

Attention: Australian Government

Productivity Commission

Submission: Issues Paper on National Water Reform

18 April 2017

National Water Reform and Indigenous peoples of Australia

The National Water Reform Inquiry is, on its Terms of Reference (ToR), is to ‘assess progress towards achieving the objectives and outcomes of the National Water Initiative (NWI). It is noted that the Issues Paper (IP) does not specifically name Indigenous water rights and interests as distinct, First Peoples which directly and indirectly affect water use and access under the National Water Reforms and across Australia’s jurisdictions.

Also noted, after discussion with staff of the Productivity Commission (PC) that, the PC has only one position on the stakeholder working group¹ for Aboriginal and Torres Strait Islander (ATSI) peoples.

The IP includes at Box 1, titled “Overview of Australia’s national water reform and key events”, does not include key events which relate to ATSI peoples, for example the decision in the High Court in *Mabo (No 2) v Queensland*, or identify pre-federation water reforms which directly affected ATSI peoples. The overview in the IP does not include the inclusion of Indigenous Clauses in the NWI.

The COAG “eight key elements of the NWI”² in the IP should include a separate “key element” to represent “agreed outcomes and actions” for ATSI peoples; and drafted in consultation with ATSI communities. This proposal is highly relevant in light of the treaty discussions in various jurisdictions across Australia; and the proposed amendments to the Australian Constitution.

Overturing aqua nullius: Securing Aboriginal Water Rights

In my doctoral thesis, by research, awarded in 2014 and titled “A Web of Water Rights: Examining the Competing Aboriginal Claim for Water Property Rights and Interests in Australia”,³ ‘examined and analysed a range of themes in Aboriginal water rights and interests in Australia’ and put forward nine recommendations for law reform in relation to

¹ *Water Act 2007* (Cth) s 89. See IP v.

² IP 7.

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http://www.researchonline.mq.edu.au/vital/access/manager/Repository/mq:35733?exact=sm_type%3A%22Thesis+PhD%22 (accessed 18 April 2017).

national reform in water. These recommendations should be included in discussing and “developing future reform priorities”⁴ for Aboriginal peoples.

In 2015 the doctoral thesis “A Web of Aboriginal Water Rights” was awarded the national Stanner Prize, as a “unanimous decision of the judges” and comment from Professor Mick Dodson highlighted the importance of the thesis, stating, “it brought a whole new dimension to water rights in the legal frame” and “well-written, well-argued, with an audience beyond the very immediate”.⁵ The thesis chapters provide a sound basis to address the ToRs set out in the Inquiry, and the chapters inform (not exhaustive):

- Specific pathways to achieve Indigenous objectives through water planning⁶
- What further actions are needed to achieve clear and secure property rights, the effect of ‘unbundling entitlements’ on Aboriginal water rights and interests and whether current approaches in rights are fit-for-purpose, for Aboriginal peoples⁷
- How to recognise and progress water resources for Indigenous peoples and meet the cultural and economic needs and interests of Indigenous peoples in water planning across jurisdictions⁸
- The participation and inclusion of Aboriginal peoples in “guiding best practice management of environmental water”⁹
- Address policies that affect the health of water systems, from an Aboriginal perspective¹⁰
- Respond to the public health, safety and environmental issues in water and wastewater services for Aboriginal peoples¹¹

This year, the Hon. Michael Kirby AC CMG, former judge of the High Court, launched the book, “Overturning aqua nullius: Securing Aboriginal Water Rights”, and originated from my doctoral thesis. Mr Kirby wrote in the foreword of “Overturning aqua nullius”, “Dr Marshall’s research confirms the nexus that exists between Aboriginal health and wellbeing and access to water”¹² and the “recommendations [in the book] call on Australian governments to introduce statutory regimes, to review current laws and implement informed public policies”.¹³ Any reforms discussed and assessed in this Inquiry into the National Water

⁴ IP “Developing future reform priorities” 7.

⁵ <http://aiatsis.gov.au/news-and-events/news/stanner-award-winner-announced> (accessed 18 April 2017).

⁶ IP 7.

⁷ IP 11.

⁸ IP 13-14.

⁹ IP 19.

¹⁰ Ibid.

¹¹ IP 25.

¹² Dr Virginia Marshall, *Overturning aqua nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017) viii. <http://aiatsis.gov.au/publications/products/overturning-aqua-nullius-securing-aboriginal-water-rights/paperback> (accessed 18 April 2017).

¹³ Ibid.

Reform should be undertaken in light of the First Peoples water rights and interests, not as a 'stakeholder' but as a first right to water.

I look forward to the opportunity to answer any questions or discussion on my submission and make myself available to provide expertise in this area of law reform.

Yours faithfully

Dr Virginia Marshall