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National Water Reform 2020
Productivity Commission
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20th August 2020

RE: Productivity Commission Inquiry on Water Reform 2020

Dear Commissioners,

We welcome the opportunity provided by the Productivity Commission (PC) to make a submission to the National Water Reform Inquiry into progress of the Intergovernmental Agreement on a National Water Initiative (NWI).

The Water Justice Hub is a network of researchers hosted by the Australian National University. It collaborates with the Martuwarra Fitzroy River Council (Martuwarra Council), which is an alliance of Traditional Owners from six independent Indigenous Nations.

In this submission we focus on the social/ environmental justice problem of water and environmental colonialism and how a future NWI could better contribute to water decolonisation. This corresponds to 'Information request 3: feedback on matters that should be considered for inclusion in a renewed NWI'. We also draw your attention to the recommendations made by the Institute of Water Futures (IWF) about information, governance, water accounting and justice. We agree with the IWF that "national conversations on water reform are vital to reinvigorate the water debate and help put Australia on track to a sustainable water future".

Taking a decolonising approach, the recommendations here are illustrated by the example of the Martuwarra Fitzroy River Council. The Martuwarra Council's governance approach is based on First Law, love and care for Living Waters. We recognise the right to self-determination of all Indigenous peoples and support governance models that fit the context and direction of Traditional Owners. The broader principles and recommendations drawn from the example of the Martuwarra Council can be used to inform national water reform discussions but are not intended to be universally prescriptive.

Little has changed for Indigenous peoples since the 2017 review, which was, if anything, overly generous in its assessment of progress for Indigenous peoples. We contend that:

- The current NWI's Indigenous Access clauses are inadequate and the subsequent implementation has also been inadequate.
- Water reform must:
 - be broad reaching and integrated with other legislation/ policy
 - address the substance of what Indigenous peoples have been saying
 - result in material change
 - be consistent with Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
 - aim to be transformative and to address the 'big questions' and challenging issues
 - find a pathway to work for Australian law to work together with First Law

Working with Indigenous peoples, all levels of Australian government must respond to ongoing issues that ‘muddy the waters’:

- Legacy of water dispossession yet to be rectified or even fully acknowledged by government
 - Water reform has further entrenched dispossession
 - In (so-called) ‘greenfields’ water development contexts history is being repeated
- Indigenous water is not prioritised (for example, see Minister Frydenberg’s statement on the Terms of Reference for this inquiry)
- The language of the water sector still reflects colonial assumptions
- Recommendations by Indigenous water policy experts (individuals and groups) continue to be ignored.

We provide a suite of recommendations in the final section. These recommendations can be supported by building on previous work (e.g. the First Peoples’ water engagement council that was set up by the National Water Commission), support for Indigenous peoples’ organisations, and support for research (e.g. operationalising legal pluralism for water, co-governance, and transforming property rights frameworks).

We welcome the opportunity to provide the Productivity Commission with further information as needed.

Yours faithfully,

Martuwarra RiverOfLife, Anne Poelina, Michael Davis, Kat Taylor and Quentin Grafton

SUPPORTING EVIDENCE

Attachment 1

Executive Summary for the Martuwarra Fitzroy River Council's Conservation and Management Plan for the National Heritage Listed Fitzroy River Catchment (In Press, 2020)

Forthcoming

Articles to support the reimagining of the National Water Initiative. Please email authors to request preview copies.

RiverOfLife, M., Taylor, K. S. & Poelina, A., (in press). Living Waters, Law First: Nyikina and Mangala water governance in the Kimberley, Western Australia.

RiverOfLife, M., Poelina, A., Bagnall, D., & Lim, M., (in press). Recognizing the Mardoowarra's First Law Right to Life as a Living Ancestral Being, Special Edition, Indigenous Water Rights in Comparative Law, University of Canterbury School of Law, Christchurch (New Zealand).

RiverOfLife, M., Poelina, A., Alexandra, J., & Samnakay, N. (in press). A Conservation and Management Plan for the National Heritage Listed Fitzroy River Catchment Estate (No.1) Martuwarra Fitzroy River Council Fitzroy Crossing, Western Australia, Nulungu Research Institute, The University of Notre Dame, Broome, Western Australia. In Press.

O'Donnell, E., Poelina, A., Pelizzon, A., & Clark, C., (in press). Stop burying the lede: the essential role of Indigenous law(s) in creating rights for nature, Special Edition, Indigenous Water Rights in Comparative Law, University of Canterbury School of Law, Christchurch (New Zealand). In Press.

SUBMISSION TO PRODUCTIVITY COMMISSION INQUIRY ON WATER REFORM BY THE AUSTRALIAN NATIONAL UNIVERSITY'S WATER JUSTICE HUB

Martuwarra RiverOfLife, Anne Poelina (Chair Martuwarra Fitzroy River Council and Research Fellow Water Justice Hub), Michael Davis (The University of Sydney), Kat Taylor (Water Justice Hub), & Quentin Grafton (Convenor, Water Justice Hub).

The Water Justice Hub and the Martuwarra Fitzroy River Council

The Martuwarra Fitzroy River Council (Martuwarra Council) is an alliance of Traditional Owners from six independent Indigenous Nations. In recognising and respecting the Martuwarra, Fitzroy River as a living ancestral being present in all our meetings, negotiations and publications we acknowledge the Martuwarra as first author in this submission and many of our publications.

The Martuwarra Council has come together to stand with One Mind and One Voice as a united Council of Leaders guided by our Senior Elders from Traditional Owner Groups of the King Sound, Fitzroy River, and its Catchment which we call the *Martuwarra*. The Council's foundation is our River cultural earth-centred co-governance system that is tens of thousands of years old. The Martuwarra Council maintain and share sophisticated cultural knowledge and practices which empower us as guardians to be the voice of the Living Waters of the Martuwarra River and its inalienable right to live and flow (Poelina, 2018). Through extensive publications we recognise our sacred ancestral serpent being as an important member of our planning and decision-making processes. The Martuwarra RiverOfLife, is cited as lead author in our publications (RiverOfLife, Poelina, Bagnall & Lim, 2020)

The Martuwarra Council is grounded in First Law (or 'customary law') and the guardianship system of rights, responsibility, and obligations. Traditional Owners responsibilities to look after the Martuwarra Fitzroy River Country is a fiduciary duty as we put the River's interests first (Lim, Poelina, & Bagnall, 2017). It is the lifeforce of the Fitzroy River Catchment Estate.

The Water Justice Hub is an online "hub" connecting water researchers who support the voices of communities on water the mission is to promote both 'voice' and truth-telling in relation to water and respond to the global challenges of delivering water justice for all. The Hub is hosted by the Australian National University (ANU) in Canberra and its Convenor is Prof. Quentin Grafton, Chairholder UNESCO Chair in Water Economics and Transboundary Water Governance.

Introduction

This submission offers a decolonising perspective on Australia's water governance and regulation, calling for waters to be recognised as living, interconnected ecosystems. The intent of our submission is to champion the need for real recognition of the rights of Indigenous peoples, for their voices to be heard and listened to, and for these voices (of Elders, Traditional Owners, and communities) to be fully and equitably included in water planning, management and governance in Australia.

This submission argues that, as living systems, waters have rights and interests, and these are intricately connected with the rights and interests of Indigenous peoples who are the stewards, guardians, and owners of waters. Importantly, waters are not only living natural systems, but are also cultural and spiritual systems, networks and pathways. Moreover, our submission also draws attention to the fact that, as living, inter-connected ecosystems, waters, waterways and all the

tributaries that flow from, and into them, are intricately associated with terrestrial ecosystems, together with which they form inseparable wholes.

We argue for a decolonising strategy that offers an alternative vision to the prevailing framework of the National Water Initiative (NWI), and the various plans that flow from that (see for example Burdon et al, 2015). Our strategy is shaped by Living Waters, First Law framework, which is developed from, and embedded in, governance of the Martuwarra Fitzroy River, and articulated in the Martuwarra Council's Conservation and Management Plan for the National Heritage Listed Fitzroy River Catchment Estate (RiverOfLife, Poelina, Alexandra & Samnakay, 2020). This kind of decolonising approach is required if effective, transformative change is to be achieved for water planning and governance in Australia.

Our decolonising strategy considers recognition and protection of Indigenous peoples' rights, as well as what may be termed bio-cultural rights, in the rivers and ecosystems of which they are a part. It also embraces Earth-based legal approaches that give voice, or legal personhood to rivers and other living systems. A prominent example of this approach is the one that has been taken for the Whanganui River in Aotearoa New Zealand. We also provide the example of the Yarra River in Victoria, Australia, which is managed as a single living, integrated entity (without having legal personhood, as does the Whanganui River).

Our submission looks to these kinds of developments as models that offer potential to deliver greater equity to Indigenous peoples in water management, and present forums for Indigenous voices to be front and centre in water planning, management and regulation.

Finally, we offer some thoughts for a governance structure that can also provide potentially stronger capacity for Indigenous peoples to assert their rights, interests and custodial responsibilities in rivers and other ecosystems, and in biodiversity and heritage management and conservation. One such governance structure might be based around what is referred to as a Competent Authority (Stoianoff, 2019). This type of entity is provided for in the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. An entity such as a competent authority can provide a basis on which to develop Indigenous governance methodologies framed within a decolonising approach. The Competent Authority would be a self-determining body, the foundational principles of which would include Indigenous ethics and protocols, free, prior informed consent, and recognition of Indigenous rights, in accordance with the provisions of relevant international instruments and standards.

Critique of Existing Approaches to Water Reform

We note that the Australian Government Productivity Commission's Issues Paper states that further work is needed on Indigenous 'cultural water outcomes' and cultural values, and we applaud that statement. We would suggest though, that this must also include greater attention to spiritual values, and recognition of water as a living entity. The Issues Paper does recommend 'developing water plans that incorporate Indigenous social, spiritual and customary objectives, and strategies for achieving these objectives' (Australian Government, 2020: 18). We would advocate that this should be a priority in water reforms.

It is essential to provide awareness, and correctives to the prevailing colonialist and neo-colonial approaches to water management in this country, wherein Indigenous peoples' rights and interests are embraced more completely in law and policy planning, and implementation.

The Issues Paper discusses the balance between ‘environmental outcomes’, and ‘social or Indigenous and cultural outcomes’ (Australian Government, 2020: 17). The Issues Paper states that ‘The Commission has previously recommended that environmental water holders should contribute to those outcomes where doing so does not compromise environmental objectives’ (Australian Government, 2020: 17). It is our view that ‘Indigenous outcomes’ and ‘environmental outcomes’ should not be regarded as a balancing act between competing interests wherein emphasising one set of outcomes (e.g. Indigenous) may risk ‘compromising’ environmental outcomes. Rather, these are inextricably connected: Indigenous peoples’ connections with, and relationships to, waters should be viewed as being closely embedded with environmental and ecological ‘outcomes’.

Water reform in Australia continues to be flawed in respect of Indigenous recognition and rights (Taylor et al, 2016). One of the flaws in water reform policy concerns the language that is used. For example, the term ‘stakeholder’ is used regularly in the Productivity Commission’s Issues Paper in regard to Indigenous peoples (i.e. ‘Indigenous stakeholders’), thus obscuring or denying the status of Indigenous peoples as Traditional Owners, stewards and rights holders in waters.

The National Water Initiative (NWI) introduced in 2004 by the Council of Australian Governments (COAG), has been subject to critique in regard to its provisions for Indigenous peoples (see Tan & Jackson 2013). Connell et al, for example, draw attention to some of the inadequacies:

The NWI's treatment of Indigenous issues is another example of the apparent lack of realisation of the need for further research. While the statement of principles regarding the way Indigenous concerns should be managed is impressive there is no indication as to how they are to be integrated into normal management practice (Connell et al, 2005: 88).

The NWI has partially advanced a realisation of the need to incorporate Indigenous peoples’ interests in water planning, management and governance (Jackson and Morrison, 2007). But there is still much more that needs to be done, especially in regard to fully participatory engagement with Indigenous peoples, and recognition of cultural and spiritual values and intangible forms of cultural heritage.

Summary: the NWI’s Indigenous Access clauses are inadequate, in terms of their content, poor implementation and the colonial assumptions that frame water issues.

Recommendation: future NWI reforms recognise the problem is structural and substantial changes are needed.

The Language of Policy and Law

The language and discourse of planning, policy and law reflects the thinking and worldviews of the prevailing systems (see Davis, 2006). It is with this in mind, that we argue that much of the process leading up to the present Productivity Commission’s Inquiry largely retains an entrenched colonialist perspective on water management and governance. The language and objectives in policy, practice and administration need to shift from an emphasis on mostly Indigenous ‘participation’ or ‘involvement’ in water management, to discussing full, equitable engagement, and recognition and incorporation of Indigenous peoples’ rights and interests in water, including in its management and government.

Indigenous peoples are not only ‘stakeholders’, but ‘rights’ holders, and ‘shareholders’. As owners, guardians, and stewards of lands, waters, and ecosystems, Indigenous peoples have the right not to merely ‘participate’, or to be ‘involved’ in all aspects of the regulation, management and governance of waters in Australia, but to be enabled to exercise self-determined rights to decision-making. This

is in accordance with the UNDRIP, and with international treaty obligations regarding biodiversity, and access to biological resources (which includes marine and riparian resources).

In this sense, as well as in its stated objectives, the Productivity Commission's report falls short on strategies for effective actions on the recognition of Indigenous cultural and spiritual values, and matters of self-determination, rights and ownership in respect of water and water governance. The language in the Productivity Commission's Issues Paper reflects a dominant neo-colonialist approach, with its references to Indigenous 'uses' of water, 'access', and 'consultation' with Indigenous peoples (rather than full partners in co-governance), and an overdetermined emphasis on economic aspects. Of course, we acknowledge that it is important to properly address inequities in the needs and aspirations of Indigenous peoples in regard to the distribution, allocation and uses of Australia's waters. But we suggest that reforms should also embrace more fully the cultural, social, environmental and spiritual capital that Indigenous peoples bring to water management.

Summary: water policy and law reflect the dominant neo-colonialist approach, perpetuating water injustice.

Recommendation: water policy and law be reframed to reflect Indigenous peoples' self-determination, Law (First Law/ customary law), rights, custodianship and ownership in respect of water and water governance, and the principle of free, prior and informed consent.

A Legacy of Indigenous Dispossession

The current Productivity Commission's Inquiry into water reform presents a timely opportunity to advocate for real, effective reforms to water management in Australia in ways that fully realise the rights and interests of Indigenous peoples. The inequities in the current systems are well documented in much of the literature, and some have also pointed to the inadequacies in representation, participation and full engagement with Indigenous peoples in water reform discussions (see for example Nikolakis & Grafton, 2014: 21). Some research in Australia's Northern Territory, for example, has identified a lack of 'fairness', and problematic 'top-down' water management processes, with regard to Aboriginal people (Nikolakis & Grafton, 2014: 32).

The inadequacies, flaws, and gaps in regard to Indigenous peoples' rights, interests and values in water have led some to suggest this amounts to a situation of 'aqua nullius' (Sheehan & Small, 2007; Marshall 2017, Judd, 2019). This has been noted extensively in the literature. For example Jackson and Langton comment that 'While native title law has belatedly recognized the injustice done to indigenous people in dispossessing them of their land estates, there has been no similar recognition of water injustice (Jackson & Langton, 2011: 110). Indeed, the injustice has become further entrenched with time and successive water reforms (Jackson 2017).

Summary: Indigenous peoples in Australia were dispossessed of their water, and this has never been rectified.

Recommendation: national water reform discussions directly address water dispossession (historic and ongoing) and the myth of aqua nullius, rather than minimising or ignoring these issues.

Indigenous Rights, Interests, Responsibilities and Values

The Productivity Commission's Issues Paper does recommend 'developing water plans that incorporate Indigenous social, spiritual and customary objectives, and strategies for achieving these objectives' (Australian Government, 2020: 18). As McAvoy points out, recognition of spiritual values is currently absent: 'there is no place in modern river management systems for the protection of

Indigenous spiritual values' (2006: 97). Redressing these gaps and imbalances necessitates a different way of thinking, one that is framed within a decolonising, rights-based approach. We outline some elements of this.

First Law

To achieve effective collaborative governance of rivers and environs from Indigenous perspectives in a decolonising framework, it is critical to ensure such approaches are embedded in, and underpinned by, recognition of Indigenous rights, laws and customs. This is the basis on which the Martuwarra Council is approaching its planning and strategy. In this frame, Indigenous rights are underpinned by First Law, the customary and traditional law of the Aboriginal people of the Fitzroy River.

The Martuwarra Council advocates for water reform to embrace 'models of Indigenous-led water governance that draw on Indigenous law and practice as a source of legitimacy' (Poelina et al, 2019: 237). The importance of First Law here cannot be understated: it is the cornerstone to achieving effective Indigenous governance with a voice for the river. This is elaborated in the following way:

First Laws are framed around values and ethics of co-management and co-existence, which continue to facilitate inter-generational relationships between the shared boundaries of all the river nations through ancient songlines, contemporary customs and practices (Poelina et al, 2019: 239).

This approach is detailed in the Martuwarra Council's Conservation and Management Plan. It is worth citing the relevant part here:

... the Martuwarra and the life-giving effects of water serve as the unifying basis for strategic planning underpinned by First Law. First Law is the system of governance and law that Indigenous Australians have developed over tens of thousands of years. Under First Law, the Martuwarra continues to be a sacred living ancestral being. Traditional Aboriginal law focuses on maintaining the balance of the earth so that all things can prosper. ...Two traditional First Laws, Warloongarriy (for the River) and Wunan (for the entire Kimberley region), are ancient laws for a holistic approach to regional governance that continues to be shared and respected by the Indigenous nations. These First Laws ensured the health of the Martuwarra and its Traditional Owners. ... These laws are founded on the principle that the priority of law is to protect and manage the sustainable harmony of the land over the self-interests of humans. First Laws are framed around values and ethics of co-management and co-existence, which continue to facilitate inter-generational relationships between the shared boundaries of the River nations through ancient Songlines, and contemporary customs and practices. Under First law, the Traditional Owners of the Martuwarra regard the River as a living [sacred] ancestral being (the Rainbow Serpent), from source to seas, with its own "life-force" and "spiritual essence". It is "the 'River of Life' and has a right to live and flow"

(RiverOfLife, et al., 2020: 36)

UNDRIP rights

As discussed above, Indigenous peoples' water rights and responsibilities are embedded in their Law, or First Law. This is recognised at the international level by the United Nations Declaration on the Rights of Indigenous Peoples, or UNDRIP. UNDRIP defines and protects rights of Indigenous peoples not covered by other international charters; specifically, political, cultural and territorial water and water related rights.

UNDRIP has significant implications for the way water is distributed, managed, used and governed. One of the Declaration's Principles is that Indigenous peoples have the right to use, own and control waters within traditional territories (article 26). This includes inherent rights to their own political and cultural institutions (article 5) i.e. laws around water. The right to self-determination (article 3) and decision making in matters that may affect their rights (article 18) can also be applied to water.

Although Australia is an UNDRIP signatory, it is not yet fully incorporated into law and policy. Implementing UNDRIP would mean a redistribution of water access, power and authority, and fundamental changes to governance.

Bio-Cultural Rights

Taking these First Laws as the basis, we argue that recognition of Indigenous rights is crucial to effective reform of Australia's water planning, policy and practice. The path forward in this regard requires a convergence of Indigenous rights, with what are referred to as bio-cultural rights.

The concept of biocultural rights enables thinking around models of plural legal systems, or legal pluralism, as suggested by Bavikatte and Robinson:

... it is important to note that legal pluralism that works for indigenous peoples and local communities should reflect the sort of diverse range of communitarian ethics that they hold. It should not be an artificial fragmentation of rights for the sake of individualised neoliberal ambitions as per the way the global intellectual property institutions divides their discussions on potential rights in cultural expressions, folklore, traditional knowledge and genetic resources. Put simply, it is important that these indigenous peoples and local communities are able to self-determine their community rights over natural resources. (Bavikatte and Robinson, 2011: 49).

The group, or collective rights, which are becoming known as 'biocultural rights', are gaining growing recognition in international law. Biocultural rights refer to 'a community's long-established right, in accordance with its customary laws, to steward its lands, waters and resources'. They are the 'collective rights of communities to carry out traditional stewardship roles vis-a-vis Nature, as conceived of by indigenous ontologies' (Bavikatte and Bennett, 2015: 7). Explaining this further, another writer notes that 'Biocultural approaches to conservation, governance and development all stem from the concept of biocultural diversity'. The concept draws from 'the recognition of an inextricable link between traditional knowledge, the cultural and linguistic systems that knowledge is embedded in, and conservation of biodiversity' (Apgar, 2017: 11).

These 'biocultural rights', suggest some writers, are 'derived from the experiences of local communities that have long-term attachments to the soil'. Affirmation of such biocultural rights, these authors argue, 'is a preferable response to the current ecological crisis'. The proponents of this view 'make a case for "biocultural rights" as a means to secure these community-led solutions'. (Bavikatte and Bennett, 2015: 8). The term 'biocultural', write Bavikatte and Bennett, 'has been used widely by communities, academics and civil society to indicate a way of life that has developed out of a holistic relationship between Nature and culture.' Hence, they argue, 'biocultural rights affirm the bond between indigenous, tribal and other communities with their land, together with the floral, faunal and other resources in and on the land. In the literature, this relationship is generally described as one of stewardship.' (Bavikatte and Bennett, 2015: 8).

In the context of these descriptions of biocultural rights, the concept is important in discussing connections between Indigenous rights, and rights that can be accorded to natural ecosystems, as in the idea of river rights outlined elsewhere in this paper. Thinking about these kinds of rights also

facilitates discussing Indigenous governance in terms of ideas about stewardship, ethics, and customary, or First Laws.

Summary: Indigenous peoples' rights are described by their Law and are supported by numerous international frameworks such as UNDRIP and biocultural rights.

Recommendation: National water reform look beyond Australian recognised rights (e.g. native title), which are limited, and consider international benchmarks and standards.

Governance and Legal Recognition

A Voice for the River

Recognition of Indigenous rights, and eco-cultural and Earth-centred approaches is the fundamental basis upon which Martuwarra Fitzroy River governance is being advanced.

This means a shift away from 'anthropocentric' approaches to water uses where the consumption, use and management of water pivots around humans. Alternatives to these approaches may be referred to as 'eco-centric', or 'Earth centred'. They are also consistent with, and complement the concept of what have been referred to as 'bio-cultural' rights. This is because the idea of 'biocultural rights' outlined in this submission allows scope for thinking more deeply about the important connections between ecologies, biological and cultural systems, and peoples. Earth-centred approaches are emerging as an important area in Earth jurisprudence, and can be explored in terms of their potential for facilitating recognition and incorporation of Indigenous worldviews and cosmologies in the governance of ecosystems. These approaches regard rivers and other aspects of the natural world as having their own, intrinsic rights. As O'Donnell and Macpherson write 'in many parts of the globe, courts and legislatures are beginning to acknowledge value in protecting natural resources as an end in itself' (2019: 35). The recognition of such rights is emerging in a number of countries and jurisdictions around the world, such as in Aotearoa New Zealand, and also in Colombia, Ecuador, India, and to an extent, in Australia.

In some of these contexts, nature, and natural features such as rivers are given a legal 'voice', or 'legal standing'. As some authors note, 'the grant of legal personality is the newest legal tool being used to protect and manage rivers' (O'Donnell and Macpherson, 2019: 35). Recognition of rights for rivers is an approach that aligns with the notion of giving 'voice' to the Fitzroy River, as advocated in the planning process by the Martuwarra Council. Enabling a 'voice' for the Fitzroy River within a framework of Aboriginal rights-based governance is the aspirational goal for the Martuwarra Council. In line with thinking about the concept of a 'voice' for the River, that is, the River as being accorded its own rights, is the concept of considering the kinds of rights that Indigenous peoples have in their connections with the rivers and other ecosystems as 'biocultural rights'. This notion of biocultural rights brings into focus ideas about caring for Country as forms of 'stewardship', 'or 'guardianship'.

Two examples in which Earth-centred rights are being advanced are outlined here.

Whanganui River, Aotearoa New Zealand

The governance of the Whanganui River in New Zealand's North Island, has in recent years, become established as a leading example of what has been referred to as 'Earth jurisprudence', that is, an emerging approach in which nature and natural features are accorded a 'voice', or 'legal standing'. In March 2017 Aotearoa New Zealand passed the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (Collins & Esterling, 2019; O'Donnell & Macpherson, 2019; O'Bryan, 2019). Thus, Aotearoa New Zealand became the 'first country to pass legislation recognising the river as a legal person, as

part of a political settlement with the Whanganui iwi' (O'Donnell & Macpherson, 2019: 37). This Act 'creates a representative (a guardian) ... called "Te Pou Tupua", to be the human face of the river and to act and speak for and on behalf of Te Awa Tupua'. In this approach, 'the guardian model reflects the ecocentric approach to natural resources management' (O'Donnell & Macpherson, 2019: 37).

In this collaborative river governance a 'range of entities are created, and a range of perspectives covered' (O'Donnell & Macpherson, 2019: 37). Although the Te Awa Tupua Act is significant in that it 'directly grants legal rights to the river, combined with statutory river values and a clear voice for the river in the form of guardians (Te Pou Tupua)' (O'Donnell & Macpherson, 2019: 40), this model is, in the view of one writer, not without its flaws. For example, although the Whanganui River, in this model, has rights as a 'legal person', it does 'not hold rights to use water in the river'. Thus, 'although Te Awa Tupua has a clear voice ... the legislation does not give the river or its guardians sufficient powers to fully exercise its voice, which limits its ability to achieve environmental outcomes' (O'Donnell & Macpherson, 2019: 40). According to one commentator 'the strength of the Te Awa Tupua model is that it provides a way to bring diverse interests in the river together, and frames policy debates around consideration of the river as a single interconnected entity' (O'Donnell & Macpherson, 2019: 41). The strengths and weaknesses of the approach used through the Te Awa Tupua Act must be closely examined in considering its potential applicability in other contexts where Indigenous peoples are seeking to strengthen their governance for waters and other ecosystems.

Yarra River, Melbourne, Australia

The Yarra River, flowing through Melbourne and parts of the State of Victoria in Australia, is another case in which a natural feature, through legislation, is regarded as having rights, although in a different way to the way that the Whanganui River governance system has been developed. In September 2017, the Victorian State Parliament enacted legislation entitled the Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017 (Vic) ('Yarra River Protection Act') for what is 'one of Victoria's most iconic rivers' (O'Bryan, 2019: 769). This Act 'gives an independent voice to the river by way of a statutory advisory body containing Aboriginal representation, called the Birrarung Council'. The Act achieves important new ground in that it 'is the first time that Victorian legislation has used Aboriginal language' (O'Bryan, 2019: 769). Also significant is that the Yarra River Protection Act 'treats the Yarra River as one living and integrated natural entity to be protected' (O'Bryan, 2019: 769). The Yarra River Protection Act is 'a reflection of the Indigenous conception of the Yarra as noted in the preamble: that it is alive, has a heart and a spirit, and it is part of their Dreaming' (O'Bryan, 2019: 774-5).

Although the legislation treats the river as a living entity, it does not give it legal personhood. O'Bryan notes that Victoria's Traditional Owners have not sought legal personhood for the river and recommends that any future changes improve the existing Act, rather than introducing a legal personhood model. As it stands, the Wurundjeri Woi wurrung Cultural Heritage Aboriginal Corporation has been 'constructively critical' of the draft Yarra Strategic plan and its preparation, highlighting that further improvement is needed so that Traditional Owners can equitably be involved (Lindsay, 2020).

Although the two approaches for the Yarra, and Whanganui rivers differ, they offer valuable examples of the kinds of approaches that may be considered for all waters in Australia.

Summary: new legal models are emerging, including legal personhood for rivers. These tools provide new options for water governance and management with powerful potential. However, the implementation of these exciting models varies greatly in detail which can limit their effectiveness.

Recommendation: the NWI consider it's compatibility with emerging models, such as legal personhood and the Wilip-gin Birrarung murrong model.

Legal Pluralism

Effective reform for water governance can be best achieved by recognition of Indigenous First Law alongside Australian laws, in a legal pluralism approach. Governance, and co-governance for rivers and other water systems will be enhanced within this kind of framework. As noted above, recognition of Indigenous First Law rights, bio-cultural rights, and Earth-centred legal approaches can sit alongside, and work together with, current Federal, State and Territory legal systems, to establish water governance within a frame of legal pluralism (e.g. Anker, 2014).

Summary: respecting Indigenous peoples' rights, institutions and First Law in Australia implies legal pluralism.

Recommendation: the water reform agenda explicitly consider the bigger questions of legal pluralism in the Australian context, and what this means for water governance/ decision making.

A Bio-Regional Approach

A Bioregion is short for "bio-cultural" region, or "life-place". Bioregions are defined through physical and environmental features, including watershed boundaries, soil, rainfall, forests, animals and terrain characteristics, as well as the human cultures living within them (Source: <https://deptofbioregion.org/what-is-bioregionalism>).

We refer to the Martuwarra Council's Conservation and Management Plan for the National Heritage Listed Fitzroy River Catchment Estate (2020), as an example of a planning process that is framed within a decolonising approach (RiverOfLife, et al., 2020). Drawing from that planning document, our view is that to achieve transformative change to Australia's water planning and management requires developing and implementing bio-regional approaches to water and terrestrial governance. These would offer greater opportunities to connect the kinds of elements that we are advocating in this submission. That is, to connect water as living systems, to the lands, environments and resources of which they are intimately linked, and also to connect these with ancestral and Dreaming-based geographies, First Law, voices of Elders, and extended kinship systems.

A bio-regional approach would enable recognition that the rivers are vital components of entire ecosystems, and form part of the Indigenous sacred geographies and estates. The Fitzroy River, as one of the most significant waterways in Australia, connects peoples, countries and resources, and is listed under the *Environment Protection and Biodiversity Conservation Act 1999*. Whilst there is some overlap between the NWI's focus on catchment or aquifer areas, the bio-regional approach proposed is more integrated and holistic. Taking in these aspects, a bio-regional approach to water planning would embrace strategies that include co-governance, incorporation of Indigenous knowledge and practices, and regional perspectives on conservation and heritage management.

Summary: a bio-regional approach to water planning would embrace strategies that include co-governance, incorporation of Indigenous knowledge and practices, and regional perspectives on conservation and heritage management.

Recommendation: the water reform agenda to incorporate bio-regional approaches encompassing Indigenous rights, knowledge systems, and governance

Co-governance

The Martuwarra Council champions effective, self-determining governance approaches for rivers and other ecosystems. An approach to governance that is founded on principles of Indigenous self-determination may be based on a 'competent authority' as a potential model. The concept of a competent authority as it might relate to the regulation and management of waters and other ecosystems, biodiversity, and associated Indigenous knowledge and practices, has most recently been developed through international United Nations environmental instruments. These are the Convention on Biological Diversity 1992 (the CBD) and, more specifically, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.(the Nagoya Protocol).

A competent authority is an entity, or organisation that is established for the purpose of monitoring, reporting, and regulating biodiversity-related biological and genetic resources and associated knowledge. The concept is a useful one in which to examine ways of establishing Indigenous forms of governance for waters and other ecosystems. A competent authority may take many forms and perform different functions, depending on a wide range of factors, including especially regional and local situations and circumstances. Establishing river and ecosystems governance based on a competent authority model can facilitate pathways towards effective recognition of Indigenous rights and interests within a plural framework.

In the example we offer of collaborative eco-cultural governance for the Martuwarra Fitzroy River, as noted earlier in this submission, First Laws frame the approach. As articulated by Poelina and others:

We conceive of the Martuwarra Council as an opportunity to develop a model of 'better-practice' for water management for the West Kimberley: a locally designed collaborative solution that is based on cultural governance (Poelina et al, 2019: 237).

Summary: co-governance models are being developed, such as the Martuwarra Fitzroy River Council

Recommendation: the NWI adopts a flexible approach that includes co-governance (rather than assuming a single system of water governance that is overseen by the Australian government)

Reimagining the NWI

A co-governance approach would go some way towards addressing the gaps in Australia's water governance, as outlined by RiverofLife, Taylor and Poelina:, 'there is some acknowledgement in the literature that Australian water governance needs transform, however, there is limited consideration within Australian policy of what decolonising would entail' (in press).

The example of the Martuwarra Council provides a pathway forward and fills in these details. The challenge, however, is for the national water reform agenda to support this approach as well as the approaches of other First Nations (such as cultural flows of the Murray Darling Basin First Nations), following the UNDRIP principle of self-determination.

Some broad, over-arching principles could be developed, building on previous work of the First Peoples Water Engagement Council and the Indigenous Water Policy Group, which was established by the National Water Commission. The details of a national framework would require further discussion and a commitment at the highest level to support Indigenous peoples' water rights, responsibilities and Law.

It must be stressed that, in our view, changes should be broad reaching and reimagine the foundations of water governance. This is supported by the recommendations of the National Cultural Flows project (Nelson et al 2018).

To that end, an upcoming article compares the emerging conceptual challenges to the status quo by comparing the Living Water, First Law framework to Australia's water policy framework, represented by the National Water Initiative (please contact authors to request a copy). The article analyses both frameworks, examining how they represent different water 'problems' and 'solutions' and the underlying assumptions of each.

The analysis finds that two core representations emerge. One is based on looking after and honouring Living Waters according to First Law, responding to the policy 'problem' of colonisation's threats to the system integrity. The other is based on using water resources efficiently and sustainably and responding to the 'problem' of inefficient and unsustainable use. When Living Waters are seen as an ancestral spirit, this places emphasis on the quality of relationships, adherence to Law and ensuring well-being of the interconnected system. This is incompatible with the separation of land and water rights and the concept of water access entitlements as 'property' (Roth, et al., 2015). By contrast, the NWI assumes water is an inert resource and water quantity is given key focus.

These conceptualisations effect how water is distributed. The NWI uses market mechanisms to move water to the highest monetary value and emphasises the role of science in decision making. According to the Living Waters, First Law framework, life and livelihoods on the river Country are the highest benefit uses of water. The apparent dichotomy of water as spirit versus resource, typifies 'western' (or 'modern water') and 'Indigenous' notions of water (Parsons and Fisher 2020).

The tension between the problem representations speaks to the greater ontological battle. First Law comes from the land and is tied to the *Bookarrarra*. This law of relationship are the values, ethics, rules for living in harmony with nature and our fellow non-human being. These 'rules' are the codes of conduct necessary to maintain balance and harmony with each other and with Country. This is the First Law which continues through *Bookarrarra* and continues into modernity. *Bookarrarra* is the fusion of past, and how we action this in the present always focused on the future generations (Poelina 2020). By contrast, the NWI is based on laws imported from Britain and colonial logic around water resources that misinterpreted existing systems land title (Lilienthal and Ahmad 2017; Marshall 2017).

Fundamentally, the two approaches have different foundations and perspectives of water. These conceptual 'gaps' would need to be addressed for a successful co-governance model to be implemented.

Similarities between the frameworks could act as 'bridges,' starting points that potentially promote dialogue and agreement. The aforementioned paper (Riveroflife, Taylor & Poelina ,in press) proposes avenues for future research and development that work towards a reimagining of water governance. For example, one proposed 'bridge' is sustainability. Both the NWI and Living Waters, Law First talk about sustainability. Building on this common point, we might ask: what does 'sustainability' of water resources look like when reframed to sustainability of Living Waters? What does this reframing imply for water management and governance?

Summary: A reimagined NWI must challenge the assumptions of water governance and find ways to bring together First Law and Australian Law.

Recommendation: That national conversations and research directly address 'big' questions of governance and authority for water, and develop a uniquely Australian concept of water governance that respects Living Waters and First Law.

Summary and Conclusions

The NWI's Indigenous Access clauses are inadequate, in terms of their content, poor implementation and the colonial assumptions that frame water issues. Australian water policy and law still reflect the dominant neo-colonialist approach, perpetuating water injustice. Indigenous peoples in Australia were dispossessed of their water, and this has never been rectified. However, Indigenous peoples' rights are described by their Law and are supported by numerous international frameworks such as UNDRIP and concept of biocultural rights.

New legal models are emerging, including legal personhood for rivers. These tools provide new options for water governance and management. There are also collaborative governance examples based on First Law, such as the Martuwarra Council. There is an enormous opportunity to respond creatively to water challenges.

There is no single solution. Respecting Indigenous peoples' rights, institutions and First Law in Australia requires transforming the foundations of water, and moving towards legal pluralism.

This submission suggests that a bio-regional approach to water planning would embrace strategies that include co-governance, incorporation of Indigenous knowledge and practices, and regional perspectives on conservation and heritage management. Co-governance models are being developed, such as the Martuwarra Fitzroy River Council. There are great opportunities for change. However, more work is needed to align the Australian national framework for water with Indigenous peoples' frameworks. A reimagined NWI must challenge the assumptions of water governance and find ways to bring together First Law and Australian Law.

Recommendations

High level, nation-to-nation discussions are needed about how co-governance (or other models) might work in practice. We suggest that:

1. Future NWI reforms recognise the problem is structural and substantial changes are needed.
2. Water policy and law be reframed to reflect Indigenous peoples' self-determination, Law (First Law/ customary law), rights, custodianship and ownership in respect of water and water governance, and the principle of free, prior and informed consent.
3. National water reform discussions directly address water dispossession (historic and ongoing) and the myth of aqua nullius, rather than minimising or ignoring these issues.
4. National water reform look beyond Australian recognised rights (e.g. native title), which are limited, and consider international benchmarks and standards.
5. The NWI consider its compatibility with emerging legal models, such as legal personhood and the Wilip-gin Birrarung murrong model.
6. The water reform agenda explicitly consider the bigger questions of legal pluralism in the Australian context, and what this means for water governance/ decision making.
7. The water reform agenda to incorporate bio-regional approaches encompassing Indigenous rights, knowledge systems, and governance
8. The NWI adopts a flexible approach that includes co-governance (rather than assuming a single system of water governance that is overseen by the Australian government)

9. That national conversations and research directly address 'big' questions of governance and authority for water, and develop a uniquely Australian concept of water governance that respects Living Waters and First Law.
10. Water allocation plans at a catchment scale (like the Martuwarra) must have sufficient investment, be co-designed and regulated through a statutory framework.

These recommendations can be supported by building on previous work by First Peoples, support for Indigenous peoples' organisations, and support for research (e.g. operationalising legal pluralism for water, co-governance, and transforming property rights frameworks).

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