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Summary

Indigenous-specific water entitlements are currently estimated at less than one hundredth of 1% of Australian water allocations. This minute figure contrasts starkly with the extent of Indigenous land ownership that is currently in excess of one-fifth of Australia's land mass. Indigenous Australians see clear connections between the past and present in accounting for this skewed distribution of entitlements, and their testimonies indicate an awareness of the enduring effect of historical injustices in the development of Australia water law and policy. This chapter applies concepts derived from political theory to examine this significant case of historical injustice. It argues that there is a poor appreciation within the water sector, and among wider society, of the importance of historical events and structural processes in explaining today's pattern of access to water. By revealing the dynamics of water allocation over time through the trajectory of water law and policy, the chapter shows how injustices were produced and reproduced during the colonial and state administration eras and the ramifications for achieving justice in the recent and ongoing neoliberal reform era. Indigenous peoples' rights and interests in water have been systematically and persistently marginalised because reparative or restorative mechanisms have not been established in any of the processes that have made and re-made water law and policy over the course of Australian history.

Introduction

Indigenous demands for justice present far-reaching challenges for a liberal democracy such as Australia (Waldron 1992; Ivison *et al*. 2000; Gibbs 2009). As a former colonial country that forcibly dispossessed the Indigenous population, the social and political relationships between Indigenous Australians and other citizens are matters of immense significance, as are the ways in which these relationships affect access to land and water and natural resource management more generally. The historical record of colonial events matters not only in accounting for the quality and strength of these intercultural relationships, but also in shaping them as they unfold into the future.

As seen in appeals for acknowledgement and redress and acts of symbolic remembrance, such as the apology to the Stolen Generations, history is present in Indigenous perspectives on the processes and forces that have structured their quality of life, identity, political standing and future prospects as distinct peoples. In other settler countries, connections are also made between past and present policies and injustice, especially when Indigenous representatives 'try to use the past to critique present policy and conditions' (Jung 2009: 1; see also Gibbs 2009). So it should be of little surprise that in their advocacy for water rights Indigenous Australians are making such connections and drawing attention to the 'presence of an unsettled past' (Lu 2011: 263) in the 'unfinished business' of water policy.

Water has been commodified over the past two decades through a series of reforms that entailed the separation of land and water titles, implemented in combination with measures to stimulate water trading, including pricing. In addition, water laws and planning processes were reformed to reframe the environment as a water 'user', legally entitled to water allocations as an equal with other consumers. Australia is now regarded a world leader in water management for having created the world's biggest water market (Nikolakis *et al*. 2013), established a legal requirement to provide environmental flows and set a sustainable diversion limit on water use in the Murray–Darling Basin (MDB). Economic benefits accruing to buyers and sellers of water rights, almost all of whom are irrigators, were in 2011 estimated to be worth A$2.4 billion in annual turnover of trade (Nikolakis and Grafton 2014).

Since reforms began in earnest in the mid-1990s, there have been many appraisals of the condition of Australian water resources and their development trajectory. The most recent accounts have brought Indigenous rights and interests within their scope (Jackson *et al*. 2012), a feature that can be attributed to their inclusion in national policy: the National Water Initiative (NWI) in 2004. The National Water Commission's 2011 biennial assessment of progress on water reform is exemplary. Having acknowledged the improvement in Indigenous consultation and participation in preparing water plans, the Commission concluded that

> *… the full intent of the NWI parties' commitments on Indigenous interests in water has not yet been achieved. Many water plans do not consider Indigenous cultural values and economic development, leaving the cultural and economic expectations of Indigenous Australians as an unmet demand on the water system. (NWC 2011: 9; emphasis added)*

The review offers an understated appraisal of a failure of intent, with no acknowledgement that Indigenous Australians could have unique and historical claims to natural resources. Economic framing such as this presents an Indigenous water subject or citizen as a 'new' user, rendering Indigenous claims for water as an afterthought in the bigger Australian story of re-allocation. In that process, in which the contest is largely between non-Indigenous farmers and the environment, distribution based on need holds currency as a justice principle (see Lukasiewicz *et al*. 2013), but in the NWC review, Indigenous Australians have 'expectations', not needs Moreover, framing Indigenous claims in the market logic of demand and supply puts the onus on Indigenous communities to demonstrate an economic application for water to which they may lay claim – a capacity that, because of the consequences of colonisation, is greatly constrained by access to financial capital, let alone land.

Within the neoliberal formulation of this problem, Indigenous people are conceived as 'late entrants' in what has been described as a 'mature' water economy (Smith 1998). The concept of 'maturity' in this context refers to the stage at which water resources are fully developed (Smith 1998): one reached in parts of southern Australia in the 1990s. This metaphor of growth and development of the water economy naturalises the exclusion of pre-existing Indigenous custom and rights to water from the modes of distribution that have presided over the creation and expansion of this economy, precisely the processes that have structured the accumulation of water rights.

However, the water economy did not mature naturally. Underlying and unjust socio-historical processes established during the colonial period of Australian settlement were entrenched, rather than redressed, during the 'modern' phase of water reform that commenced in the 1990s. Land and water ownership were decoupled, with significant implications for the restitution of land to Indigenous Australians via claims processes or direct acquisition. Although it heralded major changes in access to, and control of, water, this restructuring of water governance took no account of Indigenous needs and aspirations for a full 10 years of institutional change. When Indigenous interests were taken into account in water policy in the second period of reform around 2004, they were narrowly prescribed in an ahistorical and weak attempt to accommodate native title (Jackson and Morrison 2007; Tan and Jackson 2013).

Statements like those made by the NWC reflect an over-riding concern with economic efficiency and competitiveness (Hussey and Dovers 2006). Through this lens, wants or needs that manifest as 'unmet demand' do not constitute a water justice problem: one that is reflected in, for example, the skewed distribution of water resources. Such statements make no reference to special claims founded on historical entitlement or on aspirations for reparation or redistribution, nor do they question how present water users came to acquire their water use rights. Indeed, they are made intelligible by bracketing the historical and geographical factors that shaped today's system of entitlements and its patterns of access (cf. Dempsey *et al*. 2011).

With southern Australia's water resources fully allocated to water users with a history of access and entitlement (deriving from land titles), Indigenous communities in those regions, by virtue of their relative landless condition, are water poor, prompting Sheehan and Small (2007: 1) to ask 'Is a new form of Aboriginal dispossession now subtly occurring?' Preliminary estimates of Indigenous access lend support to this assertion. Jackson and Langton (2012) compared Indigenous land ownership and water entitlements, demonstrating the extent of the inequity: Indigenous Australians own more than 20% of the country's land mass,[1] while Indigenous-specific water entitlements are at present estimated at <0.01% of Australian water diversions. Based on figures relating to the MDB,[2] Darren Perry (*pers. comm*.) found a similarly minute proportion of 0.08% of the Basin's Sustainable Diversion Limit in the hands of Indigenous organisations.

Re-allocation measures (such as a water trust facility, buy-backs or special purpose licences) would be required to remove or reduce inequity in the distribution of water access

1 The estimate of land ownership is drawn from work by Altman and Markham for a parliamentary submission that is cited in Altman and Jackson (2014). Altman and Jackson state that, as of 2014, just over 20% of the land mass is held under exclusive possession Native Title or land rights regimes, while non-exclusive Native Title (shared) has been determined over a further 10%. There are still over 300 Native Title claims to be heard indicating that current figures will grow.

2 The Indigenous people of the MDB (who comprise approximately 3.4% of the Basin's population) currently hold <0.2% of land (Arthur 2010).

and, although these have been recommended at key points during the past fifteen years (see McAvoy 2006), they have not eventuated on any meaningful scale. Indigenous people remain greatly constrained in their ability to shape the use and management of water, and negligible attention has been given to the unjust social arrangements that continue to generate benefits for non-Indigenous water users. This failure to understand and act on the 'intertwined and co-implicated' (Balint *et al*. 2014) character of past and present water policy reproduces injustice in water access.

Following this introduction, I first provide a brief description of Indigenous perspectives on water justice (or more precisely, injustice), arguing that the positions advanced emphasise historical reflection, recognition and reparation. I then turn to reveal the dynamics of water allocation over time through the trajectory of water policy, showing how injustices were produced and reproduced during the colonial era and the ramifications for achieving justice in the recent and ongoing reform era. The next section discusses several theoretical concepts and ideas that can be usefully applied to the analysis of these forms of water injustice before a final concluding section.

Before turning to Indigenous perspectives, it is necessary to define key terms. Water access is the object of justice in this chapter, where access is defined as 'the ability to benefit from things – including material objects, persons, institutions, and symbols' (Ribot and Peluso 2003: 153). The term is appropriate because it encompasses matters that cannot neatly be contained within the justice categories of distribution or procedure. Property is one set of access relationships, but there are others. 'By focusing on ability, rather than rights as in property theory, this formulation brings attention to a wider range of social relationships that can constrain or enable people to benefit from resources without focusing on property relations alone' (Ribot and Peluso 2003: 154). In this formulation, structural mechanisms are brought into play as a mediating constraint and, as I will argue below, structural-based political theories can help us to see the dynamic nature of historical injustice.

I rely on Meyer and Roser (2010) for a definition of historical injustice. It arises in a situation where 'earlier generations of one community wronged earlier generations of another community and today's generations of both communities are now looking for an adequate way of responding to this historical fact' (Meyer and Roser 2010: 230). Historical injustice calls for kinds of justice that are different to distributional or procedural justice and draw on principles of need, fairness, equality, and so on. Such types of justice respond to a particular historical injustice and might include those that are reparative and/or restorative. Reparative justice, for example, is directed towards 'putting right a past wrong' and can include a range of forms of reparation including apology, compensation, restitution, and guarantees of non-repetition (Gibbs 2009: 45). Reparative justice is largely historical in focus, whereas restorative justice is usually applied in cases where the identities of the 'offender' and 'victim' are known and both are alive. Gibbs argues that these related types of justice are both suited to settler society contexts.

Indigenous perspectives and ideas on what is right or just in water access

Indigenous Australians are seeking to establish the legitimacy of their water-related values, ethics and practices and to define, increase or influence their access to water in numerous water governance institutions and negotiating arenas (Weir 2009; Tan and Jackson 2013). Notwithstanding the active role recently played by Indigenous representatives in water

forums, as a society we have a poor appreciation of their ideas on what is right or just in water governance. Contemporary Indigenous aspirations for the return of traditional lands, preservation of culture and the right to self-governance are better understood as key concerns for Australian NRM, but what would a just level of access to water look like and how far are we from developing a conception of justice that can be shared across cultures?

All human societies have norms about the kind and amount of access to water that their members should have. We have only started to explore these matters in Australia (see Jackson and Altman 2009; Weir 2009; Jackson and Barber 2013; Lukasiewicz *et al*. 2013; Nikolakis and Grafton 2014). In work in the Pilbara conducted by Barber and Jackson (2011), free access to water was, for some Indigenous respondents, a primary principle of access, based on the widespread tradition of sharing fresh water. Additional perspectives offered in that study indicate that there is an obligation for the Indigenous resource owners to provide the necessities of life for those living in the area. In a north Australian study, Nikolakis *et al*. (2013) found that more than 50% of the Indigenous people they surveyed considered water management regimes to be inequitable and 73% believed that their rights and interests are not reflected in water management policies.

Weir (2009, 2011) has closely examined Indigenous relationships with water in the MDB, as well as associated norms and ethics of responsibility and care. Weir argues that ecological loss and decline represents a form of dispossession because they disrupt, and in places sever, Indigenous relationships with place. This and much of the work on Indigenous cosmology, as well as environmental governance, reminds us that Indigenous notions of justice encompass the field of non-human life and that restoration of relationships under Indigenous institutions are likely to be sought by Indigenous peoples as vigorously as is the restitution of property.

The complexities and any variations in Indigenous notions of water resource ownership and access, and attendant rights and responsibilities, need to be more fully explored in future work. From what has been documented to date, there appears to be a consistently held perspective that emphasises an ongoing sense of Indigenous custodial responsibility and ownership, despite more than two centuries of laws that have ignored or actively attempted to remove this sense of entitlement. Moreover, Indigenous Australians see clear connections between the past and present historical injustice in the skewed distribution of entitlements, and their testimonies suggest an awareness of its endurance, as well as limiting effect on the conditions of Indigenous life.

Submissions from Indigenous organisations to the 2014 review of the *Water Act 2007*, for instance, reveal a perception that the current state of water governance is grossly unjust. For example, the submission of the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) states:

> *Our First Nations remain, with minor exceptions, locked out of meaningful participation in water planning and management including beneficial ownership of water entitlements'. (https://www.environment.gov.au/water/legislation/water-act-review)*

In the same review, the Northern Basin Aboriginal Nations (NBAN) explicitly refer to unjust patterns of access based on previous appropriations and the historic accumulation of water rights by non-Indigenous land-owners:

> *Aboriginal people were removed from their lands, including lands adjacent to rivers and streams and access denied ... Under the old English law used in Australia (riparian*

> *rights), unless you owned land adjacent to, or land which had access to water such as groundwater, or via an irrigation scheme, you were unable to hold a water licence.*
>
> *When the COAG reforms were implemented in each state, unless a person held a prior water licence or entitlement, they were excluded from owning a new licence under the new water management regime unless they purchased it.*
>
> *Accordingly, Aboriginal people were largely excluded from owning the new form of water entitlements, or shares and accessing their water dependent cultural places. Aboriginal people should have an equal right to participate in water management and use and should be allocated shares accordingly.*

NBAN calls for the Basin Plan and Water Resource Plans to: 'Facilitate Aboriginal Peoples' ownership of a fair and equitable proportion of commercial and environmental water licences' and propose several measures that would, in their estimation, remedy the historical injustice.

Water governance and the long shadow of colonialism

Water policy is dominated by the view that questions of access and distribution are simply technical problems to be resolved by economic models and more efficient hydrological engineering. It fails to appreciate that 'water justice is embedded and specific to historical and socio-cultural contexts' (Zwarteveen and Boelens 2014: 143). This section concentrates more closely on historical events and provides a more detailed, albeit still very brief, account that, like NBAN's, connects our current system of water governance to the policies, laws and norms that resulted in the appropriation of Indigenous land and water rights and repression of Indigenous water cultures. For the sake of brevity, this review is organised into three phases: (i) the riparian phase; (ii) the state administration phase; and (iii) the neoliberal phase. Indigenous systems of water governance of course pre-date and co-exist with this periodisation, but space constraints prevent any explication.

The riparian phase

Australian colonies adhered to common law riparianism as the basis of their water law for at least a century (Harris 2007). The riparian doctrine 'dictated that only individuals owning land that came in contact with a water source could acquire the right to make use of its water' (Harris 2007: 121). Aboriginal occupation of Australia was not originally recognised by colonial law and so, as landless people, Indigenous communities were not entitled to exercise common law riparian rights. White riparian landowners enjoyed the security of 'reasonable use' of water, as well as substantial government subsidies to build farming and grazing economies (Connell 2007).

The state administration phase

Over time, riparianism came to be viewed as an inappropriate institutional basis of water. In the mid-1880s, the Victorian Minister for Water Resources, Alfred Deakin, presided over a Royal Commission that recommended legislation to abolish riparianism, nationalise water by transferring rights in water to the Crown and establish a state system of licenced private diversions (Harris 2007). Indigenous property rights or interests in either land or waters were not referred to in the Royal Commission's background materials, findings, transcripts of hearings or in its recommendations for a restructure of water rights. Indigenous need for

water was being articulated at this time, however. A need for water was implicit in Indigenous political campaigns waged during this era for land for family farms in Victoria and NSW (Goodall 1996). It was also recognised to some extent in early government actions to protect or reserve waterbodies for Indigenous use to mitigate vulnerability to the environmental consequences of agricultural expansion and intensification.

Deakin's reforms were to alter the use, management and socio- political organisation of Victoria's water cycle for the benefit for the white settler and similar changes were to have a corresponding impact in New South Wales and other states. Legislation and civil law interpretation placed the use of water in the public domain under a social logic of allocation (Hussey and Dovers 2006) so that the government would have jurisdiction over the use of water. Each state resolutely maintained control of its water resources beyond the era of Federation through systems that licenced private diversions. Licensees came to regard these entitlements 'almost as rights in perpetuity' (Tan 2002). By virtue of the fact that Aboriginal people in those states had been dispossessed of their land, they had no opportunity to obtain water licences (McAvoy 2006). In other states, too, water legislation did not provide rights to water for Indigenous groups (e.g. Western Australia's *Rights in Water and Irrigation Act 1914* (Bartlett 1997)).

The neoliberal phase

This phase took hold in the 1990s when the first tranche of Council of Australian Government (COAG) reforms created a tradeable water market founded upon the existence of property rights in water and placed limits on diversions in the MDB (the Cap; see Jackson 2011). Further changes were made when Australian governments agreed to the NWI in 2004. Lukasiewicz *et al*. (2013) state that 'The NWI has a dual purpose: to establish sustainable levels of water extraction and to protect the rights of existing users' (p. 1316). Changes to the allocation regime were subject to significant advocacy by the agricultural lobby in the formulation stages (Hussey and Dovers 2006), resulting in a 'windfall gain of perpetual water rights' (Howard 2010: 361). This latter point is confirmed by McAvoy's NSW analysis:

> *Upon the de-coupling of water rights from the land it was those people who had water licenses under the Water Act 1912 who were able to then convert such into water access licences under the Water Management Act 2000. The result was that Aboriginal people were also dispossessed of their water rights. (McAvoy 2006: 101)*

Looking at the initial period of this phase brings to light a crucial historical coincidence in the timing of several events: the COAG reforms, the Cap, the incomplete processes of land restitution under statutory land claims processes and Native Title law. The numerous implications of this coincidence were not considered by the COAG leaders:

(i) Land rights legislation had been instituted as a restoration measure in most states in the 1970s and 1980s. For example, the *Aboriginal Land Rights Act 1983 (NSW)*, which recognised that Aboriginal people had been dispossessed (McAvoy 2006), had come into effect during emerging awareness of limits to water use. Hundreds of claims were lodged in the 1980s and many were still unresolved in the 1990s (Behrendt 2011). Where would the Cap and the separation of land and water titles leave those groups with unresolved claims? Would future land transfers be accompanied with water entitlements?

(ii) The *Native Title Act 1993* defined native title to include rights to water for customary purposes (Tan and Jackson 2013), yet the COAG reforms 'made no reference to native title or any other form of Aboriginal water rights' (McAvoy 2006: 93). By this time, water had become a scarce and costly resource in many regions. How would the COAG reforms, especially the pricing of water and water trading, affect those groups who were to lodge claims and prove the existence of native title, particularly their capacity to pursue livelihood opportunities reliant on water? Buying water on the market is not a trivial matter, with the high cost of water licences and the fact that one-third of the Basin is subject to native title application (Arthur 2010).

(iii) The *Native Title Act 1993* established another avenue to land restitution, via purchases by the Indigenous Land Corporation. It has become a principal route for acquiring larger parcels of rural land in the country's south and east (Arthur 2010). Would those people acquiring land under this mechanism continue to gain access to water as a result of the reforms?

(iv) The potential for conflict and uncertainty as a result of interactions between western and customary laws (see Altman 2004; Jackson and Altman 2009). The need for well-defined property rights underpinned these reforms and security was provided for environmental water of a level at least the same as water access entitlements for consumptive use (Hussey and Dovers 2006), but no similar thought appears to have been given to security of Indigenous uses.

Indigenous representatives were prevented from influencing the rules that govern the distribution of access to water. Although they had a substantial stake in these decisions, as far as I know, there was no dialogue or negotiation with Indigenous representatives at the national level until well after the NWI when, in 2010, an Indigenous advisory group was established.

The states implemented the reforms by changing their water legislation. The NSW Government for example passed the *Water Management Act 2000,* which, *inter alia*, decoupled water from land ownership and created a semi-regulated water market (McAvoy 2006). Although at that time the government did consider some of the above issues, McAvoy (2006) argues that it did so unsatisfactorily, refusing, for example, to act on calls from Aboriginal organisations to establish an Aboriginal Water Trust funded by a levy on water licences to buy water for Aboriginal benefit. In the Northern Territory also, amendments to water legislation took no account of the issues listed above and did not include any special measures to guarantee Indigenous access to water, despite the fact that Indigenous people own half of the land base. In that jurisdiction, and others, there is a real risk that the pattern of injustice evident in south-east Australia may be perpetuated as the water governance regime is rolled out (Jackson and Altman 2009; Nikolakis and Grafton 2014).

It was not until 2004 that Australian water policy recognised Indigenous rights and interests. The NWI contains several clauses designed to improve Indigenous access, but these are discretionary and, as noted by Tan and Jackson (2013), rely on interpretations of native title that constrain the scope of this newly recognised property right. Moreover, they argue that 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, and that outcomes generally preclude economic development (Tan and Jackson 2013).

Theories of justice

I have argued above that there is a poor appreciation within the water sector and among wider society and of the importance of history, of the conditions underlying poor distributions, and for the need to accept responsibility for these and the other legacies from our colonial past that shape today's pattern of access to water (such as loss of land, the impact of unemployment and low education rates on social and financial capital). This lacuna is not restricted to the field of natural resource management. Indeed, it is a feature of justice studies as well. Ivison *et al*. (2000) state that 'The relevance of the history of relations between indigenous and non-indigenous peoples is something contemporary theories of justice have been slow to recognise' (p. 9). The passage of time between the original act of wrongdoing and the moment in which a remedy is sought raises particular challenges for doing justice in these contexts (Gibbs 2009).

How should we think about historical responsibility for colonial injustices and possible remedies and what do justice theories have to offer? Having thought about Maori rights in New Zealand, Jeremy Waldron developed a framework for tackling the question: 'What are we to do now about what has happened in the past' (Waldron 1992: 140)? Waldron's dynamic model of historical injustice:

> *assumes that the importance of the injustice has to do not only with the immediate impact of the events themselves (someone suffered; someone died; something was taken), but also with its connection to other events because she suffered she lost this opportunity to educate her children … this land was not only taken from us, but never given back). Individuals live whole lives, not just series of momentary events; and acts of injustice not only hurt but blight those lives. (Waldron 1992: 146)*

In order to bring the connections between linked events to the fore, we need to attend to the structural basis of society. Structure is a concept that political theorists have analysed in studies of justice. Such studies focus on the structures and processes embodied in 'institutions, discourses, and practices' (Lu 2011: 267) that produce distributive patterns as well as the patterns themselves (Young 2006). According to Young, 'structural injustice exists when social processes put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising their capacities' (Young 2006: 114). They are based on morally unacceptable values or belief systems (Lu 2011), such as colonialism, which in Australia and elsewhere relied on a premise of entitlement to conquer and subjugate and was buttressed by ideas of racial superiority.

In Australia, the consequences of colonisation – dispossession, subjugation and assimilation – are clearly evident in the differences between Indigenous and non-Indigenous communities in many measures of socio-economic standing, health and wellbeing (Balint *et al*. 2014). As the above shows, they have had and continue to have a discernible effect on the ability of Indigenous people to govern water, including rates of water ownership and capacities to benefit from its economic use and to participate in democratic processes of management.

A structural account of injustice acknowledges the role of institutional rules and accepted norms, focusing attention on those who 'participate in rules, institutions and social practices at various levels that enable, encourage and produce 'widespread and repeated' violations' (Lu 2011: 115). The restructuring that institutionalised new water access rules in the late 18th century and again 100 years later represent arenas in which injustice or justice could be enacted.

Waldron (1992) argues that a just course of action is one in which we: (i) act to alter the consequences that flow from historical injustice; and (ii) prevent the repetition or perpetuation of such. By this reasoning, the COAG leaders took an unjust course of action when they failed to consider and tackle the effect on water access of the alienation of Indigenous property rights in land and made no attempt to pursue strategies to prevent a continuation of historic injustices sustained through previous restructuring of Australian water law. South Africa's water allocation reform program, implemented after the demise of the apartheid regime, presents a model to which they might have turned for insight into restorative or reparative measures. Reformers in that case created a category of user referred to as Historically Disadvantaged Individuals and set targets for reallocation in order to remedy historical inequalities stemming from racial exclusion (Movik 2014).

An additional consideration is the failure to negotiate with Indigenous people as a compounding act that further strained relations between Indigenous and non-Indigenous Australians and re-enacted the exclusion of Indigenous voices that had occurred during previous acts of colonial resource appropriation (Altman 2004). This relational quality of justice is a dimension that has commanded the attention of some theorists (e.g. Gibbs 2009), but is beyond the scope of this chapter.

Conclusion

Colonial injustice expropriated land and water and rendered Indigenous people incapable of recognition as members of the public or as citizens with needs for water, or any entitlement to benefit from water use. The pattern of exclusion from water allocations imprinted by riparianism was entrenched in subsequent water allocations as rights to water were nationalised and then handed on from landholder to landholder under a state-administered allocation system (Jackson 2011). Injustice endured in water policy beyond the initial events of the colonial era, shaping the conditions of life experienced during the 20th century by both the dominant non-Indigenous and Indigenous societies to the detriment of the latter (Balint *et al*. 2014).

During the land rights and Native Title era state and Australian governments instituted statutory processes to restore some lands to their traditional owners and to recognise customary systems of law, which include rights to water. When water rights were detached from land titles, the intent of these acts of restitution was undermined. The effect of narrow definitions of customary rights to water in the latest water law and policy serve as a barrier to Indigenous access, alongside others (e.g. 1998 amendments to the *Native Title Act*) (Tan and Jackson 2013).

Indigenous Australians rights and interests in water have been systematically and persistently marginalised because reparative mechanisms have not been established in any of the processes that have made and re-made water law and policy over the course of Australian history. In so far as the recent water reform agenda, ongoing governance processes, such as the review of the *Water Act*, and water policy discourse ignore these historical and structural issues, they will continue to conceal the violence enacted throughout the expropriation of Indigenous lands and creation of Australia's

agricultural systems, as well as the injustice evident in today's pattern of water access distribution.

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