

# **Deconstructing Aqua Nullius: Reclaiming Aboriginal water rights and communal identity in Australia**

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## *Introduction*

This paper examines and analyses the historical flawed treatment of Indigenous peoples water rights and interests by Australian Governments in the development of national water reform and how the early stages of the governments national water reform process failed to account for Indigenous peoples inherent rights to water, its use, management and ownership. It is not the purpose of this paper to examine or interpret Australia's current common law and statutory water regimes. The paper argues that the government's lack of inclusion of Indigenous water rights<sup>1</sup> and interests resembles Australia's western framing of Indigenous land rights, shaped by the doctrine of *terra nullius*, and reconstructs Indigenous water rights as *aqua nullius* or 'water belonging to no-one'.

The western reconstruction of Aboriginal water values compromises the Aboriginal claim to rights and interests in water, such as native title, and the use and access of freshwater and marine tenure through western water frameworks. The legal paradigms underlying post-colonial British and Australian laws effectively subdue First Peoples laws, values, customs and practices. Indigenous peoples in Australia, the continent's First Peoples, continue to be regarded as minority 'stakeholders' in national and cross-jurisdictional water management laws and policy decision-making.

## *The creation of water property rights*

An examination of the various early reports and policy documents that informed Australia's national water reforms, such as those for the Council of Australian Governments (COAG), shows a broad disregard for Indigenous water use. Where Indigenous water management issues are introduced into the water dialogue, they are referred to in terms of 'community engagement', 'water resource planning or water sharing plans', 'cultural flows' and in native title determinations. There is a failure in the water reform process to recognise and prioritise economic water values and use by Indigenous communities in Australia.

The principles of the 1994 COAG Water Reform Framework failed to include Indigenous water rights and interests as 'first water rights' of the First Australians; which of itself reveals the Australian government's reluctance to heed the High Court decision in *Mabo v Queensland [No 2]*, that is, to "acknowledge the role that *terra nullius* played in Indigenous

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<sup>1</sup> Indigenous water rights as defined in my doctoral thesis in law "A Web of Aboriginal Water Rights: Examining the Competing Claim for Water Property Rights and Interests in Australia" (2014) states at p 19, "From an Aboriginal cultural perspective, water is characterized through many layers of customary knowledge and equates to much more than a water utility, aesthetic water value and drinking water". 'Indigenous peoples' refers to the Aboriginal and Torres Strait Islander peoples of Australia.

peoples dispossession and oppression” and to “reject the proposition that Australia was practically unoccupied in 1788”.<sup>2</sup>

The western concept of ‘water belonging to no-one’ framed the government’s discussions on water reform and the adoption of national reforms. The COAGs strategy to separate water from the land created a normative western framework of water use and embeds economic values in water rights. The concept of separating water from land and creating tradeable water property rights was originally put forward by the Agriculture and Resource Management Council of Australian and New Zealand (ARMCANZ) in 1995.

From 2004 the National Water Initiative (‘NWI’), the ‘blueprint’ for national water reform, included several discretionary Indigenous Clauses<sup>3</sup> that were inadequate to address the diverse water requirements of Indigenous peoples across Australia. The language of these clauses in the NWI applies a ‘soft law’ approach for cultural water use with the words ‘wherever possible’ and for native title rights the phrase ‘will take into account’ is used to cover the field. The COAGs have concentrated the development of Australia’s water policy on non-Indigenous interests and disregarded the diversity of Indigenous water knowledge on country, the context of water use since its ancient creation and the connectivity of water to Indigenous identity and familial relationships which include fishing, fire management practices, farming and maintaining water quality.<sup>4</sup>

#### *Economic modeling and Indigenous water use*

The national water reforms in Australia have been, and continue to be, driven through national competition policy systems in order to facilitate and control water as a property; and have led to the restructure of individual entitlements (ownership) in the water market.<sup>5</sup> The Task Force on the COAG Water Reform expressed their view that “improving the overall efficiency of use of water resources, while maintaining or regaining appropriate

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<sup>2</sup> Greg McIntyre, ‘Retreat from Injustice: Mabo v the State of Queensland’ (Paper presented at the Resource Development and Aboriginal Land Rights Conference, the Centre for Commercial and Resources Law of the University of Western Australia and Murdoch University WA, 28 August 1992) 5. Greg McIntyre SC acted as counsel for the native title applicant Eddie Mabo. McIntyre citing Justices Deane and Gaudron in *Mabo v Queensland [No 2]* [1992] 175 CLR 1 [100].

<sup>3</sup> National Water Commission, ‘The National Water Initiative: Securing Australia’s Water Future’ (‘Report’, Australian Government, 2011) 44. See Indigenous Clauses 25(ix), 52 to 54 of the National Water Initiative. See also Tan and Jackson ‘Impossible dreaming: Does Australia’s water law and policy fulfill Indigenous aspirations’ (2013) 30 EPLJ 132-149. The authors note that ‘governments have allocated water entitlements without taking into account the needs of Indigenous peoples’.

<sup>4</sup> Virginia Marshall, ‘A web of Aboriginal water rights: Examining the competing Aboriginal claim for water property rights and interests in Australia’ (PhD Thesis, Macquarie University, 2014) 326. The thesis won the national Stanner Award in 2015 for the best academic thesis.

<sup>5</sup> John Tisdell, John Ward and Tony Grudzinski, ‘The development of water reform in Australia’ (Technical Report No 02/5, Cooperative Research Centre for Catchment Hydrology, May 2002) 41-42. See also Standing Committee on Agriculture and Resource Management Task Force on COAG Water Reform in ‘Water Allocations and Entitlements: A National Framework for the Implementation of Property Rights (Occasional Paper No 1, the Water Task Force for the Council of Australian Governments, Canberra, 1995).

environmental values, should be the fundamental guiding objectives in resource management”.<sup>6</sup>

The COAG determined that “Water rights should be specified over the long term, exclusive, enforceable and enforced, transferable and divisible to provide for sustainability and community needs and to reflect the scarcity value of water” and to recognize that the “highest level of absolute security in the nature of the right is through ownership”.<sup>7</sup> However, the principles adopted for Australia’s water resources management do not specify Indigenous water rights and interests as one of its ten principles.<sup>8</sup> Australia’s water priorities in the National Water Research Themes do not include a specific theme for Indigenous water rights and only include a reference to ‘drawing on Indigenous knowledge’ and ‘cultural information’ to understand ‘cultural water values’.<sup>9</sup>

The Productivity Commission recommended, under National Competition Policy Reforms<sup>10</sup> in economic modeling, for governments to progress the development of property rights regimes in water and water trade to reduce ‘inappropriate water use’.<sup>11</sup> Water was recognized by the National Competition Council (NCP) as ‘priority legislation’ to reform legislative instruments which restricted competition<sup>12</sup> and the Commonwealth agreed to “make NCP payments to the States and Territories as a financial incentive to implement” these reforms.<sup>13</sup> Notwithstanding the fact that a fundamental mismanagement and misuse of Australia’s water resources lay behind the ‘inappropriate use’ of water by farmers, irrigators and industry.<sup>14</sup>

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<sup>6</sup> The Agriculture and Resource Management Council of Australia and New Zealand, *A national framework for improved wastewater reuse and stormwater management in Australia* (1996) Office of the Environment (Cth) 4 <<https://www.environment.gov.au/system/files/resources/7671ee31-8650-41db-a555-d1aae467c68b/files/framework-stormwater.pdf>>.

<sup>7</sup> National Competition Council, ‘Assessment Reform Progress Report’ (2003) 9.9 <<http://ncc.ncc.gov.au/docs/2003%20assessment.pdf>>.

<sup>8</sup> Standing Council on Environment and Water, Report to Council of Australian Governments ‘Next Steps in National Water Reform: Preparation for the Future’ (2013) 12 <<https://www.coag.gov.au/node/520>>.

<sup>9</sup> Department of Sustainability, Environment, Water, Population and Communities, ‘National Water Knowledge and Research Platform’ (Report, 2012, COAG Standing Council on Environment and Water) 18-19 <<https://www.environment.gov.au/water/information/national-water-knowledge-and-research-platform>>. Note, the National Water Reform Thematic Oversight Group and the Department of Sustainability, Environment, Water, Population and Communities (‘DSEWPC’) guided the National Research Platform’s progress and the Australian Government through an administrative order on the 21 September 2015 revoked the responsibility of water from DSEWPC to the renamed Department of Agriculture and Water Resources.

<sup>10</sup> The National Competition Policy includes the states and territories as parties to the Conduct Code Agreement and Competition Principles Agreement; agreements which applied to water reform. See <<http://ncc.ncc.gov.au/docs/Conduct%20Code%20Agreement%20amended.pdf>> and <<http://ncc.ncc.gov.au/docs/Competition%20Principles%20Agreement,%2011%20April%201995%20as%20amended%202007.pdf>>.

<sup>11</sup> Productivity Commission, *Review of National Competition Policy Reforms* (2005) 30 <<http://ncc.ncc.gov.au/docs/PC%20report%202005.pdf>>.

<sup>12</sup> National Competition Council, ‘Assessment Reform Progress Report’ (2003) <<http://ncc.ncc.gov.au/docs/2003%20assessment.pdf>>.

<sup>13</sup> Ibid 1.4.

<sup>14</sup> See Tan in ‘Conflict over Water Resources in Queensland: All eyes on the Lower Balonne’ (2000) 17(6) *Environmental and Planning Law Journal* as cited in Virginia Marshall, ‘A web of Aboriginal water rights: Examining the competing Aboriginal claim for water property rights and interests in Australia’ (PhD Thesis, 2014, Macquarie University) 74.

The National Competition Policy Reforms (NCP) included the application of a public interest test on the reforms to “ensure that the promotion of competition was not inconsistent with social, environmental, health, equity and regional objectives”<sup>15</sup> as a result of demands by concerned community organizations,<sup>16</sup> and incorporated into the Competition Policy Agreement; however these were not codified into the public interest test.<sup>17</sup> The National Competition Council noted that “effective gatekeeping is necessary to guard against the introduction of legislation that is not in the public interest”;<sup>18</sup> and subject to oversight review.<sup>19</sup>

An examination of the NCCs assessment reports shows they do not include an application of the public interest test<sup>20</sup> to review whether the ‘benefits’ of national water reform ‘outweigh’ the costs for Indigenous communities to participate in the water market. Further if such reforms under the NCP are inconsistent with the ‘social, environmental, health, equity and regional objectives’ for Australia’s most vulnerable population and First Peoples in water right use, then this raises some serious questions. Why was no attempt made to apply the public interest test to the water needs of Indigenous communities?

The NCC requested ‘evidence that the environmental allocations in New South Wales’ were based on the best available science, where a departure from this evidence, should ensure strong socioeconomic evidence to support its case’.<sup>21</sup> For example the *Water Act 2007 (Cth)* requires that Sustainable Diversion Limits (SDLs) for water resources in the Murray-Darling Basin consider an environmentally sustainable level of take (ESLT),<sup>22</sup> as well as the socio-economic implications for the reallocation of water to the environment.<sup>23</sup>

Clearly the question should be asked as to why the COAG did not incorporate in its case for national water reform the social and economic impact on Indigenous peoples in separating water from land title. Why did COAG fail to recognize the potential conflicts flowing from introducing national tradeable water rights while ignoring Indigenous water rights?<sup>24</sup>

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<sup>15</sup> Public Interest Advocacy Centre, Submission No 32 to the Productivity Commission, *Review of the National Competition Arrangements*, June 2004, 4.

<sup>16</sup> Ibid. The PIAC submission citing P Ranald (1995) "Competition Policy" in No. 36 Journal of Australian Political Economy provides an historical context on the issue of a proposed national water reform.

<sup>17</sup> Productivity Commission, *Review of National Competition Policy Reforms* (2005) 17. See also National Competition Council ch 4 ‘The Public Interest Test’ <<http://ncp.ncc.gov.au/docs/OINcpIm-006.pdf>>.

<sup>18</sup> National Competition Council, ‘Assessment Reform Progress Report’ (2005) xiv <<http://ncp.ncc.gov.au/docs/2005%20assessment.pdf>>. See this report [96-97] Public Interest Test in clause 1(3); “the presumption is that all public interest considerations carry equal weight”.

<sup>19</sup> Ibid xvii.

<sup>20</sup> National Competition Council, ‘Considering Public Interest under the National Competition Policy’ (1996) <<http://ncp.ncc.gov.au/docs/OINcpIm-006.pdf>>. The Public Interest should be based upon an objective assessment of the facts [98].

<sup>21</sup> Ibid xxii.

<sup>22</sup> Murray-Darling Basin Authority, ‘The Socio-economic implications of the proposed Basin Plan’ (2012) Murray-Darling Basin Authority 1, 2, <[www.mdba.gov.au/sites/.../files/.../PBP\\_socioeconomic\\_implications.doc](http://www.mdba.gov.au/sites/.../files/.../PBP_socioeconomic_implications.doc)>.

<sup>23</sup> Ibid iv.

<sup>24</sup> M Young and J McColl, ‘Robust separation: A search for a generic framework to simplify registration and trading interests in natural resources’ (2002) CSIRO 25. In this report the authors explain their preference in

The recognition of priority in water use as ‘first water rights’, or referred to as ‘first in time, first in right’ or ‘prior appropriation rights’ is highlighted in the CSIRO Report by Young and McColl, ‘Robust separation: A search for a generic framework to simplify registration and trading interests in natural resources’ which analyses the case for a national water system based upon economic modeling on the ‘Tinbergen rule’;<sup>25</sup> whereby in the USA it was identified that a volume of water was allocated to this water user above those of other users.<sup>26</sup> Young and McColl’s report, in proposing an economic model that recommends significant structural reform, fails to assess the implications on native title or other Indigenous water rights and interests. The authors raised the doctrine of prior appropriation (‘first in time, first in right’),<sup>27</sup> which includes well traversed case law on Indian rights to water for Federal Reserved Rights in the USA, but neglected to acknowledge the significance of this for Australia.

COAG’s principal water policy agreement and ‘water reform blueprint’, the National Water Initiative,<sup>28</sup> should have identified and addressed the water rights and interests of Indigenous peoples as a primary concern, and should have ensured that any reform of Australia’s water resources laws was not detrimental to the exercise by Indigenous peoples of their social and economic rights and interests. Particularly in relation to Australia’s obligations under international law such as the *United Nations Declaration on the Rights of Indigenous Peoples* and Australia’s incorporation of international law in the *Racial Discrimination Act 1975* (Cth).

Former President of the Australian Human Rights Commission, the Hon. Catherine Branson QC, has expressed the view that, “human rights are not sufficiently protected and promoted in Australia and many international human rights instruments it has promised to uphold are not incorporated in Australian law.”<sup>29</sup> Australia has historically marginalized almost every

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using the application of the Tinbergen Principle for economic modeling developed by Jan Tinbergen and Ragnar Frisch in 1969 in conceptualizing the separation of water rights: p 28. In summary, the Tinbergen Principle would identify a ‘proposed set of instruments and mixes to determine whether the combination will produce a solution’. Further the authors state that the economic policy modeling as ‘bundling rights’ is required: p 21 and propose the ‘separation of issues in equity of potential water users from that of water management and other issues’: p 6 and, to ‘separate components that do not require consideration of the other components within the common pool of water resources’: p 27. See also Pablo del Rio and Michael Howlett, ‘Beyond the “Tinbergen Rule” in policy design: Matching tools and goals in policy portfolios’ (2013) 1 *Annual Review of Policy Design* 1-16. The authors conclude that the Tinbergen Rule is ‘complex’ and ‘contradictory’ in various policy models it proposes because of the variables that are generally not taken into account.

<sup>25</sup> Justice Gregory Hobbs Jnr, ‘Citizen’s Guide to Colorado Water Law’ (2003)

<<https://www.yourwatercolorado.org/flip/catalog.php?catalog=waterlaw>>. The prior appropriation doctrine is mandated into the Colorado Constitution whereby the ‘senior right holder’ has the first access to divert the water supply and to that of a later acquired water right of a ‘junior right holder’. The Senior Right Holder can obtain a court decree to enforce their legal right. All water in Colorado is a public resource and includes federal protection of unappropriated water, a Federal Reserved Right, for the beneficial use by native peoples on Indian Reservations.

<sup>26</sup> Ibid 29.

<sup>27</sup> Ibid. The authors have not included a reference in citing the doctrine of prior appropriation.

<sup>28</sup> National Water Commission, ‘National Water Initiative’ (2016) <<http://www.nwc.gov.au/nwi>>. The National Water Commission was established under the NWI.

<sup>29</sup> Australian Human Rights Commission, ‘Protecting the human rights of Indigenous people and communities’ (Speech delivered at the National Indigenous Legal Conference, Adelaide, 2009)

opportunity for Indigenous communities' self-determination, and their access to economic wealth. Australia has clearly ignored its human rights obligations in the creation of a market-based water regime.<sup>30</sup>

A further 'blow' to Indigenous peoples rights and interests occurred when the Australian Government moved the responsibility of the nation's water resources to the Department of Agriculture. It is difficult to interpret this as anything other than increasing the entrenchment of the sectional interests of farmers and irrigators.<sup>31</sup>

### *Rejecting the concept of aqua nullius: A human rights rationale*

The human right to water is widely recognized in various international documents, standards, declarations, treaties and principles,<sup>32</sup> and among multiple reports by the United Nations. The basic guarantee of water as a human right<sup>33</sup> to provide an adequate standard of living,<sup>34</sup> including adequate food, clothing, and housing are undeniably unmet standards across remote and rural Indigenous communities. I would argue that, 'minimum standards of international human rights hardly improve the living standards of Aboriginal peoples'.<sup>35</sup>

The United Nations General Assembly, including Australia, adopted goals in the *2030 Agenda for Sustainable Development* to 'transform' the world in a range of areas such as the availability of freshwater and water sanitation (Goal 6);<sup>36</sup> expanding upon the Millennium Development Goals. The Permanent Forum acknowledged the significant role of Indigenous peoples' traditional knowledge and recognized that the contribution of Indigenous peoples cultural, social and environmental practices underpin global achievements in the Sustainable Development Goals ('SDGs').<sup>37</sup> As Australian water policy does not include a national framework of human rights as a benchmark, the effectiveness of international standards would be limited.

### *Conclusion*

The COAG in February 1994 issued a Communiqué which agreed to establish the Water Reform Framework to address issues such as the "clarification of property rights, the allocation of water to the environment, the adoption of trading arrangements in water, institutional reform

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<<https://www.humanrights.gov.au/news/speeches/president-speeches-protecting-human-rights-indigenous-people-and-communities>>.

<sup>30</sup> Virginia Marshall, 'A web of Aboriginal water rights: Examining the competing Aboriginal claim for water property rights and interests in Australia', (PhD Thesis, Macquarie University, 2014) 213.

<sup>31</sup> Ibid. See Chapter 4 for an examination and analysis of the contested relationships of colonial settlers and Aboriginal peoples in NSW.

<sup>32</sup> Takele Soboka Bulto, 'The emergence of the human right to water in international human rights law: Invention or discovery?' ('Working Paper' No 7, Centre for International Governance and Justice, 2011) 21.

<sup>33</sup> Ibid.

<sup>34</sup> Article 11(1) and Art. 12 of the International Convention on Economic, Social and Cultural Rights.

<sup>35</sup> Virginia Marshall, *A Web of Water Rights: Examining the Competing Claim for Water Property Rights and Interests in Australia* (PhD Thesis, Macquarie University, 2014) 360.

<sup>36</sup> United Nations, 'Sustainable Development Goals: Water and Sanitation' (2015)

<<http://www.un.org/sustainabledevelopment/water-and-sanitation/>>. The SDG of Goal 6 for freshwater involves unified global and national policy approach to law reform on a range of interconnected water issues for Indigenous peoples in Australian such as health and well-being (Goal 3), reduced inequality (Goal 10), climate change and its impact (Goal 13), marine territories (Goal 14) and the sustainability of land and its biodiversity (Goal 15).

<sup>37</sup> *Draft Report – Permanent Forum on Indigenous Issues*, 15<sup>th</sup> sess, E/C.19/2016/L.4 (18 May 2016).

and public consultation and participation”.<sup>38</sup> There is no mention of Indigenous water rights and interests in the structural reform of Australia’s water resources.

In 1994 the Human Rights and Equal Opportunity Commissioner highlighted the long-standing health issues and inadequate clean water supply of Indigenous communities, stating that the National Health and Medical Research Council guidelines for water quality alone were unable to improve Indigenous life expectancy; in fact, the guidelines imposed a considerable cost burden.<sup>39</sup> In 2016 the Close the Gap report detailed the existing gaps in life expectancy, health and well-being for Indigenous peoples in Australia as well as the need for the domestic implementation of the SDGs.<sup>40</sup>

From the early discussions by Australian governments it is apparent that Indigenous water rights and interests were not considered along with the rights and interests of other stakeholders, or even in regard to Indigenous people’s inherent relationships with water and the environment. There is a void in national water reform when it fails to recognize First Peoples prior, and continuing, rights to water.

The challenge for governments in the context of human rights is whether they are willing to concede that the omission of Indigenous peoples water rights and interests (what I refer to as *aqua nullius*) is a repugnant concept which diminishes all Australians. The fundamental human rights and international standards whether expressed or implied recognise the inherent value of water and the steps governments should consider for incorporating the SDGs and human rights principles as a universal tenet.

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<sup>38</sup> Australian Government Department of Environment, ‘The COAG Water Reform Framework’ (1994) <<https://www.environment.gov.au/resource/council-australian-governments-water-reform-framework>>.

<sup>39</sup> Human Rights and Equal Opportunity Commission, ‘The Review of the 1994 Water Report’ (Final Report, HREOC, 2001) See also The House Standing Committee on Agriculture, Fisheries and Forestry, Parliament of Australia, *Getting Water Right(s) into future water supplies for Australia’s rural industries and communities* (2004) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=pri\\_mind/waterinq/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pri_mind/waterinq/report.htm)>. The inquiry does not provide reference to the requirements of Aboriginal communities water needs in the Murray-Darling Basin river system.

<sup>40</sup> Close the Gap Steering Committee and Oxfam Australia, ‘Close the Gap Progress and Priorities Report’ (2016) 1-56.