

Indigenous Water Interests – August 2020

First Nations people comprise a minority of the global population up to 300 million of 7,000 million. Many of those First Nations 'peoples are oppressed, marginalised and dispossessed of land, water, knowledge and a cultural life.¹ The legacy of the dispossession continues in economic, social and political disadvantage. In Australia The Productivity Commission's Report Overcoming Indigenous Disadvantage: Key Indicators 2009² exposes the continuing high levels of disadvantage faced by Indigenous communities in Australia, across a range of indicators including health, access to justice and education, abnormally high levels of incarceration.³

In the Aboriginal world view, people and Country (including lands, waterways and seas) are interdependent entities that are intrinsically linked in the landscape through cultural and spiritual significance. This means that there is no separation of nature and culture - the health of the natural environment and cultural wellbeing of Aboriginal people is directly influenced by the health of the cultural landscapes.

Over these millennia we have sustainably managed our lands, waters and natural resources for the health of our Countries and our peoples. We have understood the importance of water and its centrality to life and have cherished it accordingly. Our traditional ecological knowledge, like our stories, are passed down from generation to generation and continue up until this day. This allowed us to live in a symbiotic relationship with the land and water. We used it, we lived from it, we nurtured it. Our use was sustainable, and continues so today, where it can. Through our dispossession, and then mismanagement of our lands and waters, with a disregard for our culture, knowledge and understanding, we have witnessed the detrimental effects upon both our peoples and our environment; for we exist in harmony and in pain with our traditional countries.

Professor Irene Watson notes ' [W]hat began in 1788 with the beginning of colonisation [by the English] was more than a dramatic loss of life and violent dispossession of country. It was also the time the colonist began the covering of Raw (customary) Law and the unsettling of Country'⁴

Colonial doctrines of 'terra nullius'⁵ and 'reception' justified the English government's refusal to acknowledge Aboriginal and Torres Strait Islanders as having any status in law and allowing the unjust taking of all property and with it human rights of equality, the right to a cultural and spiritual life, the right to participate in public life and decision making, the right to live without discrimination, violence and oppression and self-determination.

Many Aboriginal and Torres Strait Islander peoples in Australia have been marginalised through the deprivation of traditional lands and waters and the difficulties encountered in practising customary law through ceremony and looking after Country. The Australian legal system has provided legislative schemes to claim back land and water's but it is challenging, uncertain and Country invariably is not based on exclusive ownership but must be shared with other stakeholders including government, pastoralists, rural communities and resource companies. Howitt observes ' [s]pecific threats to indigenous territories, and the ability of indigenous peoples to sustain their cultural

¹ Pamela Jacquelin-Andersen (ed) The Indigenous World IWIGA 2018

² Productivity Commission, Overcoming Indigenous Disadvantage: Key Indicators 2009 (2009), p5. At <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2009> (vi)

³ Australian Human Rights Commission Special Rapporteur on Indigenous Peoples' Australian Mission 17-28 August 2009, 9

⁴ Irene Watson Aboriginal Peoples, Colonialism and International Law Routledge, 2015, 20

⁵ Irene Watson above n4, 153

relationships, their duties and customs involving their traditional lands, accompany these general processes threatening indigenous survival'⁶

Aboriginal and Torres Strait Islander communities have complex knowledges which support and reinforce their relationship and deep connection to Country as the Traditional Owners of their cultural landscapes. They have distinct responsibility to care for Country and in particular, protect cultural sites of significance. Increasingly in Australia and globally, Indigenous knowledges are being recognised as an increasingly important factor in human and planet survival⁷. Application of Indigenous knowledges is recognised internationally as relevant and practical importance to adaptation and mitigation of adverse impacts of a changing climate⁸. In Australia the environmental law framework acknowledges the importance of the knowledge and input of Indigenous knowledge to natural resources management and meeting global challenges such as climate change such as including acknowledgement in legislative objects⁹ or including Aboriginal and Torres Strait Islander people as members of consultative communities to environmental decisionmakers. Such acknowledgment or consultation does not necessarily translate into duties for decisionmakers to take relevant Indigenous knowledges into account in EDM or for Indigenous knowledge custodians to have meaningful input and control over the final outcome. The absence of such legal duties for environmental decisionmakers means that mere acknowledgement of the importance of Indigenous communities and their knowledges and practices cannot be enforced to protect human rights being violated from adverse climate change impacts.

Anaya observes 'Indigenous participation in the management of environment, cultural heritage and climate change Indigenous Australians have had very limited influence in decision-making affecting their natural environment and their means of subsistence. For example, while the Australian Government has been developing a policy for climate change, and while they developed laws and policies for water use and access, there has been minimal consultation or discussion with Indigenous peoples.'¹⁰

Climate change is an environmental challenge that knows no boundaries but Indigenous communities have a heightened risk. In 2008, Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma noted '[a]s coastal and island communities confront rising sea levels, and inland areas become hotter and drier, Aboriginal and Torres Strait Islander peoples face the loss and degradation of the lands, waters and natural resources they have relied upon for generations.

⁶ Richard Howitt *Rethinking Resource Management Justice Sustainability and Indigenous Peoples* Routledge 2001,31

⁷ Luisa Maffi and Ellen Woodley, *Biocultural Diversity Conservation: A Global Sourcebook* (Earthscan, London and Washington DC, 2010)

⁸ Douglas Nakashima, Kirsty Galloway McLean, Hans Thulstrup, Ameyali Ramos Castillo and Jennifer Rubis *Weathering Uncertainty Traditional knowledge for climate change assessment and adaptation UNESCO, UNU, 2012*

⁹ Section 3(1)(f) and (g) of the Environmental Protection Biodiversity Conservation Act 1999 states (f) to recognise the role of indigenous people in the conservation and [ecologically sustainable use](#) of Australia's [biodiversity](#); and (g) to promote the use of indigenous peoples' knowledge of [biodiversity](#) with the involvement of, and in co-operation with, the owners of the knowledge.

¹⁰ Australian Human Rights Commission Special Rapporteur on Indigenous Peoples' Australian Mission above n3,57

It also poses a major threat to the physical health of Indigenous communities and our ability to sustain our traditional life, languages, cultures and knowledge.

Further, efforts to tackle climate change have the potential to entrench our economic marginalisation by exploiting Indigenous traditional lands, waters and natural resources ‘in the national interest’.

There is a lot at stake – and yet Indigenous Australians are often sidelined when it comes to the important work of developing policies and plans to respond to these pressing challenges. This has to change.”¹¹

Case Studies

In 2019 colonial dispossession and its shadow continue compounded by climate change continues to harm Aboriginal and Torres Strait Islander communities, their human rights, their access to land and water as well as interfere with their rights to a cultural life and self-determination. Some case studies will demonstrate this (climate change impacts on Barwon River/Murray Darling Basin-outline problems and solutions.

Here are some links to Climate change impacts on Murray Darling Basin-
<https://www.humanrights.gov.au/publications/native-title-report-2008-case-study-2> and the Torres Strait-
https://www.humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntreport08/pdf/casestudy1.pdf

Innovative solutions to challenges of impacts of climate change upon Aboriginal water resources and communities relying upon them.

NATIVE TITLE ACT 1993 - SECT 211

Preservation of certain native title rights and interests Requirements for removal of prohibition etc. on native title holders

(1) Subsection (2) applies if:

- (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and
- (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and
- (ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and
- (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc. on native title holders;

(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

¹¹ 2008 Climate change, water and Indigenous knowledge A Community Guide to the Native Title Report 2008[online] accessed at https://www.humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntreport08/pdf/Climate_Change_Community_Guide.pdf on 9January 2019

(a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
(b) in exercise or enjoyment of their native title rights and interests.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of class of activity;

(3) Each of the following is a separate class of activity :

(a) hunting;

(b) fishing;

(c) gathering;

(d) a cultural or spiritual activity;

(e) any other kind of activity prescribed for the purpose of this paragraph.

The following recommendations will assist in resolving the challenges outlined above-

The following suggestions may assist in resolving the challenges outlined above-

-to amend the national and state legal framework to recognise and incorporate far greater integration of “Cultural Knowledge” and the identification of “Cultural Assets”.

-greater focus needs to be placed on exploring frameworks and methodologies that can be used to establish a “Culturally appropriate Indigenous Water Council / Group” determine the Terms of Reference for the Indigenous Water Council / Group to be successfully integrated into International Fora

- the Indigenous Water Council / Group is designed to provide sound cultural advice that can assist in the remedy the harm done to the environment, it must not impose further harm, directly or indirectly upon Indigenous peoples’ who comprise the most socio-economically vulnerable peoples around the World.

- The importance of establishing and recognising both a Indigenous Water Council / Group and a mechanism that brings First Nations people together, such as a Cultural Knowledge Exchange Circle (CKEC) in onground environmental projects particularly in water resource management is essential, particularly given the history of water management practices around the World. Historically, there has generally been a failure by governments to recognise the importance of culturally appropriate environmental considerations, such as continued river flows, for river health and wetland recovery.

- The inclusion of Indigenous Water Council / Group and a CKEC in existing environmental planning frameworks, is one option for achieving this. However, for CKEC to be truly recognised in environmental management and planning, the goals, assumptions and methods of the entire system of resource management must be challenged. These initiatives would provide a safe environment for Indigenous peoples to have courageous conversations and look to tabling recommendation, such as;

- Amend the Water Act to include a new Part 6A, establishing an **Aboriginal Water and Land Holder (AWLH)**, an **Aboriginal Water and Land Holdings Advisory Committee (AWLH Advisory Committee)**, and an **Aboriginal Water and Land Holdings Account (AWLH Account)**. Note link to ss. 51(xxiv) and (xxxi) of the Constitution.
- The AWLH would be an Aboriginal person.

- Functions: The functions of the AWLH would be to purchase and manage Aboriginal Water Holdings (AWHs), purchase and manage land that would enhance the use of AWHs, and to administer the AWLH Account.
- The functions of purchasing and managing AWHs and land that would enhance the use of AWHs includes any of the following:
 - Purchasing, disposing of and otherwise dealing in water and water access rights, water delivery rights or irrigation rights;
 - Purchasing, disposing of and otherwise dealing in land that would enhance the use of water access rights, water delivery rights or irrigation rights;
 - Entering into contracts (including options for contracts) for the purposes of such purchasing, disposal or other dealing;
 - Maintaining an up to date record of AWHs and associated land;
 - The undertaking of work to enable the taking or use of water under rights or interests that form part of the AWHs and/or land holdings.
 - The undertaking of work to enhance the taking or use of water under rights or interests that form part of the AWHs, to the extent that the work is undertaken in the riparian zone by Aboriginal River Rangers employed for that purpose. For example, this could include pest control (**include other examples**).
- The functions of the AWLH are to be performed for the purpose of protecting, restoring and providing for Aboriginal cultural, social, economic and environmental values associated with water in the Murray-Darling Basin. This will *inter alia* give effect to the relevant international agreements, in particular the Convention on Biological Diversity (notably Articles 8(j) and 10(c)).
- The functions of the AWLH would be linked to of Basin Plan, Chapter 10, Part 14 (as amended in accordance with this report). That is, the functions of the AWLH would include meeting the objectives and outcomes for Aboriginal cultural, social, economic and environmental values - and cultural flows - specified in water resource plans.
- The AWLH Advisory Committee would comprise representatives from Aboriginal Nations across the Murray-Darling Basin. The Advisory Committee would advise the AWLH with respect to the performance of its functions, notably in relation to the purchasing and disposal of AWHs and associated land.

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