

Chapter 6

Indigenous Peoples and Water

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1. Introduction

Water is vital to life, essential to agriculture and a valuable energy source which may be utilised in the mitigation of climate change impacts. Water is extremely valuable globally to both Indigenous and non-Indigenous peoples and is used for many different purposes. Water is also important to both for different reasons.

For example, non-Indigenous Australians consider water as a spiritual, natural resource and a commodity that is not only essential to livelihood, but has significant economic contemporary value. However, Indigenous groups in many of these ecologically rich and often remote environments Indigenous peoples regard the inland waters, rivers, wetlands, sea, islands, reefs, sandbars and sea grass beds as an inseparable part of their estates. As well as underpinning social and economic well-being, Indigenous people's relationship with waters, lands and its resources is crucial to cultural vitality and resilience.¹

Australia, and in particular the Indigenous estate, includes some of the most biodiverse terrestrial and aquatic environments, including many intact and nationally important wetlands, riparian zones, forests, reefs, rivers and waterways. Australia also has some of the most diverse, unique and spectacular marine life in the world.²

Indigenous rights in water are not adequately recognised by Australian law and policy. This is largely because Indigenous and non-Indigenous perspectives of water and its management differ greatly. This creates difficulties as non-Indigenous laws and management plans separate land from water and generally regard water as a resource available for economic gain. As water is predominantly considered only for its consumptive value, its use and regulation is limited and restricted by governments to industries or individuals willing to pay the highest price. This affects Indigenous access and usage.

1 J Altman & S Jackson, 'Indigenous Land Management', in D Lindenmayer, S Dovers, M Harris Olson, and S Morton (eds), *Commitments: Reshaping the Lucky Country's Environment* (2008), pp 207-214.

2 J Altman & S Jackson, 'Indigenous Land Management', in D Lindenmayer, S Dovers, M Harris Olson, and S Morton (eds), *Commitments: Reshaping the Lucky Country's Environment* (2008), pp 207-214.

Historically Indigenous peoples have been excluded from water management in Australia. The lack of engagement is compounded by the fact that Indigenous peoples have low levels of awareness of water institutions, technical information and regulation.³ This has resulted in little to no involvement by Indigenous people in state, territory and national consultation processes, and the development of water policy. This means that Indigenous peoples are not well positioned to negotiate enforceable water rights or purchase highly priced water licences.⁴

Text Box 1: What are water rights?

The Productivity Commission has defined water rights as:

A legal authority to take water from a water body and to retain the benefits of its use.⁵

Water rights can come in the form of: licences, concessions, permits, access and allocations.

As well as the right to take water, other related rights include: access, exclusion, alienation, and management of the resource.⁶

As identified in the previous chapters on climate change, the focus of law and policy has become highly influenced by the domestic and international economy. As a result, Indigenous rights to water, and the importance of water to the maintenance of Indigenous society, have not been given any priority in the fight for water resources.

2. Key Issues for Indigenous peoples

Indigenous peoples have suffered as a consequence of non-Indigenous priorities in water resources in Australia. In one region alone, the Daly River region in the Northern Territory, the Indigenous peoples identified significant and long lasting impacts on their societies and communities, including:

- the reduction of land over which Indigenous peoples have control
- depopulation of some areas as a result of massacres (Woolwonga and Malak Malak)
- succession of one Indigenous group by another because of depopulation
- reduction and displacement of populations
- displacement of one Indigenous group by another

3 S Jackson, *Indigenous Interests and the National Water Initiative Water Management, Reform and Implementation Background Paper and Literature Review*, CSIRO (2007), pp 65-6. At: http://www.nailsma.org.au/nailsma/publications/downloads/NAILSMA_NWI_Review_UPDATEDec07.pdf, (viewed 26 July 2008).

4 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, Centre for Aboriginal Economic Policy Research Working Paper No. 42/2008 (2008), p vii. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf>, (viewed 28 August 2008).

5 Productivity Commission, *Water Rights Arrangements in Australia and Overseas*, Commission Research Paper, Productivity Commission, Melbourne (2003), as cited by M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, CAEPR Working Paper No. 42/2008, Australian National University, Canberra, p 4. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

6 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, CAEPR Working Paper No. 42/2008, Australian National University (2008), p 4. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

- changes in settlement patterns and organisation
- instability.⁷

I am concerned that as Australia becomes increasingly scarce of water due to climate change, long periods of drought, over-allocation to industry and agricultural stakeholders, and population growth and migration, the capacity for the recognition and security of Indigenous rights to water will become increasingly important and highly competitive.

A number of issues arise as a result of the current policy debate around water allocation and the rights of Indigenous peoples to their lands and waters. In particular:

- Indigenous peoples have had little to no involvement in the water reform and policy process and water management committee's
- the cultural significance of water to Indigenous peoples is not understood and remains unrecognised in the development and implementation of water law and policy
- the status of Indigenous water rights, particularly native title water rights, remains unresolved and limits Indigenous peoples access and allocation to water resources
- in many instances, the allocation of water rights to Indigenous peoples has been for specific purposes, i.e. cultural, environmental, and sustainable communal usage and often considered only in the context of cultural or social rights
- rights to water for economic development or commercial use have been scarce, or non-existent to date, and are at the whim of government
- many water systems are already over allocated and competition for water is high, especially in the Murray-Darling River Basin and in the agricultural development of northern Australia
- engagement in water markets is restricted due to the price of water being extremely high based on 'supply and demand' and out of reach of most Indigenous communities.

These issues will be discussed further below.

3. The Cultural Value of Water

'Water is the life for us all. It's the main part. If we are gonna loose that I don't know where we gonna stand. If that water go away, everything will die. That's the power of water. He connect with the land. *Pukarrikarra* (the dreaming) put 'em all together. One life.'⁸

Indigenous peoples are connected to and responsible for our lands and waters and in turn, Indigenous peoples obtain and maintain our spiritual and cultural identity, life and livelihoods from our lands, waters and resources. These cultural and customary rights and responsibilities include:

- a spiritual connection to lands, waters and natural resources associated with water places

7 CSIRO, *Recognising and protecting Indigenous values in water resource management*. (Report from a workshop held at CSIRO, Darwin, Northern Territory, 5-6 April 2008).

8 John 'Dudu' Nangkiriyn, Bidyadanga in S Yu, *Ngapa Kunangkul: Living Water, Report on the Aboriginal Cultural Values of Groundwater in the La Grange Sub-Basin*, (1999). At: <http://portal.water.wa.gov.au/portal/page/portal/PlanningWaterFuture/AllocationPlanning/LaGrange>, (viewed 10 September 2008).

- management of significant sites located along river banks, on and in the river beds, and sites and stories associated with the water and natural resources located in the rivers and their tributaries, and the sea
- protection of Indigenous cultural heritage and knowledge associated with water and water places
- access to cultural activities such as hunting and fishing, and ceremony.

While it is not possible to homogenise all Indigenous cultural water values into one perspective, as Indigenous values are regionally diverse and complex, there are some commonalities and distinctions from non-Indigenous laws that are important to recognise and understand.⁹ Indigenous relationships with water are holistic; combining land, water, culture, society and economy. Consequently water and land rights, the management of resources and native title are inseparable.

In a study undertaken in Anmatyerre country, in the Northern Territory, the Anmatyerre (people) identified that:

Our cultural values of water are part of our law, our traditional owner responsibilities, our history and our everyday lives. Everyone and everything is related.¹⁰

Our law has always provided for the values we place on water. It is the rules for men, women and country. Anmatyerre Law is strong today, but it is invisible to other people. Australian law should respect Anmatyerre Law so we can share responsibility for looking after water.¹¹

Indigenous barrister Anthony McAvoy argues that to date 'there is no place in modern river management systems for the protection of Indigenous spiritual values.' In most expressions of Aboriginal religion in Australia there are creation stories detailing the creation of waterways, often by a spirit being in the form of a serpent.¹² In the Gunanurung, Ord River, Western Australia, the traditional owners believe their rights and interests in land and waters were created in the *Ngarangani* or Dreaming. The dreaming is a continuing force providing for a complex of cultural values.¹³ According to Indigenous law, water places have special spiritual significance and accompanying cultural responsibilities.

The Maar peoples in South-west Victoria identify that this special ancient and ongoing spiritual and cultural connection to water has in most cases been ignored by non-Indigenous water laws.¹⁴ Cultural water use is part of Indigenous law and there are potential risks to Indigenous cultural and spiritual values when water is used for non-Indigenous economic, development, recreational or domestic purposes.

9 J Altman and V Branchut, *Fresh Water in the Maningrida Region's Hybrid Economy: Intercultural Contestation over Values and Property Rights*, (2008) p 24. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP46.pdf> (viewed 10 September 2008).

10 Dr N Rea & Anmatyerr Water Project Team, *Provision for Cultural Values in Water Management: The Anmatyerr Story*, Land & Water Australia Final Report (2008), p 18. At: <http://products.lwa.gov.au/products/PR081464> (viewed 10 September 2008).

11 Dr N Rea & Anmatyerr Water Project Team, *Provision for Cultural Values in Water Management: The Anmatyerr Story*, Land & Water Australia Final Report, (2008), p vi. At: <http://products.lwa.gov.au/products/PR081464> (viewed 10 September 2008).

12 T McAvoy, 'Water – Fluid Perceptions', (2006) 1(2) *Transforming Cultures eJournal* 97. At: <http://epress.lib.uts.edu.au/ojs/index.php/TfC/article/viewFile/262/253> (viewed 28 August 2008).

13 K Barber and H Rumley, *Gunanurung: (Kununurra) Big River: Aboriginal Cultural Values of the Ord River and Wetlands*, A study and report prepared for the Waters and Rivers Commission WA, (2003) p14. At: http://portal.water.wa.gov.au/portal/page/portal/WaterManagement/Groundwater/Ord/Content/ABORIGINAL_VALUES.pdf (viewed 10 September 2008).

14 Framlingham Aboriginal Trust and Winda Mara Aboriginal Corporation, *Kooyang Sea Country Plan*, (2004), p 4. At: <http://www.environment.gov.au/coasts/mbp/publications/south-east/pubs/kooyang-plan05.pdf> (viewed 9 October 2008).

Additionally, Indigenous peoples draw a distinction between freshwater and salt water peoples and country. The management of sea country is as equally important as freshwater to Indigenous peoples, with the sea seen as an extension of the land incorporating rights and cultural responsibilities. Indigenous peoples in the Torres Strait and those along the coastline of Australia, have a special cultural connection to sea country. For example, the Miriam people of Mer (Murray) Island have relationships with sea country that extends over 100km south to Raine Island off the east coast of Cape York Peninsula.¹⁵

3.1 Cultural vs economic vs environmental rights

Not only is water significant to the spiritual values of Indigenous peoples, water is vital for cultural and economic development.¹⁶ In general, Indigenous water rights have been allocated through a narrow cultural and social lens, with other rights such as economic and environmental water rights being excluded.

Altman and Jackson assert that:

Current environmental policy tends to promote recognition and protection of Indigenous cultural values. However, a narrow view of heritage management has often resulted in the exclusion of Indigenous people from conservation and natural resource management activities. The most direct and enduring means of embracing, protecting and, in some cases, enhancing cultural values is through ensuring access to country and the equitable participation of Indigenous people in a suite of management activities.¹⁷

However, cultural allocations should be separate from environmental allocations. For example, the Nari Nari Tribal Council, discussed further below, in an attempt to rehabilitate their wetlands, have used their purchased cultural water allocation, for environmental purposes. To enable Indigenous people to protect and manage their lands, the provision for environmental water should be included in separate allocations by the State Government.

Distinct water rights should be provided for both environmental and economic purposes. At a minimum, Indigenous water rights in “reserved water rights” should include and account for separate cultural, and economic water allocations, and where water management is being conducted by Indigenous peoples on behalf of the government, in distinct environmental water allocations.

4. Protection of Indigenous Peoples Rights to Water

The Australian Government has ratified a number of international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention of the Elimination of all forms of Racial Discrimination (CERD). As a result, the Australian Government has an obligation to its citizens, including Indigenous Australians, to respect, protect and fulfil the rights contained within them.

15 D Smyth, *Australia's Ocean Policy: Saltwater Country Aboriginal and Torres Strait Islander Interest in Ocean Policy Development and Implementation*. Socio-cultural Considerations – Issues Paper 6 (1997), p 7. At: <http://www.environment.gov.au/coasts/oceans-policy/publications/pubs/issues-6.pdf> (viewed 13 October 2008).

16 As identified in Agenda 21 access to and supply of water is vital to economic development *Agenda 21*, Chapter 18.6. At: <http://www.un.org/esa/sustdev/documents/agenda21/index.htm> (viewed 8 October 2008).

17 J Altman & S Jackson, 'Indigenous Land Management', in D Lindenmayer, S Dovers, M Harris Olson, and S Morton (eds), *Commitments: Reshaping the Lucky Country's Environment* (2008), pp 207-214.

Indigenous peoples have a right to the equal exercise and enjoyment of their human rights, including water. As articulated by AIATSIS:

Clean water access is critical for health in all communities. In Indigenous communities' lack of supply of clean water is linked to high morbidity and mortality rates. Unlike the broad rural demographic trends of rural to urban migrations and an ageing population, Indigenous Nations are staying on their lands and Indigenous communities have growing, young populations. Supporting these Indigenous communities is integral to the support of the socio-economic viability of rural Australia. The provision of services and infrastructure and the future development of growing Indigenous communities and Nations should be incorporated into planning objectives.¹⁸

Indigenous peoples' special connection to land and waters is protected under international law which provides for the right to practice, revitalise, teach and develop culture, customs and spiritual practices and to utilise natural resources.¹⁹

4.1 The International Framework

The most relevant international instruments for Indigenous water rights are set out in the table below.

Table 1: International Instruments	
International Instrument	Protection of Indigenous peoples rights to Water
International Covenant on Economic, Social and Cultural Rights (ICESR)	The right to water is implicit in the ICESCR, protected through: <ul style="list-style-type: none"> ▪ the right to an adequate standard of living ▪ the right to enjoyment of the highest attainable standard of physical and mental health²⁰ ▪ peoples' right to freely dispose of their own natural resources (wherein no case can 'a people be deprived of its own means of subsistence).²¹
International Covenant on Civil and Political Rights (ICCPR)	<ul style="list-style-type: none"> ▪ the right to freely dispose of natural resources ▪ the particular rights of 'ethnic, religious or linguistic minorities' to not be denied 'the right, in community with the other members of their group, to enjoy their own culture.'²²

18 M Morgan, L Strelein & J Weir, *Indigenous Rights to Water in the Murray-Darling Basin: In support of the Indigenous final report to the Living Murray Initiative*, Research Discussion Paper Number 14, Australian Institute for Aboriginal and Torres Strait Islander Studies (2004), p 9. At: http://www.aiatsis.gov.au/_data/assets/pdf_file/4728/DP14.pdf (viewed 18 December 2008).

19 See International Covenant on Civil and Political Rights, arts. 1, 27; International Covenant on Economic, Social and Cultural Rights, arts 1,15; Declaration on the Rights of Indigenous Peoples, arts 11-13.

20 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhchr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).

21 International Covenant on Economic, Social and Cultural Rights, arts 11-12. See General Comment 4, at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument) and General Comment 14 at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument) (viewed 3 October 2008).

22 International Covenant on Civil and Political Rights, arts1, 27.

International Instrument	Protection of Indigenous peoples rights to Water
United Nations Declaration on the Rights of Indigenous Peoples	<ul style="list-style-type: none"> ▪ Indigenous access, conservation and economic development of water ▪ a right to maintain and strengthen the distinctive Indigenous spiritual relationship with 'traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas' ▪ the right to conservation and protection of Indigenous lands and resources with state assistance ▪ the right to development for all Indigenous lands and resources including water.²³
Convention on Biological Diversity	<ul style="list-style-type: none"> ▪ objective is to sustain all life on earth, including aquatic ecosystems, with the global goal to reverse and stop the loss of biodiversity ▪ provides for the respect, preservation and maintenance of knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity²⁴ ▪ many of the decisions of the COP call for the full and effective participation of indigenous communities in order to achieve the global goal.²⁵
Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)	<ul style="list-style-type: none"> ▪ the conservation and wise use of all wetlands and their resources 'through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world'²⁶ ▪ provides guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands focusing on the need for Indigenous engagement and participation, trust and capacity building, knowledge exchange, flexibility and continuity.²⁷

23 *United Nations Declaration on the Rights of Indigenous Peoples*, Arts 25, 29, 32.

24 *Convention on Biological Diversity*, Art 8(j).

25 See for example Conference of the Parties to the Biodiversity Convention, *Marine and coastal biological diversity*, COP 9 Decision IX/20, Bonn, 19-30 May 2008. At: <http://www.cbd.int/decisions/?m=COP-09&id=11663&lg=0> (viewed 1 September 2008).

26 *Convention of the Parties 2002, Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Ramsar, 1971. At: <http://www.ramsar.org> (viewed 3 October 2008).

27 Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands, adopted as an annex to Resolution VII.8 (1999). At: http://www.ramsar.org/key_guide_indigenous.htm (viewed 3 October 2008).

International Instrument	Protection of Indigenous peoples rights to Water
Agenda 21	<ul style="list-style-type: none"> ▪ a comprehensive plan of action to be taken globally, nationally and locally by organisations of the UN, governments, and major groups in every area where there are human impacts on the environment²⁸ ▪ provides for the protection and management of freshwater resources recognising the effects that climate change will have on water and indigenous peoples.²⁹ <p>Identifies the need to:</p> <ul style="list-style-type: none"> ▪ engage indigenous people in water management policy-making and decision-making ▪ improve indigenous technologies to fully utilise limited water resources and to safeguard those resources against pollution ▪ recognise the interconnection between economic development and access and supply of water.³⁰
Rio Declaration	<ul style="list-style-type: none"> ▪ recognises the vital role of indigenous communities knowledge and traditional practices in environmental management.

(a) The human right to water

The right to water is a human right that is protected in a wide range of international instruments, including the ICESCR, ICCPR and the Declaration on the Rights of Indigenous Peoples.³¹

‘The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’³² There is a fundamental link between accessing water and living in dignity which means that the human right to water is receiving increased attention and recognition both in

28 It was adopted by more than 178 Governments, including Australia, at the UN Conference on Environment and Development in 1992.

29 *Agenda 21*, ch18, 26. Chapter 26 specifically relates to recognising and strengthening the role of Indigenous People and their Communities.

30 *Agenda 21*, ch 18.

31 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhchr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).

32 Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002). At: <http://daccessdds.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement> (9 October 2008). See also Committee on Economic, Social and Cultural Rights, *Substantive Issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 14 (2000) The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). At: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument) (viewed 9 October 2008).

Australia and worldwide.³³ The right to water is linked to many other rights including the right to food, the right to health and the right to take part in cultural life.³⁴

The Committee on Economic, Social and Cultural Rights has stated that the right to water ‘contains both freedoms and entitlements.’ The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.³⁵

With water becoming the most significant global commodity, the rights for Indigenous peoples to access and use our lands, waters and natural resources for economic development and to build sustainable communities is also provided for under the ICESCR and the Declaration on the Rights of Indigenous Peoples.

(b) The right to a healthy environment

In order to provide for water rights, the right to a healthy environment must be assured.

Environmental rights include the rights of access to the unspoiled natural resources that enable survival such as land, shelter, food, water and air; the right to refuse development; and specific environment-related rights of Indigenous peoples.

Environmental rights are provided for by international instruments including the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), the Convention on Biological Diversity, the Rio Declaration and Agenda 21.

Text Box 2: The Ramsar Convention

Australia was one of the first countries to sign the Ramsar Convention, and Australia designated the world’s first Wetland of International Importance: Cobourg Peninsula Aboriginal Land and Wildlife Sanctuary in the Northern Territory in 1974.

The Ramsar Convention is directly linked to the Convention on Biological Diversity and Ramsar wetlands are recognised as a matter of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999*.

Australia currently has 64 Ramsar listed icon sites, including the Murray-Darling Rivers.

33 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhcr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008). See also Gray J & Nolan J, Editorial, (2008) 17(1) *Human Rights Defender*, 1, p 1.

34 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhcr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).

35 Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002). At: <http://daccessdds.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement> (9 October 2008).

The Australian Government has a number of obligations under these instruments. For example, Australia currently has 64 Ramsar sites listed under the Ramsar Convention, and the Government is responsible for the management and conservation of these sites. These responsibilities are directly linked to obligations arising from the Convention on Biological Diversity through the Conference of the Parties (COP), as the two conventions deal with similar subject matter.³⁶ Many decisions of the COP have called for the full and effective participation of Indigenous communities in order to achieve the global goal.

Some countries are further progressed than others in developing the recognition of environmental rights as a human right. For example, the African Charter on Human and Peoples' Rights provides that 'all peoples shall have the right to a general satisfactory environment favourable to their development.'³⁷ In South Africa, environmental rights are protected in the constitution which grants people the right to have the environment protected, and the right to live in an environment that is not harmful to human health or well-being.³⁸

(c) The World Water Forum

The World Water Forum, an initiative of the World Water Council, is the principal water-related event in the world. The aim is to raise awareness on water issues by putting water firmly on the international agenda. The World Water Forum encourages dialogue and participation from many organisations to influence water policy making at a global level and to improve living conditions and sustainable development. The fifth World Water Forum is due to take place in March 2009 in Turkey.³⁹

At the Third World Water Forum in Kyoto 2003, an Indigenous Declaration on Water was adopted by Indigenous peoples recognising the special spiritual and cultural relationship that Indigenous peoples have with water. The declaration focuses on three areas: Indigenous water rights, Indigenous water values and Indigenous water management.⁴⁰

A declaration on Indigenous water knowledge and interests that builds on the Indigenous Peoples Kyoto Water Declaration will be presented in Turkey on behalf of Indigenous peoples across the world. The declaration will be completed with the assistance of the international delegates at the Forum. Currently there is no specific session at the World Water Forum on water and Indigenous peoples, although there will be one on 'water and culture'. Indigenous peoples will be calling for a specific forum regarding their rights to water to ensure that Indigenous participation is not restricted to the water and culture session. This will be important as Indigenous people's rights to water are about sustaining our livelihoods, of which culture is one part.

36 See, for example, the Conference of the Parties to the Biodiversity Convention, *Biological diversity of inland water ecosystems*, COP 9 Decision IX/19, Bonn, 19-30 May 2008. At: <http://www.cbd.int/decisions/?m=COP-09&id=11662&lg=0> (viewed 1 September 2008).

37 *African Charter on Human and Peoples' Rights*, art 24.

38 *Constitution of the Republic of South Africa*, s 24.

39 Fifth World Water Forum. At: <http://www.worldwaterforum5.org/> (viewed 3 October 2008).

40 Indigenous Declaration on Water, Third World Water Forum, Kyoto, March 2003. At: <http://www.indigenouswater.org/IndigenousDeclarationonWater.html> (9 October 2003)

4.2 The Domestic Framework

Despite our international obligations to protect the distinct human rights of Indigenous peoples to land, territories, water and natural resources, the human right to water is often poorly implemented at a domestic level.⁴¹ Indigenous expectations of the extent to which they can participate in water management are not being met.⁴² Compared to other colonised countries, including the United States of America, Canada and New Zealand, Australia has the least formal recognition of Indigenous water rights.⁴³

At the national level, intergovernmental agreements and initiatives are the main policy instruments. Australian law and policy has identified water as a finite resource that needs to be regulated. Additionally, there are different legislative frameworks for freshwater and saltwater.

Water management and regulation in Australia is extremely complicated. Water resources are regulated by water or natural resources management legislation, at national, state, regional and local levels with states and territories as the primary water law and policy makers. Every state and territory has its own complex water regime. Most include specific legislative provisions covering their rights and property in water.⁴⁴ Legislation is often silent in provisions for Indigenous expressed water rights, access to water as entitlements and water allocations.⁴⁵

Appendix 7 provides a summary of water law and policy developed by each state and territory government.

The notion of 'water rights' encompasses a wide class of rights under the law.⁴⁶

While some types of water are the subject of private property rights, the state is assumed to hold property rights for the majority of water, including flowing water.

Water rights are considered a legal right to water use such as native title, harvestable right or for stock and domestic purposes, or other licence holder. Water access entitlements are generally granted in the form of permits or licences by the states and territories to industry, irrigation, or local government authorities for town water supplies. A water allocation means the water that a licence holder of an access licence is entitled to take and may be attached to a water access entitlement.

41 Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At: <http://www.unhcr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).

42 S Jackson, *Indigenous Interests and the National Water Initiative Water Management, Reform and Implementation Background Paper and Literature Review*, CSIRO (2007), p 93. At: http://www.nailsma.org.au/nailsma/publications/downloads/NAISMA_NWI_Review_UPDATEDec07.pdf, (viewed 26 July 2008).

43 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, CAEPR Working Paper No. 42/2008, Centre for Aboriginal Economic Policy Research, Australian National University (2008), p vii. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

44 See *Water Management Act 2000* (NSW) s 392; *Water Resources Act 2007* (ACT) s 7; *Water Act 2000* (Qld) s 19; *Water Act 2000* (NT) s 9; *Water Management Act 1999* (Tas) s 7; *Water Act 1989* (Vic) s 7.

45 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

46 M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, CAEPR Working Paper No. 42/2008, Centre for Aboriginal Economic Policy Research, Australian National University (2008), p 4. At: <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

With significant pressures on water resources in Australia, particularly in the Murray-Darling River Basin, the federal government is increasingly becoming involved in water policy and reform.⁴⁷ Water reform has been a slow process as it involves many stakeholders. However, this will be important in responding to climate change, and the urgency needed to develop a consistent approach to cross jurisdictional management of water resources.

As identified by Collings and Falk:

The core of the recent national water reforms is that water is part of Australia's 'natural capital', where new regimes include, in most jurisdictions, the *separation* of water access entitlements from land titles, separating water delivery from regulation, implementing revised water management policy and legislation and environmental benefit.⁴⁸ The objectives of the Intergovernmental Agreement are the uniform management of water.⁴⁹ A clear statement of commitment to Indigenous Australians is absent.⁵⁰

(a) Water Policy, Legislation and Regulation

Australia provides for the management and regulation of its water resources, including inland and coastal freshwater rivers, saltwater rivers and seas, and surface and groundwater, through a significant body of water policy, legislation and regulation. Some of Australia's waterways are nationally and internationally significant and Australia has particular obligations to protect and conserve these sites.

(i) *The Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)*

The EPBC Act, passed in response to the international Convention on Biodiversity, provides a legal framework to protect and manage matters of national and international environmental significance including:

- world heritage sites
- wetlands of international importance (RAMSAR icon sites)
- Commonwealth marine areas
- national heritage places
- nationally threatened species and ecological communities
- migratory species.

47 With regard to the federal government's role in the application of water law, section 100 of the Constitution provides that: 'The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.' Historically, this provision is said to be the reason why the federal government did not become involved in water law. However, the federal government has more recently been engaging in water policy development and the constitutional validity of its engagement has not recently been challenged. Arguably, section 100 of the Constitution only relates to trade and commerce, and any action taken by the federal government to regulate water may not be seen to conflict with the reasonable use of waters by states or their residents. Due to constitutional limitations many of the federal government's powers in environmental and water law have come from international instruments as incorporated under the external affairs power, Section 51 (xxix) of the Constitution.

48 Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, in the preamble at p 1.

49 Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, in the Objectives 23(i).

50 N Collings and V Falk, 'Water, Aboriginal peoples in Australia and their spiritual relationship with waterscapes', in E Johnston, M Hinton and D Rigney, (eds) *Indigenous Australians and the Law* (2008) 131, p 132.

As discussed in the previous chapter, Indigenous interests and issues are represented through the Indigenous Advisory Committee established by the EPBC Act.

(ii) *The National Water Initiative (NWI)*

The NWI is the national water plan. National water reform began in 1994 with the Council of Australian Governments (COAG) Water Reform Framework. This was renewed in 2004 with New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory governments signing a ten year National Water Initiative. Tasmania signed in June 2005 and Western Australia in April 2006.

The major elements of the NWI are to improve:

- water security
- environmental factors
- efficiency in all areas including water trading.

Parties to the NWI are the COAG members.⁵¹ Each state and territory is required to produce a plan detailing the implementation of the NWI and to implement actions in the NWI Agreement.⁵²

The National Water Commission (NWC) is the Australian Government agency responsible for the implementation of water reform in line with the NWI. The NWC focuses on sustainable management of water and oversees many developments such as water for the environment, water markets and pricing. The NWC does not have an Indigenous Commissioner sitting on the NWC.

The NWI provides for water trading, which is the buying and selling of water access entitlements (and water rights). Whilst water trading is not new there have been significant recent reforms which will allow water trading to continue in the future. Water trading can either be temporary or permanent, depending on what is agreed between the buyer and the seller.

The NWI remains the basis for the water trade in Australia setting out the objectives and rules for water trading, aiming to make trade efficient.⁵³ States and territories also have different trading regimes. Due to many restrictions on the granting of new water licences, water trading is often the only way that water rights can be obtained.

Access to, and management of water by Indigenous people is provided for under the NWI. However, while the NWI ensures that native title rights will be accounted for, the recognition and provision of other Indigenous water rights and priorities is discretionary. This is highlighted below. The (major) specific Indigenous provisions provide:

- a commitment to recognise Indigenous needs in relation to water access and management in the Water Access Entitlements and Planning Frameworks

51 Comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association.

52 National Water Commission, *Implementing water reform*. At: <http://www.nwc.gov.au/www/html/143-implementation.asp> (viewed 8 October 2008).

53 National Water Commission, *National Water Initiative*, paras 58-63. At: <http://www.nwc.gov.au/www/html/117-national-water-initiative.asp> (viewed 28 August 2008).

- Indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, through planning processes that ensure:
 - inclusion of Indigenous representation in water planning *wherever possible (italics as made to highlight for reader)*
 - water plans will incorporate Indigenous social, spiritual and customary objectives and strategies for achieving these objectives *wherever they can be developed*
- that water planning processes *will take account of* the possible existence of native title rights to water in the catchment or aquifer area⁵⁴
- that water allocated to native title holders for traditional cultural purposes *will be accounted for*.⁵⁵

The NWI states that the provisions to address Indigenous water issues were to be implemented immediately in all water plans.⁵⁶ However, the NWI does not include specific guidelines on how to implement Indigenous water rights. The provisions related to Indigenous water rights in the NWI are very broad and as mentioned above, are subject to a great deal of government discretion. This is indicated by wording such as ‘wherever possible’ and ‘wherever they can be developed.’ The discretionary nature means that it is difficult to hold states and territories accountable in implementing Indigenous people’s rights to water. This leaves the future of Indigenous water rights at the whim of government.

Additionally, the NWC highlighted in its ‘Water planning in Australia’ position statement, that future water planning should ‘give higher priority to ensuring that the values and interests of Indigenous people are considered.’⁵⁷ However, to date each state and territory has applied Indigenous water rights in different ways, at different speeds and with varying emphases or not at all.

The NWC is planning to hold an Indigenous Water Planning Forum in 2009. The forum aims to recognise the ‘explicit inclusion of Indigenous interests in water plans’. The forum also aims to bring together ‘Indigenous people and jurisdictional water planners to identify and document good examples of Indigenous engagement in water planning processes.’⁵⁸ It is hoped that this forum will result in a formally recognised national Indigenous representative water body⁵⁹ and will include a range of Indigenous groups not limited to those already engaged in water policy.

54 The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the *Native Title Act 1993* (Cth).

55 National Water Commission, *National Water Initiative, Indigenous Access*, paras 25(ix), 52-54. At: <http://www.nwc.gov.au/www/html/117-national-water-initiative.asp> (viewed 28 August 2008).

56 As of June 2004 as The National Water Initiative was signed 25 June 2004. National Water Commission, *Schedule A: Timeline for Implementation of Key Actions*. At: <http://www.nwc.gov.au/resources/documents/Intergovernmental-Agreement-on-a-national-water-initiative.pdf> (viewed 28 August 2008).

57 National Water Commission, *Water planning in Australia position statement* (2008), At: <http://www.nwc.gov.au/resources/documents/water-allocation-planning-PS-waterlines-0408.pdf> (viewed 28 August 2008).

58 National Water Commission, *Indigenous water management*. At: <http://www.nwc.gov.au/www/html/273-indigenous-water-issues.asp?intSiteID=1> (viewed 28 August 2008).

59 National Water Commission, communication with the Manager for Water Planning, 14 August 2008.

(iii) *Water Act 2007 (Cth) (Water Act)*

The Water Act which commenced on 3 March 2008 was enacted to assist in implementing many of the elements of the NWI, including a water market and trading scheme for the Murray-Darling Basin.⁶⁰ While the Water Act is the national legislative framework for water management, it is primarily focused on the management of the Murray-Darling Basin. One of the objects of the Water Act is to 'give effect to relevant international agreements.'⁶¹ The relevant international agreements include:

- the Ramsar Convention
- the Convention on Biological Diversity
- any other international convention to which Australia is a party. That is:
 - (i) relevant to the use and management of the Basin water resources
 - (ii) prescribed by the regulations of the Water Act.⁶²

International agreements have not yet been prescribed by the regulations.⁶³ In the absence of *water ethics or principles* derived from the various international mechanisms (discussed earlier in this chapter), any negotiations the Australian Government are involved in regarding water, should ensure that as a minimum the rights of Indigenous peoples' enshrined in the Declaration on the Rights of Indigenous Peoples are fully considered. This also applies to the Basin Plan.

While the Water Act does not provide provisions for licensing, approvals or compliance with regulations, it does provide a framework for the establishment of a Basin Plan and a single Murray-Darling Basin Authority (MDBA).⁶⁴ The MDBA is an independent authority, charged with the preparation of the Basin Plan, enforcement powers and engaging the community in the management of resources.

The Basin Plan is not expected to be finalised until 2011. The plan will provide for the integrated and sustainable management of water resources. However, environmental groups have criticised the government, arguing that there is an urgent need to address significant environmental problems, particularly in the Murray-Darling River Basin.

Provisions of the Water Act, requires the Murray-Darling Basin Authority to consult widely when developing, amending and reviewing the Basin Plan, including with Indigenous communities. The Act also provides for the mandatory consideration of the uses of Basin water resources, including by Indigenous peoples. However, the distinct rights and interests of Indigenous peoples to water are not adequately provided for by this legislation.⁶⁵ For example, the Water Act should have a distinct category that provides for 'Indigenous cultural water use' and access entitlements.⁶⁶

60 See *Water Act 2007 (Cth)*, sch 3, for the Basin water market and trading objectives and principles. Currently the water market rules are being developed by the Australian Competition and Consumer Commission (ACCC).

61 To the extent to which those agreements are relevant to the use and management of the Basin water resources). *Water Act 2007 (Cth)*, s 3 (b).

62 *Water Act 2007 (Cth)*, s 4.

63 The *Water Regulations 2008* came into effect 30 June 2008.

64 See *Water Act 2007 (Cth)*, Part 2, Division 1 and Part 9.

65 For further discussion regarding the inadequate recognition and protection of the distinct rights and interests of Indigenous peoples to water, see the Australian Human Rights Commission *Submission to the Senate Rural and Regional Affairs and Transport Standing Committee, Inquiry into the Water Amendment Bill*, November 2008.

66 *Water Act 2007*, s 202(7), should be amended to specifically provide that water for Indigenous cultural purposes is included in the definition of water users. See Australian Human Rights Commission, *Submission to the Senate Rural and Regional Affairs and Transport Standing Committee, Inquiry into the Water Amendment Bill*, November 2008.

The Indigenous peoples whose country lies within the Murray-Darling River Basin, argue that they require specific cultural water allocations, which they refer to as cultural flows, to meet their spiritual, cultural, social, economic and environmental management responsibilities and development aspirations. They further argue that there is a difference between cultural and environmental water:

The difference between environmental and cultural water is that it is the Indigenous peoples themselves deciding where and when water should be delivered based on traditional knowledge and their aspirations. This ensures Indigenous peoples are empowered to fulfil their responsibilities to care for country.⁶⁷

(iv) *Water for the Future*

The *Water for the Future* plan announced by the Minister for Climate Change and Water on 29 April 2008 provides \$12.9 billion funding to support governance and water resource management reforms including:

- establish the Murray-Darling Basin Authority
- improve water information
- sustainable rural water use and infrastructure programs
- purchasing water to improve the health of the rivers and wetlands in the Murray-Darling Basin.

The plan's priorities are climate change, water security, using water wisely and healthy rivers. The NWI is involved in delivering these priorities.⁶⁸ One of the first steps taken to meet these priorities, is a commitment of \$3.1 billion by the Australian Government to purchase water for the environment in the Murray-Darling Basin over a ten year period.⁶⁹

There has been little direct involvement or inclusion of Indigenous peoples in the *Water for the Future* initiative. While remote Indigenous communities are recognised in the plan with the focus on assessing water supply, the issue of full cost recovery and the burden it would place on remote or discrete Indigenous communities is unresolved.⁷⁰

(b) **National Water Programs**

The Australian Government provides and funds several programs for Indigenous engagement and participation in water management.⁷¹ Some of these initiatives are water centered and others relate to Indigenous land management more generally. They are provided for through funding and other agencies, such as Land & Water Australia⁷² and the NWC. Programs include:

67 Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

68 Australian Government, *Water for the Future*. At: <http://www.environment.gov.au/water/index.html> (viewed 1 September 2008).

69 Australian Government, Department of the Environment, Water, Heritage and the Arts, *Overview of the Restoring the Balance in the Murray-Darling Basin Program (water entitlement purchasing)*. At: <http://www.environment.gov.au/water/mdb/entitlement-purchasing/index.html> (viewed 13 October 2008).

70 Australian Government, Department of the Environment, Water, Heritage and the Arts, *Water for the Future priorities*. At: <http://www.environment.gov.au/water/action/priorities.html> (viewed 3 October 2008).

71 For further information on Australian Government programs see Australian Government, *Indigenous Australians Caring for Country*. At: <http://www.environment.gov.au/indigenous/index.html> (viewed 1 September 2008).

72 Land & Water Australia is a statutory research and development corporation within the Australian Government Agriculture, Fisheries and Forestry portfolio. See Land & Water Australia, *About Us*. At: http://www.lwa.gov.au/About_Us/index.aspx (viewed 3 October 2008).

- Caring for Our Country
- Community Water Grants
- Great Artesian Basin initiatives
- Inland waters initiatives
- Lake Eyre initiatives
- Murray-Darling Basin programs.⁷³

Caring for our Country is the Government's new natural resource management initiative and it is an integrated package with one clear goal, a business approach to investment that includes clearly articulated outcomes and priorities, and improved accountability.⁷⁴ Caring for our Country commenced on 1 July 2008 and integrates the Commonwealth's existing natural resource management programs:

- Natural Heritage Trust
- National Action Plan for Salinity and Water Quality
- National Landcare program
- Environmental Stewardship program
- Working on Country program.

In 2007, the previous Australian Government launched the Working on Country Program, an element of the broader Caring for our Country initiative. The Working on Country program aims to build on the Indigenous knowledge of protecting and managing land and sea country, and provides funding for Indigenous peoples to deliver environmental outcomes to the Australian Government.

This program established a precedent where the Australian Government now purchase environmental services from Indigenous peoples, resulting in employment opportunities for people on their country.

Another component of the broader Caring for our Country initiative that recognises the interests of Indigenous Australians is the Indigenous Protected Areas (IPA) Program.⁷⁵ There are currently 25 IPAs in Australia with many including the management of water and sea country.

Text Box 3: Paruku IPA – Western Australia

Paruku IPA in Western Australia covers around 430 000 hectares including many waterways and spectacular wetlands. Paruku (Lake Gregory) is the only reliable source of freshwater for many birds and animals in the area.

73 Australian Government, Land & Water Australia, *The Engagement of Indigenous Australians in Natural Resource Management: Key findings and outcomes from Land & Water Australia funded research and the broader literature* (2007), p 9. At: <http://products.lwa.gov.au/files/PR071332.pdf> (viewed 28 August 2008).

74 P Garrett, Minister for the Environment, Heritage and the Arts, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 29 August 2008.

75 An IPA is an area of Indigenous-owned land and waters where traditional Indigenous owners have entered into an agreement with the Australian Government to promote biodiversity and cultural resource conservation. For further information about IPAs, see Australian Government, Department of the Environment, Water, Heritage and the Arts, *Indigenous Protected Area – Background*. At: <http://www.environment.gov.au/indigenous/ipa/background.html> (viewed 8 October 2008).

Through IPAs, the Government supports Indigenous communities to manage and conserve their lands and waters in line with international guidelines, so that plants, animals and cultural sites are protected for the benefit of all Australians. It also helps Indigenous communities develop a plan to manage their land's and waters natural and cultural values and provides ongoing support for work to control threats such as weeds, feral animals and wildfire. These issues pose significant threats to waterways in particular, and Indigenous peoples interests in these areas.

The Community Water Grants program offered grants to assist communities save, recycle or improve the health of their local water resources.⁷⁶ This program ceased on 30 June 2008. Grants were available for projects related to:

- water saving and efficiency
- water recycling
- water treatment – improving the health of surface and ground water.

During the 2007-08 financial year, the Government provided \$200 million for the Community Water Grants program. Of this, \$775,946 was provided to Indigenous water projects. While there will be no further funding available under the Community Water Grants program, the government have assured that existing projects will be unaffected.⁷⁷

The Nyirripi Aboriginal community utilised the Community Water Grants funding program to protect their water interests and address their water priorities.

Text Box 4: Community Water Grants Program – The Nyirripi Community Council

The Nyirripi Community Council in the Northern Territory received funding under the Community Water Grants program to protect 16 important water places in the Walpiri and Kartangarruru Kurintji Homelands.

Funding these programs provides capacity for elders to fulfil their cultural responsibilities to take children to each water place, share cultural stories and talk about the importance of the protection of sites.

Activities such as these are integral to caring for country, land and water management and the maintenance of culture through the transferral of knowledge. It also provides capacity to contribute to a broader social and environmental agenda enabling Indigenous peoples to monitor and improve water quality.⁷⁸

The management of the Indigenous estate, which includes up to 20 percent of Australian lands and waters, is an identified priority for the Government's developing Indigenous Economic Development Strategy.⁷⁹

76 Australian Government Water Fund, *Community Water Grants*. At: <http://www.communitywatergrants.gov.au/about/index.html> (viewed 14 November 2008).

77 Australian Government Water Fund, *Community Water Grants*. At: <http://www.communitywatergrants.gov.au/about/index.html> (viewed 14 November 2008).

78 Australian Government Water Fund, *Case studies: Water treatment projects*. At: <http://www.communitywatergrants.gov.au/grants/case-studies/treatment.html> (viewed 1 September 2008).

79 Australian Labor Party, *Indigenous economic development*. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 8 October 2008).

Text Box 5: Indigenous Economic Development Strategy (IEDS)

The Labor Party committed to improving the lives of Indigenous Australians through economic development as part of its 2007 election campaign.⁸⁰

In particular, the IEDS draws attention to opportunities arising from water resources for local enterprise and local jobs.

For example, the Australian Government has identified that in central Australia there are 'substantial ground water resources that have not been developed outside the town areas of Alice Springs and Tennant Creek'. Working with the Centrefarm Aboriginal Corporation set up by the Central Land Council, horticulture projects are able to be established with funding from the Aboriginal Benefits Account.⁸¹ This development must take place in partnership with the traditional owners for those lands and waters.

This is to ensure that:

- Indigenous priorities are addressed and not compromised
- the process is assured integrity by ensuring the full and effective participation and engagement of the traditional owners in decision-making
- traditional owner free, prior, and informed consent is obtained for development on their lands and waters
- funds secured by Aboriginal people through opportunities arising through climate change or water trading are accessible and directed only to projects that meet the aspirations of those people
- the transparency and efficiency of the ABA to ensure funds are not used to pay for services that would normally be provided by government (civil rights).

The IEDS should provide a further mechanism by which Indigenous water rights are recognised and secured.

The Minister for the Environment, Heritage and the Arts, advised that:

Indigenous cultural and natural resource management on the Indigenous estate more broadly, has great capacity to generate economic opportunity and outcomes for communities and individuals.

Indigenous land and sea management groups are increasingly undertaking commercial contract work for both government agencies and private business. The estimated value of commercial work undertaken by Indigenous land and sea management groups is around \$4-6 million per annum.⁸²

Programs such as these are vital as they provide access to opportunities related to water and carbon trading, and bio-security. However, the Government will be required to support policy development which firmly situates Indigenous people as the primary drivers of this emerging economic approach such as a preferred Indigenous tender in commercial work.

80 Australian Labor Party, *Indigenous economic development*. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 8 October 2008).

81 Australian Labor Party, *Indigenous economic development*. At: http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 8 October 2008).

82 P Garrett, Minister for the Environment, Heritage and the Arts, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 29 August 2008.

(c) State and Territory Water Programs

Appendix 7 provides a summary of reported progress on implementing Indigenous access provisions of the NWI by each jurisdiction.

While all states and territories are required to produce a plan detailing how they intend to implement the National Water Initiative, only New South Wales provide considerable recognition of Indigenous water rights in its water plan.

Firstly, a Water Sharing Plan (WSP) is developed for each catchment area as subordinate legislation under the *Water Management Act 2000* (NSW).⁸³ In each WSP, any persons with native title to water as determined under the *Native Title Act 1993* (Cth) can access water for personal, domestic and non-commercial purposes. Some WSPs provide for this allocation.

For example, the Apsley water sharing plan on the Mid North Coast of NSW provides 0.01 megalitres (ML) per day for native title purposes to the community for:

personal, domestic and communal purposes including the purposes of drinking, food preparation, washing, manufacturing traditional artefacts, watering domestic gardens, cultural teaching, hunting, fishing, and gathering, and for recreational, cultural and ceremonial purposes.⁸⁴

Secondly, the NSW Government is in the process of developing macro water sharing plans which cover several catchment areas that have low water usage.

The macro water sharing plans will include two new initiatives for Aboriginal water users:

- Aboriginal cultural licences – will have a cap of 10 ML per licence per year
- Aboriginal commercial licences – will have a limit of 500 ML per year depending on river flow.⁸⁵ Allocations are for coastal areas only, non-tradeable and unallocated to date.⁸⁶

(i) Cultural Water Access Licences

Cultural Water Access Licences are provided for in the macro water sharing plans. These plans recognise the importance of rivers and groundwater to Aboriginal culture and will allow Aboriginal communities to apply for a water access licence for cultural purposes such as manufacturing traditional artefacts, hunting, fishing, gathering, recreation, and cultural and ceremonial purposes. An Aboriginal cultural licence can also be used for drinking, food preparation, washing, and watering domestic gardens.

83 The duration of a WSP is ten years.

84 Water Sharing Plan for the Apsley River Water Source (as amended 1 July 2004) cls 27, 32, 67, pp 8, 11, 25. At: http://www.naturalresources.nsw.gov.au/water/pdf/apsleyriver_commenced.pdf (viewed 28 August 2008).

85 NSW Department of Natural Resources, *Water management plans: information for Aboriginal water users*. At: http://www.naturalresources.nsw.gov.au/water/info_aboriginal_water.shtml (viewed 28 August 2008).

86 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

These licences will be considered in both inland and coastal surface water and groundwater systems and will generally be granted, as long as the water is not used for commercial activities. These cultural licences are capped at up to 10ML per licence per year.⁸⁷

The first and only Aboriginal cultural access licence in NSW, (without a native title determination) was allocated to the Nari Nari Tribal Council in Hay in 2006.

Text Box 6: Aboriginal Cultural Licence – Nari Nari Tribal Council

The Nari Nari Tribal Council is a 'not-for-profit Indigenous organisation, committed to the preservation and protection of Culture and Country'.⁸⁸ The Nari Nari Tribal Council manages 1,300 hectares of riverine land 35km west of Hay. This land was purchased by the Indigenous Land Corporation in 2001 for the Nari Nari Tribal Council. Five thousand hectares of this land was declared an Indigenous Protected Area (IPA) in March 2003 under the Australian Government's Caring for Country program.⁸⁹

The procedure of obtaining a licence was quite complex. During the negotiations for the new water sharing plan for the Murrumbidgee a specific clause was included to provide for a total of up to 2,150 ML for cultural access licences.⁹⁰ The Murrumbidgee Water Management Committee recommended the inclusion of the provision. Indigenous peoples were represented in that Committee by the Murrumbidgee Traditional Owners Reference Group.⁹¹

The Nari Nari Tribal Council obtained their licence by applying to the Traditional Owners Reference Group, who allocate the water to Aboriginal groups or individuals. The licence works similar to an irrigation licence and has been in operation for three years.

In 2008 the Nari Nari Tribal Council received the full allocation of 2,150 ML. Allocations in past years have been 500 ML and 700 ML.

The water is used by the Nari Nari to flood their wetlands at least every 2 years providing for the maintenance and sustainability of the ecosystem, including animal and bird habitats of the wetlands.⁹²

87 New South Wales Department of Natural Resources, *Water Management Plans, Information for Aboriginal Water Users*, Fact Sheet. At: http://www.naturalresources.nsw.gov.au/water/info_aboriginal_water.shtml (viewed 15 December 2008).

88 Nari Nari Tribal Council. At: <http://narinaitc.org/index.htm> (viewed 28 August 2008).

89 The Australian Government's Indigenous Caring for Country program recognises the role that Indigenous peoples have in natural resource management and heritage activities. The program encompasses several projects such as Working on Country and IPAs. IPAs are 'an area of Indigenous-owned land or sea where traditional Indigenous owners have entered into an agreement with the Australian Government to promote biodiversity and cultural resource conservation.' See Australian Government, Department of the Environment, Water, Heritage and the Arts, *Indigenous Australians Caring for Country*. At: <http://www.environment.gov.au/indigenous/index.html> (viewed 1 September 2008).

90 Securing the provision, and securing a licence, are significant as there is a general ban on the granting of new access licences under Clause 30. The licence is issued as a regulated river (high security) (Aboriginal cultural) access licence under Clause 30 of the Water Sharing Plan for the Murrumbidgee Regulated River Water Source (as amended on 1 July 2004). At: http://www.naturalresources.nsw.gov.au/water/pdf/murrumbidgee_reg_river_final.pdf (viewed 28 August 2008).

91 D Jacobs, Department of Natural Resources, Deniliquin, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 28 July 2008.

92 Nari Nari Tribal Council, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 7 August 2008.

Despite the breakthrough in gaining a water licence, the Nari Nari have identified a number of barriers that limit their capacity to take full advantage of their licence, and for others to access cultural water licences. These barriers include:

- *Process* – The fact that only one licence has been granted, highlights the need for the current water licensing process to be more accessible to Aboriginal peoples.⁹³ Improved education and the identification of clear steps to take in the application process may increase the accessibility for Aboriginal peoples.
- *Definition* – Cultural use (of water) has not been determined and defined appropriately by neither the government nor the community. The only guarantee is that it excludes economic use. The Nari Nari are only able to use their cultural water for environmental purposes.⁹⁴
- *Funding* – The licence is very expensive. Fees are paid both to State Water (NSW) and a lodgement fee to Land and Property Information. Ongoing costs for the licence are \$9,000 per year for 2,150 ML.⁹⁵ This does not include pumping costs per ML of water. Even though a specific water quantity is allocated this does not ensure that the community receives or gains access to the water, as funding for infrastructure, such as pumps, is not provided. Therefore only Indigenous communities or organisations with adequate financial resources and infrastructure can obtain a water access licence.⁹⁶

In addition, the Nari Nari also manage a number of other projects. They have received funding under the Community Water Grants program for several projects but this funding can not be used for obtaining a water licence.⁹⁷

While there are many Indigenous groups in the Murrumbidgee Catchment, the fact that only one group have been successful in gaining a cultural access licence is evidence that there are significant barriers.

The Nari Nari have identified that:

The funding for obtaining water licences could be improved vastly. This could be provided by governments and catchment management authorities.⁹⁸

Not only are the Nari Nari providing a valuable service in the national interest by caring for the ecosystem and rehabilitating the wetlands, they are also conducting management activities which the State Government has a responsibility for.

93 The term Aboriginal people has been used as recognition that the traditional owners applicable are Aboriginal groups of New South Wales.

94 Nari Nari Tribal Council, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 7 August 2008.

95 Now the Department of Lands.

96 Nari Nari Tribal Council, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 7 August 2008.

97 This is because it does not meet the criteria for funding under the Community Water Grants program which is to save, treat or reuse water. Correspondence, Tony Cory (Acting Director, Australian Government Community Water Grants Team) Email 4 September 2008.

98 Nari Nari Tribal Council, Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 7 August 2008.

Projects such as these should be supported by governments in a similar way to Caring for Country, where the Australian Government purchases environmental services from Indigenous peoples.⁹⁹ Indigenous peoples providing these necessary services should be acknowledged and adequately funded and resourced rather than self funding or using grant monies on expensive projects and water licences.

(ii) *Aboriginal Commercial Water Licences*

Unlike other specific purpose licences, Aboriginal commercial water licences can be used for commercial enterprises owned by Aboriginal people such as aquaculture or agriculture, and they are tradable. The *Water Management Act 2000* (NSW) states that ‘benefits flow to Aboriginal people for spiritual, social, customary and economic use of land and water.’¹⁰⁰ The creation of Aboriginal Commercial Water Licences fulfils the intent of the Act.

There are limitations on the number of commercial licences available. While they generally will not be available for inland rivers due to the cap on the Murray-Darling, they may be available in certain circumstances for coastal rivers provided the commercial use does not impact on ecological values.¹⁰¹

The *Water Management Act 2000* (NSW) provides for an Aboriginal Water Trust with funds of \$5 million.¹⁰² The original proposal put to the NSW Government by the New South Wales Aboriginal Land Council and the New South Wales Native Title Services, was as a compensation package in \$250 million worth of water entitlements. The establishment of the Trust was in recognition of the intimate cultural and economic relationship that Indigenous peoples have with water, and the historical denial of ownership of the lands necessary to acquire water entitlements.¹⁰³ Further, the Trust envisaged that unallocated water will be distributed for the benefit of Aboriginal people, for example, in some groundwater and coastal surface water systems.¹⁰⁴

The NSW Aboriginal Water Trust’s charter is wide and can also include water trading, leasing of water, ownership of access licences and grants to establish water-related enterprise.¹⁰⁵

The main purpose of the Water Trust is to encourage and assist Aboriginal participation in the commercial water market by funding Aboriginal owned business where water is a core component.¹⁰⁶ Eligible projects may include the purchase of a water licence as a component of a business plan, the preservation of Aboriginal water knowledge through a breadth of culturally appropriate media, and other related

99 This is part of the Working on Country program, see Australian Government, Department of the Environment, Water, Heritage and the Arts, *Working on Country*. At: <http://www.environment.gov.au/indigenous/workingoncountry/index.html> (viewed 10 September 2008).

100 *Water Management Act 2000* (NSW), s 3.

101 NSW Department of Natural Resources, *Water management plans: information for Aboriginal water users*. At: http://www.naturalresources.nsw.gov.au/water/info_aboriginal_water.shtml (viewed 28 August 2008).

102 The Water Trust was effectively commenced in July 2005 with \$5 million over two years and thereafter with proposed enhancements. The allocation for the AWT included grant monies and other administrative costs.

103 T McAvoy, ‘The Human Right to Water and Aboriginal Water Rights in New South Wales’, (2008) 17(1) *Human Rights Defender* 6.

104 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

105 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

106 New South Wales Government, *Aboriginal Water Trust*. At: http://www.naturalresources.nsw.gov.au/water/ind_water_trust.shtml (viewed 28 August 2008).

water infrastructure requirements.¹⁰⁷ The Water Trust had secured a further \$300,000 in government funding to conduct workshops and an education kit to increase Aboriginal communities' awareness of the water reforms in relation to Indigenous water rights and interests and simplifying technical jargon.¹⁰⁸

Theoretically, in contrast to the water-sharing plans and other water reform processes, which aim to balance competing interests, the Water Trust is solely concentrated on Aboriginal projects in water and includes an eligibility criteria that incorporates the importance of Aboriginal cultural values in the grants process. This model is overseen by an Aboriginal Advisory Committee, which proposes projects based upon the eligibility criteria, to the Minister of the Department of Environment and Climate Change to be funded.¹⁰⁹

To date, the NSW Aboriginal Water Trust has approved grants in round one, and further grant assistance is underway.¹¹⁰ Additionally, while this funding is encouraged it requires further investment for the long-term viability of the Water Trust and is not adequate to provide for the purchase of commercial water in the competitive market under the NWI reforms.

(d) Other legislative and policy arrangements that affect Indigenous peoples rights to water

As discussed throughout this chapter, there is an obvious gap in water policy as a result of the inconsistency in approach and implementation across the country. As with other areas of Indigenous policy, the development of water policy has been done in complete isolation to other social and economic areas of policy that relate to Indigenous peoples, including native title, land rights, and cultural heritage. This inconsistency and isolation is heightened for Indigenous peoples, whose nation's boundaries do not necessarily correlate with state borders. Additionally, Indigenous peoples are not only forced to try to fit into the state and territory water legislative arrangements and make them relevant to their needs, but we are also forced to navigate and apply a wide range of other legislation and policy to secure our distinct rights to our lands, waters, natural resources and cultural heritage.

(i) Native Title

The application of the Native Title Act extends to each external Territory, the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* (Cth).¹¹¹

The definition of native title rights and interests in the *Native Title Act 1993* (Cth) (Native Title Act) includes rights and interests in relation to waters.¹¹² 'Waters' is defined by reference to both sea and freshwater and includes:

- (a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters

107 N Collings & V Falk, 'Water, Aboriginal peoples in Australia and their spiritual relationship with waterscapes' in E Johnston, M Hinton and D Rigney (eds), *Indigenous Australians and the Law*, (2008) 131, p 144.

108 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

109 N Collings & V Falk, 'Water, Aboriginal peoples in Australia and their spiritual relationship with waterscapes' in E Johnston, M Hinton and D Rigney (eds), *Indigenous Australians and the Law* (2008) 131, p 145.

110 V Falk, Interview with the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008, 16 December 2008.

111 *Native Title Act 1993* (Cth), s 6.

112 *Native Title Act 1993* (Cth), s 223.

- (b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in paragraph (a))
- (c) the shore, or subsoil under or airspace over the shore, between high water and low water.¹¹³

While s 211 of the Native Title Act preserves the right of native title holders to fish or engage in traditional activities, s 212 confirms the Crown's right to use and control the flow of water.¹¹⁴

The first decision to recognise Indigenous people's native title rights and interests over the sea was *Commonwealth v Yarmirr*, for the Yuwurruma members of the Mandilarri-Ildugij, Mangalara, Murran, Gadura-Minaga, and Ngaynjaharr clans in 2001.¹¹⁵ The Court determined that the native title rights and interests of the Yuwurruma members of the Mandilarri-Ildugij, Mangalara, Murran, Gadura-Minaga, and Ngaynjaharr clans included the non-exclusive right to fish in their sea country. While the law has established that native title rights and interests can include the right to fish or gather marine resources of the sea, rivers, lakes and inter-tidal zones, these rights and interests have generally been interpreted as giving only non exclusive customary native title rights in water.

More recently, in a consent determination, the Federal Court recognised that the Gunditjmarra people in Victoria hold non-exclusive native title rights and interests over 133,000 hectares of vacant crown land, national parks, reserves, rivers, creeks and sea north-west of Warrnambool. The native title rights granted include the use and enjoyment of water and the taking of resources in water.¹¹⁶

Text Box 7: The Return of Lake Condah to the Gunditjmarra

On 30 March 2008, in accordance with the native title consent determination, the Victorian Government returned the heritage-listed Lake Condah to the Gunditjmarra traditional owners.

In 1869, an Aboriginal Reserve was declared over 2,034 acres at Lake Condah. The formal handover is planned for later this year. The lake titles are to be vested with Gunditj Mirring, the registered native title body for the Gunditjmarra people.

Lake Condah is considered to be one of Australia's earliest and largest aquaculture ventures. The Gunditjmarra people's aspirations include the preservation of their culture while engaging in tourism, water restoration and sustainability projects. The Lake Condah Sustainable Development Project will re-flood the lake, restoring the wetland ecology and a constant water supply.¹¹⁷

While the restoration of permanent water to Lake Condah has progressed well,¹¹⁸ the Gunditjmarra are particularly concerned about the 'potential of continuing extinguishment of recognised native title over crown land through public works.'¹¹⁹

113 *Native Title Act 1993* (Cth), s 253.

114 *Native Title Act 1993* (Cth), s 221, s 212.

115 *Commonwealth v Yarmirr* (2001) 208 CLR 1.

116 *Lovett (on behalf of the Gunditjmarra People) v State of Victoria* [2007] FCA 474.

117 Minister for Families, Housing, Community Services and Indigenous Affairs, 'Land Condah transferred to the Gunditjmarra people', (Media Release, 25 November 2008).

118 Gunditj Mirring Aboriginal Corporation, *Annual Report* (2008), p 7.

119 Gunditj Mirring Aboriginal Corporation, *Annual Report* (2008), p 6.

The 1998 amendments to the *Native Title Act 1993*, provides that future acts and licences regulating the management of water, including the granting of access to water or taking water is valid. The amendments resulted in the watering down of Indigenous peoples rights to water (as well as other rights). Originally, native title holders were afforded a procedural 'right to negotiate' particularly concerning future development, and activity on lands and waters including the ownership and use of natural resources.

Under the amendments this was reduced to a 'right to comment'. Other than for a legislative act, notice and the opportunity to comment must be given to the relevant representative body, any prescribed body corporate and registered native title claimants before an act specified is done.¹²⁰ This effectively excluded native title holders from the development of water management plans and from having their cultural rights to water recognised and protected.

Whilst providing some procedural rights to Indigenous peoples regarding leases, licences and permits regulating the management of water, the Native Title Act has been interpreted as not imposing an obligation to comply with the common law rules of procedural fairness. The Native Title Act prescribes a list of procedural rights which are exhaustive, leaving no room for further rights to be imposed.¹²¹ The sole object of the procedural right to notice does not amount to a right to negotiate, but merely ensures that the possible impact on native title rights and interests is not overlooked. Furthermore, failure to comply with the procedural right will not affect the validity of the future act.¹²²

The Native Title Act also provides that a valid lease, licence, permit or authority, and any activity done under it, will prevail over any native title rights and interests and their exercise, with no compensation available.¹²³ This includes water licences. Therefore, if a water licence is granted then it will prevail over native title rights and interests.

The Aboriginal and Torres Strait Islander Social Justice Commissioner commented in this regard:

The grant of future commercial and other interests regarding the use of waters or water resources always take precedence. The effect of these provisions is that governments will be able to grant fishing licences and leases, and permits and authorities in respect of waters without any consideration of the effect that these grants may have on native title interests...

The UN Special Rapporteur on Indigenous Peoples and their Relationship to Land, Ms Erica-Irene Daes has raised concerns about the application of legislation that contravenes the rights of Indigenous peoples in this regard:

Indigenous people may be free to carry out their traditional economic activities such as hunting, fishing, trapping, gathering, or cultivating, but may be unable to control development that may diminish or destroy these activities.¹²⁴

120 *Native Title Act 1993* (Cth), s 24HA.

121 *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60.

122 *Lardil Peoples v Queensland* (2001) 108 FCR 453, 30 (Cooper J).

123 *Native Title Act 1993* (Cth), s 44H.

124 Commission on Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous peoples and their relationship to land*, Final working paper prepared by the Special Rapporteur, Mrs Erica-Irene A. Daes, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, E/CN.4/Sub.2/2001/21, 11 June 2001, para 90.

The Special Rapporteur made specific reference to the implications of the 1998 Native Title Act amendments, stating that these amendments can be used to:

Extinguish indigenous or native title and thus practically negate most of the legal rights recognised by the Court¹²⁵...the amendments prefer the rights of non-native title holders over those of native title holders; they fail to provide native title holders with protection of the kind given to other landowners; they allow for discriminatory action by governments; they place barriers to the protection and recognition of native title; and they fail to provide for appropriately different treatment of unique aspects of Aboriginal culture.¹²⁶

A further limitation of native title was confirmed in *Ward*.¹²⁷ The High Court held that any exclusive water rights in the Ord Irrigation District had been extinguished by the *Rights in Water and Irrigation Act 1914 (WA)* which vested water rights in the Crown.¹²⁸

The future act regime in native title applies to acts including activities such as dam construction and public water works. However, with limitations such as those identified above and Court decisions confirming the interaction with State and Territory rights to water, high impact development is validated without any real opportunity for native title holders to challenge these activities.

Internationally, indigenous peoples have argued that:

As the pressures on the Earth's resources intensify, indigenous peoples bear disproportionate costs or resource-intensive and resource-extractive industries and activities such as mining, oil and gas development, large dams and other infrastructure products, logging and plantations, bio-prospecting, industrial fishing and farming, and also eco-tourism and imposed conservation projects.¹²⁹

Particularly related to water and water development programs, the World Commission on Dams found that:

Large dams have had serious impacts on the lives, livelihoods, cultures and spiritual existence of indigenous and tribal peoples. Due to neglect and lack of capacity to secure justice because of structural inequities, cultural dissonance, discrimination and economic and political marginalization, indigenous and tribal peoples have suffered disproportionately from the negative impacts of large dams, while often being excluded from sharing in the benefits.¹³⁰

125 Commission on Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous peoples and their relationship to land*, Final working paper prepared by the Special Rapporteur, Mrs Erica-Irene A. Daes, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, E/CN.4/Sub.2/2001/21, 11 June 2001, para 90.

126 Commission on Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous peoples and their relationship to land*, Final working paper prepared by the Special Rapporteur, Mrs Erica-Irene A. Daes, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, E/CN.4/Sub.2/2001/21, 11 June 2001, para 47.

127 *Western Australia v Ward* (2002) 213 CLR 1.

128 *Western Australia v Ward* (2002) 213 CLR 1.

129 CSD Indigenous Peoples' Caucus, 'Dialogue Paper by Indigenous Peoples', in *Indigenous Affairs 4/01, IWGIA*, p 14. As cited by Commission on Human Rights, *Indigenous Issues, Human Rights and indigenous issues, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, fifty-ninth session, Item 15 of the provisional agenda, E/CN.4/2003/90, 21 January 2003, p 6.

130 World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, The report of the World Commission on Dams, 2000. As cited by Commission on Human Rights, *Indigenous Issues, Human Rights and indigenous issues, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, fifty-ninth session, Item 15 of the provisional agenda, E/CN.4/2003/90, 21 January 2003, p 6.

With these considerations in mind, any future amendments to the Native Title Act and water legislation must consider seriously the impacts on Indigenous peoples and their lands, waters and resources.

The current Australian Government, in contrast to previous governments, has announced that it will take a more 'flexible approach in recognising native title in Australia's territorial waters,' by recognising non-exclusive native title up to 12 nautical miles from the Australian shoreline in territorial waters.¹³¹

The extent of the government's new approach and the application of the new 12 mile policy will be tested in the Torres Strait. The native title holders in the Torres Strait have filed sea claims in the Federal Court. The claim covers approximately 42,000 square kilometres of sea, above the high water mark in the Torres Strait and Coral Sea between Cape York Peninsula and the mainland of Papua New Guinea. The claims are currently being negotiated with the Queensland government, the Australian Government and other parties and are likely to be heard in the Federal Court in early 2009.

Furthermore, in many parts of the country Indigenous peoples continue to struggle to have cultural flow rights or cultural water allocations recognised. Legislative arrangements that have been promoted as providing the basis for economic and sustainable development, including native title, have not played a major role (historically) in considering Indigenous rights and interests in natural resource commodity trading, such as water trading.

I am concerned that even if Indigenous peoples are granted native title water rights and interests, there are many ways for them to be validly overridden and not compensated. Customary water usage is recognised under native title, but can be subject to the doctrine of extinguishment. It is unclear as to the extent these customary water rights will be protected against other water users.

Consequently, the native title system provides limited recognition of native title rights and interests in water and is not adequate for securing or protecting Indigenous people's rights to water or engagement in water markets.

(ii) *Land Rights*

Each state and territory has its own Indigenous land rights regime, which in some cases provide for Indigenous water rights.

For example, Indigenous peoples' rights to exclusive ownership of eighty percent of the Northern Territory coastline, including the inter tidal zone was upheld by the High Court in the recent Blue Mud Bay decision.¹³² This was over land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Land Rights Act) and effectively means that these lands and waters are now Aboriginal owned and controlled.

The Northern Territory Government, Traditional Owners and other stakeholders with interests in the waters included in this decision, are working together to develop an arrangement where interests granted prior to the High Court decision are able to continue, and the Indigenous groups are able to exercise and enjoy their rights.

131 As opposed to the current 3 nautical miles. See Attorney-General for Australia, 'A More Flexible Approach to Native Title', (Media Release, 17 June 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_17July2008-AMoreFlexibleApproachtoNativeTitle (viewed 8 October 2008).

132 *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust*, [2008] HCA 29.

Some State Governments are also working with Indigenous peoples in their regions on water issues and some of these are discussed further below.

(iii) *Cultural Heritage*

All states, territories and the Commonwealth have laws protecting Indigenous people's cultural heritage. For example the *Aboriginal and Torres Strait Islander Protection Act 1984* (Cth) gives preservation and protection to areas or objects in Australian waters that are of particular significance to Indigenous peoples. For example the Budj Bim National Heritage Landscape, Victoria, is sacred to the Gunditjmara people and is possibly the world's oldest aquaculture venture.¹³³

However, due to the ownership of water vested with the Crown, Indigenous peoples' engagement in cultural heritage protection of water places, has been a further point of negotiation and compromise. In most instances, water sites with special meaning to Indigenous peoples are considered secondary to the interests of states, territories and industry stakeholders.

(iv) *Wild Rivers Act 2005 (Qld)* and the *Cape York Peninsula Heritage Act 2007*

In response to the Wilderness Societies campaign to protect rivers across northern Australia, the Queensland Parliament introduced the *Wild Rivers Act 2005* (Qld) (The Wild Rivers Act). The purpose of the Act is to preserve the natural value of rivers in Queensland that have all, or almost all, of their natural values intact.¹³⁴ The Act aims to achieve this through the regulation of most future development activities within the declared river and its catchment area. Under the Act, the Minister for Natural Resources and Water can propose a river for declaration, making this Act the first of its type in Australia.

While there are concerns with the intent and implementation of the Wild Rivers Act,¹³⁵ the recent enactment of the *Cape York Peninsula Heritage Act 2007* provides for an Indigenous water reserve or allocation in each proposed declaration under the Wild Rivers Act. This allocation is intended for the purpose of helping Indigenous communities in the area achieve their economic and social aspirations¹³⁶ and maintains to an extent, their capacity to meet their cultural obligations to their waters and lands.

In light of Indigenous peoples' previous attempts to access their rights and interests in lands and waters for commercial use, it will be interesting to monitor and assess how and whether Indigenous peoples are able to utilise these allocations and to what extent this access and utilisation will be regulated. For example, where Indigenous peoples require water resources for commercial ventures, such as tourism or aquaculture, and/or Indigenous engagement in water markets.

133 See Australian Government, Department of the Environment, Water, Heritage and the Arts, *Budj Bim National Heritage Landscape, Victoria*. At: <http://www.environment.gov.au/heritage/places/national/budj-bim/index.html> (viewed 9 October 2008).

134 *Wild Rivers Act 2005*, s 3.

135 Australian Human Rights Commission, *Aboriginal and Torres Strait Islander Social Justice Commissioners Submission to the Minister for Natural Resources and Water, Proposed Wild Rivers Declarations*, November 2008.

136 *Cape York Peninsula Heritage Act 2007*, s 27.

Text Box 8: *Cape York Peninsula Heritage Act 2007*

The *Cape York Peninsula Heritage Act 2007* provides for the joint management of national parks. Joint management arrangements are negotiated through an Indigenous Management Agreement (IMA).

IMAs outline the cultural, social, economic and environmental activities that traditional owners seek to undertake on lands and water that have been declared National Parks. However, there are concerns that some of these activities will be restricted by the proposed declarations under the Wild Rivers Act.

The relationship between the Wild Rivers Act and the Cape York Peninsula Heritage Act is unclear. However, the Queensland Government assert that while a declaration under the Wild Rivers Act may affect the management plan (or IMA) for a national park within the proposed area, it will have no impact on traditional owners' participation in the development of national park management plans.¹³⁷ The Wild Rivers Act provides that a park's management plan must be consistent with the declaration or provide a greater level of protection for the area.

Where joint management applies and IMA's and proposed wild river declarations are being developed:

- an integrated cooperative process must be established to ensure that both the IMA and the river declaration are complimentary, compliant and consistent
- traditional owners whose rights and interests may be affected by a proposed declaration are provided complete and clear information which outlines both the opportunities and the extent to which their rights will be restricted or impacted upon, prior to a declaration being made
- monitoring and assessment processes are built into both the IMA and river declaration to ensure the implementation does not lead to conflict or further disadvantage.

5. Indigenous Water Management

As discussed throughout this chapter, the regulation of resources by the states and territories has significantly marginalised Indigenous peoples from water policy development and implementation. However, as the evidence suggests Indigenous peoples in some areas are asserting rights to their water country by accessing government funding programs and navigating their way through the myriad of legislation and regulation.

Indigenous groups are also developing their own water focused entities to facilitate engagement in water policy and planning. These entities include:

- North Australian Indigenous Land and Sea Management Alliance (NAILSMA)
- Murray Lower Darling Rivers Indigenous Nations (MLDRIN)
- Australian Indigenous Water Focus Group
- South West Aboriginal Land and Sea Council (SWALSC)

¹³⁷ Queensland Government, Department of Natural Resources and Water, *Wild Rivers Draft Indigenous summary guide*, p 4. At: http://www.nrw.qld.gov.au/wildrivers/pdf/wr_indigenous_guide.pdf (viewed 12 November 2008).

(a) North Australian Indigenous Land and Sea Management Alliance (NAILSMA)

NAILSMA is an ‘unincorporated bioregional forum’ that focuses on practical support for Indigenous land and sea management with the emphasis on sustainable Indigenous controlled mechanisms.¹³⁸ NAILSMA works together with many organisations including other Indigenous groups, governments, research groups and commercial and philanthropic organisations.

Text Box 9: International Water Experts Forum, Garma Festival, 2008

In August 2008, NAILSMA worked with the United Nations University Traditional Knowledge Initiative to facilitate an International Water Experts Forum, conducted at the Garma Festival in Arnhem Land.

This forum identified the need for increased access to international mechanisms in order to improve capacity to support Indigenous water rights in Australia and globally.¹³⁹ The Forum also included discussions on the drafting of the declaration on Indigenous Water Knowledge and interests that will be developed at the fifth World Water Forum.

The Forum included both northern and southern Indigenous and non-Indigenous Australians where plans were developed to meet later in 2008 to discuss a national approach to Indigenous water issues and integrated management in Australia.

The success of the various projects being undertaken in northern Australia is greatly dependent on the ‘strong understanding and capacity for local communities to effectively engage in discussions about the future of north Australia’s water resources.’¹⁴⁰

Recently, NAILSMA received an Australian Government grant of almost \$5 million. This funding was provided to establish a community-based network to advance Indigenous engagement in the research and management of tropical rivers, water use and conservation across northern Australia.¹⁴¹

NAILSMA have established a number of working groups who focus on areas of water priority, access, management and research, including:

(i) Indigenous Water Policy Group (IWPG)

The (IWPG) was established by NAILSMA in 2006 to continue the work of the Lingiari Reports, which addressed Indigenous rights, responsibilities and interests in water.¹⁴² This work has continued through participation and engagement in a number

138 Northern Australian Indigenous Land and Sea Management Alliance, *About NAILSMA*. At: http://www.nailsma.org.au/about_nailsma/index.html (viewed 8 October 2008).

139 See Northern Australian Indigenous Land and Sea Management Alliance, *International Water Expert Forum*. At: http://www.nailsma.org.au/forum/international_water_experts_forum/international-water-experts-forum.html (viewed 9 October 2008).

140 Northern Australian Indigenous Land and Sea Management Alliance, *Indigenous Community Water Facilitator Network*. At: http://www.nailsma.org.au/projects/indigenous_community_water_facilitator_network.html (viewed 28 August 2008).

141 Australian Government, Land & Water Australia, *The Engagement of Indigenous Australians in Natural Resource Management: Key findings and outcomes from Land & Water Australia funded research and the broader literature* (2007), p 34. At: <http://products.lwa.gov.au/files/PR071332.pdf> (viewed 28 August 2008).

142 Lingiari Foundation, *Onshore and Offshore Water Rights Discussion Booklets*, Lingiari Foundation, (2002), as cited by the Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

of fora where Indigenous peoples rights and interests in water have been advocated, including the Australian Governments 2020 Summit in Canberra in April 2008, the National Water Planners Forum held by the National Water Commission in June 2008, and various Indigenous water forums.

Text Box 10: The Indigenous Water Policy Group

The IWPG was initially funded for one year (2006-07) by Land and Water Australia to increase the capacity of Indigenous organisations and communities to engage with the NWI to achieve improved water planning and management across northern Australia.¹⁴³

The IWPG is currently funded by the National Water Commission (2007-2010) under its *Raising National Water Standards Program*, to examine Indigenous water policy, and coordinating across state and territory jurisdictions.¹⁴⁴

The key stakeholders of the IWPG include:

- north Australian Indigenous communities, organisations and institutions¹⁴⁵
- north Australian water resource managers, research organisations and programs (such as Tropical Rivers and Coastal Knowledge (TRaCK¹⁴⁶)) and policy advisors
- north Australian economic development policy officers
- other government and non-government organisations
- potential investors.¹⁴⁷

The role of the IWPG is to:

- provide policy advice to its members based on research on water reform initiatives as they affect Indigenous communities and land holdings
- provide advice and representation on all matters concerning water resources in terms of the social, economic, environmental and cultural interests of Indigenous people in the north of Australia
- ensure that Indigenous interests are appropriately engaged in all regional water planning in the north of Australia, providing:
 - equitable and secure access to water for domestic and commercial purposes

143 National Water Commission, *Indigenous Water Policy Group*. At: http://www.nwc.gov.au/publications/project_info_indigenous_water_policy_group.cfm (viewed 28 August 2008).

144 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

145 Key Indigenous representatives from major regional organisations across the north that represent a large number of Indigenous communities and traditional owners participate on the IWPG including current core partners: Kimberley Land Council, Northern Land Council, Balkanu Cape York Development Corporation, Cape York Land Council, and Carpentaria Land Council Aboriginal Corporation. Key stakeholders external to the major land councils may be co-opted onto the IWPG.

146 The TRaCK research hub is a consortium of Australia's leading tropical river and coastal researchers established under the Commonwealth Environment Research Facilities Programme. The objectives of the programme are to provide the science and knowledge that governments, communities and industries need for the sustainable use and management of Australia's tropical rivers and estuaries. At: <http://www.track.gov.au/about.html> (viewed 16 December 2008).

147 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

- recognition and protection of the wide range of interests in water by developing collaborative relationships among scientists, natural resources management facilitators and Indigenous interests.

Text Box 11: The two main objectives of the IWPG

The first objective of the IWPG focuses on improving Indigenous peoples' awareness of water reform. Particularly that directed under the NWI, so that informed decisions are made about water planning and management as it affects communities in the north of Australia.

The second objective is to direct research relating to Indigenous rights, responsibilities and interests in water resources in northern Australia so that:

- Indigenous knowledge of customary and traditional water use are identified (such as the high value cultural and ecological water systems and areas)
- Indigenous knowledge, customary practices and intellectual property in water are recognised, valued and protected
- Indigenous people are engaged in consumptive and non-consumptive water planning and policy development
- the economic future of Indigenous people is secured in the development of water reforms (in both the present and emerging industries)
- existing policies on the regulation of tourism, weeds and feral animals, and other impacts on water resources are examined.¹⁴⁸

The IWPG is supported by an Advisory Group and a Policy Engagement Group (PEG). The Advisory Group provides independent strategic advice to the IWPG on matters concerning research and policies as they affect Indigenous communities in the north. The PEG¹⁴⁹ supports the IWPG to engage Indigenous positions on water resources in the north of Australia with development initiatives at the state, territory and national levels. The PEG has a two-fold approach to engagement with the IWPG. Firstly it aims to provide for meaningful Indigenous integrated policy development; and secondly, it provides for a coordinated approach that crosses jurisdictions to the management and security of water resources unique to the north of Australia.¹⁵⁰

The IWPG are currently directing legal research on water rights and research on the potential for Indigenous water markets in northern Australia. The IWPG have identified a number of key priorities for the future including the need to examine:

- Indigenous water allocation
- community consultative process and best practice community engagement
- legal rights and water resource management in terms of interests, issues, access and economic opportunities.

148 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

149 The IWPG Policy Engagement Group is currently made up of representatives from state (WA and Qld), territory (NT) and national (NWC) water agencies, but is not exclusive to other water agencies.

150 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

Indigenous knowledge is also a research priority for the IWPG in the near future.¹⁵¹

While the IWPG has a specific focus on Indigenous rights, responsibilities and interests in water in the north of Australia, they are also engaged in and support the Australian Indigenous Water Focus Group that is being convened by the Murray Lower Darling Rivers Indigenous Nations to consider the strategic development of a representative national Indigenous water group.¹⁵²

(ii) *Indigenous Community Water Facilitator Network (ICWFN)*

The ICWPG is a community based network aimed to advance indigenous engagement in research and management in north Australia. The network includes six regionally based facilitators and a co-ordinator (based in Darwin). The facilitators are based in the:

- Fitzroy and Ord catchments in Western Australia
- Katherine-Daly catchment in the Northern Territory and the southern Gulf
- Mitchell and Wenlock River catchments in north Queensland.¹⁵³

The ICWFN aims to ensure that Indigenous interests are incorporated into water policy decisions, water plans and water allocations to ensure health, economic, cultural, environmental and social benefits among Indigenous participants. Despite the aims of the ICWFN, they are concerned that 'facilitation at the community level to integrate Indigenous interests in water management among the various stakeholders remains deficient.'¹⁵⁴

(b) **Murray Lower Darling Rivers Indigenous Nations (MLDRIN)**

MLDRIN as an organisation (incorporated under the *Corporations Act 2001* (Cth)) was established in response to the High Court's Yorta Yorta judgement, which concluded that the native title rights and interests held by the Yorta Yorta people had not been continuously maintained through the experience of colonisation. The Yorta Yorta native title group were the first in Australia to receive a determination under the substantial continuity test.¹⁵⁵

MLDRIN is a regional confederation of ten traditional owner groups (who identify as Nations) from the Murray-Darling Basin Valleys in the south-east of Australia, including:

- Wiradjuri, Yorta Yorta, Taungurung, Wamba Wamba, Barapa Barapa, Mutti Mutti, Wergaia, Wadi Wadi, Latji Latji, and Ngarrindjeri peoples.¹⁵⁶

151 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

152 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

153 Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, *Indigenous Water Policy Group*, Discussion Paper (undated).

154 Northern Australian Indigenous Land and Sea Management Alliance, *Indigenous Community Water Facilitator Network*. At: http://www.nailisma.org.au/projects/indigenous_community_water_facilitator_network.html (viewed 28 August 2008).

155 *Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] 1606 (18 December 1998, para 19. This decision was unsuccessfully appealed to the Full Federal Court, and then to the High Court of Australia: *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 (8 February 2001); and *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002).

156 J Weir and S Ross, 'Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations' in F Morphy and B Smith (eds), *The Social Effects of Native Title, Recognition, Translation Co-existence* CAEPR Research Monograph No. 27 ANU E-Press (2007), p 187. At: http://epress.anu.edu.au/caepr_series/no_27/pdf/ch10.pdf (viewed 18 December 2008)

Text Box 12: Murray Lower Darling Rivers Indigenous Nations (MLDRIN)

MLDRIN is described as an extension of the traditional decision making frameworks of the traditional owner groups represented and emphasises the distinct responsibilities that traditional owners hold in their traditional country. MLDRIN argue that greater representation and rights are required in order to fulfil their responsibilities to country.¹⁵⁷

The role of MLDRIN is to perform the following functions on behalf of the traditional owners of the Murray-Darling River Valleys, including to:

- facilitate and advocate for the participation of the ten Indigenous Nations within the different levels of government in natural resource management and planning, particularly ecological restoration projects, and lobbying for Indigenous water allocations
- develop responses on cultural, social and economic impacts of development on Indigenous traditional country
- be a collective united voice for the rights and interests of their traditional country and its peoples.¹⁵⁸

In particular, MLDRIN provides strategic advice from traditional owners to natural resource management agencies responsible for water and forestry issues.¹⁵⁹ MLDRIN engage primarily with State Governments and departments, the Murray-Darling Basin Commission, and the Commonwealth Government, and it works closely with environmental groups who are concerned with the health of the rivers and their interconnected waterways.

The significant work done by MLDRIN to develop positive relationships with various governments, including those who opposed the native title claim, has resulted in positive responses to the aspirations of traditional owners. This is reflected in the Memorandum of Understanding signed between MLDRIN and the former New South Wales Department of Land and Water Conservation (in 2001) and the Murray-Darling Basin Commission (2006), and the Yorta Yorta Cooperative Land Management Agreement for the Barmah Millewah forest between MLDRIN and the Victorian Government in 2004. Both of these documents recognise the traditional ownership of the lands related.

Additionally, the Murray-Darling Basin Commission has provided funding to MLDRIN on three yearly funding cycles since 2003 and renewed in 2006. This included funding for meetings and a full-time co-ordinator. MLDRIN have also received support and

157 J Weir and S Ross, 'Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations' in F Morphy and B Smith (eds), *The Social Effects of Native Title, Recognition, Translation Co-existence* CAEPR Research Monograph No. 27 ANU E-Press (2007), p 189. At: http://epress.anu.edu.au/caepr_series/no_27/pdf/ch10.pdf (viewed 18 December 2008)

158 J Weir and S Ross, 'Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations' in F Morphy and B Smith (eds), *The Social Effects of Native Title, Recognition, Translation Co-existence* CAEPR Research Monograph No. 27 ANU E-Press (2007), p 187. At: http://epress.anu.edu.au/caepr_series/no_27/pdf/ch10.pdf (viewed 18 December 2008)

159 Murray Lower Darling Rivers Indigenous Nations, Correspondence with T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 22 October 2008.

formal acknowledgement of their role from other stakeholders in the form of funding, employment positions, and inclusion on boards and in briefings.¹⁶⁰

As discussed above, MLDRIN is also actively engaged in national and international debates and forums to advance Indigenous peoples position concerning water and climate change. The experience of MLDRIN in negotiating with governments about significant degradation of the Murray-Darling River Basin will be crucial to the national dialogue about water and climate change policy development. The engagement of MLDRIN in forums such as the United Nations Permanent Forum on Indigenous Issues and meetings of the International Union of Conservation and Nature will also bring to the debate, an understanding of the human rights based approach to policy development.

Case study two of this report includes a more detailed discussion on the Murray-Darling River Basin.

(c) Australian Indigenous Water Group

The Australian Indigenous Water Group was established as a result of discussions held at the International Water Experts Forum at the Garma Festival in Arnhem Land in August 2008. Attendee's were concerned about the need for a mechanism that provides for an exchange of both international perspectives, but also for northern and southern Australians to come together and discuss a common way forward on what is one of the greatest challenges of this time, water. The meeting clearly identified a need for national Indigenous dialogue on water.

This group will provide the first opportunity for Indigenous peoples from across the whole of Australia to discuss national water reform as it effects their communities aspirations, interests and issues.¹⁶¹

Participants in the Australian Indigenous Water Group include Indigenous representatives with skills and knowledge on specific water related issues. These issues include national Indigenous water management, policy and planning.

Text Box 13: The primary objectives of the Australian Indigenous Water Focus Group

The primary objectives of the Australian Indigenous Water Focus Group are to:

- dialogue and overview specific water issues
- formulate strategic development of a future National Indigenous Water Roundtable dialogue and engagement for the national level
- examine guiding principles for Indigenous water planning that can go toward informing the process for Indigenous Water Planning Forum
- consider the formation of a National Indigenous representative group 'Steering Committee' to assist with directing Indigenous engagement and process in the national arena.

160 J Weir and S Ross, 'Beyond Native Title: The Murray Lower Darling Rivers Indigenous Nations' in F Morphy and B Smith (eds), *The Social Effects of Native Title, Recognition, Translation Co-existence* CAEPR Research Monograph No. 27 ANU E-Press (2007), p 188. At: http://epress.anu.edu.au/caepr_series/no_27/pdf/ch10.pdf (viewed 18 December 2008).

161 Australian Indigenous Water Focus Group, *Delegate Information*, 18 November 2008, South Australian Parliament House, Adelaide, South Australia.

The National Indigenous Water Focus Group is planning a National Indigenous Water Roundtable and a National Indigenous Water Forum in February 2009.

(d) South West Aboriginal Land and Sea Council

The South West Aboriginal Land and Sea Council (SWALSC) is the representative body for the traditional owners of south west of Western Australia, the Nyoongar people. Nyoongar people represent one of the largest groups in Australia with an estimated 30,000 people living in the south west of Western Australia. SWALSC is directed by an elected council to oversee the advancement of Nyoongar culture, language, society and native title rights.

In September 2006 Justice Wilcox heard the Single Noongar native title claim over parts of the Perth Metropolitan area, which included water. It was a significant native title claim as it challenged the extent of extinguishment over a metropolitan area, which included water rights.

Waugal, the Rainbow serpent is significant to Nyoongar peoples as the creator of all waterways, underground and surface water, the billabongs, the streams, the creeks, the lakes and the springs, the wetlands, and the Swan [River].¹⁶² The spiritual, cultural and social values in Nyoongar country is significant to the Yarragadee aquifer, Gngangara Mound, Collie groundwater, the Shannon River that is one of the states few remaining wild rivers and many other water landscapes.

SWALSC is advocating along with other Indigenous groups such as NAILSMA to ensure that Indigenous water rights and interests are fully represented in the proposed Water Resources Bill in Western Australia.

6. Pressures on Indigenous Waters

As climate change, drought, mismanagement and over-allocation of water in Australia has significantly decreased the availability and quality of water resources, these issues impact on Indigenous peoples' ability to fulfil our cultural and customary responsibilities on sea and water country.

There are a wide range of pressures on Indigenous waters. As with climate change, water is not only a concern for Indigenous peoples in Australia but is increasingly becoming a global issue. The competing pressures on water come from areas including:

- personal and domestic use
- recreational uses
- the environment
- climate change
- agriculture and aquaculture
- industry
- energy

As discussed in chapters 4 and 5, the Australian Government has acknowledged that climate change poses the 'greatest long-term threat to important sea [and water] country, including our world heritage listed Great Barrier Reef.'¹⁶³

162 Senior Nyungar Elder (2002) speech in Western Australia. See, 'Aboriginal Cultural Values on the Gngangara Mound' for the Department of Environment WA p 28.

163 Australian Government, Great Barrier Reef Marine Park Authority, *Climate Change and the Great Barrier Reef: A Vulnerability Assessment*. At: http://www.gbrmpa.gov.au/corp_site/info_services/publications/misc_pub/climate_change_vulnerability_assessment/climate_change_vulnerability_assessment (viewed 10 September 2008).

The impacts of climate change will be further compounded by each of the issues listed above. For example the current drought; the over-allocation of water for agricultural, industrial and energy purposes; and the artificial control and management of our waterways, changes the natural flows of waters. These natural flows are relied upon to maintain the health of the waterways, such as ephemeral wetlands which rely on a cycle of both wet and dry periods and uphold Indigenous spiritual, cultural, social and economic values.

Changes to water country as a result of activities such as the building of dams, increasing demands from farming and mining, cattle, feral animals, weeds, run off from pesticides and fertilisers, and changing patterns of burning, have led to significant water degradation. Additionally these activities have significantly reduced the capacity for our rivers and waterways to replenish and keep up with the current levels of supply and demand. This is starkly evident in parts of the Murray-Darling River Basin.

With water yields in the Murray-Darling Basin estimated to decline from between 43 percent to 64 percent depending on the area by 2070,¹⁶⁴ there must be certainty that the water that is available, and investment in infrastructure, is not wasted.¹⁶⁵

Indigenous peoples and their water rights are recognised as being at severe risk from climate change.¹⁶⁶

The impacts of climate change such as a decline in the availability of marine resources through increased bad weather and sea level rise may [also] lead to changes in traditional and Indigenous identity and belonging, loss of culture and traditional knowledge and disruption of customs and practices.¹⁶⁷

For example, rising sea levels in the Torres Strait could see many Indigenous peoples become climate refugees and internally displaced peoples. Some Islanders will be forced to leave their lands and migrate to other islands or the mainland. Erosion of infrastructure and decreased freshwater availability are also of particular concern. Case study one of this report provides a detailed discussion on the Torres Strait Islands and climate change.

Climate change impacts have only just begun to be factored into water planning processes in Australia.¹⁶⁸ The potential impacts of climate change will be different all over Australia. However the impacts on water are much more urgent across the south. In general, large parts of Australia are expected to face increasing freshwater stress, increased drought frequency and increasing temperatures which will result in more evaporation.

The uncertain effects of climate change mean that water law and policy must be adaptive and flexible, and take into account further scientific information as it becomes available. It will also mean that water law and policy will need to interplay

164 J Austin, L Zhang, R Jones, P Durack, W Dawes and P Hairsine *Implications of Climate Change for Natural Resource Management: an assessment of the impact of climate change on catchment salt and water balances in the Murray-Darling Basin*, Report to the Australian Greenhouse Office, Canberra (2006).

165 For a further case study on the Murray-Darling see Case study 2.

166 For more information on climate change see chapters 4 and 5.

167 Australian Government, Great Barrier Reef Marine Park Authority, *Climate Change and the Great Barrier Reef: A Vulnerability Assessment*, p 753. At: http://www.gbrmpa.gov.au/corp_site/info_services/publications/misc_pub/climate_change_vulnerability_assessment/climate_change_vulnerability_assessment (viewed 10 September 2008).

168 Under the National Water Initiative water access entitlement holders bear the risk of any change in water allocation resulting from climate change and drought impacts. Australian Government, National Water Commission, *National Water Initiative*. At: <http://www.nwc.gov.au/www/html/117-national-water-initiative.asp> (viewed 28 August 2008).

and link directly with legislation and policy relating to climate change. This will be particularly important for example where forest plantations are being considered as carbon offset investment opportunities and will require water resources.

Competing pressures for water increases the potential for conflict in the future and violations of human rights, particularly the right to water.¹⁶⁹ With this in mind, it will be crucial for the Government to ensure the full and effective participation and engagement of Indigenous peoples in processes that affect our distinct rights to water and to recognise the importance in Indigenous Traditional Ecological Knowledge and Management that has been exercised by Indigenous peoples for thousands of years. This is not only to ensure that our priorities and needs are considered in the development of water policy, but also to ensure that water policy does not further disadvantage Indigenous peoples and communities.

7. Opportunities for Indigenous peoples to access their right to water

Over the last 20 years, we have witnessed the rapid decline of water quality and quantity in Australian waterways. Indigenous peoples have significant expertise and knowledge of the landscape and waterscape on their sea and water country. Among the Indigenous expertise is to protect Indigenous rights to retain their intellectual property in knowledge sharing.

The beneficiaries of water policy in Australia have predominantly been governments, and those who can afford to engage in industry or agriculture. Since colonisation Indigenous peoples have had very little opportunity to benefit from the waters that Indigenous peoples have secured and managed over thousands of years, for future generations.

The Australian Government are currently revising legislative arrangements that deal with water, the environment, native title and cultural heritage, and they are developing the legislative framework to address climate change. Governments and Indigenous peoples must take advantage of this opportunity to include provisions that provide for, and protect, Indigenous access to water for economic and sustainable development.

Significant research is also underway to examine the future for water in Australia. The CSIRO and other research organisations are working extensively in the Murray-Darling Basin to try to repair some of the damage to the river system, to provide advice on the extent to which the current level of activity (extraction) can continue, and the possibilities for future water trading. Additionally, significant work is taking place in northern Australia, particularly in the Daly River Region in the Northern Territory, with traditional owners to identify their water priorities. While agricultural production is already a feature of this region, there is also the potential for this area to replace the agricultural food production previously provided by the Murray-Darling River Basin, if previous lessons have been learnt about over-allocation in water resources.

As identified by the CSIRO:

In the period 2002-2004, the Daly River region produced over \$340 million in revenue. With the region generating revenue such as this, it is vital that Aboriginal people are invited to participate, not only for the cultural knowledge they possess, but to also

¹⁶⁹ J von Doussa, *Climate change and human rights: a tragedy in the making*, (Human Rights Law Seminar at the Australian Human Rights Commission, Sydney, 20 August 2008). At: <http://www.humanrights.gov.au/legal/seminars/index.html> (viewed 26 August 2008).

become participants in an activity that has a direct impact on their lives and their traditional lands.¹⁷⁰

While Indigenous peoples in different regions will have diverse aspirations and requirements, water legislation and policy should provide as a minimum for:

- the recognition of Indigenous peoples distinct rights to water, the environment, economic development, and participation and engagement in the *Water Act 2007*
- mandatory Indigenous representation on national and state and territory water committees, such as the Murray-Darling Basin Authority and associated advisory committee's, the National Water Commission and the Great Barrier Reef Marine Park Authority
- Indigenous stewardship and joint management of sea and water country, particularly where the waters are significant to Indigenous peoples, and those listed as world or national heritage, or Ramsar sites of significance
- provision of environmental water services by traditional owners
- Indigenous cultural water allocations¹⁷¹ that are separate to environmental, economic and social water allocations
- enterprise development including commercial fishing, aquaculture, and ecotourism
- inclusion in and access to water trading options provided for under the *Water Act 2007*
- the protection and recognition of Indigenous knowledge as a legal right.¹⁷²

8. Conclusion

This chapter has provided a discussion about the overall water environment in Australia, the priorities for water for both non-Indigenous and Indigenous peoples, and the need for serious consideration of participation, engagement, inclusion and outcomes for Indigenous peoples in the area of water policy.

While water resources in northern Australia remain relatively abundant compared to the southern states, northern Australia is not yet faced with the significant environmental problems of the south. However, the north is not immune from the impacts of climate change or human-induced error.¹⁷³

In accordance with human rights principles, Indigenous peoples must be actively engaged in all levels of management and decision-making that directly or indirectly impacts their livelihoods and communities. Effective participation in decision making about water resources is essential to ensuring non-discriminatory treatment and equality before the law.

170 CSIRO, *Recognising and protecting Indigenous values in water resource management*. (Report from a workshop held at CSIRO, Darwin, Northern Territory, 5-6 April 2008).

171 The Indigenous Nations of the Murray-Darling River Nations distinguish between cultural and environmental water. They argue that the difference between environmental and cultural water is that it is the Indigenous peoples themselves deciding where and when water should be delivered based on traditional knowledge and their aspirations. This ensures Indigenous peoples are empowered to fulfil their responsibilities to care for country.

172 See chapter 7 of this Report for further discussion about the protection of Indigenous knowledge.

173 See Hyder Consulting, *Assessment of the Direct and Indirect Risks from Human Induced Climate Change to Key Ecosystems in Northern Australia*, A report prepared for WWF-Australia (2008). At: <http://www.wwf.org.au/publications/climate-change-risk-assessment-northern-australia> (viewed 10 September 2008).

Ongoing government support and resources will be crucial to ensuring that the serious issues being faced in the south, including the exclusion of Indigenous peoples from the debate, are not repeated.

Recommendations

- 6.1 That in accordance with international law and Australia's international obligations, the Australian Government:
- i) protects and promotes Indigenous peoples right to the equal exercise and enjoyment of their human right to water, by ensuring their full and effective participation and engagement in the development and implementation of water policy
 - ii) recognises and respects the importance in Indigenous traditional ecological knowledge and management of biodiversity and conservation, including water
 - iii) give greater consideration to the relevance of international mechanisms such as the Ramsar Convention and the Convention on Biological Diversity in the development of water policy.
- 6.2 That governments fully recognise the significance of water to Indigenous peoples and incorporate their distinct rights, including as water users, to water, the environment, economic development, participation and engagement into the Water Act 2007. In particular, the Water Act should be amended to include a distinct category that provides for "Indigenous cultural water use" and access entitlements.
- 6.3 That the Government amend the Native Title Act to extend the right to negotiate to apply to water resources, including development and extraction applications, and water management planning.
- 6.4 That governments develop and include in the National Water Initiative, specific guidelines on how to implement Indigenous water rights:
- i) that the National Water Commission give higher priority to ensuring that the values and interests of Indigenous peoples are considered, including:
 - the explicit inclusion of Indigenous interests in Water Plans
 - recognition and protection of existing rights and interests held by Indigenous peoples, including native title and cultural heritage rights
 - consistency across jurisdictions in providing for the recognition and protection of Indigenous rights and interests
 - consistency across jurisdiction in implementing Water Plans and National Water Policy.
 - ii) that National Water Policy includes explicit links to climate change policy.

- 6.5 That government departments that have specific responsibilities for Indigenous affairs (for example, the Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney-General's Department) work closely with the Department of Environment, Water, Heritage and the Arts, and the Department of Climate Change, to ensure that the social, cultural, environmental and economic impacts and opportunities for Indigenous peoples arising from water and climate change are identified and addressed.
- 6.6 That Australian governments commit to a framework that provides for Indigenous participation in water policy that includes national principles for engagement with Indigenous peoples, including:
- the adoption of, and compliance with, the principle of free, prior and informed consent
 - the protection of Indigenous interests, specifically access to our lands, waters and natural resources and ecological knowledge
 - the protection of Indigenous areas of significance, biodiversity, and cultural heritage
 - the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
 - access and benefit-sharing through partnerships between the private sector and Indigenous communities
 - non-discrimination and substantive equality
 - access to information and support for localised engagement and consultation.