categorised as “basic landholder rights” and are afforded the

²⁴ Jackson S, Tan PL and Altman J, *Indigenous Fresh Water Planning Forum: Proceedings, Outcomes and Recommendations* (report prepared for the National Water Commission, 2009); First Peoples Water Engagement Council, *Indigenous Water Planning and Management Issues: Advice to the National Water Commission for the Biennial Assessment of Progress in Implementation of the National Water Initiative* (report compiled by Neva Collings, March 2011); First Peoples Water Engagement Council, *Advice to the National Water Commission* (May 2012).

²⁵ First Peoples Water Engagement Council (2011, 2012), n 24.

²⁶ NWC, n 9.

²⁷ Murray Darling Basin Authority (MDBA), *Summary of Murrumbidgee Regions, From the Guide to the Basin Plan* (Australian Government, 2010). For updated information, see MDBA website on Basin planning where the revised draft of the proposed Basin Plan is now available: <http://www.mdba.gov.au/proposed-basin-plan> viewed 3 January 2013.

²⁸ Tan PL, “Legal Issues Relating to Water Use, Issues Paper No 1 Report to the Murray-Darling Basin Commission, Murray-Darling Commission Project MP” reprinted in *Property: Rights and Responsibilities, Current Australian Thinking* (Land and Water Australia, 2002) pp 13-42.

²⁹ Jackson S, “Aboriginal Access to Water in Australia: Opportunities and Constraints” in Grafton and Hussey, n 19, pp 601-627.

³⁰ McKay J, “Water Institutional Reforms in Australia” (2005) 7 *Water Policy* 38.

same priority as domestic and stock rights.³¹ This is notionally the highest category of rights. When plans are suspended in an emergency, first priority is to be given to the taking of water for domestic purposes by persons exercising basic landholder rights, and for domestic purposes or essential town services authorised by an access licence. Because most water plans in New South Wales have zero allocation for native title rights, any priority for Indigenous access is illusory.

Further, an entitlement to extract water in the exercise of native title rights has little meaning if there is insufficient water or if it is polluted.³² The practical effect on native title rights of competition for water is explained by the New South Wales Department of Natural Resources. While the New South Wales water sharing plans protect federal law native title rights to water, the practical effect is that the native title holders can:

continue to take water even when licensed users must cease to pump. However, in very dry times, restrictions may be imposed on the amount of water that can be taken, recognising the impacts of extraction on the environment and other users. These restrictions are described in the *Water Management Act 2000* and are not generally defined in the plans.³³

The imposed “restrictions” in the New South Wales Act relate both to rules of distribution and a hierarchy of rights. It is contended that these restrictions do not adequately protect Indigenous interests in a situation where it is generally recognised that many of the surface and groundwater sources of New South Wales are over-allocated or overused.³⁴

New and innovative measures introduced in New South Wales, discussed below, present a mixed picture when read with water sharing plans. In most water sharing plans for New South Wales inland rivers (where competition over water is high and environmental degradation manifest), native title rights are currently not allocated any water. By contrast, in plans for coastal rivers where the competition is less intense, measures range from low impact ones that correlate to existing rights under native title legislation, to those that provide for new use such as Aboriginal commercial licences. Nevertheless, even these measures are limited in their scope and may contain onerous provisions, such as charging for water used for cultural/environmental purposes.³⁵

Lack of guidance and competing priorities

McFarlane³⁶ attributes the lack of compliance with the NWI to its provisions being expressed in discretionary terms, eg “where possible”. Although discretion provides flexibility, competing priorities may result in inaction or lack of attention to Indigenous priorities.

Law reform and native title organisations point to a narrow “recognition space” for native title legislation; their calls for substantive reform have yet to be heeded.³⁷ In these circumstances and in a spirit of reconciliation, phrases in the NWI such as “wherever possible” or “wherever they can be developed” should receive a purposive interpretation, referring to measures as being capable of being developed rather than the current ambivalence adopted by most States. A purposive reading would be supported by national targets for improved access to water, procedural standards for inclusion of Indigenous participants and their diverse interests in water planning, and monitoring of progress in implementation of national water policy.

³¹ *Water Management Act 2000* (NSW), ss 4, 55. See also NSW Office of Water, *Our Water Our Country: An Information Manual for Aboriginal People and Communities about the Water Reform Process* (2nd ed, NSW Department of Primary Industries, 2012).

³² Behrendt and Thompson, n 2.

³³ Rural Solutions, *Aboriginal Access to Water Across Australia* (Department of Water, Land and Biodiversity Conservation, Government of South Australia, 2008) p 26.

³⁴ See eg MBDA, n 27.

³⁵ Jackson S and Langton M, “Trends in the Recognition of Indigenous Water Needs in Australian Water Reform: The Limitations of ‘Cultural’ Entitlements in Achieving Water Equity” (2012) 22 *Journal of Water Law* 109.

³⁶ McFarlane B, “The National Water Initiative and Acknowledging Indigenous Interests in Planning” (paper delivered at the *National Water Conference*, Sydney, 29 November 2004).

³⁷ Australian Human Rights Commission, *Native Title Report* (2008); Australian Human Rights Commission, *Inquiry into the Native Title Amendment Bill* (Parliament of Australia, Senate 12, 2009) pp 59-60.

Little guidance is provided to water resource managers and regional bodies in meeting the Indigenous access and participation objectives.³⁸ Traditionally, water decision-makers were required to optimise often conflicting ideals with limited and uncertain information³⁹ and this continues under the NWI. It is therefore suggested that researchers, Indigenous groups and policy makers need to collaborate to overcome several key challenges that impede progress, namely:

- (i) limited knowledge of how to address Indigenous water requirements;
- (ii) the degree of technical difficulty in specifying volumes or shares of water for these requirements;
- (iii) a lack of Indigenous and government agency capacity; and
- (iv) the need for better policy on how to resolve competing priorities.

The extent to which a native title entitlement will satisfy native title requirements can only be determined on a case-by-case assessment in State water plans; however, it is significant that review of New South Wales’ 35 Water Sharing Plans (WSPs) reveals that only two have provided an entitlement for native title. Even for these two, Apsley and Kangaroo River, the approach in water planning was to relegate native title rights to *equal to* or *less than* human domestic and pastoral stock use.

The Apsley WSP provides 0.01 ML/per day for native title purposes to an Indigenous community residing on the Apsley River. This amount was determined using a formula based on per capita residential water use, rather than considerations relating to spiritual or cultural objectives or patterns of customary use of aquatic resources. According to Miller,⁴⁰ an officer of the New South Wales Department of Natural Resources, there was considerable discussion about the nature of this right, both inhouse and with the affected Indigenous community. The community had a water frontage and, under a right available to all landowners or lessees in all Australian jurisdictions, it was therefore entitled to a basic landholder right to water for domestic and stock purposes. In this plan it is difficult to appreciate the difference between the basic landholder right and the native title right.

In the 2003 Kangaroo River WSP native title rights were quantified at 0.073 ML/day. It was recognised that the exercise of native title rights may increase in the life of the plan, similar to domestic and stock rights. As the latter category of rights was estimated in the WSP as a total of 1.047 ML/day, the rate of abstraction was nearly 15 times that of native title rights. Aboriginal cultural access licences, discussed below, are also available; however, again the volumes attached to these are less than those for domestic and stock access licences. The allowable volumes, plus the fact that cultural licences usually have a term of only one year, might make it more worthwhile for Indigenous people to apply for a domestic and stock licence rather than a cultural access licence.⁴¹

Native title determinations

The NWI requires that water plans take account of the *possibility* of successful native title determinations. However, except for Western Australia, most State plans suggest that water managers appear to be waiting for native title determinations before assessing the potential requirements arising from successful claims.⁴² In New South Wales, for example, as of April 2012 there had been only two determinations that recognised native title. The slow pace and low numbers of determinations are likely to limit the allocation for native title purposes and prejudice potential claimants, especially in south eastern Australia. If Indigenous-specific allocations are seen as dependent on the legal recognition of native title, then many Indigenous groups may be further dispossessed of customary rights, through no fault of their own. This problem could become especially pronounced in areas where resource use is approaching full development.

³⁸ Jackson S, Tan P, Mooney C, Hoverman S and White I, “Principles and Guidelines for Good Practice in Indigenous Engagement in Water Planning” [2012] *Journal of Hydrology* 57.

³⁹ McKay, n 30.

⁴⁰ Dave Miller, personal communication, 10 October 2009.

⁴¹ Jackson et al, n 24.

⁴² Western Australian Government, *Western Australia’s Implementation Plan for the National Water Initiative* (Department of Water, 2007) p 33.

Full development may also occur in northern parts of Australia, such as the Tindal aquifer in the Katherine region of the Northern Territory. That aquifer is reaching full allocation, prompting the need to reconsider the rules that govern its use. Groundwater is currently extracted from the aquifer for irrigated agricultural and other purposes, including domestic and light industrial use. Demand for water is likely to grow given that the region may have the potential for intensive agriculture. Although there is only one small portion of Indigenous-owned land within the aquifer area, a native title claim is pending and, if successful, may raise expectations of commercial development opportunities.

However, it must be noted that many Indigenous groups do not yet have fully formed strategies for utilising water for commercial purposes. This should not preclude them from benefiting from future development opportunities, particularly where it is likely that a cap on water entitlements will soon be in place and that entering the water market in coming years may be costly or impossible.⁴³ The Tindal Plan currently includes an Indigenous reserve of consumptive water for economic development purposes (introduced as a special measure in the absence of any Northern Territory policy recognition of Indigenous water rights) but only in the event that native title is recognised.⁴⁴

Consultation that does not meet Indigenous aspirations

For decades, administrative discretion characterised water management, with institutional capture by powerful interests.⁴⁵ With reforms in the mid-1990s, a more consultative model developed for water planning. Even then, State agencies tend to view consultation under the NWI as more information-giving than active participation by communities.⁴⁶ Until very recently and in only a few instances, planning outcomes manifested a failure to fully consider Indigenous interests and aspirations and rely on an outdated consultation paradigm that seeks to identify sites for heritage protection.⁴⁷ These shortcomings are shown clearly in the *La Grange Groundwater Plan*, recently developed in Western Australia.

Western Australia only accepted the principles of the NWI in April 2006 and has yet to reform its legislation.⁴⁸ Planning for the La Grange groundwater resource in the Canning Basin commenced in 1999 prompted by demand for water for a large cotton irrigation project in the remote Kimberley region south of Broome. Although consumptive use of its groundwater resource was low, horticultural development, pastoral diversification and expansion of the mining sector were expected to increase water use.

At least eight Aboriginal communities are located within the plan area. Much of the area is covered by the Karajarri Native Title Determination of 2002 and 2004, which includes exclusive native title rights to about half of the planning area. According to the determination, native title holders can exercise their rights to take water for traditional uses. While Stone and others see the native title determination as an important step forward, they argue it is “insufficient on its own to protect water dependant cultural values”.⁴⁹

⁴³ Jackson and Altman, n 1.

⁴⁴ Northern Territory Government, *Water Allocation Plan for the Tindal Limestone Aquifer, Katherine 2009-2019* (Department of Natural Resources, Environment, Sports and the Arts, 2009).

⁴⁵ Tan, n 28.

⁴⁶ Hamstead et al, n 12; Tan PL, *Collaborative Water Planning: Legal and Policy Analysis Volume 3* (Tropical Rivers and Coastal Knowledge Hub Technical Report (Project 1.3), Land and Water Australia, 2008); Jackson and Altman, n 1.

⁴⁷ Jackson S, “Compartmentalising Culture: The Articulation and Consideration of Indigenous Values in Water Resource Management” (2006) 37(1) *Australian Geographer* 19.

⁴⁸ Tan, n 46; Gardner et al, n 8. Western Australian legislation is undergoing reform, currently the *Rights in Water and Irrigation Act 1914* (WA) allows for Indigenous representation on the Local Water Resources Management Committee (WRMC), but no additional measures are provided for Indigenous engagement. Issues of policy and Indigenous Access to water are put to the Department of Water’s Indigenous Advisory Committee as those issues arise: Western Australian Government, *Western Australia’s Implementation Plan for the National Water Initiative* (Department of Water, 2007).

⁴⁹ Stone R, Edgar J and Mathews D, “La Grange Groundwater – Native Title and Indigenous Engagement in Water Planning” (paper presented at the *AIATSIS Native Title Conference*, Perth, 4-5 June 2008).

At commencement of the planning process in La Grange, statutory provisions only allowed for Indigenous participation in local plans, which are the lowest level of plans. Western Australia currently has a “nested” water planning system. Three levels of water management plans are provided in the *Rights to Water and Irrigation Act 1914* (WA) at regional, subregional or local levels. These classifications are rather misleading because the plans may relate to more than one region, subregion or locality, and moreover all three levels of plans may be combined in the one document (see s 26GV). The objectives of the plans are to guide management by detailing the management approaches relevant to the level of plan.⁵⁰ With the La Grange plan, being a Kimberly subregional allocation plan, the Department of Water went beyond its statutory duty to engage the Indigenous communities by appointing an Indigenous liaison person.⁵¹ The plan notes that the Department of Water will consider native title decisions in water licence assessments by notifying native title holders, or their representative body, of new applications to take water and giving them an opportunity to comment.⁵²

The Department of Water asserts that Indigenous interests are also recognised in other ways. For instance, the primary mechanism by which Indigenous values are to be protected is by constraining the level of permissible extraction across the total area, within a low level of risk. Management zones around high-value areas, within which licensing conditions are more onerous, provide another level of protection. Further, there is protection of environmental and cultural values by providing water for the environment, improved provision of community water supplies, involvement in planning, and through effective engagement processes.⁵³ These mechanisms are seen to be appropriate by the Department given the low level of information available, the significance of the values, the relatively low level of water use and the relatively low capacity for intensive management in this remote area.

Some processes, however, are not securely bedded in law and policy; for example, Indigenous involvement in water resource monitoring and management, and lack of a policy on Indigenous access to water for economic use. Prior to the native title determinations, Yu had undertaken a cultural values study of the area. Three wetlands systems within the plan area are recognised for their high conservation values under the Ramsar system,⁵⁴ and are important to the traditional owners, as are the groundwater resources that sustain many of the freshwater springs and swamps.⁵⁵ A study of Indigenous values found 131 sites of cultural significance that are dependent on groundwater.⁵⁶

With regard to environmental management, the traditional owners likely saw their role as a determining and influential one. The study recommended the establishment of a multiagency approach for the provision of funding and resources to enable traditional owners to:

- undertake their own planning processes for land and water resources;
- develop appropriate cultural and environmental techniques for water and land management; and
- investigate options for the future uses of land and water that incorporate traditional cultural and ecological values.⁵⁷

With respect to the native title claim, the study noted:

[T]he Traditional Owners will be asserting rights to groundwater, the right to trade resources, which they will argue includes groundwater, and the right to receive a portion of the any resources taken from the land.⁵⁸

⁵⁰ Tan, n 46.

⁵¹ Stone et al, n 49.

⁵² Western Australian Government, *La Grange Groundwater Allocation Plan* (Water Resource Allocation and Planning Series, report no 25, Department of Water, 2010).

⁵³ Susie Williams, Department of Water, personal communication, February 2009.

⁵⁴ Western Australian Government, n 42.

⁵⁵ Yu S, *Ngapa Kunangkul: Living Water – Report on the Indigenous Cultural Values of Groundwater in the La Grange Sub-Basin* (Western Australian Water and Rivers Commission, 2000).

⁵⁶ Yu, n 55.

⁵⁷ Yu, n 55.

⁵⁸ Yu, n 55, p 41.

The traditional owners' views on their resource rights, their management and resulting entitlements are unlikely to emerge in judicial determinations or be wholly shared by government.

It is worth noting that the State government's NWI Implementation Plan is quite specific in limiting Indigenous access to water resources to "non-consumptive cultural purposes".⁵⁹ Further, the La Grange Plan does not commit the water agency to improving community water supplies. The plan affords traditional owners only a minor part in the management of the water resource, eg as respondents to licence applications and participants in the cultural heritage assessment of applications.

The Department of Water is currently engaged in policy discussions with Indigenous organisations and is examining ways of improving Indigenous access to water for economic purposes. It is also worth noting that the La Grange planning process was initiated because irrigation proponents required access to Aboriginal land. The demand for access to land became the key negotiating factor for the native title claimants to participate in water planning prior to the determination. The land access issue also provides commercial leverage for sharing the benefit stream from mineral resource development.

THE EFFICACY OF STATUTORY SCHEMES

Within water policy discourse, "native title" is often referred to as if there is only one homogenous form of Indigenous rights to land and water recognised by law. There are in fact two models in Australia: a) the land rights model; and b) that conferred by the federal *Native Title Act*. The land rights model, which predates the *Native Title Act*, is a State and Territory-based model that grants inalienable freehold title to the Indigenous holders. As argued below, the High Court decision regarding fisheries in the *Blue Mud Bay* land rights case⁶⁰ has positive implications for water management.

The Native Title Act's limited protection of Indigenous access to water resources

A common theme of the Australian literature on Indigenous rights is the criticism of legal and administrative approaches to native title, especially its debilitating effect on Indigenous participation in resource management.⁶¹ Gardner et al observe that native title to water "had the potential to be of great significance in the allocation and management of water rights in Australia" but this potential "has been denied by the manner of its development both under common law and statute".⁶² In a brief period between 1993 and 1998 Indigenous peoples could negotiate rights over water resource developments;⁶³ however, amendments to the *Native Title Act* abolished that right. A United Nations Committee considered that Australia was not only in breach of its international obligations, but that it had created legal certainty for States and third parties at the expense of native title.⁶⁴

The *Native Title Act* followed the groundbreaking decision in the 1992 *Mabo* decision.⁶⁵ Section 223 of the Act establishes a form of native title where traditional lands *and water* are still held in accordance with traditional laws and customs. However, establishing native title is difficult as amendments to the *Native Title Act* and decisions of Australian courts have adopted an overly-specific and restrictive approach to Indigenous rights when compared to other countries.⁶⁶ Commentators have

⁵⁹ Western Australian Government, n 42, p 33.

⁶⁰ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24.

⁶¹ O'Donnell M, "Briefing Paper for the Water Rights Project" in Lingiari Foundation, n 2, pp 95-105; Rose DB, "Freshwater Rights and Biophilia: Indigenous Australian Perspectives" (2004) 23 *Dialogue* 35; Behrendt and Thompson, n 2; McAvoy T, "Native Title Litigation Reform" (2009) 92 *Reform* 30.

⁶² Gardner et al, n 8, p 255.

⁶³ Langton, n 2.

⁶⁴ Bartlett R, *Native Title in Australia* (LexisNexis Butterworths, 2004).

⁶⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁶⁶ See generally Young S, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008).

noted that native title to water is of limited significance because the burden of proof is “extremely onerous”, the content of the right has been “frozen” and the degree of past extinguishment declared by common law and legislation is widespread.⁶⁷

In relation to *freshwater*, native title allows a *limited, non-exclusive and non-commercial* right to use water without the need for a licence.⁶⁸ The Act validates types of past actions of government that extinguished native title, provides compensation for some acts where title has been extinguished, and provides administrative processes for determining claims. Native title holders cannot prevent the doing of *future acts* of water development, but limited procedural safeguards and the right to compensation apply.

As discussed below, the native title legislation offers lesser rights than the land rights schemes. However, the native title framework has been used in at least one situation outside of a water plan to leverage Indigenous access to a benefit stream from water-dependent commercial land-use. Amendments to the *Native Title Act* in 1998 introduced Indigenous Land Use Agreements (ILUA).⁶⁹ These are agreements between a native title claimant group and interested parties for the use and management of lands or waters. They can be negotiated in areas where native title has, or has not yet, been determined to exist. When registered with the National Native Title Tribunal (NNTT), ILUAs bind all parties to the terms of the agreement.

In 2000 the Northern Territory government purchased the Pine Hill pastoral lease in central Australia to secure horticultural development. It subsequently negotiated an ILUA with the traditional owners in 2007, following a development application for grape growing. The ILUA gave the traditional owners compensation in the form of a living area on the Pine Hill pastoral lease, an art centre at Mulga Bore and a horticulture block to develop. In return, native title was extinguished on the lease on two other blocks the government wanted to develop. Native title was recognised over the remainder of the area. Since the ILUA was settled, at least one water licence has been granted to traditional landowners to develop horticultural enterprises.⁷⁰

The definition of Indigenous uses in the NWI references native title as a source of rights. However, cl 54 of the NWI, which provides that water should be allocated to native holders for *traditional* cultural purposes, suggests an intention to preclude commercial uses, as discussed above in relation to La Grange.

The NWI and the statutory frameworks for native title and land rights have been criticised as “insufficiently inclusive in their definition of water property”.⁷¹ McFarlane⁷² like many others⁷³ expects that native title rights to water will continue to be interpreted as non-exclusive and non-commercial in nature, allowing native title holders to use and take for domestic purposes only.

Potential of increased access under the land rights model

The first Australian land rights case, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, gave rise to the land rights model. When the Milirrpum claim failed, the Commonwealth government passed the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) to recognise Indigenous land rights. The area of Arnhem Land in the Northern Territory claimed in *Milirrpum* was granted to the traditional owners.⁷⁴ This model was followed in other States (with the exception of Western

⁶⁷ Gardner et al, n 8, p 255.

⁶⁸ Gardner et al, n 8.

⁶⁹ McRae H and Nettheim G, *Indigenous Legal Issues: Commentary and Materials* (LBC Information Services, 2009) p 222; Gardner et al, n 8.

⁷⁰ Rea N and Anmatyerr Water Project Team, *Water Project Team, Provision for Cultural Values in Water Management: The Anmatyerr Story* (Land and Water Australia Final Report, 2008) p 18.

⁷¹ Altman J, “Indigenous Interests and Water Property Rights” (2004) 23 *Dialogue* 29.

⁷² McFarlane, n 36.

⁷³ Eg O’Donnell, n 61; Bartlett, n 64.

⁷⁴ Bartlett, n 64.

Australia), although land holdings were smaller. McRae et al note:

Collectively these land rights laws have yielded far more of the contemporary Indigenous estate around Australia than native title has to date, often with a stronger title and associated set of rights, as well as greater certainty for Indigenous people and better protection against unwanted activity on their land. Statutory land rights also typically offer a clearer and more secure basis for Indigenous economic activity.⁷⁵

Generally legislation under this model does not expressly provide for inland or coastal water, or other resource rights.⁷⁶ However, each jurisdiction has its own special features that provide for access to coastal water and inland water.⁷⁷ In the Northern Territory where vast areas of land are held by Indigenous communities under the ALRA, litigation has arisen over *land* in the intertidal zone and seabeds. An important relevant case is *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, otherwise known as the *Blue Mud Bay* case.

Under the ALRA, the Yolngu people hold parts of Arnhem Land including a large coastal area called Blue Mud Bay. Since the late 1990s, the Yolngu had been in dispute with the Northern Territory government regarding whether the Director of Fisheries could authorise fishing in waters overlying Aboriginal land.⁷⁸ The matter was heard by the High Court. It ruled that grants made under the ALRA permitted the Arnhem Land Aboriginal Land Trust to exclude persons who hold a fishing licence from entering waters that lie within the intertidal zone. Further, the court held that the Director of Fisheries had no power to grant fishing licences in the disputed areas.

As Indigenous peoples hold approximately 80% of the Northern Territory coastline under the ALRA, the full implications are still unclear. Access to their land and waters is the lever by which traditional owners can now assert control of the use of the intertidal zone. Government, commercial and recreational fishers will be required to negotiate terms for access, opening up commercial opportunities for Indigenous landowners. Not surprisingly, given the importance of fishing to the Northern Territory economy and society, the decision has caused considerable, albeit localised, concern, as well as disruption to existing management systems. The peak Aboriginal land management organisation, the Northern Land Council, has established an interim licensing system to allow fishing and access to continue according to previous conditions under fisheries legislation.

Writing in 2004, Jackson predicted that significant and continuing legal uncertainties in the area of Indigenous sea rights were likely to stimulate negotiated agreements. Evidence from the Northern Territory showed that previous success in the negotiation of collaborative management structures with pearling companies, amateur fishing groups, or government agencies, offered a “formula” by which to address Aboriginal and other coexisting interests.

The Northern Territory government and the fishing industry have now recognised that negligible Indigenous participation in fisheries management is unsustainable.⁷⁹ Indigenous landowners and stakeholders in the Territory are turning towards collaborative management as the preferred mechanism for redressing the exclusion of Indigenous people from commercial resources.⁸⁰ Valuable work has been done to identify an agreement process for negotiating governance of water between

⁷⁵ McRae and Nettheim, n 69, p 222.

⁷⁶ O'Donnell, n 61; Altman n 71.

⁷⁷ Jackson S, “Maritime Agreements and the Recognition of Customary Marine Tenure in the Northern Territory” in Langton M, Teehan M, Palmer L and Shain K (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) pp 220-236.

⁷⁸ Coldwell H, “Fee Simple Estate and Footholds in Fishing: The Australian High Court’s Formalistic Interpretation of the Aboriginal Land Rights Act” (2010) 19 Pac. Rim L. & Pol’y J 303.

⁷⁹ Australian Government Fisheries Research and Development Corporation, *Openness, Transparency, Fairness and Trust: An Overview of the Northern Territory Multi-sector Fishing and Seafood Industry Council Fact Finding Mission to New Zealand* (Northern Territory Seafood Council, 2008).

⁸⁰ Henderson P (Northern Territory Chief Minister), *Working Together on Blue Mud Bay* (media release, 26 November 2008).

Indigenous owners and the government in the Northern Territory.⁸¹ Much can be learnt from the co-management experience in Canada⁸² where negotiations have taken place because of the different approach taken in native title processes.

Australian and Canadian native title processes compared

Negotiating access to water by involving Indigenous people in management decisions requires a legislative and policy framework to structure negotiations. It goes without saying that the negotiations must be carried out in good faith.

Where mining and exploration activities or compulsory acquisition are proposed over land subject to a native title claim, Indigenous groups have a right to negotiate.⁸³ This is not the case where regulatory action relating to water is proposed. There is only a right to comment on a water management proposal.⁸⁴ This right to comment has been the subject matter of two decisions of the Full Federal Court, both of which read down the scope of the provision.⁸⁵ Further, no effective recourse seems available in Australia should the native title holders’ right to comment be ignored.⁸⁶ There is a possibility that injunctions are available to Indigenous groups who view that their right to comment has not been exercised.⁸⁷ However injunctions are all or nothing solutions, and prejudice Indigenous interests as the legal test of considering a “balance of convenience” tips the scales in favour of protecting the economic interests of employers, employees and government revenues as the Canadian Supreme Court noted.⁸⁸

In Canada there is constitutional protection of Aboriginal rights. A further right of fair dealing with Indigenous people in the spirit of reconciliation was found by the Canadian Supreme Court in *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 at [7]:

[G]rounded in the principle of the honour of the Crown, which must be understood generously... the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued... The duty to consult and accommodate is part of a process of fair dealing and reconciliation... Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation... that s. 35 of the *Constitution Act*, 1982, demands.

In this case, the reissue of logging licences had been objected to by the Haida people, who had lodged claims over the land. The government, which held legal title to the land, denied owing a duty to consult with the people. Even though the Haida’s claim was strong, it was complex and would take many years to prove. Absent consultation and accommodation, the Haida people might win their title only to find themselves deprived of forests, vital to their culture and economy.

Having drawn the comparison between Canadian and Australian native title positions, and noting the general shortcomings of the Australian native title regime, it is argued that there are compelling reasons not to rely on native title determinations to provide for Indigenous access to water. The next section considers policy reasons for formulating new mechanisms to meet Indigenous aspirations in this area.

⁸¹ Craig D, Hancock D, Rea N, Gipey C, Penangk E, Nabangardi J and Scrutton T, *An Agreement Approach that Recognises Customary Law in Water Management* (Land and Water Australia, 2008).

⁸² Hoverman S, Delfau K and Tan PL, *Developing Alternative Management Models for Indigenous Water Plans and Strategies in Australia’s North: Final Report* (TRaCK NAWFA Social and Cultural Values Project: Sub-project 3, 2012).

⁸³ *Native Title Act 1993* (Cth), s 25.

⁸⁴ *Native Title Act 1993* (Cth), s 25.

⁸⁵ *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60; *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v Queensland* (2001) 108 FCR 453.

⁸⁶ McAvoy, n 61.

⁸⁷ *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v Queensland* (2001) 108 FCR 453 at [73] per Merkel J.

⁸⁸ *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 at [14].

NEW MECHANISMS TO MEET INDIGENOUS WATER REQUIREMENTS

It is clear that in Canada there is constitutional protection of existing Aboriginal and treaty rights.⁸⁹ In Australia there is no federal Bill of Rights, and even the *Native Title Act* could be repealed at any time. However, a “duty to consult” could be drawn from Australia’s endorsement in 2009 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁹⁰ Initially one of the four votes against the Declaration in the General Assembly in 2007 (the others were the United States, Canada and New Zealand), Australia under the Rudd Labor Government promised to be guided by the Declaration’s benchmarks and standards.⁹¹ A number of its Articles relate to aspirations of Indigenous peoples’ water rights, in particular requiring signatories to:

- consult and cooperate in good faith with Indigenous peoples’ own representative institutions, to obtain their free, prior and informed consent before implementing legislative or administrative measures that may affect them (Art 19);
- acknowledge the right of Indigenous peoples to maintain and strengthen their spiritual relationship with their traditionally owned territories and waters (Art 25);
- recognise and protect Indigenous rights to own, develop and control lands, territories and resources traditionally owned, occupied or used (Art 26);
- consult and cooperate in good faith to obtain free and informed consent prior to the approval of any project affecting their lands or territories particularly in connection with the development, utilisation or exploitation of mineral, water or other resources (Art 32); and
- take appropriate measures, including legislation, to achieve the ends of the Declaration (Art 38).

The Declaration has already provided the basis for relevant laws in Bolivia and other Latin American countries.⁹² While Australia has not enacted domestic laws implementing UNDRIP provisions, it should acknowledge the Declaration’s strong moral and authoritative suasion and its potential to influence the interpretation of statutes.⁹³ Indigenous groups across Australia have developed policy statements calling on the Australian government to be “responsive to the rights of Indigenous people”.⁹⁴ The Australian Law Reform Commission, the Australian Human Rights Commission and the NNTT have joined these groups in calling for reform of the *Native Title Act*.⁹⁵ Drawing on Indigenous peoples’ rights to be consulted in good faith would offer a high level of protection to their rights to use, own, develop, and control their own resources.

Innovations in New South Wales and Queensland

In the more recently colonised parts of northern Australia where water use is increasing but the resources to cope with demand not yet fully developed, Indigenous people are advocating special

⁸⁹ Hartley J, “Case Note: Upholding the Honour of the Crown: Haida Nation v British Columbia (Minister of Forests) [2004] 3 SCR 511” (2005) 6(8) ILB 22.

⁹⁰ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* (General Assembly Resolution 61/295, 2007).

⁹¹ Davies M, “Indigenous Struggles in Standard Setting: The United Nations Declaration on the Rights of Indigenous Peoples” (2008) 9 *Melb J Int’l L* 439.

⁹² Rangi Toki K, “What a Difference a ‘DRIP’ Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples” (2010) 16 *Auckland Law Review* 243.

⁹³ Barelli M, “The Role of Soft Law in the International Legal System: In the Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58 *ICLQ* 957; Morse B, “Indigenous Peoples and Water Rights: Does the United Nations’ Adoption of the Declaration on the Rights of Indigenous Peoples Help?” (2010) 20 *Water Law* 254.

⁹⁴ NAILSMA, *Katri Laif* (News for North Australian Indigenous Land and Sea Managers, Mary River Statement, Issue 5, December 2009).

⁹⁵ Australian Human Rights Commission, n 37. On the 20th anniversary of the *Mabo* decision, the Commonwealth Attorney General has pledged reforms, which are yet to be tabled in Parliament. The government proposes reforms to add flexibility to land-use agreements, legislate criteria for good faith agreements, reduce barriers to agreements where native title has been extinguished by parks and reserves and clarify the taxation of payments from native title agreements: Harrison D and Gordon M, “Gradual Changes to Native Title Law”, *Sydney Morning Herald* (6 June 2012).

measures to protect their water rights in the form of strategic water reserves.⁹⁶ These measures draw upon innovations put in place in New South Wales and Queensland.

New South Wales innovations include specific purpose licences

In New South Wales, where competition over water is high, there has been recognition that reliance on native title is not sufficient. Therefore statutory measures, developed with input from Indigenous representative organisations, have been introduced to grant specific Indigenous entitlements to water and public information packages developed.⁹⁷

New South Wales has progressively over the last 10 years introduced four types of special purpose licences for Indigenous interests:

- a) Aboriginal cultural access licences;
- b) Aboriginal commercial licences;
- c) Aboriginal community development licences; and
- d) Aboriginal environment licences.

The first, Aboriginal cultural access licences, are not to be used for commercial purposes. They are available only on an annual basis and may be renewed. It appears that they will be granted as a matter of course, on application. Capped at 10 ML per licence per year, they allow holders a small volume of water, and are limited to traditional and domestic uses. It is likely that these licences will only benefit communities not able to successfully prove the existence of native title as those who hold native title already have rights for traditional activities and domestic requirements under the *Native Title Act*. Cultural access licences do not appear to be popular and their shortcomings have been noted elsewhere.⁹⁸

Aboriginal commercial licences are the first of their kind in Australia and may be granted over surface or groundwater and used for any general commercial purpose, including aquaculture and manufacturing. As a rule, special purpose licences are generally not able to be traded, and are not accorded any specific priority under s 58 of the *Water Management Act*. However, the Aboriginal commercial licences can be traded on a temporary basis. As far as determined, two New South Wales water sharing plans provide for these licences and for similar Aboriginal community development licences: the 2003 Dorrigo WSP; and the 2004 Stuarts Point Aquifer WSP. Land atop the latter is owned by the Kempsey Local Aboriginal Land Council, which has previously grown native flowers on this site and has aspirations for further horticultural crops.⁹⁹ These two types of licences are the most readily available licences to Aboriginal communities.

Since 2011 Aboriginal environmental licences may be granted to supplementary water, ie high flows in regulated systems when dams overflow (formerly known as “off-allocation access”).¹⁰⁰ The first of these licences has been permitted under the Barwon-Darling Unregulated and Alluvial Water Sources WSP 2012.¹⁰¹ The WSP restricts the total volume taken under this licences to 500 ML per year. Detailed flow rules apply and water is only made available upon written application within the water year. This is an acknowledgement that historical development of water has deprived Aboriginal communities of flows to lagoons and wetlands of significant cultural significance.¹⁰²

A further New South Wales innovation is the Aboriginal Water Trust, set up to support those who want to participate in the commercial water market. Stringent investment guidelines apply, eg

⁹⁶ Nikolakis W, “Providing for Social Equity in Water Markets: The Case for an Indigenous Reserve in Northern Australia” in Grafton and Hussey, n 19.

⁹⁷ NSW Office of Water, n 31.

⁹⁸ Rural Solutions, n 33; Tan, n 10.

⁹⁹ Jackson et al, n 24. Jackson and Langton, n 35.

¹⁰⁰ *Water Management Act 2000* (NSW), s 70 allows the Minister wide powers to authorise taking of water by an Order subject to restrictions as to the take and the period.

¹⁰¹ *Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012* (NSW), s 50.

¹⁰² Maclean K et al, *Ngemba Water Values and Interests Ngemba Old Mission Billabong and Brewarrina Aboriginal Fish Traps (Baiaime’s Ngunthu)* (CSIRO, 2012) p 27.

applicants must have a business plan and be Aboriginal individuals or corporations, or partnerships with 51% Aboriginal ownership. Funding may only be used for matters such as water conservation, water-based infrastructure, acquisition of expert water skills and knowledge, and knowledge and capacity-building in Aboriginal water knowledge.

An excellent information manual was produced by the New South Wales Office of Water to inform Aboriginal communities about water reform but the initiatives described above are recent and some are yet to be implemented.¹⁰³ Whether they go some way towards addressing Indigenous peoples' desire to enjoy economic and environmental benefits associated with water remains to be seen.

Indigenous water reserves in Queensland

Indigenous water reserves have been implemented in northern Queensland, initially only available from rivers in Cape York. The reserves in the Mitchell and Gulf Water Resource Plans, finalised in 2008, were a direct result of a landmark multiparty negotiated agreement – the 1996 Cape York Agreement and the enactment more than a decade later of the *Cape York Peninsula Heritage Act 2007* (Qld). Despite owing their existence to political as opposed to water planning processes, and the conservative amounts allocated,¹⁰⁴ these reserves show that much more can be done to give life to the NWI objectives.

Water allocated through these reserves will take the form of water licences and will thus not be tradeable, unlike the majority of entitlements (called water allocations), which will result from water plans. As yet, there have been no applications made for water from the reserves.

The purpose of the reserves is to help Indigenous communities in the Cape York Peninsula Region area achieve their economic and social aspirations. However, there is little evidence that Indigenous people in the Gulf and Mitchell Catchments were engaged in the water planning process, therefore it is unclear whether the volumes allocated will meet their needs.¹⁰⁵

Declarations under the *Wild Rivers Act 2005* (Qld) may also provide for Indigenous water reserves. The legislation aims to preserve values of a river that has not been significantly altered from its natural state through declaring management areas subject to cap on resources, rules and limits on new development activities. Currently 12 river systems have declared wild river areas.¹⁰⁶ Outside of Cape York, the only other Indigenous reserve has been allocated in the *Cooper Creek Water Resource Plan 2011*, which was declared a wild river. A small volume of 200 ML for non-irrigation purposes has been set aside for helping local Indigenous people achieve their economic and social aspirations, but as yet there is no process for defining the purpose.

Wild rivers legislation is highly controversial: a number of Indigenous spokespersons oppose the declarations arguing that provisions regulating development within a riparian zone restrict efforts to build an economic base from native title; other Indigenous people have publicly supported wild rivers, particularly the boost a declaration may bring for local environmental management. The new Newman Government for Queensland, elected in April 2012, is likely to repeal or make substantial changes to the legislation.¹⁰⁷ Should there be a negotiated replacement for this legislation, a co-management framework has much potential.

¹⁰³ New South Wales Government, *Our Water Our Country: An information manual for Aboriginal people and communities about the water reform process* (ed 2.0, Department of Primary Industries, Office of Water, 2012).

¹⁰⁴ The *Mitchell Water Resources Plan 2008* provides an Indigenous reserve of 5,000 ML, and 1,000 ML is reserved in the *Gulf Water Resource Plan 2008*. The volumes of water available are small, in comparison to the general reserve that comprises 175,000 ML per annum in the Gulf and 55,000 ML per annum in the Mitchell.

¹⁰⁵ Cranney K and Tan PL, "Old Knowledge in Freshwater: Traditional Ecological Knowledge in the Mitchell Catchment" (2011) 14 AJNRLP 71.

¹⁰⁶ They are the Fraser, Gregory, Hinchinbrook, Morning Inlet, Settlement, and Staaten (which were the first group of rivers declared in 2007); the Archer, Stewart, and Lockhart (in 2009); Wenlock (in 2010); and Cooper Creek and Georgina/Diamantina Basins (in 2011).

¹⁰⁷ This was an election promise made by Mr Newman, see Williams B, "Miner Cape Alumina to Move on Steve Irwin's Land", *News.com.au* (23 April 2012).

CO-MANAGEMENT AS A POLICY RESPONSE

Co-management is a form of collaborative management approach to resource governance. In Australia and elsewhere it has been developed within protected area, coastal zone, and fisheries management systems.¹⁰⁸ Its broad aim is to redress the alienation of Indigenous rights by designing institutions that draw on Indigenous knowledge, initiative and expertise, and by offering mechanisms for Indigenous involvement in decision-making. At the same time it must accommodate rights held by non-Indigenous people and broader public interest in resource management.

In countries such as Canada, co-management structures have a strong legal basis – from recognition of common law rights through to statutory regimes obliging governments to engage Indigenous people on natural resource management.¹⁰⁹ In New Zealand, the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* (NZ) establishes a single co-management entity for that country's longest river.¹¹⁰ The settlement came after many generations of struggle by Maori people. The agreement should pave the way for similar agreements in other catchments, although Ruru argues that Maori rights to water are far from being conclusively defined or resolved under the *Resource Management Act 1991* (NZ).¹¹¹

Co-management has been viewed as an influential mechanism that focuses on *processes* that generate *new relationships* between Indigenous peoples and the structures of the general community. Jull and Craig describe the impact of the native title settlements that have brought co-management arrangements to Canada, Greenland and Alaska:

This psychological change from colonial rule of one people by another to a partnership of peoples is ultimately more important than any specific clauses in an agreement. After all, the essence of each agreement and its related instruments is that it provides legal security to a people for their basic rights, territories, and livelihoods; the means to make decisions for themselves in a range of important local matters; and mechanisms for conducting relations and resolving problems with the national majorities and senior government or governments of the country.¹¹²

Wyatt makes the important point that co-management as experienced in Canada has not redefined government power or recognised Indigenous title; rather it has “enshrined a decision-making relationship between First Nations and the rest of society”.¹¹³

Currently, co-management of water is less well accepted in Australia, albeit considerable effort has been devoted to establishing co-management regimes for national parks and fisheries.¹¹⁴ Experience in other sectors has shown that when co-management arrangements are implemented in tandem with recognition of Indigenous property rights, the likelihood of equity in resource management improves.¹¹⁵ For example, the Kowanyama community's efforts to cooperatively manage fisheries resources in the Mitchell River delta system of Cape York with the Queensland fisheries

¹⁰⁸ Hoverman et al, n 82; Farrier D and Adams M, “Indigenous-Government Co-Management of Protected Areas: Booderee National Park and the National Framework in Australia” in Lausche B, *Guidelines for Protected Area Legislation, Special Protected Area Type* (IUCN, 2011) pp 1-40; Hill R, “Towards Equity in Indigenous Co-Management of Protected Areas: Cultural Planning by Miriwung-Gajerrong People in the Kimberley Western Australia” (2011) 49(1) *Geographical Research* 72.

¹⁰⁹ Netheim G, Craig D and Meyers G, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Rights* (2002) pp 9-26; Durette M, “A Comparative Approach to Indigenous Legal Rights to Freshwater: Key Lessons for Australia from the United States, Canada and New Zealand” (2010) 27 EPLJ 296.

¹¹⁰ Aho L, “Indigenous Challenges to Enhance Freshwater Governance and Management in Aotearoa, New Zealand – the Waikato River Settlement” (2010) 10 *Water Law* 285.

¹¹¹ Ruru J, “Undefined and Unresolved: Exploring Indigenous Rights in Aotearoa New Zealand's Freshwater Legal Regime” (2010) 10 *Water Law* 236.

¹¹² Jull P and Craig D, “Reflections on Regional Agreements: Yesterday, Today and Tomorrow” (1997) 2 AIL Rep 475 at 490.

¹¹³ Wyatt S, “First Nations, Forest Lands, and ‘Aboriginal Forestry’ in Canada: From Exclusion to Co-management and Beyond” (2008) 38 *Canadian Journal of Forest Research* 171.

¹¹⁴ Hoverman et al, n 82.

¹¹⁵ Smyth D, “A Voice in All Places: Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone” (report to the Resource Assessment Commission Coastal Zone Inquiry, copy available from the National Library of Australia, 1993).

management agency have been sustained for over 20 years, representing one of the longest lasting Australian examples.¹¹⁶ A more recent marine example is the agreements regarding the Great Barrier Reef Marine Park Authority's provision for Traditional Use of Marine Protected Areas. Even though resource management is implemented in accordance with a traditional owner plan, the degree of Indigenous control is currently quite constrained, applying only to particular species.¹¹⁷

Formal arrangements for co-management now more frequently feature in ILUAs but little analysis has been carried out. One exception is that of Hill's examination of the planning between the Miriuwung-Gajerrong people and the state of Western Australia in Indigenous-owned protected areas in the Kimberley region.¹¹⁸ Hill found that Indigenous initiation and control of planning was a key factor in sharing equitable intercultural space for ongoing negotiation of co-management.

According to Ross and others, a common feature of many Australian co-management initiatives is that they enable Indigenous people to hold recognised (and partially funded) roles in conservation management complementary to their customary management responsibilities. It is this fundamental feature of co-management that should be explored for application to Australian systems of water management. It could take various forms, depending on the nature of the resource, the land tenure, size and capacity (including ecological and hydrological knowledge) of the Indigenous population and pattern of regional water use.

CONCLUSION

Partial recognition of Indigenous rights to land and water, and the ability to benefit from their commercial use, has brought about changes in the relationships between state resource agencies and Indigenous peoples¹¹⁹ but much remains to be done.¹²⁰ In the main, the evolution has been towards widening the scope for co-management initiatives, or power sharing between nation states and Indigenous minorities, and joint conservation projects. Lane¹²¹ argues that in post-settler states such as Australia, major political adjustments are required to extend beyond the initial recognition of Indigenous land rights to address the sharing of productive resources between Indigenous claimants and others.

However, progress towards water management and planning to recognise Indigenous land and water interests under the current water national policy is compromised in several ways. For example, it defeats the intention of the NWI to rely on native title and land rights legislation as the sole means of providing access to water for Indigenous people. Delays are occurring while jurisdictions wait for native title determinations or negotiations to be resolved before addressing the water requirements likely to satisfy native title rights. Competition among users is intense in regions such as New South Wales where water use is high.

Despite the existence of the NWI guidelines for plans to *immediately* include consideration of Indigenous water use, water plans rarely specifically address Indigenous requirements. The NWI envisages a situation in which water may need to be allocated to meet certain Indigenous requirements, including subsistence use, landscape features of value, and native title. Research elsewhere has pointed to the substantial conceptual and technical difficulties facing water resource

¹¹⁶ Larsen K, "Aboriginal Traditional Owner Aspirations for National Park Homelands in the Cape York Peninsula Heritage Act 2007" (Qld) in Smyth D and Ward G (eds), *Protecting Country: Indigenous Governance and Management of Protected Areas* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007).

¹¹⁷ Ross H, Grant C, Robinson CJ, Izurieta A, Smyth D and Ris P, "Co-management and Indigenous Protected Areas in Australia: Achievements and Ways Forward" (2009) 16 AJEM 242.

¹¹⁸ Hill, n 108.

¹¹⁹ Baker R, Davies J and Young E (eds), *Working on Country: Contemporary Indigenous Management of Australia's Lands and Coastal Regions* (Oxford University Press, 2001).

¹²⁰ Hill and Williams, n 2.

¹²¹ Lane M, "The Role of Planning in Achieving Indigenous Land Justice and Community Goals" (2006) 23 *Land Use Policy* 385.

managers seeking to calculate and allocate water to meet these needs. Overcoming the difficulties facing water assessments will require concerted effort from State water agencies, research organisations and Indigenous groups.

Except for a small number of north Queensland plans and the Tindal plan in the Northern Territory, water for Indigenous use is not “reserved”. Even where it is, in a number of remote undeveloped rivers in Queensland’s far north, it is not where it is needed. In the rest of that State, as with all other jurisdictions, water management actions are rarely designed to address Indigenous priorities.

Given political will, co-management of water resources will be easier to introduce in tropical north Australia where Indigenous people hold rights to substantial tracts of land, and where there is significantly less competition for water. The task is different in parts of south-eastern Australia and where any new allocations to Indigenous people will need to come from a buy-back of water by the Commonwealth to address over-allocation. Until this is achieved, it is here predicted that only token amounts of water will be allocated to Indigenous use and the environmental costs of water scarcity will continue to impair Indigenous rights to water. Nonetheless, even in such constrained situations there is still some room for Indigenous people to participate in the management of environmental water, particularly when it is managed with Indigenous priorities in mind. The way in which co-management institutional arrangements could accommodate differences in northern Australia and the developed south needs to be further explored.

Across Australia Indigenous groups assert their rights to create inclusive processes and collaborative relationships. The neglect of Indigenous peoples’ economic aspirations and livelihood opportunities under the present model of native title is of particular concern given the considerable commercial value of water under newly established trading systems. Governments have allocated water entitlements with little regard or knowledge of Indigenous interests and many Indigenous people believe that contemporary water resource management is amplifying inequities.

Australian water regimes are being challenged to address native title rights and interests held by Indigenous peoples in a similar fashion to the challenges posed to marine and coastal zone management in the Northern Territory over the past 20 years. The trend in the coastal space is towards co-management of shared marine resources that addresses Indigenous claims and expectations for economic prosperity and cultural wellbeing, whilst accommodating other existing interests. Vigorous legal intervention has now clarified the extent of Indigenous sea rights and overturned northern Australian fisheries management. Many of the same strategies are being employed in the water management arena, although successful litigation is yet to disrupt water law, policy and practice. From the international arena, the Declaration on the Rights of Indigenous Peoples provides a strong normative basis for policy action for Australia and other countries facing the same challenges.

The authors suggest that lessons from overseas experience in co-management could provide a stronger basis for Indigenous participation in water management, and opportunities for the articulation and affirmation of indigenous values, beliefs and aspirations. In light of the substantial institutional barriers described above, the authors call for close investigation of co-management models to provide a policy foundation for collaborative and equitable water resource plans.