

Submission to the National Water Reform Productivity Commission Issues Paper

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18 April 2017

Thank you for the opportunity to make a submission to the National Water Reform Issues Paper. The focus of this submission is on Chapter 5 of the Issues Paper - Water Resource Management. In particular, it focuses on one of the future reform priorities identified by the National Water Commission in 2014 as unfinished business, namely 'specific pathways to achieve Indigenous objectives through water planning'² and associated questions in the Productivity Commission's Issues Paper. My responses to the questions are set out below.

1. How can the interests and needs of Indigenous people be better accommodated and represented in water planning processes?

a. Legislative Amendments:

Water planning processes are generally undertaken by the states. Accordingly, better accommodation and representation of Indigenous interests and needs in water planning processes can be achieved by states amending their relevant water laws to:

- specifically refer to Indigenous interests, needs, values and uses; and
- mandate representation on advisory and decision-making bodies.

Some states, such as NSW and Queensland, already include references to Aboriginal and Torres Strait Islander interests and uses in the objects or purposes of their water management legislation.³ NSW also mandates Indigenous representation on water management committees.⁴ But water legislation in other states, such as Victoria, is silent on these matters. This is likely to have influenced the NWC's finding in 2014 that Indigenous participation in water management decisions continues to be patchy.⁵

At the Commonwealth level, the *Water Act 2007* (Cth) also refers to Indigenous issues, values and uses in various provisions,⁶ which has subsequently been reflected in the 2012 Basin Plan.⁷ The Commonwealth has further recognised the value of Indigenous knowledge and the importance of Indigenous perspectives in recent amendments to the *Water Act 2007* (Cth) which have introduced Indigenous matters relevant to Basin water resources as a field relevant to the Murray Darling Basin Authority's functions.⁸ High level expertise in this field makes one eligible for appointment to the MDBA.⁹ The Basin Community Committee also provides for Indigenous representation, recently increased from one to at least two following

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² National Water Commission, *Australia's Water Blueprint: National Reform Assessment 2014*, 4.

³ *Water Management Act 2000* (NSW) s 3(c)(iv), s 5(2)(e); *Water Act 2000* (Qld) s 10(2)(v).

⁴ *Water Management Act 2000* (NSW) ss 12, 13.

⁵ National Water Commission, *Australia's Water Blueprint: National Reform Assessment 2014*, 114.

⁶ Section 21(4)(c)(v), s 22,

⁷ Basin Plan 2012, cls 10.52 – 10.55.

⁸ *Water Act 2007* (Cth) s 178(3)(h).

⁹ *Water Act 2007* (Cth) s 178(2)(a).

the recent amendments.¹⁰ So it is clearly not without precedent for all of the states and territories to better accommodate Indigenous interests and needs by amending their water laws.

b. Timing of participation:

Indigenous people should be involved at the beginning of water planning processes and when developing water related legislation (or amendments to), rather than part way through or at the end.

By way of example, Victoria has recently released the Yarra River Action Plan to protect the iconic Yarra River, including measures for legislative protection of the River.¹¹ What is significant about this Action Plan and the proposed legislation in the Plan (which still under development) was the participation of Traditional Owners from the outset in the development of the Action Plan by the Ministerial Advisory Committee. As the foreword to the Action Plan by Wurundjeri Council Elders notes:

Unusually, we were sitting upstream, at the table where decisions are made, not learning about processes that had occurred, and decisions made, 12 months or more previously. We hope that this Ministerial Advisory Committee marks the beginning of something quite different to decision making on Country; co-designing decisions, policies, and managing our sovereign assets (land, water and sky) as Traditional Owners in partnership with the state.

Involving Indigenous people early in the process recognises the value of Indigenous knowledge and views and their unique status as Australia's First Peoples, not as merely another stakeholder group. It is also consistent with the UN Declaration on the Rights of Indigenous Peoples, and in particular articles 18, 19, 25, 26 and 32.

c. Victorian developments

Victoria has made some important strides forward in terms of recognising Indigenous interests and the value of Indigenous knowledge in water management. This is evident from the Yarra River Action Plan noted above, which contains a proposal for legislation which will require Indigenous inclusion in planning processes, and will establish an independent advisory body, the Birrarung Council. The legislation will specifically provide for the Council to have at least two Traditional Owner representatives on it.¹²

It is also evident in the 2016 Water Plan, 'Water for Victoria' under which the Victorian government has committed to invest in an Aboriginal Water Program, being 'a state-wide approach to incorporate Aboriginal values and expertise into water management.'¹³ The program involves the establishment of an Aboriginal Reference Group to co-design the Program with the Department of Environment, Land, Water and Planning.

The Victorian Government has also committed to appoint an Indigenous person to be a Commissioner on the Victorian Environmental Water Holder.¹⁴ This will make significant

¹⁰ *Water Act 2007* (Cth) s 202(5)(c).

¹¹ Victorian Government, *Yarra River Action Plan - Wilip-gin Birrarung murrong* (2017)

¹² Victorian Government, *Yarra River Action Plan - Wilip-gin Birrarung murrong* (2017) 13 (Actions 2, 5)

¹³ *Water for Victoria* (2016) 102.

¹⁴ *Water for Victoria* (2016) 172 (Action 10.8).

inroads into ensuring Indigenous perspectives are part of the environmental watering decision-making process, and will assist in maximising social and cultural benefits of environmental watering wherever possible. Indigenous participation should therefore be one of the guiding principles for ‘best practice’ management of environmental water.¹⁵ There has also been an improvement in the representation of Traditional Owners on various Catchment Management Authorities.¹⁶

However, with the exception of the proposed Yarra River protection legislation, what is notably lacking in Victoria is a willingness to amend relevant legislation to statutorily enshrine Indigenous values and uses in relation to water and ensure the continuing representation of Indigenous people on management and advisory bodies established under that legislation.¹⁷ Unlike the proposed Yarra River protection legislation, this leaves Indigenous values and uses, as well as representation, vulnerable to the whims of the government of the day. This deficiency can no doubt be extrapolated to water legislation in other states.

Statutory recognition of Indigenous values, uses and representation is important because it complements and strengthens existing non-legislative arrangements. Alternatively, it may provide the impetus for such arrangements to be developed. States and territories should therefore be encouraged to amend their water laws to specifically recognise Indigenous interests, uses and values, and to provide for Indigenous representation on advisory and decision-making bodies.

2. Should further water reform be pursued through an improved NWI?

In short, yes. The NWI is now nearly 13 years old. Insofar as it provides for the recognition of Indigenous needs in relation to water access and management,¹⁸ it is deficient in a number of respects.

The main paragraphs in the NWI relating to Indigenous interests in water are paras 52–54.

Paragraph 52 calls for Indigenous representation in water planning, which is qualified by the phrase ‘wherever possible’, so it is only aspirational in its terms.

Paragraphs 53 and 54 both refer to native title, however native title is an inadequate mechanism to achieve Indigenous objectives. It is limited to only those rights capable of being recognised by the common law, which is reflected in the limited scope of water rights recognised in determinations to date (eg spiritual, cultural and non-commercial communal needs, with no participatory management rights). The *NTA* provisions relating to procedural rights, as interpreted by the courts (eg the opportunity to comment in s 24HA)¹⁹ further reduce the capacity of native title holders to participate in decisions regarding the management of water resources. In addition, there exist significant barriers for Indigenous

¹⁵ This addresses the first question on p 19 of the Issues Paper.

¹⁶ Lisa Neville, ‘New Faces for Catchment Management in Victoria’ (Media Release, 11 November 2015).

¹⁷ The only reference to Indigenous rights, interests or values in the *Water Act 1989* (Vic) is in s 8A, which recognises traditional owner rights to take and use water pursuant to a *TOS Act* agreement. There are no references in the *Catchment and Land Protection Act 1994* (Vic) to Indigenous values or interests.

¹⁸ Paragraph 25(ix).

¹⁹ *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60; *Lardil Peoples v Queensland* (2001) 108 FCR 453.

groups, particularly in the more settled parts of Australia, to obtain recognition of any native title rights.

As a result of these barriers, Victoria introduced an alternative process to native title recognition under the *Native Title Act 1993* (Cth), namely the *Traditional Owner Settlement Act 2010* (Vic) (*TOS Act*). A settlement under the *TOS Act* will result in the recognition of Traditional Owner rights akin to native title rights under the *NTA* and with similar inadequacies.²⁰ However even so, they are not native title rights, and therefore do not fall within the scope of the NWI.

Given the above, the focus on native title in the NWI can be seen as a major weakness. The NWI could be improved by acknowledging that there are other ways in which Indigenous Australians have had their rights as Traditional Owners recognised. The NWI could also be improved by recognising that Indigenous interests in water extend beyond native title and *TOS Act* rights to take and use water for cultural, spiritual and non-commercial communal needs, but also include economic and commercial interests in water.

²⁰ Katie O'Bryan, 'More Aqua Nullius? The *Traditional Owner Settlement Act 2010* (Vic) and the Neglect of Indigenous Rights to Manage Inland Water Resources' (2016) 42(2) *Melbourne University Law Review* (advance).