

# ***“Indigenous Peoples’ Rights to Water: Environmental Flows, Cultural Values and Tradeable Property Rights in Australia”***

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## **Preliminary Discussion Paper**

Indigenous Peoples’ Legal Water Forum

University of Otago Stadium Centre Wellington New Zealand

27<sup>th</sup> July 2009

*‘The capacity of Indigenous peoples to access freshwater is currently juxtaposed against trends contributing to water scarcity such as issues of availability of freshwater, access and the forces and impacts of climate change. In developing this theme, this paper aims to examine two converging trends that find a nexus in market environmentalism. The physical constraints and impacts to freshwater such as climate change, and the economic, policy and legal changes governing water; providing a broader scope of the trends in water law and the Australian law pertaining to Indigenous rights to water.’*

### **Climate Change and Environmental Trends**

The predicted impacts of anthropogenic global warming are fostering a re-evaluation of many areas pertaining to the economy, and environmental and natural resource law and governance. As issues of access, use and scarcity are exacerbated by climate change, freshwater will continue to figure prominently in this re-assessment. IPCC reports and internal modelling by groups such as CSIRO reveal that impacts are already being felt in areas concerning water supply and extreme weather events. As it now appears inevitable that some level of anthropogenic warming will occur, in Australia, climate change looms large in all areas of environment and water management. Furthermore, the necessity for mitigation at a federal government level, as well as a growing emphasis on local adaptation measures, is precipitating to major changes in the legal, regulatory risk and policy landscape.

Although it may seem a truism, the potential for schisms in political and cultural groups that may develop around issues such as ‘water security’ should not be underestimated. While typically particular vulnerability of Indigenous peoples to climate change has been couched in terms of loss of lands and waters through events, such as sea-level rise, the loss of customary lifestyles where water availability becomes limited or where excessive flooding occurs also deserves consideration.<sup>1</sup> For example, considering the particular vulnerability of traditional lifestyles, the increased flooding in northern New South Wales northern rivers highlights the consequences of, and the need for, litigation where governments fail to act to mitigate or to provide adequate adaptation strategies and mechanisms.

Climate change will continue add a layer of complexity to major structural and legal reforms in the water sector that have occurred in Australia over the last 20 years or so.

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<sup>1</sup> See for example, Owen Cordes-Holland, ‘The Sinking of the Strait: Implications of Climate Change for Torres Strait Islanders’ Human Rights Protected by the ICCPR’ (2008) 9(2) *Melbourne Journal of International Law* 405.

In particular areas of water law reform, the changes have been far reaching, notably in South-eastern rural Australia, however the impetus of research and reform is shifting to focus attention on northern regions and Australian cities.

### **Water Quality**

Another more persistent problem for Australia is the management of water quality particularly, in regards to non-point source pollution such as agricultural pesticide or other effluent run-off. In Australia, there have been long standing attempts to address these problems in rural areas principally through Integrated Catchment Management (ICM), with the *Resource Management Act* 1989 from New Zealand being an early innovator. However Australia is yet to achieve the more pervasive, formalised inclusion of indigenous participation in water catchment management that is provided for under the *Resource Management Act* 1989 (NZ). Although, in South-eastern Australia several jurisdictions have adopted catchment management authority structures as important entities in the emerging forms of water resource planning and market-based mechanisms, such as water trading. Nonetheless, there remains a wider question about whether there are cultural rights that could encompass legally enforceable protections for example for ‘high quality’ water.

Issues of water quality and changing patterns of water use and value for Indigenous water management have pertinence for not only rural areas. Water management in urban areas is undergoing major challenges in terms of greater efficiencies – storm water collection; recycling and emerging commercial uses such as sewer-mining. The means in which Indigenous people might be engaged in these new forms of social and economic ordering of water resource use needs to be signalled. Moreover, the need to consider the possibilities of such engagement become more pressing when in Australia, there are major shifts occurring in how water is captured, allocated and distributed between urban and rural areas. Water security policies in all major capital cities have seen projects designed to harvest water for cities from further and further a field. Such far flung water gathering impinges on the water available in rural areas, which in themselves may be suffering either water shortages or water quality degradation, calling into issue the extent to which we might need to reconfigure the understanding of how rural areas provide ‘ecosystem services’ such as water supply for city areas.

### **Trends in Water Law**

If we turn to consider Australian rural areas more directly, it is clear that water law is undergoing widespread ‘reform’. Such reform has initiated pervasive structural change with many implications for indigenous peoples’ cultural and economic sustainability. In this regard, water law reform needs to be understood in the context of the longstanding parameters of water resource regulation within Australian law. To that end, a much abbreviated discussion is provided of the central features of Australian water law before considering the drivers for change over the last two decades where there has been a substantial transformation to water law in all jurisdictions. These drivers are both of a physical/ environmental character such as environmental degradation and climate change, as well as changing policy and governance practices such as the introduction of water trade – all of which have specific ramifications for Indigenous peoples’ rights to water.

## Crown Vesting of Water Resources

Water rights, under the settler legal system in Australia, are predominately allocated through statutory systems of rural and urban Australia.

### i. Water vested in the Crown

In Australia, principally water as a resource is vested in the Crown, which in most Australian jurisdictions first occurred under water resource legislation in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. The vesting of the resource largely abrogated the existing common law regulation. The need for the colonies (and later the States) to directly control water in the colony through statutory schemes has been attributed to the dry characteristic of the continent where competition between users was likely. It was also part of a larger impetus to use water as an 'instrument' in advancing the colonial settlement of the interior of Australia. This settlement typically occurred in the context of the displacement of Indigenous peoples from their traditional country.

Presumably, although not directly addressed by courts to date for water resources per se, such vesting is a concomitant of the radical title of the Crown and represents the 'bare constitutional power' to deal with the resource.<sup>2</sup> In this manner Australian water law differs quite significantly to its US counterpart with 'first appropriation doctrine' prevalent in western water laws. However New Zealand follows the Australian model more closely.

The parameters of 'vesting' in the Crown such as reservations for public purposes and national parks in a native title situation, were considered in *Ward v Western Australia*<sup>3</sup> where the High Court found that vesting created a statutory trust that transferred the fee simple, and that vesting of land in a local shire and statutory authorities for purposes including water projects, extinguished native title. Bartlett argues that such an interpretation of the effect of reservation is inconsistent with previous law on the issue, in particular, the reasoning of Brennan J in *Mabo [No 2]*.<sup>4</sup> Nonetheless, post-*Ward*, the prevailing law is that inconsistent land uses consequent upon vesting where authorised by legislation will extinguish.<sup>5</sup> The operation of the past acts regime of the *Native Title Act 1993* (Cth) clearly also needs to be considered. Crown vesting is important also, as often it will determine the nature of the Crown interest in the banks and beds of rivers, streams, lakes etc. The exact legal effects of a statutory regime dealing with water and indigenous rights needs to take into account the nature of the initial vesting,<sup>6</sup> and the extent to which public rights of access may be preserved, even before turning to consider the particular character of private rights to water.

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<sup>2</sup> i.e. to be distinguished from strictly 'beneficial' ownership.

<sup>3</sup> (2002) 191 ALR 1 at [219].

<sup>4</sup> See R Bartlett, *Native Title In Australia* 2<sup>nd</sup> ed. 2004, pp. 368 -373.

<sup>5</sup> *Ibid* at 373.

<sup>6</sup> See s 212 NTA - Confirmation of ownership of natural resources etc. (1) Subject to this Act, a law of the Commonwealth, a State or Territory may confirm: (a) any existing ownership of natural resources by the Crown in right of the Commonwealth, the State or the Territory, as the case may be; or (b) any existing right of the Crown in that capacity to use, control and regulate the flow of water; or (c) that any existing fishing access rights prevail over any other public or private fishing rights. Confirmation of access to beaches etc. (2) A law of the Commonwealth, a State or a Territory may confirm any existing public access to and enjoyment of: (a) waterways; or (b) beds and banks or foreshores of waterways; or (c) coastal waters; or (d) beaches; or (da) stock-routes; or

As a consequence of the vesting of water in the Crown, private rights to water allocations for irrigation are predominately allocated through statutory systems in rural and urban Australia. For example, the *Water Act* 1989 in Victoria provides for a system of water entitlements in either regulated rivers i.e. where water is released from storages or unregulated rivers where for example a 'take and use license' will allow pumping from a river.

ii) *Prima facie* State legislative competence

The Federal Parliament does not have a direct Constitutional head of power under s 51 to make laws with respect to 'water'. Historically therefore, the majority of water regulation has emanated from the states. Section 100 of the Federal Constitution does confer on states circumscribed rights in relation to conservation and irrigation. The lack of central constitutional power over water has caused problems where waterways are shared by two or more states who wish to use the water differently. For example, since before Federation, the management of the Murray-Darling Basin has been a source of conflict between South Australia, Victoria, New South Wales and Queensland.<sup>7</sup> One aspect of the response to the environmental crisis this engendered has been that the Federal Parliament enacted the *Water Act 2007*. This enactment relied on 'indirect' heads of federal legislative power, such as the external affairs power, and powers to make laws with respect to trade and commerce and corporations. With respect to groundwater there have been similar problems of inter-jurisdictional tensions over water use. Attempts to resolve these difficulties have occurred principally through inter-governmental agreements with the attempt to place caps on extraction in the Great Artesian Basin<sup>8</sup> being one such example.

In concert with other moves by the Commonwealth Government to centralise regulatory power, this situation would seem to be the start of a new federally – coordinated era of water regulation. The national approach to water regulation is discussed below in the context of the Murray-Darling Basin. Its effect are being felt more widely as state legislatures make reforms to implement national water policy principles, particularly the schemes of water planning, water entitlements and water trading.

### **Surface and Overland Flows**

Another distinctive feature of Australian water law relates to the unique physical properties of Australian hydrology. Concern regarding potential climate change impacts and growing issues of water scarcity in Australia have fostered attempts to include 'more' of the 'water cycle' under the ambit of state water law regulation. For

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(e) areas that were public places at the end of 31 December 1993. (3) Any confirmation under this section does not extinguish any native title rights and interests and does not affect any conferral of land or waters, or an interest in land or waters, under a law that confers benefits only on Aboriginal peoples or Torres Strait Islanders.

<sup>7</sup> Jennifer McKay, 'The Legal Frameworks of Australian Water: Progression from Common Law to Sustainable Shares' in Lin Crase, L. (ed) *Water Policy in Australia: The Impact of Change and Uncertainty* (2008), 44.

<sup>8</sup> *Ibid* at 49.

example, attempts to include overland flow as part of the waters under the control of the State. Australia's rivers are typically intermittent in flow and overland or surface flow may constitute a major component of total flows. In Victoria, for example, such overland flows are highly regulated and a licensing regime operates for on farm dams over certain capacity. While much attention on rights to water focus on water courses, surface flows, and groundwater as well as overland flows should not be ignored.

Furthermore, the question of 'interception uses' and the extent to which they are amenable to discrete regulation looms large in Australia, especially in the Murray Darling Basin. The assertion of Indigenous rights to water also needs to take into account the geomorphologic and hydrological character of water in all its manifestations. While rivers clearly hold a special significance for many groups, the cultural, and indeed perhaps also, the commercial value of water 'widely conceived' to include all aspects of the hydrological cycle could be examined and is potentially very significant.

### **Riparian Rights**

At common law, water is considered to be a fugacious substance, not capable of being the subject of defined property rights. However, landholders at common law had riparian rights and rights to exploit groundwater.

There remain some residual areas of common law rights in various parts of Australia based around riparian doctrines. Fundamentally, a riparian water right at common law is one where there is a right conferred on land holders to take water from adjoining rivers. Although the doctrine, at least in its early implementation, placed some limits on the amounts each land holder could take, today, common law riparian rights are relatively insignificant, generally having been displaced by statute,<sup>9</sup> and often find statutory expression whereby statutory rights allowing the taking of water for stock and domestic use.<sup>10</sup> Yet, riparian rights where access to water is consequent upon land holding can be selectively important for Aboriginal peoples. The historic conferral of riparian rights on landowners can be important for native title claims for in some cases the riparian rights extended as far as the *median ad filium line* (the middle of the bed of any adjacent water course). Later, it was common for a Crown reservation to be placed along banks and water courses, which are of pertinence inter alia in demarcating boundaries etc for native title claims.

### **Recognising Cultural Values**

Australian efforts to meaningfully include Indigenous values and traditional knowledge in water management have been very sporadic. Recent attention to water resource planning running through National Water Initiative (NWI) policy agendas, and recent reforms to water legislation, such as Sustainable Water Strategies in Victoria and the basin-wide planning process (The Plan) to be implemented under the new federal *Water Act* will, provide institutional forums for more concerted inclusion of indigenous views. The *Water Act 2007* (Cth) does make some provision for Indigenous involvement in its planning processes. The Plan is to be developed with

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<sup>9</sup> For a representative example See *Ashworth v State of Victoria* [2003] VSC 194.

<sup>10</sup> See for example *Water Act 1989* Vic.

regard to 'social, cultural, Indigenous and other public benefit issues'.<sup>11</sup> This consideration is one of a dozen objectives and it is very unclear as to respective priorities. There is no indication of how competing issues are to be reconciled. These objectives are subject to the prior requirement that The Plan implement international agreements (particularly the Biodiversity Convention) and the conservation of Ramsar wetlands and other 'key environmental sites'.<sup>12</sup>

Heritage law regimes in many instances already recognise and protect cultural values for rivers. These regimes are important sources of legal protection for Indigenous cultural values and traditional knowledge in respect of freshwater. However, just how such heritage regimes intersect with systems for more dynamic Indigenous involvement in water management needs further examination. Jackson and Morrison note the moves to incorporate Aboriginal heritage values through impact assessment processes but point to the difficulties in considering the indirect and cumulative effects of settler water use on Indigenous water management and care for country.<sup>13</sup> In the Australian state of Queensland, the Wild Rivers legislation<sup>14</sup> provided a relatively recent example of river conservation laws that did not adequately address Aboriginal involvement in caring for country or the economic imperatives of long-term community sustainability.

### **Water Allocation**

Current concerns regarding the water allocation process hold major implications for Indigenous peoples' rights to water. Leaving aside the long standing and highly controversial issues about re-allocation of consumptive water entitlements in irrigated areas and the introduction of environmental flows across most jurisdictions, some other current issues include: if current rights pertaining to domestic and stock uses continue relatively unrestricted? What are the impacts of allowing these 'exemptions' in eras of growing water scarcity, vis a vis indigenous rights to access water of cultural significance? Can there be a more robust recognition of cultural flows? What is the implication of a new designation of 'critical human water needs' outlined in the new Cth *Water Act 2007*? These rights identified under the *Water Act 2007*, presumably designed to ensure urban centres do not run out of domestic water supply, are to be given the highest priority. As a consequence how does this impact other water rights; including cultural rights and/ or environmental flows?

### **Property to Water and Water Trading**

The opportunities for water trading and associated forms of market environmentalism currently are quite tentative, the potential for Indigenous peoples' involvement in these emerging economic opportunities should be raised. Market-based forms of water law and regulation have become well entrenched in Australia. Such market instruments were critical to the water law and policy reforms in Australia that have taken place over the last 20 years or so, that principally focussed on the Murray-

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<sup>11</sup> ss 171, 172, 21(4)(c)(v) *Water Act 2007* (Cth).

<sup>12</sup> s 21(1)-(3) *Water Act 2007* (Cth).

<sup>13</sup> S. Jackson and J. Morrison, Indigenous Perspectives in Water management, reforms and implementation, in K. Hussey and S. Dovers, (eds) *Managing Water for Australia The Social and Institutional Challenges*, 2007, 23-41, 28.

<sup>14</sup> Wild Rivers Act Qld

Darling Basin (MDB). The MDB water management problems, coupled with ongoing drought and climate change, have created a crisis in water. Most rivers in the MDB are heavily regulated, with major storage and diversion works supporting an extensive irrigation industry and regional water supplies. The MDB has experienced significantly reduced stream flow and altered stream flow patterns. As a result, there has been a concerted water law reform process put in place, principally directed to addressing problems in the MDB. The fundamental problem in the MDB is that most catchments are over allocated. The introduction of the Murray-Darling 'cap' on water extractions in the mid 1990s, while setting a useful limit on further allocations to States, has not achieved significant progress due to the additional challenges of climate change and drought. The following outlines the first stage of the water law reform process.

### **The Council of Australian Governments (CoAG) Water Resource Strategy**

There are fundamentally three major aspects to water law reforms which commenced in 1994 with the Council of Australian Governments (CoAG) reforms. The most controversial elements have been the separation of an entitlement to water from land holding to facilitate property in water,<sup>15</sup> and the recognition that the environment itself required a water 'entitlement', generally referred to as an environmental flow or an environmental water reserve.<sup>16</sup>

The Council of Australian Governments (CoAG) Water Resource Strategy in 1994 endorsed the following principles:

- Water pricing should be consumption-based and operate on the principle of full cost-recovery and removal of cross-subsidies.<sup>17</sup>
- Water allocations should include reviewable allocations for the environment based on the best scientific information<sup>18</sup>, and restoration of environmental allocations in over allocated systems;
- Water allocations should be clear, separate from land title,<sup>19</sup> and tradeable.<sup>20</sup>
- The public should be widely consulted.<sup>21</sup>

During the period from 1994 – 2004 there were a series of water law reforms in most Australian jurisdictions that sought to implement these CoAG principles with varying degrees of compliance. All jurisdictions introduced the concept of a separate tradable water entitlement although few went very far in developing an extensive water trading system. The impetus for water trade was to move water to its highest and best value use to achieve greater 'efficiencies' and initiate structural change in rural industries principally, irrigated agriculture. In concert, there were reforms to introduce

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<sup>15</sup> J. McKay, J. and H. Bjornlund, 'Recent Australia Market Mechanisms as a Component of an Environmental Policy', in Land and Water Australia, *Property Rights and Responsibilities, Current Australian Thinking*, (AGPS 2002) 137, 138.

<sup>16</sup> E.g., Department of Natural Resources and Environment, State of Victoria, *Healthy Rivers, Healthy Communities and Regional Growth: Victorian River Health Strategy – Environmental Flows* (2002).

<sup>17</sup> CoAG Water Resource Policy, cl 3(a) (i).

<sup>18</sup> CoAG Water Resource Policy, cls 4, 5.

<sup>19</sup> CoAG Water Resource Policy, cl 4.

<sup>20</sup> CoAG Water Resource Policy, cl 5.

<sup>21</sup> CoAG Water Resource Policy, cls 6(g), 7(b), 8(b).

environmental water reserves (environmental flows) in the water laws in most jurisdictions. Indigenous peoples were involved in consultation on many aspects but had little effective voice in decisions about many of the changes.

Despite extensive water law reforms and extensive research, the water situation, especially in southern Australia, continued to deteriorate. In 2004, CoAG announced two new initiatives based around intergovernmental agreements; The National Water Initiative and the Living Murray Initiative<sup>22</sup>.

### **The National Water Initiative**

The 'National Water Initiative' (NWI) sought to achieve a nationally compatible water market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use, 'that optimises economic, social and environmental outcomes.' It included:

- clear and nationally-compatible characteristics for secure water access entitlements;
- transparent, statutory-based water planning;
- statutory provision for environmental and other public benefit outcomes; and
- improved environmental management practices.<sup>23</sup>

The NWI also addresses how Indigenous access to water can be achieved.<sup>24</sup> Furthermore, it stated Indigenous people are to be included in the water planning process 'wherever' and 'whenever' possible. Indigenous cultural and traditional values are specifically included as 'other public benefit' outcomes to be the goal of water plans. It is a requirement under the NWI that Indigenous water use be considered. In addition, the "protection of certain Indigenous heritage values" is included as a principle to guide the establishment of water trading rules.<sup>25</sup> While these first steps are encouraging, however the NWI is a policy document and not legally binding. Further, the obligations in the NWI are rather vague and will require more precise formulation to be effectively realised in water law reforms.

The second scheme, Living Murray Initiative promised 500 gigalitres of water for iconic ecological sites along the Murray River.<sup>26</sup> To date, very little of that water has been delivered. In fact, further environmental deterioration has occurred and over-allocation problems remain critical with greatly reduced flows to downstream states, such as South Australia.<sup>27</sup>

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<sup>22</sup> See Council of Australian Governments, *Intergovernmental Agreement on a National Water Initiative* (2004)

<sup>23</sup> IGA, National Water Initiative clauses.

<sup>24</sup> Paras 52-5

<sup>25</sup> Schedule E, paragraph 3(v) (Jackson and Morrison, 2007 in *Social and Industry Perspectives, Hussey and Dovers (eds), 2007*, CSIRO Publishing).

<sup>26</sup> Daniel Connell, 'Contrasting Approaches to Water Management in the Murray-Darling Basin' (2007) 14 *Australasian Journal of Environmental Management* 6.

<sup>27</sup> Anne Pye, 'Water Trading along the Murray: A South Australian Perspective', (2006) 23 *Environmental and Planning Law Journal* 131.

In early 2007, the Howard Federal Government introduced the National Plan for Water Security. The hastily prepared plan included measures for major new investment in irrigation technologies and infrastructure, including channel delivery technologies to increase water efficiencies. Consequent water savings were to be shared between basin irrigators and the Government, with the latter savings prescribed for environmental flows. While the plan rhetorically promised to solve water over-allocation in MDB 'once and for all', it also made more concrete promises of new governance arrangements and a sustainable cap on surface water and groundwater use. These arrangements were formalised in the *Water Act 2007* (Cth).

### **The *Water Act 2007* (Cth)**

The federal *Water Act* is the culmination of a long series of legislative and policy instruments designed to implement a cap on further levels of extraction of water from the Basin. Extensive scientific research has been directed to determining ecological baselines required to support healthy rivers.<sup>28</sup> Against this backdrop, the 2007 Act represents the most comprehensive legal and institutional structure to date, with broad powers to legislate for water planning across the Basin.

Section 19 of the Act provides:

The Basin Plan will provide for limits on the quantity of water that may be taken from the Basin water resources as a whole and from the water resources of each water resource plan area.

An Authority (newly established under the Act) is to prepare the Basin Plan. The Plan once in effect, regulates entitlements to consumptive use of water, and sets the framework for water trading. The Plan is the central planning and allocation mechanism, for 'the establishment and enforcement of environmentally sustainable limits on the quantities of surface water and ground water that may be taken from the Basin water resources (including by interception activities)'.<sup>29</sup> Nested under the Basin wide plan are the water resource plans for given water resource plan areas, located generally within the States.

This plan operates in the context of existing state water laws, water planning, and water trading markets that have emerged in the Basin, to facilitate the movement of water to its highest value use. The Water Act will be implemented in a situation of widespread market failure where structural adjustments in consumptive use patterns have failed to address over-allocation and the federal government has instituted a water buyback scheme to prevent the imminent collapse of the ecological basis of the river. However, while much attention is focussed on how to reach environmental sustainability, cultural rights have received far less consideration.

### **Recognising Indigenous Peoples' Values in and Rights to Water**

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<sup>28</sup> Anita Foerster, 'Victoria's new "Environmental Water Reserve:" what's in a name? (2007) 11 *Aust. J. of Natural Resources Law and Policy* 145.

<sup>29</sup> *Water Act 2007* (Cth), s 3(b).

Although there is a growing recognition of Indigenous involvement in water law and governance,<sup>30</sup> and in emerging economic opportunities founded around market environmentalism, Indigenous rights to water are typically conceived by the colonial legal system as having a usufructary character. This obscures cultural and physical dimensions and precludes Indigenous people from accessing commercially viable volumes. Nonetheless, it is predominately through the accepted patterns of land rights and native title that Indigenous peoples' rights to waters are realised in a legal sense.

### **Indigenous Involvement with Water-related Biodiversity Conservation**

Much water law and policy reform in recent years within Australia has been in response to ecological degradation, and clearly ecological changes may threaten the continuation of Indigenous cultural practices involving water.<sup>31</sup> Water is a critical component of many ecosystems and strong Indigenous involvement in its management and use is necessary to achieving many biodiversity conservation outcomes. Indigenous communities must be included in robust, legally enforceable ways, in relation to water based biodiversity conservation frameworks, to ensure that Indigenous concepts of value and significance are fully considered.<sup>32</sup> While there have been moves to include aboriginal peoples in conservation and protected areas management, typically few such agreements and policies allow for Indigenous peoples to have fully autonomous decision making for such areas.

#### **i) Legal Models for 'recognising' Indigenous Interest in Water**

There are two major ways of conceptualising existing legal frameworks for the incorporation of Indigenous interests in water within Australia.<sup>33</sup> Each model has its own specific limitations. The first model rests on inclusion of Indigenous interests within the statutory water law frameworks.<sup>34</sup> In most instances the concept includes a 'cultural' allocation of water within a scheme for allocating and trading water that we might designate as a 'neo-liberal' market approach. This water allocation and trading approach to water law and management has gained primacy over the last decade and now represents the most pervasive regulatory approach.<sup>35</sup> Given that there are significant limitations to the effective incorporation of Indigenous interests in water under such an approach, Indigenous groups need to be proactive in seeking effective representation and substantive recognition of interest in water and in the sustainable

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<sup>30</sup> Sue Jackson, (CSIRO Sustainable Ecosystems), 2006, *Recognising and protecting Indigenous values in water resource management* A report from a workshop held at CSIRO in Darwin, NT, 5-6 April 2006, CSIRO, Northern Land Council, Australian Government Land & Water Australia.

<sup>31</sup> See generally, Jess Weir, *Murray River country : an ecological dialogue with traditional owners*, 2009.

<sup>32</sup> Lee Godden, and Kathleen Birrell, 'Indigenous Rights and Biodiversity Protection in Victoria', Environmental Defenders Office Issues Paper, May 2007.

<sup>33</sup> See also, Poh Lin Tan, 'A review of the legal basis for Indigenous access to water'. A report prepared for the National Water Commission, February 2009, Griffith Law School, Griffith University.

<sup>34</sup> Sue Jackson 'Background paper on Indigenous participation in water planning and access to water' (2009) National Water Commission.

<sup>35</sup> Lee Godden, 'Governing Common Resources: Environmental Markets and Property In Water' in Aileen McHarg et al, *Property in Resources* 2010 (forthcoming).

management of water in a more holistic sense.

A related approach is to include Indigenous knowledge and values associated with water within 'stakeholder' interest under the broadening of public participation regimes for natural resource and environmental management over the last decade or so. This widening of stakeholder interests to include Indigenous peoples' interests at a regional level, such as in catchment management structures has been consequent upon the moves to regionally devolve natural resource management, principally under the Howard Government. Such participation has had a chequered history, and it will not be directly canvassed here but arguably to date, these institutional structures and funding process remain one of the most comprehensive manner in which governments and other organizations have sought to involve Indigenous peoples in water policy and management.

The second model is to consider Indigenous interest in water as a component of the existing rights-based regimes for land claims.<sup>36</sup> In Australia, there are two main sources of land rights: the Native Title Act regimes and statutory land rights schemes, eg *Aboriginal Land Rights (Northern Territory) Act 1976*. There is some interaction between the two models. For instance, the Western Australian government policy is to statutorily recognise Indigenous water entitlements, defined as rights under native title determinations.<sup>37</sup> A similar approach is taken by the Queensland government in relation to its 'wild rivers' policy (see below).<sup>38</sup>

The two main 'conceptual' models are based on 'recognition' of indigenous interests and their subsequent 'inclusion' within statutory resource allocation and tenure regimes. Yet, the level of direct legal enforceability varies; i.e. native title rights are clearly enforceable but the status of indigenous interests 'recognised' under water laws is much less transparent unless falling within the Native Title regime.

### ***Native Title Act 1993 (Cth)***

*Mabo v. Queensland [No 2]*<sup>39</sup> is generally regarded as a pivotal point in the legal relationship between Aboriginal people and the Australian colonial society and its institutions. It constituted legal acknowledgment of pre-existing Aboriginal occupation of land (and subsequently waters) through the recognition of native title. Cases post-Mabo have configured native title as a bundle of rights, including various rights to water. Generally, it is accepted by the courts that what is recognised as native title will include rights to water. This was confirmed by the subsequent *Native Title Act 1993* (NTA).

The NTA defines native title in section 223 as 'the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or

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<sup>36</sup> See also Poh Ling Tan, above n 51.

<sup>37</sup> Government of Western Australia above n 48.

<sup>38</sup> Cf *Water Act 2000* (Qld) s 10(2)(c)(v) defines sustainable management objectives to include 'recognizing the interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning'.

<sup>39</sup> 175 CLR 1.

Torres Strait Islanders; and the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and the rights and interests are recognised by the common law of Australia.’

It is clear at a general level that native title can exist in relation waters where not extinguished. The NTA provides a specific *future acts regime* with respect to water in section 24HA. The position arguably remains undecided at law as to whether the future acts regime may extend to the water planning processes under NTA s 24HA.<sup>40</sup> While it is clear that the grant of water leases, licences permits and authorities will result in the suspension of native title rights to the extent of any inconsistency<sup>41</sup> and compensation will be payable<sup>42</sup>, the exact status of Basin wide planning has not been definitively determined.

Section 211 of the NTA expressly preserves customary rights to hunt, fish and gather traditional resources including by implication aquatic resources. In this sense it comprises particular rights to utilise water.<sup>43</sup> In addition, ‘Indigenous rights to hunt, fish, and gather living natural resources, such as crocodiles and turtles, may arise in association with a native title claim to particular lands and waters.’<sup>44</sup>

Where the necessary connection and other requirements for native title are satisfied, the content of rights to water within a native title claim are generally regarded by the courts as usufructuary in character, although this is not the only possible interpretation that might be given to claim evidence relating to connection to waters under s223 *Native Title Act* 1993.<sup>45</sup> In *Commonwealth v. Yarmirr*, [1998] 771 FCA in relation to coastal and offshore areas, the Court held that native title included rights of access, fishing and hunting, visiting and protecting places with cultural and spiritual importance and safeguarding traditional knowledge. A customary right to fish was non-exclusive. The issue of Aboriginal rights to water per se, fishing and offshore areas in respect of statutory land rights regimes was recently considered in *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 (30 July 2008).

## Barriers to Claims

The question of the maintenance of customary connection with waters since pre-sovereign times as a component of s223 was emphasised by the High Court in Yorta-

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<sup>40</sup> The section provides that , ‘This section applies to a future act that consists of the making, amendment or repeal of legislation in relation to the management or regulation of: (a) surface and subterranean water; or (b) living aquatic resources’.

<sup>41</sup> s 24 HA (4) NTA 1993.

<sup>42</sup> See ss 24 HA (5) NTA 1993.

<sup>43</sup> See s 211 (2) NTA 1993. ‘If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so: (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and (b) in exercise or enjoyment of their native title rights and interests.’

<sup>44</sup> Jackson and Langton, above n 1, at 10.

<sup>45</sup> The narrow construction of s223 NTA is an acknowledged concern and has been the subject of proposals for reform including a proposal by the Current Chief Justice of the High Court. See Chief Justice R French, *Lifting the Burden of Native Title*, 2009 93 *Reform*, 10 at 11.

Yorta.<sup>46</sup> In this instance, the area under claim, included the areas along the Murray River bordering NSW and Victoria. The Yorta-Yorta peoples under a very stiff evidentiary burden, failed to establish such connection and thus were unsuccessful. Subsequently, the Yorta-Yorta peoples negotiated a co-management agreement with the Victorian state government giving them significant water management responsibilities particularly for the ecologically sensitive Barmah Forest area. Agreement making has emerged as an important avenue with respect to the Indigenous Land Use Agreement provisions of the Future Acts regime under the NTA with significant potential to incorporate water access and use rights.

### **Indigenous Peoples' Rights to Water under Water Legislation**

There are a number of more recent water laws in state jurisdictions that now explicitly recognise indigenous interests in water, while other water legislation typically provides a 'savings' provision for native title rights. A 'savings' provision typically indicates that the legislation is not to affect native title rights and interests.

The *Water Act 2000* (Qld) and the *Water Management Act 2000* (NSW) both recognize the rights to take or use water without a license or approval in accordance with native title rights. The latter Act also provides for the establishment of a trust to assist Indigenous people to participate in water markets.

The native title laws in New South Wales allow for allocations of water to native title holders under water sharing plans. Typically this is derived as a 'surrogate' environmental water allocation.<sup>47</sup> Issues are emerging though as to whether there needs to be a separate and culturally specific flow above the environmental water requirements. In other jurisdictions, agreements have delivered varying types of cultural water rights, or as in NSW, specific-purpose licences for Aboriginal communities.<sup>48</sup> Although, Tan and Jackson note that very few such licences have been allocated; and that, '[j]urisdictions appear to be waiting for positive determinations [presumably of native title] before allocating water.'<sup>49</sup>

### **Negotiated Outcomes and Agreement Making**

During the last decade or so, in Australia, with the recognition of native title in 1992, there has been a proliferation of agreements between Aboriginal people, governments, non-government organisations, and private entities, such as mining companies. Agreement-making about land and resources existed prior to the recognition of native title. Pre-native title forms followed a more ad hoc trajectory and it was not as comprehensively 'institutionalised' as has occurred since the advent of the Native Title Act 1993.

Given the acknowledged limitations of judicial interpretations of native title over the post-Mabo era, increasing numbers of indigenous peoples have pursued negotiated

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<sup>46</sup> *Members of the Yorta-Yorta Community v Victoria* (2002) 214 CLR 422.

<sup>47</sup> Jackson and Morrison, above n 33 at, 23-41, 30.

<sup>48</sup> Ibid.

<sup>49</sup> Sue Jackson and Poh Lin Tan, Presentation Transcript, Indigenous Access to water and participation in water planning under the National Water Initiative Indigenous Water Forum 19 February 2009, Available at <http://waterplanning.org.au/news-and-events/national-indigenous-water-planning-forum>.

outcomes and agreement-making rather than following claims through the litigation process. Agreement-making already comprises a significant forum for recognising and protecting Indigenous peoples' interests in water. Agreement-making is significant in that it offers an expansive scope for more robust incorporation of Indigenous interests in water.<sup>50</sup>

In Australia, the bulk of the category of water-related agreements is made up by consent determinations under the *Native Title Act* 1993. The following provides a typical example of such agreement making.

### **Consent Determinations Under the Native Title Act 1993.**

*Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474, is a consent determination by the Federal Court and the underpinning agreement is part of the emerging Victorian 'land justice' policy framework. The decision of North J related to the Mt Eccles National Park and associated areas such as Lake Condah in Western Victoria. It was agreed that non-exclusive native title rights exist over 133,000 hectares of vacant crown land, national parks, reserves, rivers, creeks and sea north-west of Warrnambool Victoria. As a consequence, native title also has been extinguished over 7,600 hectares of the claim area. The native title rights and interests include:

- (a) entering and remaining on the land and waters;
- (b) camping on the land and waters landward of the high water mark of the sea;
- (c) the use and enjoyment of the land and waters;
- (d) right to take the resources of the land and waters; and (e) right to protect places and areas of importance on the land and waters.<sup>51</sup>

The Determination states that insofar as the native title rights and interests may provide a right to take water from waterways, that right is limited to domestic and ordinary use.<sup>52</sup> Further, in light of the non-exclusive nature of Gunditjmara title, the native title rights and interests do not confer possession, occupation, use and enjoyment of the land and waters on the native title holders to the exclusion of all others.<sup>53</sup> There is no native title in the Native Title Area in or in relation to groundwater as defined in the *Water Act* 1989 (Vic).<sup>54</sup>

Native title co-exists with other interests but does not have priority,<sup>55</sup> (inconsistency of the incidents test). Thus while there is an emerging scope for Indigenous peoples to negotiate legal protection for interests in water as noted typically these will be in the form of non-exclusive, and thus typically, non-commercial uses of water.

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<sup>50</sup> Morgan, M, Strelein, L, Weir, J, 2006, 'Authority, Knowledge and Values: Indigenous Nations Engagement in the Management of Natural Resources in the Murray-Darling Basin' in M Langton, O Mazel, L Palmer, K Shain, M Tehan (eds) *Settling with Indigenous People*, 2006, 135.

<sup>51</sup> *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474, [para 5].

<sup>52</sup> *Ibid* at [para 6].

<sup>53</sup> *Ibid* [para 8].

<sup>54</sup> *Ibid* [para 3].

<sup>55</sup> *ibid* [para 11].

Thus, despite some encouraging signs of a more inclusive representation of indigenous peoples' interests in water in a range of policy processes and some legislative implementation of specific cultural rights to water in some jurisdictions the overall pattern is that cultural claims to water are not well represented in the water law context. Native Title (with all of its acknowledged difficulties) and statutory land rights still represent the predominant means by which indigenous peoples' interests in water might be actualised. Thus, as Mazel notes, the 'dichotomy of difference'<sup>56</sup> which lies at the heart of colonialism and Western ideology has prevailed in Australia throughout the rights-based agenda and into the current narrative of neo-liberal models of economic development. It has, through the use of the law to entrench indigenous people's continued marginalisation.<sup>57</sup>

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<sup>56</sup> See Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), 33.

<sup>57</sup> O Mazel *Griffith Law Review* (forthcoming)