THE RECOGNITION AND PROTECTION OF ABORIGINAL INTERESTS IN NSW RIVERS

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SUMMARY

Aboriginal interests in river systems manifest themselves in a variety of ways that reflect traditional and contemporary relationships to country. Despite the importance of river systems to them, Aboriginal people have historically been marginalised from decision making about rivers. In dealing with Aboriginal interests in land and waters the legal system in NSW does not start from the premise that landscapes are imbued with Aboriginal cultures. Instead it characterises rights and interests on its own terms and in a manner that is consistent with western legal traditions. Aboriginal relationships to country are necessarily fragmented as result. This is as true for the common law recognition of Aboriginal rights as it is for attempts to recognise and protect those interests in legislation.

The need to recognise and protect Aboriginal interests in river systems arises as a matter of necessity under Australia’s international human rights obligations. Those rights include the right to self-determination, freedom from discrimination and rights to enjoy cultural heritage. It is also a social justice issue. The lack of protection of Aboriginal interests in river systems requires further action.

This paper makes a number of recommendations, summarised below, aimed at addressing some of the inequities that have arisen from the failure of the non-Aboriginal society to adequately recognise and protect Aboriginal interests in NSW river systems.

1. Aboriginal involvement in the management of river systems

There is an urgent need to redress the degradation of NSW river systems so that river flows meet the cultural needs of Aboriginal people. Possible ways to achieve this include requirements for:

- Staged increase in water price;

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- Staged reduction in volume licensed;
- Staged increase of the river level at which pumping is allowed;
- Phase out large scale irrigation on the unregulated streams;
- Any transfers of irrigation licenses be within ecologically sustainable use;
- Improve water quality by managing stock access to rivers and reducing grazing pressure near rivers.

Recent reforms to water management introduced under the Water Management Act 2000 (NSW) is in part designed to encourage these processes. They have however, been unable to extend to the type of changes that Aboriginal people require in order to enjoying more fully their interests in river systems. In order to achieve this it is recommended that:

a. The NSW government adopt the 11 principles set out in the Boomanulla Statement as a framework by which Aboriginal participation in resource management will be implemented through legislative reform.

b. Steps should be taken to develop a means of calculating a Cultural Health Index for rivers in NSW so that Aboriginal values are appropriately identified and incorporated into river management regimes.

c. Cultural flows should be an essential component of river management. Measures should be introduced to ensure that Aboriginal cultural needs are realised through an adequate flow of good quality water in the river. A 'cultural flow' can be set and monitored as sufficient flow in a suitable pattern to ensure the maintenance of Aboriginal cultural practices and connections with the rivers.

d. Environmental planning and control needs to be re-evaluated to enable a greater consideration of the impacts on Aboriginal people. This should include the effects on the identified cultural values of affected river systems. There should also be broader enquiries into the down stream effects of certain irrigation practices including the impact of the use of fertilisers on river quality.

e. The NSW government should undertake an independent audit of water sharing plans with a view to investigating the following:

   i) The extent and quality of the participation of Aboriginal people in the processes that led to the implementation of the water management plans;
ii) The extent to which Aboriginal participants had access to legal and other professional advice to assist their participation in the development of water sharing plans;

iii) The extent to which the Water Sharing Plans facilitate the targets and strategic outcomes contained in Targets 7, 13 and 14 of the State Water Outcomes Plan;

iv) The adequacy of the identification of the native title component of 'basic landholder rights';

v) Where measures have been referred to in Water Sharing Plans that are intended to benefit Aboriginal people, to review the implementation and effectiveness of those measures; and

vi) Legislation should be developed to enable regional partnerships with Aboriginal people in relation to the joint management of fisheries.

2. Recognising Aboriginal rights

Attempts to improve the manner in which Aboriginal interests in river systems are protected will remain tokenistic and inadequate until there is an appropriate recognition of the nature and extent of those interests in legislation and adequate measures taken to ensure their protection. The government needs to look at options for providing legislative recognition of the full range of Aboriginal interests in waters, and not leave the recognition of those interests to complicated Court processes. That includes a recognition of Aboriginal interests in the water itself as well as the activities associated with river systems.

3. Improved heritage protection

It is essential that measures be taken to improve heritage protection legislation in NSW. At the least, amendments need to be made to the NPWA to ensure that the Aboriginal people are recognised as the owners of their own cultural heritage and to ensure that they have greater control over that heritage.

Amendments should also be made to ensure that sites of significance and Aboriginal objects are not interfered with or destroyed without the consent of the Aboriginal people concerned. Ideally, special legislation should be passed that protects the full range of Aboriginal cultural heritage under Aboriginal control.
4. Land needs

Land ownership cannot be separated from other aspects of Aboriginal interests in rivers. An adequate land base is essential to the ability of people to adequately access river systems in a manner that enables them to maintain their traditional cultures. To date both the Aboriginal Land Rights Act 1983 (NSW) and the Native Title Act 1993 (Cth) ('NTA') have proven inadequate in achieving land justice for Aboriginal people in NSW. It is recommended that:

(a) Existing powers under the Western Lands Act and Aboriginal Land Rights Act could be used to support a homeland acquisition program through excisions from large leasehold properties. Excision areas should be considered on other forms of tenure such as State Forests and National Parks.

(b) The NSW Government should undertake to add many more parks to Schedule 14 of the National Parks and Wildlife Act 1974 (NSW). Priority should be given to parks located on river systems.

(c) Steps should be taken to refocus the use of the statutory land fund under the Aboriginal Land Rights Act 1983 on the acquisition of a substantial land base as was originally intended by that Act.

5. Improving access to rivers, streams, wetlands and waterholes

Crucial to Aboriginal people enjoying their interests in NSW river systems is ensuring that they have access to them. Government needs to promote means of removing barriers for Aboriginal people to access land and rivers for customary purposes. A number of mechanisms may be available in this regard, they include Indigenous Land Use Agreements under Part 2, Division 3 of the NTA, the protection of public access rights on Western Lands leases, preserving Crown tenures, such as stock routes and state forests which are often used by Aboriginal people for hunting and fishing purposes and encouraging a greater utilisation of ss.47-48 of the Aboriginal Land Rights Act 1983 (NSW) which make provision for access to private lands for hunting and fishing purposes.

6. An Aboriginal Water Trust

The NSW government has accepted the need for such a trust and has taken steps for its establishment. It has committed $5 million Aboriginal Water Trust to assist the Aboriginal community in the development of water-based farming and aquaculture enterprises. As it remains unclear as to how the water trust will operate, a number of recommendations are made in relation to it, namely:
(a) It is essential that the water trust not be seen as an alternative to the proper observance of statutory obligations to develop and implement strategic plans to advance the objects of the WMA and the Outcomes Plan;

(b) The $5 million dollars allocated is insufficient to adequately remedy the inequitable distribution of water resources in the state and the state Government should look at means for an on-going contribution to the fund;

(c) Any funds for the administration of the trust should be additional to, and not paid out of the trust itself; and

(d) There needs to be flexibility in the manner in which the trust is utilised and it should be focused on purchasing and leasing water entitlements on the open market.

1. INTRODUCTION

Aboriginal peoples have much to offer and society as a whole has much to gain by negotiating an empowering role for Aboriginal people in river management. A proper recognition of the Aboriginal role in river management will be an important step in establishing the economic, cultural and biological diversity necessary for a sustainable and just society.

This paper, prepared for the NSW Healthy Rivers Commission, examines ways to recognize Aboriginal interests in NSW rivers. Cultural, historical and legal issues are examined in order to reach recommendations. The term “rivers” is taken to include all aquatic and semi-aquatic environments including wetlands, springs and waterholes. While this paper has a considerable focus on inland river systems in NSW, the issues raised have relevance to coastal river systems as well. Furthermore, because the need for a holistic approach to river systems is an important aspect of this paper, considerable focus is given to Aboriginal interests in adjoining lands and cultural heritage associated with those systems.

Marcia Langton has described the Aboriginal world view in relation to country in the following manner:

“In the Aboriginal world, there is an established body of laws that allocate rights and interests among particular people to water sources such as lakes, rivers springs. These laws derive from the sacred ancestral past that imbues the present, shaping and forming the world we inhabit with its distinctive features, and, notably, emplacing individual and group entities and polities in landscapes and waterscapes with jural - such as property - rights and responsibilities, according to religious principles. These property relations are then expressed
metaphorically in the Aboriginal discourse of possession and stewardship symbolised in a variety of ways, ....

These Aboriginal waterscapes are construed not only as physical domains, but also as spiritual, social and jural spaces, according to the same fundamental principles as our affiliations to places in the landscapes. The dialogic relationship in indigenous thought between the ancestral past and its effect on human existence derives from the Aboriginal understanding of the transformative powers of the spiritual beings that inhabit those places. Their legacy to us is both the nature of our being and the nature of our relationship to place, be it a waterscape or a landscape.\(^2\)

Despite the importance of river systems to Aboriginal people, they have historically been marginalised from decision making about rivers. At the heart of the non-recognition of Aboriginal interests in rivers is the competition between the Aboriginal peoples and Europeans over access and control of resources.\(^3\) While calls for land and resource justice for Aboriginal peoples over the last 40 years have resulted in some measures which have been described as attempts to remedy past injustices, by and large Aboriginal people remain disenfranchised from the benefits of the exploitation of the resources upon which they once wholly managed and depended upon. At the same time, many of the rivers in NSW have been degraded by unsustainable developments that have harmed Aboriginal interests and excluded Aboriginal people from any economic benefits of such developments.

2. NATURE OF NSW RIVER SYSTEMS

2.1 Landforms and river catchments

The headwaters of most of the rivers of NSW rise along the Great Dividing Range. Small (1\(^{st}\) order) streams combine to form 2nd order streams and so on until major streams are formed. The smallest sub-catchments are ‘nested’ within progressively larger sub-catchments and river catchments.

Five inland rivers (Gwydir, Namoi, Macquarie, Lachlan and Murrumbidgee) rise entirely from the Great Divide in NSW. Also rising in the Great Divide, the Border Rivers catchment is shared with Queensland and the Murray River catchment is shared with Victoria. These seven catchments are joined by the Castlereagh and the Bogan rivers rising from further inland in NSW, and the Culgoa, Warrego and Paroo Rivers flowing from Queensland. These twelve catchments form the NSW part of the Murray-Darling Basin. Part

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of the Bulloo-Bancannia Basin also occurs in the far north-west of NSW, as does a very small part of the Lake Eyre Basin.

Altitude and relief across inland NSW generally decrease from east to west. In the upland or ‘western slopes’ parts of inland catchments, rivers are generally in a geological phase of forming erosional landscapes with only small floodplains. As the river valleys merge onto the western plains they become depositional and the current river channels are generally cut into sediments that the rivers have deposited over the last few million years. In the far west of NSW landforms include erosional pediplains and sand dune systems. Many soils are infertile although there are areas of fertile floodplain soils derived from basalt.

Characteristic of the lowland sections of the inland rivers is the existence of billabongs, anabranches, effluent (distributary) channels, marshes and ephemeral lakes. These wetlands receive water in times of flood and have high natural productivity based on the cycles of wetting and drying. They are often located in ancient drainage systems formed under different climates and river flow patterns in the past.

The major coastal catchments of NSW rise from the Great Dividing Range, they are the Tweed, Brunswick, Richmond, Evans, Clarence, Bellinger, Nambucca, Macleay, Hastings, Camden Haven, Manning, Karuah, Hunter, Hawkesbury-Nepean, Parramatta/Sydney Harbour, Georges/Botany Bay, Hacking, Shoalhaven, Clyde, Moruya, Tuross and Bega, and the Snowy, which is shared with Victoria. In addition to these river catchments, there are 92 coastal lakes and numerous small streams that drain directly to the coast.

Coastal rivers generally have a steep fall from the ranges. Flood plains, wetlands and estuaries may be extensive due to coastal landform processes beginning with the drowning of ancient valleys by the post-glacial rise in sea level.

### 2.2 Variations in climate and river flows

For inland rivers annual rainfall decreases from east to west, and temperatures increase from south-east to north-west. Rainfall, and also river flows, is variable and unpredictable, especially to the north and the west. The northern rivers rise in an area of summer rainfall and so maximum flows tend to be in late summer. The southern rivers rise in an area of uniform to winter rainfall, so maximum flows tend to be in late winter to spring, especially where affected by spring snow melt, for example, the Murrumbidgee and Murray.

Flows in the rivers of the semi-arid and arid north-west of NSW (Darling, Warrego, Paroo and Bulloo-Bancannia) are among the most variable and least predictable for rivers around the world. They are also the least regulated inland rivers in NSW and supply water to important ephemeral wetlands.

Inland aquatic plants, animals and micro-organisms have evolved to suit these highly variable and unpredictable environments. Aquatic biota may be
highly mobile or able to go through their life cycle quickly and then move or go into a drought resistant stage.

Rainfall in the coastal river basins is higher and more reliable than inland, so that river flows are less variable. Northern rivers are in an area of distinct summer rainfall. Compared to inland rivers, most coastal rivers are not greatly regulated. Urban expansion is a major threat.

2.3 Relationship of rivers to groundwater systems

Springs are common in upland areas and usually occur where a change in rock type forces groundwater to the surface. Coastal springs and soaks are often associated with sand dunes that store rain water. Large mid-stream valleys have extensive shallow unconfined aquifers closely connected with surface waters in rivers. Billabongs and other wetlands are examples of groundwater dependent ecosystems. Groundwater may occur in deposits from ancient drainage systems that are still replenished by floods.

In the northern inland is the Great Artesian Basin. Mound Springs occur at a few places were these artesian waters come naturally to the surface. The Artesian Basin has been extensively tapped by bores. Apart from along the intake beds along a north-south band between Yetman and Gilgandra, the Great Artesian Basin waters are generally separated from surface flows.

3. ABORIGINAL PEOPLES OF NSW

3.1 Aboriginal Populations in NSW

Approximately 120,047 Aboriginal people reside in NSW. That figure represents 29% of the country’s Aboriginal population. It is 1.9% of the State’s total population that numbers 6,326,579.4

The representation of Aboriginal people as a percentage of the population varies across NSW. In general terms the Aboriginal proportion of the local population is higher where the total population is lower.

The total population of inland NSW is 716,036 (2001 census). Total Aboriginal population for the area is 38,261 or 5.3%. The largest populations centres for Aboriginal people are Moree and Dubbo. In some of the smaller centres Aboriginal people make up a significant proportion of the total population. Examples include Wilcannia (64.6%), Brewarrina (61.4%), Boggabilla (43%), Bourke (33.3%), Goodooga (82.3%), Walgett (42.1%), Coonamble (26.4%), and Peak Hill (20.4%). The following table highlights the high Aboriginal population in some parts of inland New South Wales.

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Table: Aboriginal populations of inland NSW

<table>
<thead>
<tr>
<th>Indigenous geographic area</th>
<th>Indig-enous No:</th>
<th>Non-Indig-enous No:</th>
<th>Status Un-known No:</th>
<th>Total No:</th>
<th>Indig-enous %</th>
<th>Status Unknown %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sthn Tableland&lt;sup&gt;5&lt;/sup&gt;</td>
<td>338</td>
<td>23,219</td>
<td>1,217</td>
<td>24,774</td>
<td>1.4</td>
<td>4.9</td>
</tr>
<tr>
<td>Bourke&lt;sup&gt;6&lt;/sup&gt;</td>
<td>7,298</td>
<td>41,989</td>
<td>2,682</td>
<td>51,969</td>
<td>14.0</td>
<td>5.2</td>
</tr>
<tr>
<td>Tamworth&lt;sup&gt;7&lt;/sup&gt;</td>
<td>9,659</td>
<td>111,422</td>
<td>3,947</td>
<td>125,036</td>
<td>7.7</td>
<td>3.1</td>
</tr>
<tr>
<td>Wagga Wagga&lt;sup&gt;8&lt;/sup&gt;</td>
<td>20,966</td>
<td>475,882</td>
<td>17,426</td>
<td>514,274</td>
<td>4.1</td>
<td>3.4</td>
</tr>
<tr>
<td>Total</td>
<td>38,261</td>
<td>652,503</td>
<td>25,272</td>
<td>716,036</td>
<td>5.3</td>
<td>3.5</td>
</tr>
</tbody>
</table>

Along the coast there are also many centres with a large Aboriginal population, such as Sydney, Newcastle, Wollongong, Nowra, Kempsey, Armidale and Lismore. The large non-indigenous population of the coastal areas means the Aboriginal proportion of the population is generally small.

3.2 Aboriginal Groups in NSW

Traditional systems of land tenure and the nature of traditional rights and interests in land and waters in NSW are complex and vary from region to region. It is beyond the scope of this paper to go into these matters in any detail. Some general observations can however be made.

It is clear that European colonisation of NSW has had a dramatic effect on many Aboriginal communities and the environments of their traditional country. In many respects however, the culture and beliefs of Aboriginal people and their relationships to their traditional country have proven to be remarkably resilient.

Many Aboriginal groups in NSW are best identified by reference to a focus area of country. This can include rivers, creeks, lakes and swamps, with these features often important in marking out and naming the stretch of country. Group identity is a set of practices that recruit people to a sense of belonging to kin and country. ‘Tribal’ names have often been used as a form of collective identity but can be misleading in some cases because:

- Groups with primary affiliation with a tract of country are usually smaller than the large named ‘tribal’ or language groups; and
- Some groups use different names in different contexts, thereby asserting multiple layers of group identity;

<sup>5</sup>This includes areas such as Yass and parts of the Southern Tablelands.
<sup>6</sup>This includes areas such as Broken Hill, Wilcannia, Menindee, Ivanhoe, Dareton, Wentworth, Buronga, Bourke,Goodooga, Brewarrina, Cobar, Culgoa, Walgett, Lightning Ridge, Collarenebri, Gulargambone, and Coonamble.
<sup>7</sup>This includes areas such as Inverell, Guyra, Tingha, Manilla/Warialda, Werris Creek, Tamworth, Gunnedah, Murrurundi, Quirindi, Narrabri, Wee Waa, Boggabilla, Moree, and Mungindi but excludes areas such as Northern tablelands, New England, Armidale and Upper Hunter.
<sup>8</sup>This includes areas such as Griffith, Leeton, Narranderra, Wagga Wagga, West Wyalong, Cootamundra, Tumut, Cowra, Orange, Bathurst, Forbes, Parkes, Peak Hill, Condobolin, Lachlan, Warren, Narromine, Dubbo, Wellington Gilgandra and Coonabarabran.
Some groups emphasise connections to country through family history rather than use a label for their group;

Some people have different names by which they identify themselves, each of which is legitimate and which are used in different circumstances;

Group boundaries are often gradual or unclear;

Group boundaries can be highly permeable in the sense that a person may have rights and duties in neighbour's country;

Most individuals now (and probably in the past) have multiple group affinities through various descent lines or other recruitment rights;

Broad language group names have become more used over the last century than smaller group or 'dialect' names;

Some groups have changed or kept their 'tribal' name as the community has moved locations, with these choices all within the options of their multiple group affinities to different ancestors.

Territorial group recruitment among Aboriginal people in NSW has never been well documented and the evidence suggests some flexibility. The available evidence suggests that, for most areas, recruitment can be through either parent. Adoption and step-parenting are consistent with known recruitment practices from the past and present. Place of birth, place of birth of family members, place of burial of family members, expert knowledge of country, responsibility for country and long (intergenerational) association are all practices that may legitimise group membership.

The social totem system and the kinship system are similar over much of inland NSW and southern inland Queensland. These systems increase the interconnectedness of Aboriginal people over a wide region. Along the coast there is less emphasis on connections through the social totems, with more emphasis on location. Connections have always existed through named social (not territorial) relationships, obligations and ideal marriages. Today the extensive connections remain. Some types of social connections have increased during the colonial period due to forced movements and other wider mixing of groups.

The contemporary strength of Aboriginal identity can be demonstrated by examining several themes in people's lives:

- Attachment to country;
- The importance of the kinship network;
- A continued use and enjoyment of bush food and other bush resources;

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9 Territorial group recruitment is a reference to how a person becomes a member of a traditional land-owning group.
10 A social totem is an identificatory totem (such as an eagle, dingo, bony bream, carpet snake, emu, etc) usually obtained through either a materilinial, paterilinial or cognatic descent. In parts of New South Wales it is materilinial.
11 Relationships might be based on sharing a “meat”, and ideal marriages are between people of certain 'meats' or exogamous local groups.

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• Communication style including ancestral language;
• A sense of survival despite the European settlement.

These themes of continuity matter a great deal more than material signs chosen to represent some static idea of Aboriginal identity, such as whether a person walks or drives to the river, and whether they use a bought fishing line or one made from bush fibres.

4. ABORIGINAL INTERESTS IN NSW RIVER SYSTEMS

Aboriginal interests in NSW river systems manifest themselves in a variety of ways that reflect traditional and contemporary relationships to country - Aboriginal people insist on their holistic relationships to country. They are not limited to utilitarian interests but take on a range of cultural values. As Marcia Langston has noted, waterscapes are “not only physical domains, but also as spiritual, social and jural spaces ...”12 For thousands of years Aboriginal land use along the inland rivers has centred around hunting, gathering and fishing. Sophisticated patterns of land use, including the movement and use of fire, maintained and increased biological diversity.

Special cultural places and sacred areas are treated carefully and act as sanctuaries. For example Rainbow Serpent sites in the river may have restrictions on their use, and they are the deepest holes in the river so they provide a refuge for fish and other life. Areas around other creation places may not have been burnt, so they act as a refuge for fire-sensitive plants. Culture has mediated to limit the impact of people on the environment for thousands of years. This holistic approach to water resources is a matter characteristic of many Indigenous peoples worldwide.13

Accordingly, in commenting on particular aspects of Aboriginal interests in river systems it is necessary to be cognisant of the interrelated nature of many of those features. Understanding the variety of ways in which Aboriginal relationships in river systems manifest themselves also assists in understanding the broad manner in which those relationships are impacted upon and the manner in which actions affecting those river systems can cause distress to Aboriginal people.

It has been noted that the “values and ideologies that support decisions about what is equitable in water distribution clearly vary from culture to culture

and even between subcultures". A failure to recognise and accommodate the full range of Aboriginal values in water management decisions in NSW rivers in favour of more utilitarian values characteristic of Western cultures, will not deliver equity in any objective sense but merely perpetuate processes of colonization and dispossession in a manner inconsistent with international standards.

4.1 Aboriginal occupation and environmental change

It is clear that Aboriginal people have occupied NSW for a very long time. The beach dunes that formed around inland lakes between about 45,000 and 25,000 years ago contain many campsites and some of the earliest graves in the world. The presence of many large cemeteries suggests a very high population along the Murray and Murrumbidgee Rivers.

Before the European colonisation there were changes in the Australian environment over long periods of time. These changes involved temperature, sea level, land area, rainfall, run off, ground water, windiness, seasonality, erosion, deposition, vegetation, animals, fire and human activities. All these changes affected the rivers systems of NSW. Throughout these changes Aboriginal land management wisdom accumulated for over a thousand generations so that Aboriginal culture developed a long-term sustainable relationship with the environment.

The beginnings of people in Australia seem to be linked with the extinction of many types of larger mammals and some other animals. There is a range of theories as to when, how and why these extinctions happened. Some researchers argue the use of fire changed the environment too much for these animals. Others believe that wherever people went in the world, they were like a super-predator and the animals originally had no fear of people; yet others believe that changes in the climate caused the extinctions.

We now know that the period between about 45,000 and 25,000 years ago was cooler and wetter than recent times. Inland lakes and billabongs were fairly full most of this time, and large river channels carried greater flows than today.

Between about 25,000 and about 15,000 the climate was cold, dry, windy and more seasonal. This was the last 'ice age' in the cold parts of the world. There were small glaciers in the Australian Alps and more snow along the Great Dividing Range as far north as Toowoomba. The locking up of water as ice all around the world caused a drop in sea level by about 100 metres. Coastal rivers flowed across the now-submerged continental shelf to the coastline that was then up to 50 km to the east of the present NSW coast. Tasmania, Australia and New Guinea were joined as one bigger continent. Long sand dunes were building up again in the great inland dune fields. Fewer trees grew along the southern inland rivers. River flows varied more between wet and dry seasons. More groundwater, built up during the preceding wet

period, discharged into the rivers. On the inland plains, river banks frequently slumped and so the river channels migrated across their flood plains more rapidly than in recent times. Sand blew out of seasonally dry inland river channels to form the pale sand dunes found near rivers west of a rough line from Boggabilla to Albury. The twisted course of many inland rivers was distinctly different from today. For instance the Darling River flowed in the very twisted Anabranch channel. During this time the water table was just above the bed level of many inland lakes. Groundwater that had built up during the previous long wet period was discharging into the lakes, bringing a lot of salt with it. Every summer the strong west winds blew salty clay off dry lake beds to cover the sandy beach dunes that had built up during the earlier wet period. Coastal environments were also colder, drier and windier.

Between about 15,000 years ago and about 8,000 years ago the world climate gradually warmed and sea levels rose as the ice melted. By about 10,000 years ago the climate was similar to today. Rainfall had increased, windiness had decreased, temperatures had warmed up and trees covered more of the land. Groundwater levels had dropped and so salty groundwater did not discharge into inland lakes and rivers. Lakes and billabongs filled when floods flowed down rivers that in many cases had formed new, less twisted river channels. After each flood many of the fresh water lakes and billabongs gradually dried out. These wetting and drying cycles established the very productive ecosystems of the inland wetlands. These conditions lasted until extensive alteration of rivers occurred in the 20th century.

Over the last few thousand years of stable environmental conditions there is evidence for regional specialization in implements, economies and art styles. Patterns of land use became more sophisticated and food production increased in a process of regional intensification of production. The dingo arrived in Australia about 4,000 years ago and may have led to some as yet unclear cultural and environmental changes. Aboriginal cultural patterns have probably been fairly stable for a few thousand years.

4.2 Fish

Many person-hours are spent fishing by Aboriginal people along the river systems of NSW. For Aboriginal people fishing is much more than a 'recreational' activity. It is a family activity and provides an opportunity for older people to reveal places, knowledge and ideas to younger people. It is a time when young people can admire the skills, knowledge and wisdom of their elders.

Fishing places a person in a direct relationship with the environment, with the cultural practice of fishing mediating that relationship. This situation validates culture. It is a time when all the experience and knowledge and wisdom of the Aboriginal practitioner have value. It is a time when literacy is irrelevant. A time when the whole sweep of colonial history is irrelevant. In this way, fishing is a decolonised experience. For a colonised people for whom
political and geographical decolonisation are not realistic lifetime aspirations, opportunities to decolonise the mind are vital and life affirming.

Fishing produces highly valued food for the autonomous Aboriginal economy. The fish produced enable individuals to give, exchange and share within the kinship network or in accordance with other interpersonal obligations. It enhances a person's ability to fully participate in their social duties as an Aboriginal citizen. The sum of many such enhanced personal abilities aggregates to enhance the functioning of Aboriginal society.

In this way fishing is a critical right for Aboriginal people. Aboriginal people have a duty to practice and defend this right. Governments in Australia have a duty to recognise the rights of Aboriginal people in accordance with international obligations, national laws, state laws and the common law. There is also a strong case for law making and policy implementation to guarantee these rights in the context of management of the environment and natural resources. This context requires Aboriginal involvement.

4.3 Plants

The riparian environments of NSW have a higher biomass and higher diversity of plants than the adjacent less watered areas. There are several semi-aquatic food plants that occur particularly in rivers and wetlands.

Plants are also a source of medicines and the biological diversity along rivers makes them important places for this purpose. They have always been an important economic resource for Aboriginal people. Plants are a resource used for food and for making traditional implements. For example, sheets of bark are cut from several types of trees for dishes, canoes and other purposes. These scarred trees are now important heritage items. Firewood is the traditional Aboriginal fuel for warmth, cooking, ceremonial, industrial and other uses. Especially in the drier western parts of NSW, firewood is in greatest supply along the rivers.

As with fishing, plant gathering activities along river systems remain important for Aboriginal people. Essential to being able to carry out those activities is the presence of relevant plant and tree species and access to land for the purpose of carrying out those activities.

4.4 Animals

For many species of mammals, birds, reptiles and other animals the rivers are ribbons of relative abundance, especially in dry times. Aboriginal people enjoy a wide range of animal foods and these are often in greatest supply close to the rivers. Kangaroos, wallabies, emus, goannas, echidnas, ducks and turtles are some of the types of animals that are important to Aboriginal people along the rivers. As with fishing, hunting activities remain important cultural and social activities for Aboriginal people. It is of course a precondition to the enjoyment of those activities that healthy populations of a
range of animal species exist and that access to lands is adequate to enable those activities to occur.

4.5 Camping places

Rivers are favourite places for camping right up to the present day. This continues a long tradition evidenced in the abundance of archaeological camp sites along river systems.

Particular practices, such as camping a short distance back from the river bank, may continue.

4.6 Spiritual connections and sites of significance

The river systems of NSW have been a focus of life and central to the identity of many Aboriginal peoples for thousands of generations. This focus is exemplified by group names, especially in western NSW. The Paakantji people take their name from Paaka, the Darling River. One group of Ngiyampaa speakers is the Paawankay named after Paawan, the Barwon River and a western Wiradjuri group is the Galiyarrgiyalung, from galiyarr, the Lachlan River.

Many traditions tell of ngatji in Paakantji, waaway in Ngiyampaa and Wiradjuri, tanggel along the Murray River and garriya in Gamilaraay and Yuwaalaraay. These are the water snakes or rainbow serpents that made the rivers, creeks, lakes, swamps and waterholes. They remain in the sacred waterholes in the rivers and other places. Other ancestral beings created parts of the rivers. Many named places exist along rivers. People may be named after places in the rivers or waterholes away from rivers.

The extent of areas that may be classified as comprising a site of significance may be the subject of considerable diversity. Often it is a general locality that may be regarded as significant rather than a specific feature located in it. As Justice Toohey observed in the Walpiri Land Claim:

However that does not dispose of the difficulty surrounding the use of the words ‘a site’ which is contrasted with ‘the land’ twice in the definition of traditional owners. Dr Peterson complained:

‘To isolate sacred sites from the country-side at large is like treating the eyes of the potato as the potato itself’

The word may mislead by generating a tendency to think of sites as particular features of the landscape occupying relatively little space and rendering unimportant the country around them.... In my opinion sites should be thought of as places usually

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15 For example, in 1981 the late Linda Miller named several deep holes in the Namoi River at Cuttabri; Macabe, F.P., 1848 Manuscript map of part of the Darling River showing native names; Mitchell Library.

16 For example, Warlpa is a personal name used in a previous generation and again in this generation, taken from the name of a waterhole between White Cliffs and Tibooburra.
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possessing some particular feature such as a hill, creek or waterhole, but not delimited by the precise amount of space occupied by that feature.17

Consistently with this, is an understanding that activities occurring in a broader area surrounding a site may well be considered to be inappropriate or otherwise affect or interfere with the site and the cultural values pertaining to it. Often the area requiring protection will depend on the nature of the site and the activity concerned.

A further aspect of sites of significance relates to knowledge of, and associated with, those sites. In Aboriginal communities knowledge is not universal, and information about sites of spiritual significance are not given freely either across generations or between genders.

Processes that require the disclosure of such information are often seen skeptically by some Aboriginal people as they require a departure from cultural values and norms. This explains why Aboriginal people sometimes only raise the existence of sites at a late stage of development proposals,18 it also explains why superficial enquiries into the existence of sites does not reveal their existence. The wrong people may have been asked, or the existence of the site may be known to some members of the community and not to others. While this may be frustrating to developers and governments alike, it is a product of the cultural values of the Aboriginal people and the manner in which knowledge works in these communities. Also, recent experience has been that revealing the location of sites will increase the risk of their destruction.

Aboriginal groups cling to their traditions about important places on the rivers and assert their right to protect these sacred places. The natural and cultural values are inseparable in the continuing Aboriginal tradition about such places. At the same time it is necessary to be cognizant of the fact that it is inappropriate to see sites of significance merely as isolated places of interest to Aboriginal people. The broader landscape and environment may well be equally important to Aboriginal people. In some cases particular sites are focal points representing the broader travels of spiritual beings whose presence involves the landscape at large. The fact that the landscape at large is involved

17 Report of Aboriginal Land Commissioner Justice Toohey, Claim by the Warlpiri and Kartangaruru-Kurintji, para 69-70. Similar relationships have been acknowledged in relation to Indigenous people in New Zealand. In relation to the Maori of the South Island of New Zealand, it has been noted that:

"On a wider scale, the entire landscapes of the Taieri and Kakaunui catchments are dotted with sites of significance. These sites did not function in isolation from each other, but were part of a wider cultural setting that included not only sites as defined by the presence of archaeological remains, but also the waterway itself. The significance of cultural landscapes reinforces the need to:

Ensure that sites are selected from throughout the catchment.

Develop a tool that ensures a holistic perspective on stream health assessment."


with these cultural values influences Aboriginal behaviour and relationships to country. Accordingly while the sites are significant, they should not be seen as a means to limit the cultural and spiritual significance of country.

4.7 Burial grounds

The locality of the camping grounds along river systems has also resulted in many Aboriginal burial grounds being located in close proximity to them. Erosion caused by recent land use and river management changes has led to the exposure of many of these burials. The most significant example in this regard are the burials located at Lake Victoria in south west NSW.

Here the protection of thousands of burials is in conflict with the management of a major water storage used to regulate flows in the lower Murray River. A Plan of Management has been prepared to protect these burials, but there are doubts about its effectiveness. Due to the limited power of the Aboriginal community in this situation, dilemmas about how to respond to this serious desecration have caused conflict in the community. Aboriginal people have asserted their right and duty to care for the remains of kin, however old those remains may be.

There have been some encouraging changes in how white society responds to the finding of remains. In keeping with government policy, landholders, researchers and local police generally support the notion that decisions about burials are 'Aboriginal business'. Nevertheless, the size and location of some burial grounds can lead to conflict with landholders and developers.

4.8 Places of colonisation events

The colonisation of NSW has also given rise to different forms of connection to land and waters. As Larissa Behrendt has noted:

"There is also a newer historical memory imprinted onto land as a result of the experiences of colonialism creating new symbolism on the landscape. People remember where camps were destroyed, people were massacred and children taken away."\(^{19}\)

Several well-known massacre sites are named after a river feature: Myall Creek, Hospital Creek, Rufus River, Massacre Island. Interference with sites of this kind can be distressful to Aboriginal communities and management of river systems should be flexible and sensitive enough to ensure their proper identification, recognition and protection.

4.9 Community water supply

It is stating the obvious that Aboriginal communities have an interest in river systems as a means of ensuring a clean water supply. With changes which have been brought by European colonisation there has been changes in the manner in which this need manifests itself. As HC Coombs has observed:

"... the environment, so far as they have access to it, is no longer capable of meeting their basic needs. Air alone is substantially as freely available, although not as comparable quality with that of pre-contact times. In many places, the waters upon which their lives depended and which figured so splendidly in their mythology have been denied to them, or sullied and polluted by alien animals. In many places, they have become dependant on ground water, for access to which they must rely on the bounty of Governments and the technology and convenience of their engineers."

Aboriginal aspirations about water quality are significantly different to non-Aboriginal aspirations. Based on the standard that existed for thousands of generations, Aboriginal people generally aspire to a standard of water quality that is good enough to drink from the river. This aspiration contrasts markedly with the non-Aboriginal view, and clearly illustrates an Aboriginal perspective that must be acknowledged rather than dismissed as unrealistic.

4.10 Commercial use of land and water

Aboriginal people have always maintained their livelihood from their country. With the alienation of significant portions of their traditional country and different needs in terms of education, health and housing it has become necessary for Aboriginal people to look to different means of securing a living from their country.

Aboriginal people were used as cheap labour to build up the inland pastoral industry, then with the economic changes and land reforms of the last 75 years, they have been gradually locked out of the industry. There is a similar history involving use then marginalisation of Aboriginal labour in many industries such as horticulture, fishing, mining, timber, sugar cane, cotton and wool. Many rural Aboriginal people now live on Aboriginal community lands on the edge of various towns. Aboriginal people are marginalised from decision making structures and lack a fair share in the regional economic resource base, the land.

A consequence of these historical developments has been the pressures on Aboriginal communities to change their land use habits and increasingly

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become farmers and to use land for commercial purposes. As Goodall has described, some of the very early Aboriginal reserves created in NSW were established in order to encourage Aboriginal people to take up farming practices.\(^{22}\) Similarly, one of the underlying philosophies of the *Aboriginal Land Rights Act* 1983 (NSW) is to create a regime whereby Aboriginal people can be self-sufficient. It defeats the purposes of that philosophy if Aboriginal people are provided with land but not the means to develop it. Indeed, a grave injustice will be perpetuated against Aboriginal people if government policy is to dictate that Aboriginal people should be largely dispossessed of their traditional lands and in relation to those areas where they have not been dispossessed they are precluded from adopting methods of agriculture, including access to water for irrigation, which would enable them to make a living from those lands. The need to avoid such an injustice has long been recognised in other jurisdictions and measures taken to recognise and protect the rights of Indigenous people to waters for agricultural purposes.\(^{23}\)

### 4.11 Management of the natural environment

As before European colonisation, the Aboriginal right and duty to manage the natural environment continues. This interest is based on the reciprocal obligations of persons, and their common obligation to their country. There may be specific personal interests, such as protocols relating to an individual’s totem (or ‘meat’) or a person’s skill with hunting, fishing, food gathering or food processing, or a person’s ties to a particular place. The aggregate of these individual interests, together with the organizational skills in a community, will determine the level of collective assertiveness concerning natural resource management. It is an obligation of agencies to encourage and facilitate an active role for Aboriginal people in these issues.

### 5. IMPACT OF CURRENT WATER INDUSTRY DEVELOPMENTS ON ABORIGINAL INTERESTS IN NSW RIVERS

From the earliest stages of European colonisation, non-Aboriginal people started to have a significant impact on rivers and waterholes. One early recorded example in inland NSW occurred near Menindee. Kukirrka (or Burkes Cave) is a waterhole in the Scropes Range north of Menindee. It was a reliable water source for Wiimpatja when travelling away from the Darling River. Hermann Beckler was the plant collector and doctor on the Burke and Wills expedition.

When he first visited Kukirrka north of Menindee on 21st December 1860 he records:

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\(^{23}\) See for example *Winters v United States* (1908) 207 US 564.
"The friendly little mountain range, ... a picturesque gorge, ... we were most pleasantly surprised to find sufficient water in a rock reservoir for both us and our animals." And "The whole area formed a small paradise before us ..."

When Beckler next visited Kukirrka on 29th January 1861 he records:

"We ... set to work immediately to dig under the rocks surrounding the natural reservoir. In this way we succeeded in obtaining a sufficient quantity of water for our animals. At a freshly opened spot, which filled repeatedly and quite quickly with water for a period of an hour, the water disappeared all at once with a gurgling sound before our eyes, never to be seen again."

Sadly it was all too common for Europeans to come to an important place, recognise its beauty and then destroy it.

Taking inland NSW as an example, we can illustrate some of the impacts on Aboriginal people of environmental changes caused by European colonisation.

By about 1830 the Aboriginal people of the south western, central western slopes, and the north western slopes were in competition with colonists for land and water. By about 1840 pastoral settlement was reality for the Aboriginal people of the Barwon River, the Kuli of the Murray River and the Wiimpatja of the lower Darling. By about 1860 Wiimpatja of the mid Darling and Mayi of the Bogan were under occupation and by about 1880 all of western NSW was under foreign occupation.

The rich pastures that the squatters found were the product of many generations of Aboriginal land management. The colonisers grossly overestimated the stock carrying capacity. The first big environmental impact of the pastoral settlement was the very heavy grazing of the river frontages or other places where there was permanent water, whatever the seasonal condition of the pasture. Loss of ground cover led to high run off and erosion, with much sediment ending up in the river.

In the years between the 1850s and the 1890s the squatters and selectors gained more secure land tenure, always at the expense of Aboriginal people. Bores, ground tanks and fences were installed. In the Western Division, for example, sheep numbers had reached about 6.5 million by 1879 and peaked in 1887 at 15.3 million.

Paddle steamers plied the Murray, Murrumbidgee and Darling Rivers from the 1850s to the 1920s. The rivers were cleared of snags for the steamers and this removed very important habitat for fish. Much wood was cut along the banks to fuel the steam engines on the boats. In some places rock bars in the river were blasted to let boats pass. This would have changed the pattern of pools along the river as well as damaging the rock features that may well have been significant sites for Aboriginal people in the area.
Grazing and clearing along the western slopes in the mid to late 19th century initiated widespread slope erosion that can be seen today as a layer of 'post European alluvium' in many valleys. This changed the slope geometry, which in turn initiated gullying of many streams. It is now thought that the 'typical' Australian gully is in fact a product of the European colonization where previously the common form of small streams was a 'chain of ponds'. These upstream changes had effects right down the river systems, including silting up deep water holes and covering gravel and sand river beds with fine sediment.

The rabbits spread through inland NSW during the 1880s. In the 1890s there was a long dry period. The massive overstocking, the rabbit plague and the long drought caused a collapse of the ecosystem on the western plains.\textsuperscript{24} Erosion by wind, and the occasional rain, was enormous. The native biodiversity declined as many animals became extinct. Sheep numbers declined and have never recovered.

Over the last one hundred and sixty years there has been much clearing of the upper catchment along the western slopes, then later on the near western plains. In many of the wheat and sheep areas there is only about 5% of the original native vegetation cover left.\textsuperscript{25} This has resulted in much soil erosion, with sediment and nutrients added to the rivers. For every tonne of wheat harvested up to four tonnes of topsoil may be lost from the wheat fields.\textsuperscript{26}

The mid 20th century saw the rise of large scale river regulation and the irrigation industry, first in the southern inland rivers and later in the northern inland rivers. This has led to diversion of very high percentages of median annual flows of most inland rivers. Large dams have been built on almost all the tributary rivers in the Murray Darling basin. Many weirs have been built on the main rivers. The effect of all these storages has been:

- To reduce the temperature of water flows;
- To reduce the variability of flows - in some cases to reverse the seasonal flow pattern;
- To create rivers with many large still ponds of water (ideal environment for carp and bluegreen algae); and
- To prevent the migration of native fish which is a necessary part of their life cycle.\textsuperscript{27}

Changes over the last 30 years include decreasing wool prices, increased costs for farmers, property amalgamation, increases in water diversion, expansion of cotton farming, spread of carp through the rivers, and westward expansion of dryland cropping. Irrigation has grossly altered the flow patterns

\textsuperscript{24} Noble, J.C., \textit{The Delicate and Noxious Scrub}, CSIRO, 1999, p. 23.
\textsuperscript{25} Standen, P. et.al., Murray-Darling Basin Environmental Resources Study, MDBC, 1987, pp. 183-188.
of the rivers. Clearing has continued on the western plains and there is continuing heavy grazing of the western riverbanks, so that they are normally bare of understorey vegetation. There is some evidence that gully erosion rates on the slopes have slowed, possibly linked to rabbit control and reduced areas of cropping along the higher slopes.

Inland rivers also face significant pollution. Agriculture is one of the biggest users of chemicals, weed killers, insect killers, fungus killers, defoliants and fertilisers. The chemical load on the natural environment and on people has been called 'slow poison'. Several sewerage systems at towns and cities are still adding nutrients to the rivers and so increasing the growth of algae.

There are continuing signs of ecosystem collapse. One is the 'extinction debt', seeing the continuing decline in long-lived woodland bird species decades after the worst period of habitat fragmentation by clearing. Another is the appearance of now chronic blue-green algae blooms in inland rivers. It would appear that the riverine ecosystems reached a threshold beyond which they could not absorb sediments, nutrients and other changes. Most ecosystems consist of layers such as the canopy, understorey and ground cover. Most biodiversity is, from a few centimetres below ground to about one metre above ground, including fungi, algae, bacteria, protozoa and other foundations of the food chain on land and in water. Biodiversity close to the ground has suffered most from colonial land use.

Environments with a high biodiversity are stable and productive. Damaged environments have few species. In the rivers biodiversity is in danger of declining from a variety of plants and animals to a very simple and unstable system dominated by carp and blue-green algae.

Grazing, dry land cropping and irrigation industries are affected by the extreme variability and unpredictability of the climate - not knowing when and how much rain is going to fall. There is continual conflict between the short term need to produce for cash flow, and the long term need to maintain environmental health.

Water diversion for irrigation occurs on a massive scale particularly in inland river systems. In the Murray-Darling Basin, an average 10,000 gigalitres is diverted per year compared to an annual average discharge of 12,200 gigalitres per year. There are many serious environmental impacts of this degree of development.

Irrigation and other infrastructure development has altered the floodplain environment. Flooding has been prevented or directed by earth banks. Soil salinity and compaction are emerging problems. Floodplain

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clearing and developments have had a serious impact on Aboriginal heritage sites including burials, scarred trees and stone artifacts.31

5.1.1 Impacts of large dams

All major inland rivers in NSW have large dams for irrigation supply. The total storage capacity of these dams is greater than the annual average flow.32 Environmental impacts of large dams include interruption of sediment supply, thermal pollution and grossly altering the seasonal flow patterns. Riverine biota are seriously affected by these changes. On coastal rivers, dams cause disruption to estuarine environments.

The impact of dams on Indigenous communities around the world is notorious. The era of large dam construction in the Murray-Darling Basin has probably ended, but it is worth recounting a broad perspective here. In November 2000, the World Commission on Dams released its report33 on the environmental, social and economic costs and benefits of large dams. The Commission looked at dams with a dam wall height of over 15 metres, but the principles it came up with can apply to weirs and many other development projects. The Commission found that:

- Dams are driving many people from their homes;
- Indigenous people are losing out without compensation;
- The main beneficiaries of dams are the rich and the dam builders and contractors;
- Better alternatives to provide food, water, electricity and economic opportunities are often not considered;
- Costs of dams are great and usually underestimated; and
- Employment for dam builders is never a good enough reason to build a dam.

5.1.2 Impacts of weirs

Weirs are examined here at length because they are a type of development that is small enough to be promoted by local interests and yet they illustrate the cumulative impacts of river degradation to the direct detriment of Aboriginal people. Many weirs were installed on inland rivers during the 20th century.34 Some were for town water supply but many relate to irrigation or simply to ‘watering the inland’. Many have no clear purpose. Recent weir proposals at Walgett and Wilcannia seem to justify themselves simply as a ‘development project’. The NSW *State Weirs Policy* strongly discourages any

new weirs or enlargement of existing weirs because of their environmental impacts\(^{35}\), but from time to time there is a push for more weirs and bigger weirs. Supporters often advocate that the river towns will not survive without more secure water supplies, but usually these same supporters of weirs are supporters of irrigation that has caused a reduction in the small to medium flows needed for town water supply. We know that more weirs and bigger weirs will provide ideal conditions for carp and blue-green algae. They will hinder the migration and breeding of native fish.

The environmental impacts of weirs include disrupting the migration of native fish in favour of creating an environment favourable to the spread of carp and algae. Weirs increase salinity and evaporation of water. The disruption of small to medium flows also affects the biodiversity in the river system.

The construction of weirs has a number of social and cultural consequences for Aboriginal people. These include:

**Fishing**: Fish are a crucial issue in the traditional economy of Aboriginal people. Fishing for food continues to be a vital part of Aboriginal life along the inland rivers. Fish are a key indicator of the social impact of river changes on Aboriginal people. Fish bite with fresh flows down the river, not in ponds held back by weirs. Any short term improved fishing just below a weir is in fact a sign that the weir is likely to further reduce the availability of fish and so cause detriment to Aboriginal people.

**Sacred Places**: There are sacred sites in the rivers that can be permanently drowned and so made inaccessible by weirs. The continuity of the full relationship with some sites, such as *Purli Nhaangkalitji* (the Falling Star near Wilcannia) requires periods of dry river. Other sacred places such as *Nganhu* (the Brewarrina Fishtraps) require variable water levels. There are many important deep holes in the rivers that are *Ngatji*, *Waaway*, *Tanggel* and *Garriya* (Rainbow Serpent) sites. These places would have their integrity and sacredness degraded by the imposing of relatively static water levels held back by weirs.

**Recreation**: The most used but under-recognised recreation feature at many towns is the river. This is where the kids go swimming and where many people go fishing. These activities can be unsafe or impossible near a weir.

**Sense of Place**: Weirs pin hopes for ‘development’ on ideas that are completely out of harmony with the regional environment. Weirs are destructive, unsustainable and inequitable. Weirs devalue what is special and beautiful: the fantastically variable rivers, often flowing through dry country. There is a need to explore enterprises and water use technologies that are in keeping with the environmental and social situation.

The impact of weirs is relevant to the assessment of many existing weirs that have a doubtful purpose. Security for town water supply usually only needs a small alternative source of water for the occasional times when the river stops flowing for an extended period. The Water Reform process should increase the security of town water supplies by providing for increased river flows.

Two examples illustrate this point. The first is the Wilcannia weir proposal. Water use and civic development interests have long proposed a new weir for Wilcannia. With the encouragement of NSW politicians, Central Darling Shire Council ignored all the principles set out by the World Commission on Dams in this proposal. Finally in 2002 the Environmental Impact Statement told Council to go back and “look at all options”, including non weir options, for meeting the apparent need for the weir i.e. town water supply. Subsequently, an adequate supply of good quality groundwater was located close to town.

In this proposal the following groups were among those who were never identified as stakeholders:

- The Aboriginal people who frequently go fishing;
- The Aboriginal people who believe in the Ngatji (Rainbow Serpent) sites and other cultural places in the river; and
- The Aboriginal people who regard the river as a place for spiritual recreation.

Some strange justifications for the weir emerged, such as ‘fish are more common when the river is high, so if the river is kept high by a weir there will always be a lot of fish.’ The fact is that not weir pools. The proposal included a fishway to reduce the environmental impacts of the weir. A fishway will not remove the fish barrier effect of a weir. It merely mitigates this impact and will not reduce the many other known environmental impacts of a weir.\(^6\)

A second example is the Brewarrina weir. The Brewarrina weir is unnecessary for a secure town water supply. During late 1995 when the Barwon River was very low for many weeks, Brewarrina did not have significant water restrictions. The pool of water from which the town pumped in this dry period was in fact mostly below the base of the weir wall and held back mainly by the rock bar at the site. This rock bar is the largest in the Barwon-Darling River. This is the site of Nganhu, the biggest Aboriginal stone fish trap and sacred site in the bed of the river. The Brewarrina weir was built across the middle of this sacred place in the 1960s. Reconciliation and justice suggest that this weir should be removed.

6. HUMAN RIGHTS, SOCIAL JUSTICE AND ABORIGINAL INTERESTS IN NSW RIVERS

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The need to recognise and protect Aboriginal interests in NSW river systems does not arise in a vacuum of morality guided only by political goodwill. It arises as a matter of necessity under Australia’s international human rights obligations.

6.1 Self-determination

The right to self-determination is a fundamental aspiration of Indigenous peoples. The UN Charter and Article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights make clear that all peoples are entitled to a right of self-determination. Access to, and decisions in relation to, land and natural resources is a fundamental component of the right of indigenous self-determination.

There is a significant amount of material relating to the right of Indigenous people to self-determination and a comprehensive discussion is not within the scope of this paper. It is sufficient to say however that access to, and decisions in relation to, land and natural resources is a fundamental component of the right of Aboriginal self-determination.

6.1.1 Freedom from discrimination

Australia has obligations to ensure that Aboriginal interests in river systems are not interfered with in a racially discriminatory manner. Freedom from discrimination and equality before the law are rights that are articulated in many international instruments that Australia has ratified. It includes the right to freedom from discrimination in the enjoyment of property interests. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (‘CERD’) provides that:

"... States parties undertake to prohibit and to eliminate racial discrimination in all its forms and guarantee the right of every one, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: .... (d) (v) The right to own property alone as well as in association with others; (vi) the right to inherit."

Avoiding discrimination is not limited to preventing acts based on racial discrimination. It also includes taking positive steps to ensure that fundamental

rights are enjoyed equally. 39 Both CERD 40 and the Racial Discrimination Act 41 also allow for special measures to be implemented to remedy or prevent the perpetuation of past injustices.

6.2 Protection of Aboriginal cultural heritage

A number of international instruments to which Australia is a party make provision for the protection of the cultures of minorities, including Indigenous peoples. Article 27 of the ICCPR provides that:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

The Human Rights Committee has indicated that the protection afforded by Article 27 extends to “the rights of persons, in community with others, to engage in economic and social activities that are part of the culture of the community to which they belong.”

The perpetuation of, “historical inequities” constitute a breach of Article 27. The protections afforded by Article 27 have been stated to protect “a particular way of life associated with the use of land resources, especially in the

39 In relation to Article 2 of the ICCPR the Human Rights Committee has noted that: “The Committee considers it necessary to draw attention to States parties the fact that the obligation under the Covenant is not confined to the aspect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.” See General Comment No. 3 (13) (Art.2), para 1 as quoted in Pritchard, S., “The International Covenant on Civil and Political Rights and Indigenous Peoples”, Pritchard, S., Indigenous Peoples, the United Nations and Human Rights, Federation Press; 1998, p. 190.

40 Section Art. 2(2) of the International Covenant on the Elimination of All Forms of Racial Discrimination.

41 Section 8, Racial Discrimination Act 1975 (Cth).

42 Other strong statements in the international arena for the protection of cultural rights have come in the form of the UNESCO Declaration of the Principles of International Cultural Cooperation 41 and Article 30 of the International Convention of the Rights of the Child. Articles 2 and 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and Article 15 of the International Covenant on Economic, Social and Cultural Rights.


case of indigenous peoples” and extends to “such traditional activities as fishing or hunting and the right to live in reserves protected by law.”

Australia has ratified the Optional Protocol to the ICCPR allowing for complaints to the Human Rights Committee for breaches of the convenant. In Mabo [No:2] Justice Brennan observed that the “opening up of international remedies to individuals pursuant to Australia’s accession to the Option Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and international standards it imports.”

It should also necessarily bring to bear a powerful influence on the development of Government policy.

6.3 Aboriginal involvement in resource management

For Aboriginal people, having involvement in the manner in which resources are managed is as much an incident of ownership as the recognition of ownership of the soil itself. It is also a crucial component of the enjoyment of many traditional activities. There is no utility in, or enjoyment of, a right to traditional hunting and fishing activities if there are no fish to catch or if the fish are so full of toxins that they are not fit for consumption. A right to be involved in the management of country clearly falls within the fields of operation of international instruments relating to the protection of property interests and the right to enjoy Aboriginal cultural heritage.

Indeed, the Human Rights Committee has commented that Article 27 of the ICCPR imposes obligations to take “positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them.”

The need to involve Aboriginal people in decision-making processes in relation to natural resources is also recognised in Principle 22 of the Rio Declaration on Environment and Development and Article 8(j) of the

47 Mabo v State of Queensland [No:2] 175 CLR 1 per Brennan J at 42.
49 Principle 22 states: “Indigenous peoples and their communities, and other communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”
Convention on Biodiversity. \(^{50}\) Key concepts in this recognition are "effective participation" and "equitable sharing of benefits". The starting point for the recognition and respect of these rights is not to see Aboriginal people's involvement in resource management as just another interest group that needs to be consulted. Rather it requires a starting point whereby Aboriginal people are seen as legitimate stakeholders with whom tangible outcomes need to be negotiated.

6.4 Kyoto Declaration on Water

Indigenous peoples from around the world held sessions as part of the 'Third World Water Forum' at Kyoto, Japan in March 2003. One of the outcomes of those sessions was an Indigenous Declaration on Water. That document restates the profound relationship that Indigenous people from around the world have with their natural environment. It acknowledges the problems that non-Indigenous approaches to water use have had on the natural environment and the ability of many Indigenous people to enjoy their cultures. Among other things it notes that international law recognises the right of Indigenous peoples to self-determination, ownership and control of traditional land and resources, to exercise customary law. The Kyoto declaration also recognises the right of Indigenous peoples interests in water and for decisions about water to be made with the informed consent of Indigenous people obtained through culturally appropriate consultations.

A copy of the Kyoto Declaration is annexed to this issues paper as Appendix A. While it has no formal status at international law it nonetheless represents an important joint statement by Indigenous people expressing a desire for the enforcement of standards contained in instruments which do have such a status and which have been ratified by Australia.

6.5 Social justice and Aboriginal interests in NSW river systems

As well as being an issue of human rights, the full and proper recognition of Aboriginal interest in NSW rivers is also an important social justice issue. In its 1994 Social Justice for Indigenous Australians Policy the Commonwealth Government, after noting the history of dispossession of Aboriginal people acknowledged that:

\(^{50}\) Article 8(j) states that: "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. Other relevant articles of the convention to indigenous peoples are, Article 10 (e) that requires that parties protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation of sustainable use requirements."
"... the consequences of dispossession and mistreatment, and of loss of control over their own daily lives, were social disintegration and economic marginalisation. The effects still manifest themselves in today’s generation."51

The Aboriginal and Torres Strait Islander Social Justice Commissioner gave the following account of the Commonwealth’s Social Justice Strategy:

"The central objective of the Commonwealth’s Social Justice Strategy are expressed in these terms: 'They seek to achieve a society in which economic resources are distributed fairly; in which individual rights are enhanced; where there is fair and equal access to community services and where all have the opportunity to participate and achieve individual development...'. This strategy is structured on the government targeting areas of disadvantage and devising beneficial, remedial programs. It is essentially a welfare model based on government discretion being exercised to identify need and redistributing resources to fill the empty cup."52

Despite changes in government and policy at a Commonwealth level, the concept of social justice continues to have relevance. It is an approach that has continued to be promoted by the Aboriginal and Torres Strait Islander Social Justice Commissioner, with the emphasis that social justice is not one based on charity but one that is based on the recognition of rights of Aboriginal people.53 This understanding of social justice should be uncontroversial. It is recognising that measures need to be taken to ensure equality of outcomes for disadvantaged people.54 The need for such measures to ensure citizens enjoy their rights equally has long been the foundation of the horizontal fiscal equalisation55 carried out by the Commonwealth to ensure equality of living standards between States and Territories, and local governments.56

7. THE BOOMANULLA STATEMENT

54 It is similar to what Larissa Behrendt has referred to as substantive equality: See Behrendt, L., Achieving Social Justice: Indigenous Rights and Australia’s Future, Federation Press, 2003, pp. 125-127.
56 See s.6, Local Government (Financial Assistance) Act 1995 (Cth).
In March 2002 the New South Wales Aboriginal Land Council ('NSWALC') in conjunction with the Department of Land and Water Conservation (NSW) (as it was then known) coordinated a conference to enable Aboriginal communities to discuss their expectations in planning processes in NSW. One outcome of that conference was a draft statement prepared by the Aboriginal delegates. While the conference indicated that the outcomes would ultimately need support from the broader Aboriginal community, it nonetheless developed eleven “principles and protocols” for Aboriginal involvement in the planning process. They were as follows:

1. Any planning must respect the timeframes of Aboriginal People. This must be defined and honoured in future protocols.
2. Aboriginal identity and traditional ownership and custodianship must be recognised in natural resource planning and implementation.
3. Aboriginal culture and values must be identified, respected and incorporated in natural resource planning and implementation.
4. Aboriginal knowledge about vegetation, water and catchments must be recognised as important and where appropriate, active measures must be made to ensure legal protection of community intellectual property rights.
5. Cultural diversity must be respected - there is not one Aboriginal community, culture or view. Culture and traditional practices differ across communities.
6. Aboriginal people are major stakeholders in natural resource management, because their lives and spirituality are related to the land. This should be acknowledged in any consultation process.
7. The economic benefits that flow from natural resource management must be shared with Aboriginal communities, as Aboriginal people have a traditional custodian’s right in relation to natural resources, which they never have given up.
8. Plans that affect the lives of traditional owners must be made on the basis of their informed consent.
9. In recognising the rights and interests of Aboriginal people, government (and other) agencies must be prepared to “negotiate” with Aboriginal people - not merely “consult”.
10. Biodiversity must, as a minimum, be maintained at its current level.
11. The only Aboriginal people who can legitimately speak for country are those who are authorised by community leaders in their country and in accordance with any agreed community protocols for nominations and representation.

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The manner in which these principles should be implemented was not elaborated upon. The statement itself noted the need for the issues to be developed through appropriate processes. The Boomanulla statement has however been endorsed by NSWALC which is the State's peak Aboriginal organisation. The Boomanulla Statement therefore constitutes a significant statement by Aboriginal people in NSW as to how their interests in natural resources need to be accommodated.

It should be apparent that the content of the Boomanulla statement is consistent with the human rights entitlements expressed in the numerous international instruments to which Australia is a party. Accordingly, it should not be seen as controversial. Nor should its content be seen merely as an aspirational statement the acknowledgement of which is left to the whim of the Government. It needs to be approached by Government as a statement of the rights and expectations of Aboriginal people that need to be respected so meaningful partnerships between Aboriginal people and the Government can be built.

8. THE FRAGMENTATION OF ABORIGINAL INTERESTS UNDER THE AUSTRALIAN LEGAL SYSTEM

In dealing with Aboriginal interests in land and waters the legal system in NSW does not start from the premise that landscapes are imbued with Aboriginal cultures. Nor does it deal with those interests in a holistic manner that Aboriginal people would consider to be appropriate. Instead the NSW legal system itemises and characterises rights and interests on its own terms and in a manner that is consistent with western legal traditions. Those traditions determine the language by which rights are defined and determine the mechanisms through which rights are recognised. They are presented as a natural order of doing things and a normal way of viewing the world. It deals with interests with what Mary Douglas describes as "the pathetic megalomania of the computer whose whole vision of the world is its own program." In truth the manner in which the legal system characterises and itemises is not in accordance with any natural order or universal logic. Such characterisations


60 Larissa Behrendt has argued that "it is inevitable that the laws and institutions of society are constructed with the values of the dominant culture and they produce unsatisfactory results, conflict, marginalisation and ostracism for those who find themselves challenging those values. This goes some way towards explaining why 'western' institutions often fail Indigenous peoples." Behrendt, L., Achieving Social Justice: Indigenous Rights and Australia's Future, Federation Press, 2003, p. 67.


62 As Mary Douglas has observed, "comparison of cultures makes it clear that no superficial sameness of properties explains how items get assigned to classes. Everything depends on which properties are selected": Douglas, M., ibid, p. 58.
are deliberately selected outcomes that serve the purposes of the dominant culture.

As a result of the imposition of the categories and classifications of the NSW legal system, Aboriginal relationships to country are necessarily fragmented into those categories. Some aspects of the Aboriginal worldview can be accommodated while others "just slip between the meshes of the inquiry."63

An example of the difficulties caused by this type of fragmentation is illustrated by the inadequacies of the manner in which native title rights and interests are characterised under the Native Title Act 1993 (Cth) ('NTA'). If ever there was an area of law which could accommodate Aboriginal interests in land in a manner consistent with the Aboriginal worldview it is in the area of native title. That is meant to be the entire purpose of that body of law. However, while the High Court has noted that Aboriginal interests in land are primarily a spiritual affair,64 it has also stated that the recognition of native title rights and interests requires the spiritual to be "translated into the legal."65 A majority of the Court has expressly indicated that this "requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered separate from the duties and obligations which go with them."66

Such fragmentation invariably leads to important aspects of Aboriginal cultures being ignored. For example, in Western Australia v Ward, the High Court suggested that the Aboriginal right to speak for country and the right to give and deny permission to access resources may readily be translated as a right to "possession, occupation, use and enjoyment", but where exclusive rights can not be recognised,67 then it may be more appropriate to list Aboriginal interests as a number of 'activities.'68 It has been noted elsewhere that it would be an absurdity to try and describe freehold interests by lists of


67 This may be because of a prior inconsistent grant that may mean that native title is partially extinguished.

68 Western Australia v Ward (2002) 191 ALR 1 per Gleeson CJ, Gummow, Gaudron and Hayne JJ at paras 52, 88 and 95; and Daniel v State of Western Australia [2003] FCA 666 per Nicholson J at 136.
activities.\textsuperscript{69} It is equally problematic to describe Aboriginal relationships to
country in that manner. As Sutton has observed:

\begin{quote}
"In any case the rights listed are a representation – one that may not be
very close to Aboriginal ways of representing such things – put together
usually by a non-Aboriginal person for a bureaucratic – legal process,
not a sophisticated anthropological account of the relevant practices.
For that reason all such lists of rights are bound to be artificial, and
rather foreign in some areas extremely foreign to the culture of the
claimants."
\end{quote}

The inadequacy of such fragmentation has significant consequences for
Aboriginal people because it is only the "rights" which are recognised as
"native title rights" that are protected under the NTA.

More overt illustrations of the fragmentation of Aboriginal relationships
to country in the field of native title law are apparent by the refusal of the
Australian legal system to recognise certain types of Aboriginal interests at all.
In \textit{Commonwealth v Yarmirr} the High Court determined that Australian courts
would not recognise Aboriginal ownership of coastal seas\textsuperscript{71} even though those
rights may exist under Aboriginal laws and customs. They have reached a
similar position in relation to exclusive fishing rights.\textsuperscript{72}

In these circumstances the classification of what aspects of Aboriginal
cultures will be recognised are not whittled away by the imposition of Western
characterisations. They are thrown into the abyss of non-recognition by a
deliberate policy decision to oppose their recognition. For Aboriginal people
whose cultures are centred on their ownership of marine tenures,\textsuperscript{73} that non-
recognition is of the same effect as the racially discriminatory and discredited
legal theories which treated Australia as \textit{terra nullius} at the time of sovereignty
to enable Aboriginal interests to be ignored.

The cultures of Aboriginal people in NSW are faced with similar
structural difficulties when it comes to recognition in legislation. The

\textsuperscript{69} Wooten, H., "The End of Dispossession? Anthropologists and Lawyers in the Native Title
Process" in Finlayson, T., and Smith D., (Eds) \textit{Native Title: Emerging Issues for Research,

\textsuperscript{70} Sutton, P., \textit{Kinds of Rights in Country: Recognising Customary Rights and Incidents of
Native Title}, National Native Title Tribunal Occasional Papers Series, No.2/2001, p. 22.

\textsuperscript{71} \textit{Commonwealth v Yarmirr} (2001) 208 CLR1 per Gleeson CJ, Gaudron Gummow and
Hayne JJ at paras 97-100.

\textsuperscript{72} \textit{Western Australia v Ward} (2002) 191 ALR 1 per Gleeson CJ, Gaudron, Gummow and
at paras 126-127, the rights to look after and protect knowledge and ceremonies relating to
sites of significance were held not to be native title rights because they were held to be
interests in relation to land and waters, despite that distinction probably being
incomprehensible to the Aboriginal people concerned. A similar position was reached in
\textit{Western Australia v Ward} (2002) 191 ALR 1 at paras 57-61.

\textsuperscript{73} See for example Memmott, P., and Trigger, D., "Marine Tenure in the Wellesley Islands
Region, Gulf of Carpentaria" in Peterson, N and Rigsby, B., \textit{Customary Marine Tenure in
separation of resource management from ownership of the soil may be convenient for the government but it does not necessarily make sense to people who may see the two very closely intertwined in the right to speak for country. The separation of issues such as cultural heritage protection, land ownership and hunting and fishing rights to Aboriginal people can be equally problematic. Yet this is how the NSW legal system deals with those interests. The Aboriginal Land Rights Act 1983 (NSW) deals with land, the National Parks and Wildlife Act 1974 (NSW) deals with cultural heritage and the right to hunt and gather native title flora and fauna, the Fisheries Management Act 1994 (NSW) deals with Aboriginal fishing rights and the Water Management Act 2000 (NSW) deals with interests in water. To the extent any of these rights are recognised as native title rights and interests they are largely, but not always exclusively, dealt with under the NTA 1993 and the Native Title (New South Wales) Act 1994. Each of these components operate within their own carefully defined legislative frameworks.

To the extent that aspects of the Aboriginal worldview do not fit within these fields of operation, they are ignored. In participating in the various planning and management processes which exist under these respective regimes, and in dealing with the different bureaucracies which administer them, Aboriginal people have difficulties in having the range of matters which are relevant to them dealt with in an integrated way.

More fundamentally, the protection of Aboriginal interests in legislation is at the whim of parliament. Protections can be provided and removed as the government pleases, subject only to overarching Commonwealth protection. Government policy has always imposed a hierarchy of the protection of rights with Aboriginal interests usually placed well to the bottom. Here the structural difficulty facing Aboriginal people is in the form of the competition for resources that is a characteristic of colonialism. Michael Mansell has observed:

“Basically, what we have in Australia is open access to the resources on Aboriginal lands. As a result of that, white Australia has generated enormous wealth and revenue and we are left to stand in queue (usually

74 The Healthy Rivers Commission has provided extensive commentary on the need for “a whole system” view of river management which is impeded by separately defined mandates. See for example Healthy Rivers Commission, Securing Healthy Coastal Rivers: A Strategic Perspective, April 2000, pp. 17-20.

75 Indeed it is no surprise that Aboriginal people at the Boomanulla conference complained that “The planning process springs from European thinking, which is linear and focussed on measuring data. This way of thinking does not rest easily with Aboriginal (holistic) ways of thinking about the environment and about the people who live in the environment.” Bruce Callaghan & Associates Pty Ltd, Report on the Boomanulla Conference for Country 5-6 March 2002, p.6. See also Schneirer, S., Faulkner, A., and Fisher, C., Aboriginal Cultural Values of the Native Vegetation in New South Wales: A Background Briefing Paper of the Native Vegetation Advisory Council of New South Wales, Background Paper No: 5, March 2001, p. 20.

76 The Racial Discrimination Act 1975 (Cth) and the Native Title Act 1993 (Cth) are two examples.
The recognition of Aboriginal interests in natural resources and their management does not commence from the starting point of recognising what Aboriginal peoples' rights are. Often the only response to the recognition of Aboriginal interests is in a limited manner designed only to ensure that the regime imposed gains some legitimacy.

Recent State initiatives in the form of the *Indigenous Fisheries Strategy and Implementation Plan* are illustrative. Aboriginal fishermen from coastal areas of NSW have long asserted their traditional fishing rights, including their traditional right to sustain a livelihood from the sea resources they have always exploited. A number of Aboriginal families have fished commercially in those regions but through increasing changes in licensing and regulatory regimes, have increasingly been excluded from those activities. This has been a source of ongoing complaint.

The NSW Government has had the opportunity to actively support in the Courts the recognition of traditional commercial fishing rights in *Mason v Triton*. In that case the recognition of those rights were opposed. In *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* even non-exclusive rights to fish in the rivers were opposed and the government argued that all such rights, even if they existed under the laws and customs of the Yorta Yorta people, were extinguished.

The NSW Government also has had the opportunity to provide legislative recognition of the interests of Aboriginal people in restructuring aspects of the commercial fishing industry in the *Fisheries Management Act 1994* (NSW). It could have secured to Aboriginal people a proportion of the resource. It chose not to. Instead it merely inserted a provision indicating that the legislation was not intended to affect the operation of the NTA.

Coupled with the State's position of opposing the recognition of such interests, the State's real position becomes apparent. In order to give legitimacy to the lack of meaningful recognition, the State has implemented a policy

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78 Aboriginal families on the New South Wales South Coast have been particularly affected by increasing restrictions on beach net-hauling which is an activity which they maintain that they have always traditionally carried out.
79 *Mason v Triton* (1994) 34 NSWLR 572.
80 *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* [2002] HCA 58.
82 Section 287 of the *Fisheries Management Act 1994* (NSW) provides that:
"This Act does not affect the operation of the Native Title Act 1993 of the Commonwealth or the Native Title (New South Wales) Act 1994 in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect."
which does not remedy the past exclusion of Aboriginal interests from the commercial fishing industry. Nor does it start from a legal recognition of Aboriginal interests in the resource. While the Indigenous Fisheries Strategy introduces specific initiatives for social and economic development, they do not ensure that Aboriginal people have access to a greater share of the resource. The Strategy can be contrasted to the approach adopted in New Zealand of ensuring a comprehensive recognition of Aboriginal involvement in the commercial fishing industry. It even reflects poorly in comparison with the Recommendations of the Rural Industry Strategy which was developed by the Aboriginal and Torres Strait Islander Commission and a number of Commonwealth government departments in response to the recommendations of the Royal Commission in the Aboriginal Deaths in Custody.

Measures of the kind contained in the Indigenous Fisheries Strategy, while often constituting a step forward, need to be seen in perspective. Policy makers too often fall into the trap of assuming that any outcome is a good outcome. Aboriginal people also still uncritically accept the limited outcomes put on offer.

Policy development and legislative reform that has occurred to date in relation to a range of resources has been greatly limited by these structural difficulties. It has reduced Aboriginal policy development to being piece-meal and reactive. The status quo of the distribution of resources and existing legislative frameworks are too readily relied upon as an excuse to limit the range of solutions available to Aboriginal people.

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83 Although the Strategy provides a number of important statements in relation to traditional economic interests in New South Wales fisheries, it provides no legal recognition of that interest. Nor does the strategy foreshadow any future legal recognition to that effect. The strategy that is implemented is one that seeks to build “respect” for Aboriginal interests that are otherwise not protected in legislation and to support education campaigns to achieve that goal.

84 The Strategy seeks to “promote community access to aquaculture opportunities”, “link communities to other government agencies” to plan and support such ventures, promote indigenous involvement in shellfish aquaculture, “assist” with feasibility studies to assess viability of identified value adding commercial opportunities and to consult with Aboriginal people on ‘strategies’ to maintain and support Aboriginal fishers in the industry. The implementation plan for the strategy proposes action to carry the strategy into effect. It includes publicising workshops, funding feasibility studies, formalising a community partnership model for “an” aquaculture hatchery on the coast, “consulting” current fishers about value adding opportunities, and identifying strategies to “maintain levels of Indigenous involvement in commercial fishing”.


87 Behrendt, L., op.cit., p. 11.
Larissa Behrendt has argued that the "Indigenous experience has shown that working within existing institutional forms leaves ideologies and biases which infest those institutional structures unchanged."\(^{88}\) The challenge for people involved in developing policy for Aboriginal people is not to simply assume that directing the attention of existing structures towards some limited problems affecting Aboriginal people is an adequate response. Rather, the Aboriginal world view should be the starting point, and if existing structures are not capable of recognising, protecting and accommodating that world view, then it is those structures which need to be questioned.

9. THE LEGAL FRAMEWORK FOR THE RECOGNITION AND PROTECTION OF ABORIGINAL INTERESTS IN NSW RIVER SYSTEMS

When the standards set under the international human rights instruments referred to above are considered it becomes apparent that the manner in which Aboriginal interests in rivers are currently protected in NSW is inadequate.

9.1 The recognition of Native Title rights and interests in NSW river systems

The High Court's decision in *Mabo [No:2]*\(^{89}\) belatedly recognised the pre-existing property interests of Aboriginal people to their traditional country. In doing so, the High Court rejected the notion that Australia was, prior to European settlement, a land belonging to nobody. The decision was a milestone for Aboriginal people because it provided at least some opportunity for the recognition of their interests in land and waters beyond the limited mechanisms which governments were otherwise willing to allow through land limitations of Native Title rights legislation.

9.1.1 Limitations

The legal construct of native title does however have significant limitations. Native title is not a faithful representation of ongoing Aboriginal interests in land. It is a product of the Australian legal system and is as much about asserting the validity of the past dispossession of Aboriginal people as it is about recognising the Aboriginal interests concerned. *Mabo [No:2]* affirms the view expressed in previous decisions to the effect that the British assertion of sovereignty over Australia and the introduction of the common law were not

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only lawful, but challenges to them were not justiciable. The High Court also confirmed the power of Parliament to dispossess Aboriginal people of their land by granting it to white settlers and to do so without providing Aboriginal people with compensation. McNeil has noted the anomalies of this aspect of the High Court’s decision in light of normal common law rules for prioritizing property interests, but that power has now been confirmed on a number of occasions. The NTA and the Native Title (New South Wales) Act 1994 (NSW) now confirm that numerous interests granted under various legislation have previously extinguished native title rights and interests.

The extinguishment of Aboriginal interests by past inconsistent grants will be taken to have occurred regardless of whether the relevant interest was actually used and regardless of whether it resulted in any actual interference with the enjoyment by Aboriginal people of their traditional laws and customs. The reality of this rule for Aboriginal people in NSW has been illustrated by the High Court’s decision in Anderson v Wilson that held that Western lands leases extinguish native title. This decision has meant that for almost all of the Western Division of NSW, there is no possibility of native title rights and interests being recognised regardless of the strength of connection that remains. Even in areas not affected by that decision, native title may only exist on an arbitrary scattering of parcels of land which may hinder the ability of Aboriginal people to enjoy their traditional laws and customs.

The manner in which the law in relation to extinguishment has developed highlights the need to ensure that Aboriginal interests in NSW river systems are not limited to only being regarded as being co-extensive with native title interests. Aboriginal cultures will continue notwithstanding that the Australian legal system does not recognise the rights and interests that flow from these cultures. The failure to recognise those interests will perpetuate the injustice to those communities.

It is becoming increasingly apparent that the recognition of native title has limitations in another important respect, namely its inability to characterise and protect the Aboriginal interests concerned. When the High Court recognised native title in Mabo [No:2] the Court emphasized the fact of occupation rather than the content of Aboriginal laws and customs. Consistently with the

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91 Mabo v State of Queensland [No.2] (1992) 175 CLR 1 per Brennan J at pp.58 and 64. See also the judgment of Mason CJ and McHugh at pp. 15-16.
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decision of the International Court of Justice in the **Western Sahara Case**,\(^97\) and
the rejection of the approach of Justice Blackburn in **Milirrpum v Nabalco**.\(^98\)\(^99\) the High Court confirmed that the fact that Aboriginal interests in land may not
conform with western concepts of property is no barrier to the recognition of
Aboriginal ownership of the soil. Accordingly, the Court ordered that the
Murray Islanders were entitled to possession, occupation, use and enjoyment of
their traditional lands as against the whole world.\(^99\) That order was intended to
reflect the Murray Islanders' ownership of the area concerned under their own
laws and customs. It was not a precondition to that order that they prove a level
of 'possession' as that term is understood by the common law.

Since **Mabo** [No:2] the Courts have had difficulty with the task of
translating Aboriginal rights into common law terms and have started to
emphasise 'activities' instead.\(^100\) Furthermore, the High Court has moved away
from first principles by increasingly placing greater emphasis on requirements
to prove a continuity of the internal social structures of Aboriginal communities
and the normative rules which give rise to the rights and interests.\(^101\) These
changes increase the difficulty of establishing native title and begin to
unsatisfactorily limit the rights and interests that can be established as a result.

9.1.2 Questions about extinguishment of Native Title in river systems

The nature and extent of native title rights and interests that may exist in
the NSW river systems, and the circumstances in which such rights will be
taken to have been extinguished by inconsistent grants is a matter that remains
the subject of considerable uncertainty. Whether native title will exist in lands
adjoining those river systems will depend on the tenure history of the land
concerned. As already noted, the decision in **Anderson v Wilson** means that
there is unlikely to be an opportunity to recognise native title in areas that have
been the subject of a Western lands lease. This will affect almost all of the
Western Division of the State. The extent of other interests that will extinguish
native title is unknown.\(^102\) The fact that native title may have been extinguished

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\(^97\) **Mabo v State of Queensland** [No.2] (1992) 175 CLR 1 per Brennan J at p. 51 and Toohey J
at p. 182.
\(^98\) **Mabo v State of Queensland** [No.2] (1992) 175 CLR 1 per Brennan J at p. 51; Deane and
Gaudron JJ at p.102 and Toohey J at pp. 183-184.
\(^100\) **Western Australia v Ward** (2002) 191 ALR 1 per Gleeson CJ, Gaudron, Gummow and
Hayne JJ at paras 52, 88 and 95; **Daniel v State of Western Australia** [2003] FCA 666 per
\(^101\) **Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors** [2002] HCA
28 at paras 54 and 89. For a critique of this change in approach see Pearson, N., The High
Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its
Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta, Sir Ninian Stephen
\(^102\) The NTA contains a Schedule of interests that will extinguish native title. All other
interests are left to the Court to determine. The location of those interests can only be
determined through extensive historical tenure searches.
by inconsistent interests in land may also be fatal to some native title interests in adjoining waters, but this may not necessarily be the case.

In NSW the regulation of land and waters has long been the subject of distinctive legislative regimes. Fishing has also historically been regulated by its own body of legislation. Rights to water, rights of navigation and rights to fish, both at common law and under statute, can exist independently of the ownership of the soil. Common law presumptions as to the rights that attach to the ownership of the soil have always been rebuttable by the existence of pre-existing interests. The ownership of the soil is therefore not necessarily determinative of the existence of native title rights and interests.

Uncertainty also remains in relation to outstanding questions as to what constitutes a public work for the purposes of the NTA. Under the NTA a public work will extinguish native title. It also remains unclear as to what the effect of the construction of dams and other changes in water flows will have on native title rights and interests. What at least seems clear is that legislative regimes that merely regulate the extraction and flow of rivers will not extinguish native title.

Where the tenure history does not preclude the recognition of native title then existing determinations would seem to suggest that the rights and interests may include “possession, occupation, use and enjoyment of the adjoining lands.” It may include the right to hunt, gather and fish, although exclusive fishing rights will not be recognised. Rights of access for the purpose of carrying out these activities will also be recognised as will rights to protect sites of significance. Such sites may not be limited to those of spiritual significance but may include campsites and areas where clays used for traditional purposes are located. It is unlikely that Australian Courts will

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103 In relation to navigation see Orr-Ewing v Colquhoun (1877) 2 HL 839 at 854. In relation to several fisheries see Hindson v Ashby [1896] 2 Ch 1 at 10 and Holford v Bailey (1850) 13 QB 426 at 445 and Smith v Andrews [1891] 2 Ch 678 per North J at 697. In relation to other preexisting rights to fish see Lord Advocate v Balfour (1907) SC 1360.

104 The presumption at common law that land which borders a river or lake includes the bed of the river under the ad medium filum aquae rule is rebuttable by evidence of preexisting interests: Lanyon Pty Ltd v Canberra Washed Sand Pty Ltd (1966) 115 CLR 342 per Kitto J at 349. The existence of riparian rights is also a common law presumption: H. Jones & Co Pty Ltd v Kingsborough Corporation (1950) 82 CLR 282 at 29b. It would also be rebuttable by a person with a better interest or a pre-existing interest. Any presumption that an interest carries with it a private right to fish in the waters (see Attorney General (British Columbia) v Attorney General (Canada) [1914] AC 153 at 167) has now been regulated by statute: s.38 Fisheries Management Act 1994.


108 In Carpentaria Land Council Aboriginal Corporation & Ors v State of Queensland & Ors (1998) 83 FCR 483 the Carpentaria Land Council Aboriginal Corporation sought an injunction seeking to prevent the compulsory acquisition of land along a river bank which was
recognise Aboriginal ownership of flowing water but that does not mean that native title rights and interests will not be affected by alterations to river flows and be therefore entitled to a remedy for that alteration.

It is important to remember that native title rights and interests do not depend on their conformity with the common law for their recognition. They are sui generis interests. The process of translating Aboriginal spiritual connections into legal rights and interests is in its formative stages and there remains a considerable amount of uncertainty as to what will be the complete range of rights and interests that will be recognised in those cases.

9.1.3 The protection of Native Title interests under the Commonwealth Native Title Act 1993

A principle object of the NTA is the recognition and protection of native title. In Western Australia v The Commonwealth the High Court noted that the NTA constitutes “an exclusive code” regulating the extinguishment and impairment of native title rights and interests. The NTA provides 11 categories of future acts by which native title can be validly affected. Generally, speaking all acts are “valid” if they are covered by particular subdivisions of the Act but certain procedural rights will need to

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97 This is both because of the principles set down in Yanner v Eaton (1999) 201 CLR 351 in relation to ownership of matters which are difficult to assert possession over, but also because legislative schemes which vest management and control of those waters in the Crown will extinguish any such exclusive interest: Western Australia v Ward (2002) 191 ALR 1 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at para 263.

110 Western Australia v Commonwealth (1995) 183 CLR 373 at 469.

111 Section 10, NTA provides that: “Native title is recognised and protected, in accordance with this Act.” Section 11 provides that “Native title is not able to be extinguished contrary to this Act.” Although s.11 refers to “extinguishment” not being contrary to the NTA, in Western Australia v The Commonwealth, the High Court proceeded on the basis that the NTA placed a similar restriction on the impairment of native title as well: see Western Australia v The Commonwealth (1995) 183 CLR 373 at pp.404-405 and 468; and Western Australia v Ward [2002] HCA 28 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at para 103.

112 See s.24AA(3), 24FA(1)(a), 24GB(5), 24GC(2), 24GD(2), 24GE(2), 24HA(3), 24ID(1)(a), 24JB(1), 24KA(3), 24LA(3), 24MD(1), and 24NA(2), NTA.

113 The term valid must be understood within the scheme of the legislation. Section 253, NTA defines ‘valid’ as including “having full force and effect”. In Western Australia v The Commonwealth the High Court commented on the term ‘valid’ and indicated that:

"... those terms are not used in reference to the power to make or to the making of a State or Territory law but in reference to the effect which a State law, when validly made, might have in creating an exception to the blanket protection of native title by s.11(1). In using the terms "valid" and "invalid", the Act marks out the areas relating to native title left to regulation by State and Territory laws or the areas relating to native title regulated exclusively by the Commonwealth regime." Western Australia v The Commonwealth (1995) 183 CLR 373 at 469.
be afforded to native title holders. Depending on the nature of the activities involved, any one of a number of subdivisions are likely to apply to future acts affecting Aboriginal interests in rivers in NSW. The subdivisions that are most likely to apply are as follows:

Section 24GD: Sub-division 24GD relates to future acts comprising the granting of interests associated with agricultural activities on land adjoining pastoral properties. In effect it allows pastoralists to obtain interests in adjoining lands, including for the purposes of grazing cattle and water extraction purposes. Where sub-division 24GD applies Aboriginal people are entitled to a notice and to be provided with an opportunity to comment on the act.116 The non-extinguishment principle applies and compensation is payable for the doing of the act.117

Section 24HA: Sub-division 24HA relates to the legislative acts and other acts relating to the management of water and air space. Section 24HA also relates to leases and licences granted under legislation regulating the management of water and airspace. Aboriginal people are entitled to a notice and a right to comment in relation to such acts.118 Compensation is payable for the doing of the acts and the non-extinguishment principle will apply.119

Sub Division 24KA: Subdivision 24KA relates to the future acts which comprise public infrastructure works such as the construction of roads, jetties, pipelines, transmission lines as long as they do not comprise a compulsory acquisition of land.120 The non-extinguishment principle applies to the act and compensation is payable to native title-holders.121 In relation to such acts, native title-holders are required to be afforded “the same procedural rights as they would have in relation to the act on the assumption they instead held ordinary title.”122

Other future acts affecting native title in rivers systems are likely to attract the protection afforded by s.24MA and s.24MB, NTA.123 To the extent that this is the case the Aboriginal people are entitled to not be put in a more disadvantaged position than ordinary title-holders and receive the same procedural rights as other landholders.

116 Section 24GD(6)-(7), NTA.
117 Section 24GD(3)-(4), NTA. The non-extinguishment principle means that the future act is valid but native title will be suppressed for the period that the act will continue.
118 Section 24HA(7), NTA.
119 Section 24HA (5), NTA.
120 Section 24KA(2), NTA.
121 Section 24KA(4), NTA.
122 Section 24KA(7), NTA.
123 See generally, Bartlett, H., Native Title in Australia, Butterworths, 2000, pp. 474-475.
Before the NTA will intervene to protect native title rights and interests, an act must be one that "affects" native title. The Courts are yet to clearly set out the scope of this precondition. There is considerable argument to suggest that the future act regime will have broad operation. In the first place the NTA is supposed to be a special measure for the recognition and protection of native title. Given that the validation and extinguishment provisions in the NTA are draconian and discriminatory, it is in the future act regime that the beneficial nature of the legislation must be found. It would therefore not be expected that the future act regime would be given a narrow operation.

Secondly, the function of the future act regime is to protect the property interests of Aboriginal people. Such legislation is usually given an interpretation that most effectively achieves its purpose.

Thirdly, there is already precedent in the NTA as to when property interests are to be affected for the purposes of the NTA. Section 86 allows people to be a party to native title proceedings if their interests may be affected by the proceedings. That precondition has been applied broadly and to the detriment of the native title claims process in the NTA. Given the beneficial nature of the legislation it would be extraordinary for the affecting of native title rights and interests to be more narrowly construed.

Experiences from overseas jurisdictions also suggest that the manner in which native title rights and interests are affected may be broader than what some governments may prefer. In the United States Indigenous people living on reservations have been able to enforce a level of access to water to ensure that their traditional way of life can sustained, and to have a sufficient flow of water to “develop, preserve, produce, or sustain food and other resources of the reservation “to make the reservation livable”. It includes having sufficient water flow to protect traditional fishing rights. Activities not in the immediate vicinity of where Aboriginal rights are exercised, may nonetheless have an effect on the enjoyment of those interests.

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124 Section 227, NTA provides: “An act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.”


127 For an account of this problem see Pearson N., Where We’ve Come From and Where We’re At With the Opportunity That is Koiki: Mabo’s Legacy to Australia, Mabo Lecture: Native Title Representative Bodies Conference, 3 June 2003, pp. 4-6.


While most of the litigation in that jurisdiction involves the enforcement of treaties, it is not only the treaties that are the source of those rights. They also arise by virtue of the traditional occupation of the Indians. While Indigenous water rights in the United States have primarily arisen in different legal and historical circumstances, the principles are arguably equally applicable to understanding the circumstances in which native title maybe considered to be affected. At the very least it is easy to understand that a right to fish is of little value if there is no water to fish in or if the flow of the water is so affected that the fish can no longer live there.

Notwithstanding that certain levels of extraction may have been tolerated in the past, there is no reason why a Court should uphold that those levels are entitled to be maintained when considerations arise as to the renewal of various plans and licences. To do so would perpetuate an injustice to Aboriginal people.

It is equally clear that protection for native title rights is not restricted to only the acts that physically impair the enjoyment of traditional rights to hunt and fish. In Huakina Development Trust v Waikato Valley Authority a Maori group sought and obtained injunctive relief against the granting of a pollution licence because of a failure to consider the detrimental effects the licence would have on the Maori group’s spiritual connection with the waters concerned. Given that the High Court has noted on a number of occasions that native title is primarily a spiritual affair, it would not be inappropriate if a similar position was reached by an Australian Court.

The Native Title Act now regulates the procedural rights of native title-holders for future acts in relation to the management of water and the issuing of water licences. Where native title rights and interests are affected a right to compensation will arise. How that compensation will be determined is at present uncertain. The consequences for a failure to provide the procedural rights set out in the NTA are also unclear. The procedural rights in the NTA have been described as “important entitlements.” While a failure to afford those procedural rights may not necessarily result in the invalidity of the act,

at 254-255 a regulation that diverted water away from the Lake with the “effect of making fish native to the Lake endangered protected species, and have unsettled the erosion and salinity balance of the lake to a point where the continued utility of the Lake as a useful body of water”, was invalidated. The regulation was invalidated if it was considered ‘an arbitrary abuse of discretion” because the relevant guidelines had been ignored and trust responsibilities to the tribe had been ignored.


133 Huakina Development Trust v Waikato Valley Authority [1987] NZLR 180 at 223.


135 Section 24HA, NTA.

equity may intervene to provide a remedy for native title-holders.\(^{137}\) The nature and extent of those equitable remedies remain undetermined.

### 9.1.4 Native Title and government attitudes to the recognition and protection of Aboriginal interests

The recognition of native title, and the dispelling of the myth that Australia was *terra nullius* at the time of European settlement, provided Australian governments with an opportunity to reassess the manner in which Aboriginal interests in natural resources are respected. The opportunity presented by the recognition of native title is probably most tellingly illustrated by the antagonism to the High Court’s decision from governments and industry people alike.\(^{138}\) Rather than embrace the underlying philosophy of the decision, the response has been one of attempting to limit and contain its implications.

The fact that governments rarely act to recognise and protect Aboriginal interests is aptly illustrated by the NTA itself. In enacting the NTA and complimentary State legislation Australian governments moved to provide immediate certainty for all land users. Aboriginal people on the other hand only get protection through access to complicated procedures. There is no reciprocal recognition of their substantive rights. Instead they have been forced to go to Court to fight for the recognition of their interests in costly and time consuming litigation, often against people who have no rights at jeopardy but who are nevertheless funded with public money to oppose the claims. It is no wonder that the mediation provisions in the NTA have been largely unsuccessful.\(^{139}\)

Such a negative legislative response to the High Court’s decision in *Mabo [No.2]* has seen an opportunity wasted. It reflects an attitude that appears to have been carried over into the litigation of native title. Despite the fact that some native title rights and interests, such as the right to hunt and fish, would be uncontroversial to the public at large, the NSW government has strongly opposed attempts to have those rights and interests recognised in a number of contested hearings.

The inability and reluctance to engage Aboriginal interests is also reflected in the manner in which native title rights and interests have been dealt with in legislation enacted since the recognition of native title. The trend in some legislation is to merely enact a clause providing that native title rights and interests are asserted to be not affected by the changes in the legislation.\(^{140}\)

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\(^{139}\) For an account of this problem see Pearson N., *Where We’ve Come From and Where We’re At With the Opportunity That is Koiki Mabo’s Legacy to Australia*, Mabo Lecture: Native Title Representative Bodies Conference, 3 June 2003, pp. 4-6.

\(^{140}\) *Forestry and National Park Estate Amendment Act* 1998 which introduced s.104A into the *Native Title (New South Wales) Act* 1994.
Alternatively, merely complying with the NTA is seen to be adequate.\footnote{See for example s.287, 
*Fisheries Management Act* 1994.} The idea that governments are adequately accommodating Aboriginal interests merely because native title rights and interests are said to be not affected by the legislation is as much a piece of fiction as the doctrine of *terra nullius* ever was.

Finally, failing to meaningfully engage Aboriginal people to determine how native title interests may be affected or otherwise protected is a significant deficiency in public administration. In relation to legislation that allows for the on-going issuing of licences that will have an affect on native title rights and interests, the effect is to create undefined liabilities for the payment of compensation. Without a mechanism to pass those liabilities on to the recipients of such licences, the compensation payable is left to the public. An added difficulty to this type of approach is that, having created the liability, governments are then under more pressure to oppose the recognition of the native title rights and interests in the Courts so that the obligation to pay compensation never crystallises.

A more equitable approach would clearly be to identify the nature of the Aboriginal interests up front or to otherwise put in place adequate measures for their protection so that there is a greater level of certainty in both the rights and interests of all concerned and any liabilities to pay compensation.

### 9.1.5 Indigenous Land Use Agreements

The NTA contains detailed provisions for Indigenous Land Use Agreements (ILUAs) which allow parties to agree on the manner in which future acts can proceed or can put in place alternative procedures on a regional or state-wide basis.\footnote{See sections 24CA-24CL and 24DA-24DM, NTA.} The use of ILUAs therefore represents an alternative, flexible option for addressing Aboriginal interests. Dealing with land management issues through ILUAs has a number of important advantages:

(a) It allows solutions to be found through processes of mutual respect and consensus rather than leaving matters for an unsatisfactory resolution in the Courts. It forms the basis of an on-going relationship that can assist in the constructive resolution of other issues as they arise.\footnote{Neate, G., “The Effectiveness of ILUA’s as a Risk Management Tool: A Mediator’s Perspective” (1999) *AMPLA Yearbook*, pp. 254-276 at p. 255.}

(b) It provides an opportunity to avoid the inadequacies inherent in many other processes. Whatever the failings of the outcome in terms of recognition, at the very least it is done by consent. The importance of this cannot be underestimated as the recognition and protection of Aboriginal interests through negotiated settlement
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overcomes some of the structural difficulties associated with the recognition of Aboriginal interests that have been outlined above.

(c) It allows agreement without the prerequisite that native title be recognised, or even addressed. That is despite the provisions allowing for ILUAs being in the NTA.

(d) It provides sufficient flexibility to allow for resolution of issues on a regional or state basis. This can assist outcomes to be crafted to meet the specific needs of a particular region.

Unfortunately, to date the ILUA procedures have not been adequately utilised by the NSW government that has instead preferred to push Aboriginal issues off to be dealt with at an undefined time in the future. In the few places where ILUAs have been used, they have not involved recognition of native title rights and interests. Furthermore, in deciding to adopt an approach of using ILUAs it is important that governments approach them in a manner that allows them to remedy the structural difficulties referred to above. This will not occur if their use is limited to only being a tool for creating certainty for non-Aboriginal interests. The difficulties facing Aboriginal people in getting the issues that they want dealt with can equally afflict ILUAs as other processes. Those representing the government need to be given a sufficient mandate to deal with the entire range of issues relevant to Aboriginal people and not hide behind existing structures and bureaucratic arrangements to avoid dealing with those issues.

9.2 The NSW Aboriginal Land Rights Act, 1983

The regime established under the NTA is not the only means by which Aboriginal interests in land have been recognised. However existing measures designed to remedy past dispossession of Aboriginal people have not been able to adequately deal with Aboriginal interests in NSW river systems.

In 1983 the NSW government enacted the Aboriginal Land Rights Act 1983 (NSW) (‘ALRA’). The Preamble sets out the remedial nature of the legislation. The ALRA recognises that many Aboriginal people had previously been dispossessed of their lands and were unlikely to be able to establish traditional connections to land, it was considered inappropriate to premise land rights legislation on establishing such a traditional connection such as that required in the Northern Territory. The legislation had the immediate effect of transferring existing Aboriginal reserves to Local Aboriginal Land Councils (‘LALCs’). The legislation also sets up a regime for

144 The Preamble to the ALRA provides: “WHEREAS: Land in the State of New South Wales was traditionally owned and occupied by Aborigines: Land is of spiritual, social, cultural and economic importance to Aborigines: It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land: It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation.”

145 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).
the claiming of land. Crown land that is not needed, nor likely to be needed, for an essential public purpose, and is not lawfully used or occupied may be claimed. The land claim process is a simple administrative procedure whereby a LALC or NSWALC lodge a document identifying the claimed land. The Minister administering the Crown Lands Act then determines whether the land is claimable or not. If it is claimable then it is transferred in fee simple to the relevant Land Council. If the Minister refuses the claim, then the Land Council can appeal to the Land and Environment Court.

This procedure has a number of benefits that reflect the needs and realities of Aboriginal people in NSW. Compared to the costly process associated with native title claims, the process for lodging land claims is very simple. It does not involve extensive evidence from Aboriginal people, nor does it require complicated historical, anthropological or archaeological enquiries.

The ALRA has also created an economic base by which 7.5% of land tax over 15 years was set aside in an account administered by NSWALC to help develop programs to assist Aboriginal people to develop a level of economic self-sufficiency. This is a genuinely beneficial measure that allows Aboriginal people to purchase lands and start other enterprises. Until the introduction of the Indigenous Land Fund at a Commonwealth level, this was a unique measure that has not been duplicated in any other legislation. However, significant shortcomings remain. As at 8 July 2003, 6985 claims had been lodged under the ALRA. A total of 3352 had been refused while 1147 remain undetermined. A total of 2060 claims had been granted resulting in the transfer of 78487ha of land. That represents about 0.1% of the total area of the State. In other words Aboriginal people in NSW do not have their ownership recognised in 99.9% of their traditional country. Compared to land rights schemes operating in the Northern Territory and South Australia the extent of land transferred has been modest. Furthermore, most of the claims granted are located in the eastern third of the State. In the Western Division of NSW, with the exception of the Winbar claim of 23000 hectares, there have been very few successful land claims and very little land returned.

The claim process has also had other failures. Often political considerations influence the Minister’s consideration of Aboriginal land claims. The Labor government’s refusal of 50 Aboriginal land claims on the same day to fulfill an election promise to create a number of new National Parks is an example. Aboriginal communities are then forced to appeal to the Land and

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146 Figures obtained from the Department of Land and Water Conservation (as it was previously known).


Environment Court to achieve the result that they should have achieved if the Minister had considered the matter properly. A further failing of the claim process has been the fact that while some LALCs have been able to lodge a number of successful claims, other Land Councils have never had a successful land claim because there is simply no claimable Crown land in their area. LALCs in the Western Division of NSW have been particularly disadvantaged in this regard. Because most agriculturally viable land has been alienated, it is not open for Aboriginal people to claim that land. It has therefore been rare for Aboriginal people to successfully claim land along river systems. Even land that may be of particular cultural significance to Aboriginal people may not be claimable, because even though they are not particularly important to the public at large, they are nonetheless lawfully used and occupied.

Another major shortcoming of the ALRA is the failure of the financial resources of the New South Wales Aboriginal Land Council to be sufficiently directed towards the acquisition of land. Instead, much of its resources have been used to fund administration and social projects. This has stifled the fulfilling of a key component of the legislation, namely the return of land to Aboriginal people.

The failings of the ALRA to deliver land justice to Aboriginal people has necessarily had an impact on the manner in which their interests in river systems can be recognised and enjoyed.

9.3 Aboriginal ownership of National Parks

In 1996 amendments were made to the NSW National Parks and Wildlife Act 1974 (NPWA) and the ALRA to enable a number of national parks to be held under Aboriginal ownership. The measure was an important one. Aboriginal ownership of national parks has proven in other jurisdictions to be extremely successful both in terms of empowering Aboriginal people and improving the management of the park.149 Indeed it was surprising that it took so long to see the value of those arrangements in NSW.

The legislative scheme in NSW allows for National Parks to be scheduled for Aboriginal ownership, subject to negotiation of a lease. Seven national parks and reserves are currently on the schedule.150 Once negotiation

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149 See for example Uluru/Kata Tjuta National Park, Kakadu National Park, Gurig National Park; Nitmulik (Katherine Gorge) National Park.
150 Biamanga National Park, Gulaga National Park, Jervis Bay National Park, Mungo National Park, Mutawintji National Park and related areas, Mount Grenfell Historic Site and Mount Yarrowyk Nature Reserve have been placed on the Schedule.
of the lease has concluded, the park is then transferred to an Aboriginal land council to be held in trust for identified traditional Aboriginal owners, and Aboriginal people are required to lease the park back to the Minister responsible for the NPWA. Rent is negotiated and if necessary arbitrated by reference to specific statutory criteria. The legislation also allows settlement of land claims over some lands by bringing them under the scheme for Aboriginal ownership of national parks.151 The regime provides a model for the meaningful involvement of Aboriginal people in land management. Unfortunately, the regime is under utilised. Only two new parks have been added to the schedule of parks since the legislation was enacted. This is despite numerous new parks being created over areas where Aboriginal people have lodged native title claims. Mutawintji National Park was handed back in 1998. No other parks on the schedule have been handed back. This places a question mark over the NSW government’s commitment to its own legislation. It also indicates reluctance or inability to implement policy arrangements that effectively integrate land rights and social justice with natural resource management.

9.4 The recognition and protection of cultural rights

Aboriginal interests in NSW river systems cannot be separated from their interests in land and the preservation of their cultural rights. In NSW Aboriginal cultural heritage is protected, to an inadequate degree, under the NPWA. When the ALRA was enacted in 1983 it was accompanied by promises that it would soon be followed by new Aboriginal cultural heritage legislation.152 The Select Committee of the Legislative Assembly upon Aborigines had recommended in 1980 that:

“The legislation establishing the Aboriginal Heritage Commission shall—
(a) Acknowledge the cultural revival occurring throughout Aboriginal Australia, particularly as it affects this State;
(b) Ensure that the people with responsibility for sites have complete control of those sites;
(c) Provide that persons who have no right in Aboriginal law to enter sacred sites or sites of significance are prevented from so doing without permission from the controlling body.”153

This recommendation was in part in recognition of the inadequacy of the existing legislative regime in place in NSW for the protection of Aboriginal cultural heritage and also in recognition of the importance of those sites of

153 First Report of the Select Committee of the Legislative Assembly upon Aborigines, August 1980, p. 120.
significance to Aboriginal people.\textsuperscript{154} When the \textit{Aboriginal Land Rights Bill} 1983 was put before Parliament, it was not accompanied by further heritage protection legislation as recommended by the Select Committee. The Minister for Aboriginal Affairs advised Parliament:

"\textit{Land and the law affected by legislation in this area is highly complex, because of its religious and spiritual nature. It is my intention to seek the assistance of the new Aboriginal councils that will be formed under the proposed legislation before introducing an Aboriginal Heritage Commission Bill for the protection and ownership of sacred and significant sites.}"\textsuperscript{155}

Since 1983 there have been several consultation exercises in an attempt to draft heritage legislation. These have been unable to convince the government to implement their recommendations. In 2001 Parliament made the only small changes since 1974 to the legislation affecting Aboriginal heritage.\textsuperscript{156} Implementation of even these small changes have been delayed by government. The only change commenced to date is to replace the blatantly offensive term ‘relic’ with the more neutral ‘Aboriginal object’.\textsuperscript{157} The offensive wording continues, however, as the term ‘object’ still includes Aboriginal remains! Parliament and Aboriginal people still wait for the commencement of the amendment that changes the offence ‘knowingly destroy’ to the stronger ‘destroy’ (an Aboriginal object) in s.90 of the \textit{NPWA}.\textsuperscript{158} The inability of successive governments to deliver even the modest recommendations of the 1980 Select Committee indicates that Aboriginal heritage is still treated as a nuisance or an impediment to economic development and will still be decided on within the non-Aboriginal terms of reference.

The \textit{NPWA}, insofar as it relates to the protection of Aboriginal cultural heritage, remains inadequate and offensive to Aboriginal people who remain, by and large, sidelined from key decisions relating to the well being of their cultural heritage. The \textit{NPWA} defines an “Aboriginal object” as “any deposit, object or material evidence (not being a handicraft made for sale) relating to Indigenous and non-European habitation of the area that comprises NSW, being habitation both prior to and concurrent with the occupation of that area by persons of European extraction and includes Aboriginal remains.”\textsuperscript{159} 

\textsuperscript{155} Minister for Aboriginal Affairs Frank Walker as quoted in Wilkie, M., \textit{op. cit.}, p. 107.
\textsuperscript{156} Parts of the National Parks and Wildlife Amendment Act 2001 No 130.
\textsuperscript{157} Schedule 1, Clause 1 commenced 4/10/02.
\textsuperscript{158} It remains a defence to such an action that the person took reasonable precautions or reasonably believed that the activity would not cause such destruction; see s.90 (1) (A).
\textsuperscript{159} “Aboriginal remains” are defined as: “... the body or the remains of the body of a deceased Aboriginal, but does not include; a body or the remains of a body buried in a cemetery in which non-Aboriginals are also buried, or a body or the remains of a body dealt with or to be dealt with in accordance with a law of the State relating to medical treatment or the examination for forensic or other purposes, of the bodies of deceased persons.”
83, NPWA *inter alia* deems any ‘Aboriginal object’ to be Crown property and no compensation is payable for such a vesting. In 1996, amendments were made to the NPWA providing the Director-General with a discretionary power to return Aboriginal objects to the traditional owners of those objects or dealing with them in accordance with the reasonable instructions of the traditional owners, but the exercise of that power remains discretionary.

The definition of the cultural heritage that receives protection under the NPWA is inadequate. It emphasises archaeological aspects of Aboriginal cultural heritage and provides inadequate recognition to broad notions of Aboriginal relationships to land and sites. This selective protection is just another form of fragmentation of Aboriginal interests by the NSW legal system.¹⁶²

The inadequacy of the NPWA to adequately protect areas of post-contact significance has also been noted. Byrne et al have noted that:

> “Effectively, the Aboriginal presence and experience in the local landscape after the time of white settlement is erased from public view. What is publicly visible as a landscape is a landscape filled up with the heritage of white settlement, one in which there is no space for the heritage of the Aboriginal experience.”¹⁶⁴

The NPWA allows for lands to be declared to be an “Aboriginal place”. The care, control and management of Aboriginal places is vested in the Director-General of the National Parks and Wildlife Service (‘NPWS’). An “Aboriginal place” is one which, in the opinion of the Minister, “is or was of

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¹⁶⁰ Section 83(3), NPWA. See also s.33D(4) of the *National Parks and Wildlife Act 1967*.

¹⁶¹ *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996*, Clause 34, Schedule 1, introducing s.85A into the NPWA.


¹⁶³ A discussion paper released by the NPWS has noted that:

“One of the most striking features of Aboriginal Sites Register (maintained by NPWS) is that of more than 30,000 ‘sites’ recorded only a few hundred relate to the period of the last 213 years. The rest are precontact sites. Of the 17,500 sites on the NSW States Heritage Inventory that relate to the State’s 213 year history since 1788, only seven have been placed there for their value to Aboriginal heritage.”


¹⁶⁵ Section 85(2), NPWA. The NSW Government has recently announced that it intends to consolidate a number of agencies including NPWS, the Environmental Protection Authority and the Royal Botanical Gardens into the Department of Environment and Conservation (DEC). By virtue of the *Public Service Employment and Management (Environment and Conservation) Order 2003*, s.6, any reference in any document to the NPWS is taken to be a reference to the DEC and any reference to the Director General of the NPWS is to be construed as a reference to the Director General of DEC.
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special significance with respect to Aboriginal culture". Such a declaration can relate to lands whether they are in public or private ownership. Any place on which an Aboriginal "object" or "Aboriginal place" is situated may be declared and protected as an "archeological area". The Director-General has a discretionary power to give directions regulating the entry on to and use of Aboriginal places and archeological areas.168

Not only does that NPWA vest ownership of Aboriginal cultural heritage in the Crown without compensation but it gives NPWS extensive control over that heritage. The Director-General is responsible for "the proper care, preservation, and protection of any Aboriginal object or Aboriginal place on any land reserved" under the Act and is responsible "for the proper restoration of any such land that has been disturbed or excavated for the purpose of discovering an Aboriginal object."169

With regard to the protection afforded by the NPWA, s.86 makes it an offence for a person, other than with the authority of the Director-General to disturb or excavate land to remove an object, disturb or move any Aboriginal object that is the property of the Crown, take possession or remove an object from land under the control of the NPWS. But the Director-General has the power to permit any of these offences under the terms and conditions that he or she thinks fit.170 In addition, s.90 allows the Director-General to give consent to destroy Aboriginal places or Aboriginal objects.

In a context where, in the past 20 years, there has clearly been a growing understanding of the importance of Aboriginal cultures to Aboriginal people, and in the context of Australia’s international obligations in relation to that cultural heritage, the regime established by the NPWA remains unacceptable legislation. It is inadequate in its assumptions as to ownership of cultural heritage, the regime for protection and is incapable of providing protection for the full range of forms that Aboriginal cultural heritage in river systems may take. It’s inadequacy is illustrated by the fact that such an important cultural site such as Boobera Lagoon was not protected under the NSW legislation and only gained a level of protection by virtue of Commonwealth legislation.171

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166 Section 84, NPWA.
167 Section 65, NPWA. The offence that may be caused by declaring areas which contain skeletal remains an “archaeological area” perhaps need not be explained other than to suggest the outrage that would be caused if the cemeteries of white society were given the same classification.
168 Section 66, NPWA.
169 Section 85, NPWA. The requirement to restore does not relate to damage done under a permit granted under s.87, NPWA.
170 Section 87, NPWA.
171 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). This Commonwealth protection is only temporary and there are negotiations currently to secure long term protection for Boobera Lagoon under NSW legislation. The NPWA is proving little use for this purpose, obliging the local Aboriginal people to explore arrangements under the Crown Lands Act 1989.
9.5 The recognition and protection of Aboriginal hunting and fishing rights

The traditional hunting and fishing practices of Aboriginal people are protected to a limited degree by a number of exemptions from licensing regimes and prohibitions on the taking of flora and fauna. In relation to fishing in NSW rivers Aboriginal people do not require a fishing permit in order to carry out those activities. The *National Parks and Wildlife Regulations* also exempt Aboriginal people from offences relating to taking protected flora and fauna.

To the extent that traditional hunting and fishing rights can be established as an incident of a native title right or interest, then those activities now also receive the protection of the NTA. Section 211, NTA applies to hunting, fishing, gathering and cultural and spiritual activity and other prescribed activities. It has the effect of preserving those interests if a law of the Commonwealth or the States prohibits similar activities other than in accordance with "a licence, permit or other instrument granted or issued to them under the law" and the law is not one that confers rights or interests only for the benefit of Aboriginal peoples. Aboriginal peoples are able to carry on those activities as long as it is for non-commercial needs and in the exercise of native title rights.

However, allowing the activity to occur does not necessarily protect the continuing enjoyment of those rights and interests. There is little point in being able to hunt, fish and gather if the resource is so depleted that there is nothing to catch. Furthermore, the enjoyment of those rights and interests is premised on the ability of Aboriginal people having access to areas where those rights can be exercised.

With the dispossession of Aboriginal people of their traditional lands the ability to enjoy traditional hunting and fishing activities has also been restricted. The ALRA has not caused the return of large areas of land that can be used for traditional activities, nor has the Court recognised the co-existence of native title rights and interests in relation to western lands leases. Part 8 of the ALRA contains provisions for access arrangements to be negotiated between a LALC and the owner or occupier of land for the purposes of hunting, fishing and gathering. Where such an agreement has not been able to be negotiated the LALC can apply to the Land and Environment Court for a permit allowing such access. Part 8 does not, however, extend to enabling access for other purposes, such as visiting sites of significance. Any such

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172 Section 34C(2)(f), *Fisheries Management Act* 1994.
174 Section 211(3), NTA.
175 Section 211(1), NTA.
177 Section 47, ALRA.
178 Section 48, ALRA.
access arrangement is subject to "the provisions of any other Act and any rule, bylaw, regulation, ordinance or like instrument". The operation of this type of agreement therefore does not have the same scope as s.211 of the NTA. Part 8 of the ALRA has been rarely used and its scope is untested in court. This is a matter discussed in more detail below.

9.6 Aboriginal involvement in water and other resource management

In recent years there has been an increasing recognition of the valuable part that Aboriginal people can play in the management of natural resources. This acknowledgement has in part coincided with the global recognition reflected in Art. 8(j) of the International Convention on Biodiversity. The recognition of native title has also acted as an incentive to the involvement of Aboriginal people in resource management.

There is however a discrepancy between Aboriginal perceptions of what constitutes an appropriate level of involvement in the management of natural resources and the government's willingness to accommodate those perceptions. Aboriginal people want to be involved in the management of resources, not merely consulted in relation to them. When Aboriginal interests in resource management are reduced to consultation there is no obligation to meaningfully address their concerns. Consultation processes only place Aboriginal interests in competition with a range of other interests which then need to be considered in the decision making process. The result may be no different than if the consultation had not occurred in the first place.

Even where Aboriginal people are involved in planning processes, that involvement is meaningless unless they are properly resourced to participate in an informed manner. There may be complicated scientific and legal issues to be dealt with that are difficult for some Aboriginal people to understand. These difficulties are exacerbated where other participants in the process are well-resourced government agencies, environment groups and industry bodies. The complexity of the issues that are required to be dealt with can also be intimidating for Aboriginal participants. Without adequate support Aboriginal participants may not be able to respond or deal with those issues to ensure that their interests are protected. Of equal concern is the fact that Aboriginal people are not resourced to examine all the options that may be available to remedy or accommodate any concerns that they may have. The range of possible outcomes is instead dictated by the interests and agendas of other

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179 Section 47, ALRA.
181 The Boomanulla Statement noted that there was "imbalance of power on committees between Aboriginal representatives and white, technical, commercial and community representatives" which needs to be addressed: Bruce Callaghan & Associates Pty Ltd, Report on the Boomanulla Conference for Country 5-6 March 2002, p. 11.
participants. The processes themselves may operate on time frames that do not allow those participating to take matters back to their communities so that they can be discussed in an appropriate manner. Governments need to realise that there are no short cuts to involving Aboriginal people in resource management. As Maureen Tehan has noted the “seeds of on-going dispute are to be found in regimes which fail to recognise Aboriginal interests in land and fail to allow adequate time and resources for decision making about developments and protection of country.”

Tokenistic processes neither achieve the goals of involving Aboriginal people in the planning process nor do they appease the concerns of Aboriginal people. It is a lose/lose outcome. The seemingly endless litigation associated with the Lake Cowal gold mine and the Sandon Point Development illustrate how the failures for the proper involvement in planning processes creates on-going Aboriginal community discontent, added expenses to governments and uncertainty for developers and other users of the resource.

It should be noted that the NTA goes nowhere near allaying these concerns. On the contrary, it duplicates many of the problems. In the first place it only has operation in relation to the discreet areas where native title exists. As noted above these areas are not co-extensive with Aboriginal interests under their own laws and customs. The scope for Aboriginal involvement under the NTA, even where native title does exist is varied. Different procedural rights exist in relation to different kinds of acts. A right to negotiate exists in relation to certain mining acts and compulsory acquisitions. In other instances

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182 Aboriginal participants at the Boomanulla Conference complained that the “natural resource plans set the agenda of natural resource management in a manner which does not adequately assess/address likely impacts on the livelihoods of Aboriginal people. It is extremely difficult for Aboriginal people to be heard when the scope is limited to pre-defined environmental and scientific matters”: Bruce Callaghan & Associates Pty Ltd, Report on the Boomanulla Conference for Country 5-6 March 2002, p. 6.


186 Sub-division P, NTA.
Aboriginal people will be afforded the same procedural rights as other landholders. Other provisions confer only a right to "comment" on Aboriginal people, and even that limited right has been read narrowly. A further aspect of "consultation processes" is that they can be seen as merely an information retrieval exercise whereby Aboriginal knowledge of natural environments in particular localities is obtained by government departments and employees who then use that information to increase their own expertise and to implement management strategies. Aboriginal people do not always get credit for that knowledge, are not always remunerated to convey that knowledge and do not always share the benefits of the use of that knowledge. Aboriginal people are increasingly becoming aware that their knowledge is a valuable commodity and are understandably becoming increasingly reluctant to relinquish that environmental knowledge to well resourced and well funded bodies as a form of charity. Failure of governments and their agencies to deal with Aboriginal people in a manner which is similar to the way they treat all other consultants will only increase barriers to the passing on of knowledge which could progress the better management of NSW river systems.

The Aboriginal voice should be heard and given effect by governments. Aboriginal people have been here since the beginning of time, now make up a significant proportion of the lifetime residents of many regions and Aboriginal people are here to stay. As well as Aboriginal to government negotiations, autonomous Aboriginal networking should be supported to allow policy and negotiating strategy to be developed by Aboriginal peoples.

10. ABORIGINAL INTERESTS IN RIVERS AND WATER REFORM IN NSW

The practical consequences of the fragmentation of Aboriginal interests in the landscape is exemplified in recent water reform measures introduced in NSW. Aboriginal people have historically not participated in industries involving water extraction from rivers other than as a labour force. They have however paid the price of the over allocation of the water licences and the impact that has had on NSW river systems. In their joint submission to the NSW government in relation to the Water Management Act 2000 NSWALC and New South Wales Native Title Services Ltd (NSW NTS) explained that the over-allocation of water in NSW river systems "has resulted in serious injustice and inequity to Aboriginal people in a number of specific ways" and cited the following examples:

(a) "Aboriginal health in rural and remote areas is directly connected to the health of the aquatic ecosystems. The deterioration of the

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187 See ss.24MA, 24KA(7) and 24MD, NTA.
188 See ss.24GB(9)(d), 24GD(6)(b), 24GE(f)(ii), 24HA(7)(b), 24JB(6)(b) and (7)(b).
waterways has been dramatic in respect of each of the relevant indicators. Algal blooms, dry land salinity, fish kills, acidity all relate in some way to the over-allocation of the water and the uses to which it is put. This has all occurred with the sanction of the government.

Aboriginal people in rural and remote areas rely on the waterways for consumption, recreation, sewerage, spiritual, cultural, economic, social and travel purposes. If the aquatic ecosystems are unhealthy, the Aboriginal community reliant upon that ecosystem is affected in dimensions not experienced by the rest of the community.

(b) Aboriginal people have been deprived of the ability to carry out their customary and spiritual obligations to care for their lands and waters. The only use that has had any protection is economic use.

(c) Aboriginal people have been deprived of the ability to participate in the proposed water market by reason of historical injustices, it is now not possible to participate without buying in.\(^{190}\)

The Water Management Act 2000 (NSW) provides for a significant change to the manner in which water resources are managed in NSW, particularly in relation to what were previously unregulated rivers. One feature of this regime is that it requires the preparation of water sharing plans. The preparation of these plans requires an identification of the various needs of the environment and water users.

Having taken the important decision to undertake such significant reforms, a rare opportunity was presented, as part of that process, for the NSW government to more fully protect the interests of Aboriginal people in river systems. It also represented an opportunity to secure to them a genuine and equitable share of an important resource. Instead, while there is scope, within the new legislative scheme, for the protection of some Aboriginal interests in water, the reality is that the initiatives in the legislation are, in their current form, largely unenforceable, and without supplementary measures are unlikely to bring about significant change for Aboriginal people.

10.1 The Water Management Act, 2000 and the recognition of Aboriginal interests in water

On the surface the WMA appears to make some important statements in relation to Aboriginal interests in water. The stated objects of the WMA are a step in the right direction. They rightly espouse the need for Aboriginal people to share in the benefits of water resources.\(^{191}\) The water management principles set out in the WMA include that:


\(^{191}\) Section 3 of the WMA sets out the objects of the legislation. Relevantly, the objects include: "... to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular: ... (c) to
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- Geographical and other features of indigenous significance should be protected; and
- Geographical and other features of major cultural, heritage or spiritual significance should be protected; and
- The social and economic benefits of the community need to be maximised.\(^{192}\)

Section 6, WMA requires a State Water Management Outcomes Plan ("the Outcomes Plan") to be established. The Outcomes Plan sets out "the overarching policy context, targets and strategic outcomes for the development, conservation, management and control of the State’s water sources."\(^{193}\) It is designed to establish "short term targets" and to promote the objects of the WMA in "more specific and tangible ways,"\(^{194}\) although these are not intended to be exhaustive. The short-term targets insofar as they expressly refer to Aboriginal people include:

**Target 7:** Mechanisms in place to enable Aboriginal communities to gain an increased share of the benefits of the water economy.\(^{195}\)

**Target 13:** The knowledge sharing, training and resources necessary to ensure that Aboriginal people have the capacity to be effectively involved in water management identified and addressed.\(^{196}\)

**Target 14:** Water sources, ecosystems and sites of cultural or traditional importance to Aboriginal people identified, plans of management prepared, and measures put in place to protect and improve them.\(^{197}\)

It also sets in place 'long term' targets. Relevantly, in the context of social outcomes, these include:

"Aboriginal traditional and contemporary dependencies on, and cultural association with water protected and improved. In particular: ...
(c) Economic access to water increased,
(d) Cultural and customary associations with water protected,
(e) Opportunities for learning and information improved, and
(f) Capacity for Aboriginal people’s involvement in water management increased."\(^{198}\)

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\(^{192}\) Section 5(2)(e)-(g), WMA.

\(^{193}\) Section 6, WMA. See also *State Water Management Outcomes Plan*, Ch.1, Part 1, p. 1.

\(^{194}\) State Water Management Outcomes Plan, Ch.1, Part 1, pp. 1-2.

\(^{195}\) *State Water Management Outcomes Plan*, Ch.2, Part 2, Division 3 (Legal Access Entitlements), p. 9.

\(^{196}\) *State Water Management Outcomes Plan*, Ch.2, Part 2, Division 5 (Cultural Needs) p. 11.

\(^{197}\) *State Water Management Outcomes Plan*, Ch.2, Part 2, Division 5 (Cultural Needs), p. 11.

\(^{198}\) *State Water Management Outcomes Plan*, Ch.2, Part 2, Division 5 (Cultural Needs), p. 11.
While there is a recognition of Aboriginal interests in the stated objects of the WMA and the water management principles, that recognition in each instance is one of a number of broadly identified interests. Those objects identify the broad range of goals which the WMA has and they are not of themselves enforceable other than to the extent identified in other provisions of the WMA. In this regard s.9(1) of the WMA provides that it is the ‘duty’ of all persons exercising functions under the WMA “to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles”. Section 9(2), WMA provides that “it is the duty of all persons involved in the administration of this Act to exercise their functions under this Act in a manner that gives effect to the State Water Management Outcomes Plan.” These provisions make the objects of the Act and the Outcomes Plan relevant to testing the manner in which functions under the Act are carried out. It does not guarantee outcomes.

10.2 The protection of Native Title rights and interests in the Water Management Act, 2000

Apart from the requirements to deal with native title in the Water Sharing Plans (WSPs) the WMA itself only provides the most minimal of protections of native title rights and interests. Section 55, WMA provides:

(1) A native title holder is entitled, without the need for an access licence, water supply work approval or water use approval, to take and use water in the exercise of native title rights.

(2) This section does not authorise a native title holder:

(a) to construct a dam or water bore without a water supply work approval, or

(b) to construct or use a water supply work otherwise than on land that he or she owns.

(3) The maximum amount of water that can be taken or used by a native title holder in any one year for domestic and traditional purposes is the amount prescribed by the regulations.

In the first place, an entitlement to extract water does not ensure that there is any water to extract or that the water is of consumable quality. The protection of any native title entitlement to extract water is itself inadequate.

198 State Water Management Outcomes Plan, Ch.2, Part 1, Division 2 (Social Outcomes), p. 6.
199 Furthermore, stating that a particular matter should be ‘increased’ or ‘improved’ is no guarantee that the outcome will be adequate for Aboriginal people. Indeed the potential remains for the measure to be little more than tokenistic.
200 Section 55, WMA is, at the time of writing, yet to commence operation.
201 While that may in part be the purpose of water sharing plans, as discussed below, these plans have proven to be less than adequate. In any event they require the quality of water flow to be negotiated with other stakeholders and there is no guarantee that the outcome will be at a level that sustains the interest. It can also be contrasted to the position accepted in the
Secondly, the NSW NTS has pointed out that there is a risk that broader native title rights may not be recognised. If there is a determination that native title that in effect allows the extraction of water in a manner in excess of the formula set out in s.55 then issues of compensation will arise. At the very least the protection of those rights will not be guaranteed.

Thirdly, as NSW NTS has also noted, s. 55 “adopts a ‘frozen in time’ approach to Aboriginal economic use of water resources by limiting them to domestic and traditional purposes. The pressures on Aboriginal communities in contemporary society are such that subsistence economies can no longer be viably maintained. Aboriginal communities have to develop in order to provide a means of economic independence for their communities.” The need for Aboriginal communities to have sufficient access to water to ensure the continuation of traditional activities, and to enable the use of traditional lands to evolve to meet the changes brought by European colonisation, has been guaranteed and recognised in the United States through treaties signed in the mid 1800’s. It is unfortunate that in the year 2000 the NSW government still could not guarantee a more generous entitlement to the resource.

Finally, and most fundamentally, s.55 treats the entire interest of Aboriginal interests in waters as though it is coextensive with native title rights. This ignores the limitations of native title and the human rights and social justice basis for the recognition of traditional interests in water.

The inadequacy of s.55 is compounded by the fact that it is difficult to identify the protection that it will afford that is not already protected under s.211 of the NTA. The contradictions inherent in the measure are apparent when it is considered that the NSW government has actively argued that no native title exists in NSW river systems. If the government was committed to recognising and protecting Aboriginal interests in river systems then a different approach should have been adopted. The right could easily be recognised as an Aboriginal right and not left to the uncertainties and expense of Court processes associated with native title in order to secure their protection.

United States where the quality in flow is guaranteed and the Indigenous interests take priority: see generally Becker, H., “Aboriginal Water Rights”, Rivers, Vol. 2, No: 1, 1991, pp. 66-73 and United States v Walker River Irrigation District (1939) 104 F.2d 334 at 339. It would have been open for the Government to provide a similar guarantee in the WMA had it wanted to do so.


10.3 Procedural rights under the Commonwealth *Native Title Act* 1993

In addition to the procedures under the WMA, there is also a requirement that the Minister complies with the NTA. Under s.24HA, NTA the Minister is required to give notice of an act affecting native title to native titleholders, registered native title claimants, and the Aboriginal representative body. Native titleholders and the registered claimants are to be afforded an opportunity to comment on the doing of the act. The procedural rights in s.24HA(2) only relate to the grant of a licence covered by s.24HA(2). A WSP does not fall within this category even though a WSP may affect the manner in which such licences are issued.

The procedural rights in s.24HA(7) will be triggered when a particular licence is issued in accordance with the WSP. Whether the issuing of the licence complies with a WSP may be a matter in relation to which native titleholders will comment when that arises. It is necessary to note however, that as the law currently stands the WSPs will not be invalid for a failure to comply with s.24HA although other equitable remedies may be available. Exactly what these may be is unclear. The continuing operation of the *Racial Discrimination Act*, 1975 may also mean that other procedural rights may need to be afforded to the extent that they are enjoyed by other titleholders.

10.4 Aboriginal involvement in the preparation of Water Sharing Plans

The process for establishing Water Sharing Plans (WSPs) is triggered either in the establishment of a management committee, or by subsequent Ministerial order. Aboriginal people are entitled to be represented on management committees but because there are at least 11 members on such committees, they will always be a significant minority on the committee. Where the plan is prepared by the management committee, the draft WSP is to be prepared in accordance with the terms of reference specified in the order. Furthermore, in the draft WSP, the management committee “must have regard to the socio-economic impacts of the proposals considered for inclusion in the draft plan.” In preparing a draft WSP, notification is supposed to be given to a limited number of bodies but failure to provide notice does not result in

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206 Section 24HA(7)(a), NTA.
207 Section 24HA(7)(b), NTA.
210 Section 15(1), WMA.
211 Section 13, WMA.
212 Section 15(2), WMA.
213 Section 18, WMA.
214 Section 36 WMA. Notice needs to be given to each local council, each catchment management committee, each holder of a licence and such other person that the Minister determines.
invalidity of the WSP. After the draft WSP is prepared it is referenced to the Minister and if the Minister is not satisfied that the plan complies with the WMA, the Minister refers the draft WSP back to the management committee.

Once the Minister is satisfied that the draft WSP is suitable for public exhibition, the Minister must give public notice which specifies the places, dates and times during which the draft plan may be inspected in public. Any person can make submissions on the draft WSP. The submissions are then sent back to the management committee and upon its consideration of those submissions, the management committee resubmits the draft WSP to the Minister along with their comments on the submissions made.

Upon this procedure being followed, the Minister then makes the WSP either in accordance with the recommendations of the committee or with such changes as he considers appropriate. Section 41, WMA provides that the Minister can only make a decision to make the plan “after complying with the requirements of this Part.”

Because Aboriginal people are represented on water management committees there is some scope for their input into those plans. A number of the WSPs have some specific measures that may indicate some proactive Aboriginal involvement in their development. For example cl.33 of the WSP for Apsley River Water Source 2003 provides that:

1. The Minister should seek the views of the Amaroo Local Aboriginal Land Council in relation to all new access licence applications.
2. The Minister should consider any advice provided under sub-clause (1) before determining the access licence application.

This in effect provides a right to comment on new access licences for the Local Aboriginal Land Council that is not dissimilar to the right afforded under s.24HA of the NTA. It is not clear how significant this is without understanding the likely demand for new licences in that area. A variation of this is provided for in cl.34 of the WSP for the Dorrigo Plateau Surface Water Source 2003 that provides:

The Minister will seek the views of the Dorrigo Plateau Local Aboriginal Land Council and/or the relevant Elders group on all new licence applications in relation to the impact on sites of significance and appropriate mitigation measures.

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215 Section 36(3), WMA.
216 Section 37(2), WMA.
217 Section 38, WMA.
218 Section 39, WMA.
219 Section 40, WMA.
220 Section 41, WMA.
221 That is reference to Part 3 of the WMA which covers the entire regime for making WSPs.
222 A similar clause appears in the WSP for the Commissioners Waters Water Source 2003 (cl.33) in relation to Armidale Local Aboriginal Land Council and in the WSP for the Toorambee Creek Water Source 2003 (cl.30) in relation to Bellbrook Local Aboriginal Land Council.
The WSP for the Dorrigo Plateau Surface Water Source also provides for Unregulated River (Aboriginal Commercial) Access Licences for Aboriginal communities and Aboriginal persons.\(^{223}\)

It is the only WSP we perused which had such a provision, although a number of other plans provided for Unregulated River (Aboriginal Cultural) Licences. Another feature of the WSP for the Dorrigo Plateau Surface Water Source relates to the granting of unassigned Total Daily Extraction Limits ("TDEL"). Clause 51(7) provides that:

Following any assignment of unassigned TDELs in accordance with subclause (3), and any further amendment to the unassigned TDELs in accordance with subclause (5), 50% of the remaining unassigned A and B class TDELs in each zone will be included as unregulated river (Aboriginal cultural or commercial) TDELs in clause 48(4).

The clause is interesting in that it is the only example in the WSPs we perused which contained any mechanism for distributing unallocated extraction limits to Aboriginal people.

However, it also highlights the level at which Aboriginal interests are treated in the plans. Although, as a matter of theory an allocation can be given to Aboriginal people, the operation of cl. 51(3) of that WSP means that allocation will only be given if "the very low flow level in the zone is increased" and the Minister does not distribute all the extra allocation to 'existing' unregulated river access licences. Furthermore, because many rivers are over allocated, the duplication of such a clause in other WSPs is unlikely to deliver any benefits to the communities concerned. The priority with which Aboriginal interests in the resource are treated can be compared to the more generous approach in the United States where it is the Aboriginal needs which are prioritised.\(^{224}\)

Most WSP's do not have a clause such as that contained in the Dorrigo Plateau Surface Water Source WSP. The reason for this is unclear. Further investigation is needed to determine the reasons. It is however clear from at least one WSP that the ability for Aboriginal people to participate in the WSP processes may be subject to many of the problems identified at the Boomanulla Conference referred to above. For example, the WSP for the Commissioners Waters Water Source (at p.37) states:

Aboriginal community representatives have been involved in development of this Plan, but it is unlikely that the broader Aboriginal communities have been given enough capacity to deal with the issues.

\(^{223}\) WSP for Dorrigo Plateau Surface Water source and the Dorrigo Basalt Groundwater Source 2003, cl.80.

The ability for tangible measures to be included in the WSPs would be assisted by such measures as:

(a) Providing representative Aboriginal organisations with adequate resources to provide participants with the expertise, including legal resources and other expertise, to assist them in formulating clauses in the WSPs which will provide for cultural protection, recognition of native title and the issuing of water access licences to Aboriginal people (and/or the funds for them to buy licences on the market).

(b) The preparation of information packages, or the holding of information sessions, to assist people to understand the importance of the management regimes and the need for their interests to be acknowledged and protected in the WSPs. It should also seek to assist them to identify their options for achieving outcomes in the WSP process.

(c) Aboriginal participants will also be assisted by the preparation of documents to form the basis of submissions in relation to Aboriginal water needs. To the extent that localised reports can be prepared, they would be of even greater assistance.

(d) The preparation of documents that can set out the socio-economic impacts on Aboriginal people by the current regime, and any proposed changes to the existing water regimes will also assist Aboriginal participants and the planning process generally.

10.5 The inadequacy of Water Sharing Plans in relation to Indigenous interests

While it is beyond the scope of this paper to consider the manner in which all of the Water Sharing Plans (WSPs) have accommodated Aboriginal interests and implemented the policy goals set out in the objectives of the WMA and the Outcomes Plan, a consideration of some of the plans gives cause for concern that they have been inadequate in pursuing those goals.

WSPs are significant planning documents even though they are yet to commence operation. Once they commence, they operate for 10 years. The failure to adequately address Aboriginal interests will perpetuate inequities for a considerable period of time. The following matters give rise for concern:

(a) While some WSPs refer to the objective of recognising and protecting traditional values of water to Aboriginal people, others do not refer to Aboriginal people’s interests in the objectives at

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225 WSP for the Karuah River Water Source, cl.11; WSP for the Apsley River Water Source 2003, cl.11; WSP for the Commissioners Waters Water Source 2003, cl.11; WSP for the Toormbee Creek Water Source, cl.11; WSP for the Jilliby Jilliby Creek Water Source 2003, cl.11; WSP for the Wandalla Creek Water Source 2003, cl.11; and WSP for the Tenterfield Creek Water Source 2003, cl.11.
Some WSPs merely seek to equate Aboriginal interests in waters as being co-extensive with environmental strategies. Accordingly, no specific strategies are developed to protect those interests.

(b) Most of the WSPs refer to the need to identify the “extent of spiritual, social and customary values of water to Aboriginal people” in their performance indicators. The Aspley River WSP (cl.13) also refers to the “change in consultation on Aboriginal values in water licensing decisions”, while the WSP for the Commissioners Waters Water Source also refers to the “extent to which native title rights requirements have been met”.

(c) The manner in which performance indicators are to be met are supposed to be set out in the Appendix to each plan. In relation to spiritual and cultural values, and the native title rights and interests, the WSPs generally only describe a process for identifying those values which need protecting, although some also refer to consultations to minimize effects. None of the WSPs we perused have performance indicators in relation to economic values.

226 WSP for the Mandagery Creek Water Source, cl.11.
227 The Lachlan WSP is express in this approach:

“(d) water management that recognizes, respects and incorporates the spiritual, economic and aesthetic values of the water source to provide for the following outcomes:
(i) the recognition and protection of the traditional rights of Aboriginal people;
(ii) the protection of sacred sites;
(iii) the maintenance of traditional rights of access to birds, fish, crustacean and other traditional foods; and
(iv) the protection of the cultural, spiritual and identity aspects of rivers and wetlands.
Note: Although there are no specific strategies directly related to this objective in this Plan, the environmental water provisions in the Plan contribute to providing the specified outcomes.”

229 See also WSP for the Commissioners Waters Water Source 2003, cl.13.
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important to Aboriginal people or benchmarks for achieving the recognition of those values.

(d) Native title rights are supposed to be given substantive consideration in the WSPs. The water sharing provisions of a WSP "must deal with the identification of requirements for water within the area to satisfy basic landholder rights". Basic landholder "rights" include native title rights and interests. The inadequacy of the manner in which native title is dealt with is highlighted by what appears to be a standard clause that appears in every WSP. The standard clause is as follows:

"(1) At the commencement of this Plan the water requirements of holders of native title rights are a total of 0 ML/day.
(2) This Plan recognises that the exercise of native title rights may increase during the term of this Plan.
Note. Increase in the use of native title rights may occur as a result of the granting of native title rights under the Commonwealth Native Title Act 1993."

Many WSPs do not allocate any water flow for native titleholders. At least one WSP makes a nominal allocation of 0.01ML. In addition to being based on an erroneous assumption that native title is 'granted' rather than being a pre-existing right, the approach towards native title constitutes a 'don't worry about it until it arises' approach. This is a far from satisfactory management tool. Furthermore, the approach appears inconsistent with s.20 (1) of the WMA.

(e) A brief perusal of some of the WSPs shows how easily broad policy principles are lost in the details of preparing WSPs. While both the objects of the WMA and the Outcomes Plan refer to economic benefits, the WSPs are not specifically aimed at that purpose. Target 7 of the Outcomes Plan is a crucial target in that it expressly refers to relevant economic benefits for Aboriginal people. The WSPs deal with Target 7 of the Outcomes Plan to varying degrees. Some WSPs do not refer to the target at all. Other plans

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233 Section 20(1)(b).
234 WMA, Dictionary.
235 WSP for the Mandagery Creek Water Source 2003 Order, cl.27; the WSP for the Karuah River Water Source 2003 Order, cl.27; WSP for the Dorrigo Plateau Surface Water Source and Dorrigo Basalt Groundwater Source 2003, cl.28; the WSP for the Commissioners Waters Water Source 2003 Order, cl.27; WSP for the Toorunbee Creek Water Source 2003 Order, cl.24; WSP for the Jilliby Jilliby Creek Water Source 2003 Order, cl.27; the WSP for the Wandella Creek Water Source 2003 Order, cl.27; and the WSP for the Tenterfield Creek Water Source 2003 Order, cl.27.
236 WSP for the Apsley River Water Source 2003 Order, cl.27.
refer to the fact that "the Government has established other mechanisms to address this target."\textsuperscript{238} It is not clear what those other mechanisms are, or what relevance they have to the particular river under consideration. Other WSPs refer to the fact that licences can be granted under the plan for cultural purposes,\textsuperscript{239} although those licences may not be consistent with what Aboriginal people expect to be covered by references to an "increased share in the benefits of a water economy" which is identified in Target 7 of the Outcome Plan. The Mandagary Creek WSP also refers to the plan that "provides water market opportunities within this water source,"\textsuperscript{240} but it is not clear from the WSP how Aboriginal people benefit from that other than in common with the broader community. Other WSPs refer to the measures which exempt access for Aboriginal cultural purpose from licence embargoes,\textsuperscript{241} but in some instances that benefit also applies to local water utility access licence, and domestic and stock access licences and so therefore it is hardly exceptional. The Karuah River WSP states that:

The Government has yet to establish these mechanisms and therefore these early plans cannot effectively address these targets.\textsuperscript{242}

\textbf{(f)} While most of the WSPs refer to Targets 13 and 14 of the Outcomes Plan, which relate to the protection of Aboriginal sites of significance and cultural values, this is not true for all. The WSP for the Lachlan Regulated River Water Source for example states that:

The Plan does not address specific Aboriginal cultural or traditional requirements and has not identified any sites of particular importance. It is likely that the environmental flow rules in the Plan will contribute to protection.\textsuperscript{243}

\textsuperscript{238} WSP for the Mandagery Creek Water Source 2003, p.42; WSP for the Dorrigo Plateau Surface Water Source and Dorrigo Basalt Groundwater Source 2003, p. 53; WSP for the Toorumbee Creek Water Source 2003 Order, p.27; WSP for the Dorrigo Plateau Surface Source and the Dorrigo Basalt Groundwater Source 2003, p. 35; WSP for the Commissioners Waters Water Source 2003, p.36 (this plan considers this a "High" level of contribution); WSP for the Jilliby Jilliby Creek Water Source 2003, p. 36; WSP for the Wandella Creek Water Source 2003, p. 37; and WSP for the Tenterfield Creek Water Source 2003, pp. 40-41.

\textsuperscript{239} WSP for the Mandagery Creek Water Source 2003, p.42; WSP for the Dorrigo Plateau Surface Water Source and the Dorrigo Basalt Groundwater Source 2003, p. 35; the WSP for the Commissioners Waters Water Source 2003, p. 36; WSP for the Toorumbee Creek Water Source 2003, p. 27; WSP for the Wandella Creek Water Source 2003, p. 37.

\textsuperscript{240} WSP for the Mandagery Creek Water Source 2003, pp.42-43. See also WSP for the Jilliby Jilliby Creek Water Source 2003 Order, p. 36.

\textsuperscript{241} WSP for the Karuah River Water Source 2003 Order, pp.40-41; WSP for the Apsley River Source 2003, p. 35.

\textsuperscript{242} WSP for the Karuah River Water Source 2003 Order, pp. 40-41.

\textsuperscript{243} WSP for the Lachlan Regulated Water Source 2003, p. 38. An identical statement appears in the WSP for the Commissioners Waters Water Source 2003, p. 37 and WSP for the Jilliby
Even where Targets 13 and 14 were addressed, some WSPs referred to the environmental flow rules as the mechanism for protection, although in most instances this was coupled with reference to ongoing consultation. Others merely referred to the fact that Aboriginal people had been involved in the WSP in assisting to achieve the target.

Some of these failings also raise concerns over the validity of some of the plans and the process by which they were established. At the very least it raises a question mark over the level of scrutiny the Minister exercises in approving the plan. It is not unheard of for management plans in other areas of resource management to be invalidated where they have not been properly prepared. For example, Management Plans in relation to fisheries have been invalidated where they have been based on erroneous mathematical formulas to identify resource allocations that have rendered the plans arbitrary and therefore unreasonable.

In this context arguments may arise that relevant considerations have not been considered, where important matters in the Outcomes Plan and the Water Management Principles have not been referred to, or on the face of the plan have not been addressed. Examples which may fall within this category in the WSPs that we have perused include the Lachlan WSP, to the extent that it states that there “are no specific strategies directly related to” the protection of sites of significance, the failure of most WSPs to deal with Aboriginal economic values as described in the objects of the WMA and Target 7 of the Outcomes Plan, and the fact that the ‘requirements’ for native title needs have not been identified.

A particular problem associated with the introduction of the WMA and the preparation of WSPs has been that some of the management committees drafting the WSPs had almost finished their work before the government

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244 WSP for the Mandagery Creek Water Source 2003, p. 43.


246 See for example, *Minister for Primary Industries & Energy v Austral Fisheries* (1993) 40 FCR 381. See also for comparative purposes *Pyramid Lake Paiute Tribe of Indians v Morton* (1973) 354 F.Supp 252 where a water regulation was invalidated because of a failure to properly consider Aboriginal interests.

247 WSP for the Lachlan Regulated Water Source 2003, p. 4. See also p. 37.

248 It can also be noted that while a duty to make enquiries has sometimes been recognised in the context of whether a decision is reasonable, such a duty has generally been restricted to a failure to consider information which was known to the decision-maker and readily available to him: *Luu v Renevier* (1989) 91 ALR 39 per Davies, Wilcox and Pincus JJ at 50 and *Tickner v Bropho* (1993) 40 FCR 183 per Black CJ at 197-199.
finalised the Outcomes Plan in 2002. Consequently, management committees did not have the benefit of even the minimal targets relating to Aboriginal people when attempting to balance the competing interests in already stressed rivers.

Despite good intentions, WSPs appear to have suffered from many of the difficulties identified above which beset Aboriginal involvement in resource management. The legislation itself does not clearly identify and recognise Aboriginal interests in the river systems concerned. That recognition is left to be determined in competition with other users who already have their own interests clearly identified. The protection of these interests is likewise not assured. They, too, are left to be accommodated in competition with other self-interested stakeholders. Such processes become a barrier if Aboriginal people are not adequately resourced to put forward their views. The end result is that despite grand statements and over arching objectives, these goals simply become illusory.249

11. IMPROVING THE RECOGNITION AND PROTECTION OF ABORIGINAL INTERESTS IN RIVERS

The lack of protection of Aboriginal interests in NSW river systems and the failure of water sharing plans, in that regard, requires further action.

11.1 Aboriginal involvement in the management of river systems

There is no point in agreements that give Aboriginal people defined rights to rivers if the rivers continue to be degraded to the point that the subject of those rights are of little practical benefit.

To have rivers worth exercising rights over there will have to be a significant reduction in water extraction for irrigation throughout NSW. This is the only way to restore river flows to meet cultural needs. Possible ways to achieve this include:

- Staged increase in water price;
- Staged reduction in volume licensed;
- Staged increase of the river level at which pumping is allowed;
- Phasing out of large scale irrigation on the unregulated streams;
- Ensuring transfers of irrigation licenses are within ecologically sustainable use; and

249 The Water Sharing Plans are yet to commence operation and following a recently announced shift in resource management policy (See Department of Infrastructure, Planning and Natural Resources, A New Approach to Natural Resource Management, October 2003) it is possible that they may be subsumed in further water management reforms. If this is to be the case it is to be hoped that the failings of the WSP processes will be addressed in any subsequent regime implemented for managing water and water catchments.
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- Improving water quality by managing stock access to rivers and reducing grazing pressure near rivers.

Recent reforms to water management introduced under the WMA are in part designed to encourage these processes. They have however been unable to extend to the type of changes that Aboriginal people require in order to enjoy more fully their interests in river systems. It is becoming increasingly accepted that Aboriginal knowledge and values will greatly improve the management of NSW river systems but, as discussed above, there needs to be improvement in the manner in which that participation occurs and the manner in which Aboriginal values are recognised and protected in management regimes.

11.1.1 Management planning to international standards

Improving Aboriginal involvement in the management of NSW river systems must necessarily commence with the acknowledgement of the interests which Aboriginal communities have in those systems. That is required by the international human rights instruments discussed above.

A useful starting point would be for the NSW government to adopt the 11 principles set out in the Boomanulla Statement, which are listed above, as a framework by which Aboriginal participation in resource management will be implemented through legislative reform.

Developing systems for the involvement of Aboriginal people in resource management in accordance with those principles will go a significant way to ensuring that Aboriginal involvement is empowering rather than tokenistic. It will also help to develop partnerships in resource management rather than the series of consultative processes that are characteristic of current management regimes. This in itself will be consistent with the need to allow Aboriginal people to exercise their right to self-determination.

As noted above, many of the difficulties Aboriginal people experience in the processes designed for their involvement in resource management were canvassed at the Boomanulla Conference. There were a number of observations made at that conference that would constitute positive steps to implement those principles insofar as they outline how Aboriginal participation in resource management should take place. These included that:

- Consultation with Aboriginal people must not be tokenistic but must spring from recognition of each community’s rights.
- Consultation with Aboriginal communities means negotiation with them about the meaning of land management and about what must be done.
- ...as custodians of the land, Aboriginal people must be actively involved, not just in the planning stages, but also afterwards in land management.

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250 Bruce Callaghan & Associates Pty Ltd, op.cit., para 2.3.
251 Bruce Callaghan & Associates Pty Ltd, ibid., para 2.1.1.
252 Bruce Callaghan & Associates Pty Ltd, ibid., p.10.
253 Bruce Callaghan & Associates Pty Ltd, ibid., para 2.1.2.
• Communities must come to Planning Committees as partners in land and water management not simply as an advisory voice of the representatives concerned.  

• Local decision making is the Aboriginal community way. The role of Elders Councils must be respected in forming decisions. This will take time and planning, and management processes must allow for proper consideration, with full information available at community level.  

• To participate as partners in planning, resourcing is needed to ensure that Aboriginal communities are properly equipped to take their custodian's role in the natural resource planning and implementation process.

A range of other measures could be considered as part of the implementation of those principles. Aboriginal people do not have statutory control over the lands and waters at many sites of significance. Planning in this context must advocate the best possible management to promote the Aboriginal values and interests in a politically achievable manner.

The International Union for the Conservation of Nature (IUCN) has suggested that protected areas should be declared in all nations. IUCN has listed six categories of protected areas ranging from nature reserves (Category 1) to areas managed to protect natural resources (Category 6). In Australia the concept of Indigenous Protected Area (IPA) has recently been developed to support the management of Aboriginal lands for conservation purposes. The application of these international standards to the preferred management of important places can give added credibility to the case for Aboriginal interests in river systems.

11.1.2 River environment indicators for Aboriginal people

A role in the maintenance and restoration of the biodiversity of NSW rivers will enable the recognition of the traditions and the skills of Aboriginal people. It is clear that Aboriginal people are still thinking out the key indicators of the state of the river environment from their point of view.

In New Zealand some attempts have been made to develop a means of calculating a Cultural Health Index for rivers. The three relevant components of that index have been traditional association, food and other resources (mahinga kai), and stream health. These aspects were intended to incorporate a holistic approach to assessing the manner in which the resource is protected.

254 Bruce Callaghan & Associates Pty Ltd, ibid., para 2.1.7.  
255 Bruce Callaghan & Associates Pty Ltd, ibid., para 2.2.1.  
258 These areas are established through voluntary agreements where Aboriginal people already own the land concerned. It does nonetheless enable funding to be obtained under the Commonwealth Natural Heritage Trust of Australia Act 1997 to assist with the management of those lands.  
In order to identify stream health it was necessary to examine Maori perceptions of the characteristics of a healthy river system. This resulted in a range of indicators being specified, including the shape of the river, sediment in the water, riverbank condition, flow characteristics, flow variations, flood flows, sound of flow, movement of water, water quality, water quality throughout catchment, riparian vegetation, temperature, catchment land use, freshwater smell, sediment on the riverbed stones and gravel, biodiversity, whether the fish are safe to eat, and whether the water is safe to drink. These include matters that may not necessarily be relevant to non-Aboriginal approaches to assessing a healthy environmental flow. Each of these may be relevant characteristics of a healthy river system in the view of the Aboriginal people in NSW, although there may be other matters which Aboriginal people would consider appropriate from their own cultural standpoint.

Once the relevant criteria were identified it was necessary to allocate a grading to those criteria. Importantly, it is the Maori people who carried out that grading thus giving them an important level of control over how their cultural values are assessed.

It is recognised that further work is needed for a similar model to be implemented on a broader scale but it nevertheless represents an attempt to incorporate in a meaningful way Indigenous values into assessing the manner in which river systems are managed. Whether such a model could be adopted or adapted to be useful to Aboriginal people in NSW is a matter that will need to be determined in consultation with those people. As it turned out in that case it proved compatible with other methods which were considered more standard from a Western standpoint. Indeed, in facilitating Aboriginal people to identify their interests in this way it necessarily allows Aboriginal people to identify their interests in a way that is not fragmented into a non-Aboriginal world view or splintered to confirm with western legal norms. This approach can be contrasted to the mechanisms put in place under the WMA for water sharing committees and the development of water sharing plans.

Firstly, the actual cultural interest of Aboriginal people is identified rather than have that protection reduced to the artificial legal construct of a native title interest.

Secondly, steps are put in place to actively identify and incorporate those interests rather than to have them debated and whittled away by other interest groups.

Thirdly, it is a process whereby the Aboriginal people were resourced to identify their interests in a culturally appropriate manner, to utilise and protect environmental knowledge in a culturally appropriate manner rather than having committees and non-Aboriginal timeframes thrust upon them.

11.1.3 Guaranteeing cultural flows in river systems


\[261\] Tipa, G., and Tierney, L., op. cit., p.18

\[262\] Tipa, G., and Teirney, L., op. cit., p.45.
Identifying Aboriginal cultural needs and perspectives on what constitutes a healthy river is a meaningless exercise unless there is a commitment to ensure those needs are realised through an adequate flow of good quality water in the river. It is inappropriate to assume that environmental flows under water sharing plans will be adequate. Instead, in the absence of the establishment of a cultural health index for rivers, what might constitute an adequate flow of good quality might be determined by reference to iconic places and issues such as fish whose sanctity can be directly related to flows. Examples of such ‘surrogate cultural water targets’ might include:

- Ensuring that (say) 90% of high flows that would reach areas of significance (such as Boobera Lagoon) under natural conditions reach those areas by management of flows in the rivers;
- Ensuring that water extraction and regulation of flows in the Barwon-Darling and its tributaries enables use of Nganhu (the Brewarrina Fishtraps) equivalent to (say) 90% of days that would be useable under natural flow conditions;
- Manage flows and extractions to ensure that fish passage may occur over the Wilcannia weir no less than (say) 90% of the days that fish passage could occur under natural flow conditions;
- Remove or modify weirs and other barriers that impede fish movement; and
- Protect river banks and upper catchments to reduce turbidity.

Cultural flows should be an essential component of river management. A ‘cultural flow’ can be set and monitored as sufficient flow in a suitable pattern to ensure the maintenance of Aboriginal cultural practices and connections with the rivers. In circumstances where rights to water are being turned into a commodity and schemes for tradable water rights being expanded, it becomes increasingly important to ensure that Aboriginal cultural flows are secured in legislation as a non-tradable interest. Aboriginal people do not have the means to purchase those water flows on the open market. Indeed, the entire purpose of those markets is to direct the resource in a utilitarian manner rather than in a way that accommodates Aboriginal perspectives on that resource.263

Furthermore, in the absence of any enforceable means to ensure that a flow relevant to Aboriginal cultural needs is secured under the existing regime for developing water sharing plans, it is appropriate that Aboriginal cultural flows be secured in the same manner that basic landholder rights264 are protected.

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264 See for example, s.20(1)(b), *Water Management Act 2000.*
11.1.4 Evaluating development proposals

Aboriginal people have a complex relationship with the environment, and have a rich range of heritage places and objects created by their occupation along river systems since the beginning of time. Plants, animals, the landscape and items left by earlier generations may all be regarded as special. Human remains have a special significance. Developments have the potential to damage land and heritage values of importance to Aboriginal people.

Developments may cause pollution, cause health problems, reduce biodiversity and have social impacts. For example, a tourism development may bring alcohol and resulting inappropriate behaviour close to an important cultural area. Wild animal industries may worry people whose totem (or 'meat') is being farmed or harvested. There may be wider concerns about changing the relationship with food animals, and concern about competition between subsistence and commercial harvesting of plants and animals.

The types of development near rivers that may be of concern include quarries, roads, bridges, power lines, cables, pipelines, land clearing, cropping, channels, dams, weirs, levee banks, land planing, pump sites, water extraction, water storage, drainage, aquaculture, rural subdivision, housing, tourism, town expansion, and sewerage works.

Furthermore, the river environment has been badly degraded by the cumulative effect of many small developments, although each one on its own might not be a disaster. For example, a series of small irrigation licenses adds up to a lot of water extracted, a series of water storages adds up to big changes in river flow patterns, many small clearing licenses add up to a large loss in biodiversity and many free flowing artesian bores add up to a reduction in the whole artesian basin water supply. Development proposals need to be evaluated in a framework that matches the environment. Interconnectedness and nested hierarchies of sub-catchments within catchments are two important principles.

Environmental planning and control needs to be re-evaluated to enable a greater consideration of the impacts on Aboriginal people. This should include the effects on the identified cultural values of affected river systems as those matters are understood by Aboriginal people concerned.

The existing law (s. 90, NPWA) that is meant to protect ‘sites’ is inadequate to properly recognise and protect all matters that may be of cultural significance to Aboriginal people. Nor does it provide a strong enough protection to burials, objects, places and areas of significance.

There should also be broader enquiries into the downstream effects of certain irrigation practices including the impact of the use of fertilisers on river quality. These matters directly affect the quality of enjoyment by Aboriginal people of their traditional rights, yet currently clearing and irrigation developments are not sufficiently assessed and controlled. Large areas of land can be disturbed and off-site effects, including on rivers, produced without an Environmental Impact Statement.
Consideration needs also to be given for a greater role for Aboriginal social impact statements where significant changes in land use or significant developments are involved.

11.1.5 Boobera Lagoon Draft Plan of Management – an example of Aboriginal endorsed management

Boobera Lagoon is a sacred site near Boggabilla. The significance of Boobera was recognized by its declaration in 1984 as an *Aboriginal Place* under the NPWA. In 1986 the Australian Heritage Commission listed Boobera Lagoon in the *Register of the National Estate*.

The importance of Boobera Lagoon needs to be understood through a broad range of cultural and community values.

**Land and Spirit:** Boobera lagoon is the resting place of Garriya, the local name for the powerful spirit being normally referred to in English as the rainbow serpent, water snake or crocodile. Garriya created the rivers and watercourses and rests in deep waterholes. Aboriginal law prohibits entry to the waters of Boobera Lagoon and being close to the Lagoon after sundown. Many Aboriginal people express the view that they become spiritually recharged by visits to Boobera Lagoon. Boobera is a focus for identification with walaaybaa (country), especially for northern Gamilaraay people.

**Kinship:** Most Aboriginal people treat the Lagoon with an easy combination of respect and familiarity comparable to the relationship with a grandparent. Family visits to the lagoon revitalise kinship links and responsibilities. One tradition relates that even Garriya respects kinship laws and this adds to the power of Boobera to mediate for good family relationships.

**Economy:** A good variety of bush food and medicine is available at Boobera Lagoon. Most Mari believe that fishing in the lagoon is acceptable and there are times when fish can be caught at Boobera when they are not biting in the river. Fishing also plays an important role for meditation and culture sharing.

**Communication:** A large number of traditional stories relate to Boobera Lagoon. The place serves as a significant setting for the telling of these stories and hence the continuity of culture.

**Survival:** Oral history relates events at Boobera Lagoon from the period of frontier warfare in the middle of the 19th century. Richard Buchhorn\(^{265}\) has summarised the documents from that time which show that in 1848 some government officials were recognising the cultural significance of Boobera and the wish of local Mari that the area be returned to their control and protection. The struggle for control over recent years has been an important source of political identity for the local community.

**History:** Substantial evidence of old time Aboriginal presence can be seen around Boobera Lagoon, including scarred trees, stone artifacts and shell

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middens. In 1994 an ancient grave was exposed by soil erosion and then protected by the actions of local Aboriginal people.

**Environment:** The landscape, the plants, the animals and the ecological processes are all inseparable parts of the cultural values to local Aboriginal people. Boobera Lagoon, as one of the few permanent lakes, is an outstanding environmental feature in the Darling River drainage basin. Even from the non-Aboriginal point of view, Boobera should be managed as an area of high conservation value. Habitat restoration would benefit many species including birds dependent on open water such as the black swan.

For several decades local Aboriginal people have been calling for removal of irrigation, power boating and foreshore grazing to protect the Lagoon. Their long campaign is gradually succeeding. In a community-endorsed draft Plan of Management the necessary principles for the management of Boobera Lagoon are stated:

- Respect for Aboriginal law and tradition about Boobera must be central to the management regime.
- Local Aboriginal people with traditional ties must have a controlling interest in the management body.
- The management body should be able to integrate management of the lagoon waters, nearby lands of whatever title and ownership, and the catchment.
- An achievable goal is to manage Boobera as a Protected Landscape (IUCN Category 5). IUCN has suggested the following management objective for Category 5 protected areas:

To maintain nationally significant natural landscapes which are characteristic of the harmonious interaction of humans and land while providing opportunities for public enjoyment through recreation and tourism within the normal life style and economic activity of these areas. These are mixed cultural/natural landscapes of high scenic value where traditional land uses are maintained.

The draft Plan proposes that, as part of a review after 5 years, consideration be given to aim for Natural Monument (IUCN Category 3) status with the management objective:

To protect and preserve nationally significant natural features because of their special interest or unique characteristics.

The single most important management objective for Boobera Lagoon is to protect, restore and enhance the native vegetation cover on the lagoon foreshore and surrounds. Cultural and natural values will be enhanced if this single objective can be met. Soil erosion will be controlled, protecting

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archaeological deposits and undiscovered graves. Scarred trees and other trees on the foreshore now threatened by root exposure will have a longer life. A variety of animals will become more common as their habitats are improved. The restoration of rush beds and other shoreline vegetation is likely to improve water quality and help to restore aquatic biodiversity.

11.1.6 A Guardianship / Trustee / Inspector role for local groups in fisheries

There are models from south-east Asia\textsuperscript{269} that involve local people in the management of fisheries and coral reefs that have been overfished and damaged by destructive fishing methods. This situation of a degraded environment with many pressures on the resources, together with a marginalized local population, is similar to the rivers of NSW. Placing local Aboriginal people in a similar guardian role would be a positive step.

Under such a proposal local Aboriginal people would carry out the full range of functions of officers of NSW Fisheries. This management could include:

- Regulation and inspection of recreational fishing, including issuing licenses and infringement notices;
- Regulating indigenous fishing including, with assistance from community panels, imposing penalties for breaches of customary rights and duties;
- Investigating and recommending action on issues affecting the health of fish habitat, e.g., barriers to fish movement; condition of river banks; connectivity with floodplains, billabongs, wetlands and flood channels;
- Negotiating with landholders and local authorities to improve fish habitat;
- Participating in a range of natural resource management processes and agencies to advocate the restoration of native fish habitat;
- Having a guaranteed role in the review of river flow management and water quality management decisions; and
- Having a role in promoting relevant research.

This proposed fisheries joint management would be best guaranteed through legislation that enabled agreements to implement it at a regional level. Such a measure would be an effective and empowering way of involving Aboriginal people in the management of an important component of the river resource. It would also be a significant step to developing partnerships between

\textsuperscript{269} For example co-operative research on local fisheries management carried out by the Australian Mekong Resource Centre at the University of Sydney.
government and Aboriginal peoples that could be developed or duplicated in relation to other elements of that resource.

11.1.7 Audit of Water Sharing Plans

As noted above, there is a real issue about the manner in which water sharing plans are being developed in practice. The concerns in this regard extend to the lawfulness of the manner in which native title rights are being dealt with and the veracity by which the Minister checks the plans for compliance with the Water Management Act 2000 in the approval process. In future the issue will develop as to whether the goals for the recognition and protection of Aboriginal interests are being adequately implemented. Accordingly the NSW government should undertake an independent audit of water sharing plans with a view to investigating the following:

(a) The extent and quality of the participation of Aboriginal people in the processes that led to the implementation of the water management plans;
(b) The extent to which Aboriginal participants had access to legal and other professional advice to assist their participation in the development of water sharing plans;
(c) The extent to which the Water Sharing Plans facilitate the targets and strategic outcomes contained in Targets 7, 13 and 14 of the Outcomes Plan;
(d) The adequacy of the identification of the native title component of 'basic landholder rights'; and
(e) Where measures have been referred to in Water Sharing Plans which are intended to benefit Aboriginal people, to review the implementation and effectiveness of those measures.

11.2 Recognising Aboriginal Rights

Attempts to improve the manner in which Aboriginal interests in NSW river systems are protected will remain tokenistic and inadequate until there is an appropriate recognition of the nature and extent of those interests in legislation and adequate measures taken to ensure their protection.

The government needs to look at options for providing legislative recognition of the full range of Aboriginal interests in waters, and not leave the recognition of those interests to complicated Court processes. That includes a recognition of Aboriginal interests in the water itself as well as the activities associated with river systems. The Western Australian government has recently released a Draft Fisheries Strategy that recommends that there be a positive recognition of Aboriginal customary rights to fish. That strategy noted that...
legislation providing that recognition “would operate in such a way that all persons who are of Aboriginal descent and are fishing for the purpose of satisfying personal, domestic and ceremonial, educational or noncommercial needs would be entitled to fish in a customary manner.”\textsuperscript{271} The WA Draft Fishing Strategy noted that such formal recognition should be preferred because:

- It gives positive recognition to existing rights;
- It meets the objective of ensuring customary fishing is unable to be claimed by non-Aboriginal people;
- It does not require costly, inconvenient or impractical administrative systems; It acknowledges that the Aboriginal community continues to be responsible for determining who among the Aboriginal community is able to undertake customary fishing; and
- It limits imposition on bona fide customary fishing.\textsuperscript{272}

Recognition of Aboriginal interest in the water flow through the identification and guarantee of Aboriginal cultural flows is another area where express recognition is required as is the necessity to recognise Aboriginal ownership and control of their cultural heritage. It is also appropriate that both the State of NSW and statutory corporations with interests in river systems, change their position of opposing native title claims lodged by Aboriginal people. It is inconsistent for the government and statutory corporations to express concern to accommodate traditional rights in river systems but to oppose such recognition when an opportunity to achieve it arises.\textsuperscript{273}

\section*{11.3 Improved heritage protection}

It is essential that measures be taken to improve heritage protection legislation in NSW. At the least, amendments need to be made to the NPWA to ensure that the Aboriginal people are recognised as the owners of their own cultural heritage and to ensure that they have greater control over that heritage. Amendments should also be made to provide that sites of significance and Aboriginal objects are not interfered with or destroyed without the consent of the Aboriginal people concerned. Ideally, special legislation should be passed that protects the full range of Aboriginal cultural heritage under Aboriginal control. Special protection should be given to Aboriginal remains so they are not simply included as objects.

\section*{11.4 Addressing land needs}

\textsuperscript{271} Draft Aboriginal Fishing Strategy, p. 36.
\textsuperscript{272} Draft Aboriginal Fishing Strategy, p. 36.
\textsuperscript{273} See State of New South Wales Submission on Extinguishment, Vol.1 - Introduction (para 3) in \textit{Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors} – Federal Court Proceedings VG6001 of 1995, 12 December 1997. It should be noted that the State of New South Wales opposed the recognition of any native title rights and interests of the Yorta Yorta people, even the most basic rights such as a traditional right to fish.
Land ownership (through acquisition, claim or other return) cannot be separated from other aspects of Aboriginal interests in rivers. To date both the ALRA and the NTA have proven inadequate in achieving land justice for Aboriginal people in NSW. The lack of land denies Aboriginal people a share in the regional economic resource base, and prevents the expression of their rich land-based traditions. There is a strong aspiration for further land acquisition to alleviate grievance and injustice arising from the dispossession of Aboriginal people of these traditional lands. An adequate land base is essential to the ability of people to adequately maintain their traditional cultures.

Aboriginal people have also identified broader benefits of their land aspirations that are consistent with social justice requirements. These include:

- Recognise traditional ties and spiritual beliefs;
- Support cultural survival;
- Require living areas and homelands;
- Regenerate the country;
- Allow Aboriginal people to feel equal with non-Aboriginal neighbours;
- Allow Aboriginal people to feel a sense of 'home';
- Support local control;
- Facilitate Aboriginal people to make an income;
- Identify and provide for a variety of community social needs;
- Provide freedom to hunt, fish, gather food and camp;
- Provide a share in the 'new' industries such as tourism and bush foods; and
- Ensure that Aboriginal people have something that is always there.

Interestingly, of these twelve 'benefits of land' listed by participants in one workshop, probably only two would be given a money value, so illustrating the holistic role of land in contemporary Aboriginal thought.

The current community focus on water resources as a consequence of State and Commonwealth water reform initiatives provides an opportunity to consider and address the dispossession of Aboriginal people of riparian lands. Apart from providing added funds to acquire land, a number of mechanisms may be explored to seek to remedy these problems.

11.4.1 Homelands

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A particular land need that is relevant to river issues is the acquisition of family living areas away from towns. Reduced stress, cultural survival, personal responsibility, independence and greater success in managing services and enterprises have been identified as some of the benefits of such family homelands. Homelands would locate Aboriginal people in many parts of the country so they could more easily take on roles as custodians.

Existing powers under the Western Lands Act 1901 and Aboriginal Land Rights Act 1983 could be used to support a homeland acquisition program through excisions from large leasehold properties to create Reserves, with subsequent transfer of title to a Local Aboriginal Land Council or other body to hold land in trust for families recognised as being traditional owners for the area concerned.

Excision areas could be considered on other forms of tenure such as State Forests and National Parks. Various government programs should be modified to support the desire for homelands, as this aspiration has been totally ignored by agencies in NSW to present.

### 11.4.2 Increasing Aboriginal ownership of National Parks

Providing Parliament recognises the cultural significance of a national park, the NPWA enables negotiations to achieve Aboriginal ownership, leaseback to the Minister for the Environment, and care and control by a Board of Management with an Aboriginal majority. Joint management under Aboriginal ownership is a form of empowerment that contrasts with all other forms of ‘involvement’ of Aboriginal people in natural resource management. It sets a benchmark that government should measure up to when acknowledging Aboriginal interests in rivers.

Government should undertake to add more parks to Schedule 14 of the National Parks and Wildlife Act. The assumption should be that all lands are of cultural significance. Given the known high cultural significance of riverine environments, national parks on river systems should have priority for addition to schedule 14 for Aboriginal ownership.

It is important for government to have a holistic view of Aboriginal ownership of national parks, and to allocate adequate resources. Funding should be viewed as an integration of social justice and resource management obligations. This would allow the responsible agencies to see Aboriginal ownership as their core business rather than something to be avoided because they are receiving no funds to implement it.

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277 See s.39, Aboriginal Land Rights Act 1983 (NSW) and ss.43B and 44, Western Lands Act 1901.

278 For example, the Indigenous Land Corporation requires the establishment of such bodies to hold any land purchased under the Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 (Cth).
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'Regional Assessments' are an established integrated process for examining natural resources, cultural heritage and socio-economic issues at a regional level in NSW. It would be a positive step towards integrating Aboriginal interests if existing and proposed national parks could be assessed for potential Aboriginal ownership as part of the Regional Assessment process. This would provide an option to the process set out in the NPW Act.279 The listing on Schedule 14 of Biamanga and Gulaga National Parks after Regional Assessments are precedents for what should be standard practice. Another point of integration should be a special funding allocation to negotiate and establish any new Aboriginal national parks as part of the 'industry restructure funding package' that is standard when government implements decisions after regional Assessments.280

Recent experience in the Brigalow Belt South Regional Assessment indicates considerable involvement by Aboriginal people, but suggests that the process will be hard-pressed to deliver any long-lasting benefits for Aboriginal people. If the government agrees to the proposal for a new Aboriginal owned national park at Terry Hie Hie,281 this would be a significant sign of 'good faith' towards Aboriginal involvement in Regional Assessments. There is potential for the Regional Assessment process to become an opportunity for negotiations to recognize a broad range of Aboriginal involvement in natural resource management including management of river systems.

11.4.3 Re-focusing the NSW Aboriginal Land Rights Act

The ALRA has not fully realised its purpose to provide for the acquisition of land, despite the establishment of a substantial statutory fund for that purpose. The lack of focus on land has led some land councils being reduced to being barely different to other types of Aboriginal corporations concentrating on social and welfare issues such as housing, employment and community administration.282 These are all functions that do not require land rights legislation and were not the principle purpose of the ALRA when it was enacted.

The under utilisation of the fund for land acquisition risks leading to a result where future generations of Aboriginal people will be as resource-poor as those before the Act. Steps should be taken to refocus the use of the statutory fund on the acquisition of a substantial land base as originally intended by the Act. This will enhance the ability of Aboriginal people to gain control of land adjacent to river systems that have otherwise not been available through the land claim process.

279 Sections 71AR-71AV, NPWA.
11.5 Improving access to rivers, streams, wetlands and waterholes

Many Aboriginal people in NSW express a strong need for access to all lands and rivers so that traditions can continue.\textsuperscript{283} In particular, access is needed for fishing, hunting, gathering foods, camping, gathering firewood, visiting places with cultural significance, caring for country, caring for burials, caring for sites, practicing culture, teaching young people and to address social problems.

Since European colonisation Aboriginal people have generally been able to continue to hunt, fish and gather traditional foods (and new foods such as rabbit, pig and goat), collect firewood, visit places of cultural significance and camp on pastoral lands and along the rivers of NSW.

Access was particularly open on the leasehold lands of the Western Division of NSW. Up until about 50 years ago, the pastoral industry and some other rural industries depended on the labour of Aboriginal people. This made it easy for traditions to continue alongside (and often unknown to) the landholders. Over the last 50 years there have been changes in the economy and changes in ownership of many properties. Aboriginal people now get less rural work and many new owners do not know the people. Some landholder attitudes to access have hardened, even in the Western Division. Places that have been traditionally visited may now display a 'no trespassing' sign or be blocked by a locked gate. This is causing hardship and threatening Aboriginal rights.

Elsewhere, cordial relationships between Aboriginal people and landowners have allowed some access to land for hunting, gathering and fishing purposes. Many landholders are reasonable about access for hunting, fishing and continuing traditions on an informal level. They recognise, probably without thinking about it, that the two cultures can co-exist.

In some areas Aboriginal people have utilised Crown land and State Forests as a means of continuing traditional and contemporary activities.\textsuperscript{284} In some cases this may be despite the fact that such activities may be prohibited. Any future restrictions limiting the use of these lands may cause Aboriginal people concern to the extent that it is intended to restrict those long exercised activities. The conversion of State Forests into national parks under the \textit{Forestry and National Parks Estate Act} 1998 is an example of a conversion of land which occurred without sufficient regard as to the impact that conversion would have on the traditional hunting and fishing rights and other cultural activities in NSW.\textsuperscript{285} The alteration of State Crown tenures should not occur


\textsuperscript{284} For example people at the Walhallow community use the adjacent Doona State Forest.

\textsuperscript{285} Although those rights are protected under s.104A of the \textit{Native Title (New South Wales) Act} 1994, insufficient regard was had to the pressures that the change in use would have on the ability for Aboriginal people to enjoy their interests and the pressures placed on Aboriginal people to alter their lifestyle to be more conducive to the land being a national park.
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without concurrent protection of customary hunting and fishing rights.\(^{286}\) Government needs to promote means of removing barriers for Aboriginal people to access land and rivers for customary purposes. A number of mechanisms may be available in this regard, as outlined in the following sections.

11.5.1 Indigenous Land Use Agreement under Part 2, Division 3 of the NTA

Even where native title exists, the NTA does not prohibit the interference with Aboriginal interests.\(^{287}\) However, the fact that such a power exists does not mean that it needs to be exercised by the NSW Government. The amended Native Title Act allows negotiation of agreements that can be about how native title holders might exercise their access rights over areas where native title exists. This is the appropriate mechanism by which changes to land tenure and other future acts that may affect the ability of Aboriginal people to access rivers and adjoining land should occur.

11.5.2 Western Lands Act and acc access

Significant stretches of the inland rivers are in the Western Division of NSW, where most land is held under leasehold. There are quite strong rights of public access provided for under the Western Lands Act and Western Lands Leases, for example:

- A lease condition that "the lessee shall not obstruct or interfere with any reserves, roads or tracks on the land leased, or the lawful use thereof by any person."
- A lease condition that "the right is reserved to the public of free access to, and passage along, the bank of any watercourse adjoining the land leased and the lessee shall not obstruct access or passage by any member of the public to or along the bank".
- A lease condition that "any part of a reserve for travelling stock, camping or water supply within the land leased shall, during the whole currency of the lease, be open to the use of bona fide travellers, travelling stock, teamsters and carriers without interference and annoyance by the lessee ....".
- The fact that the network of 'Public Watering Places' and 'Travelling Stock and Camping Reserves' are not part of Western Lands Leases but are simply on short term leases, usually to the neighbouring lessee. The Rural Lands Protection Act encourages multiple uses of these reserves, many of which are located on the rivers.

\(^{286}\) This should be the case regardless of whether these rights are recognised and protected as native title rights and interests.

\(^{287}\) See for example s.24JA, NTA.
There is an unacceptable game of bluff regarding Aboriginal access to western lands leases. This has not changed with the High Court ruling in *Anderson v Wilson* 288 Access is a continuing right of Aboriginal people. There are human rights obligations to ensure that those rights are protected. Organizations representing holders of western lands leases have been pushing for legislative change to tighten public access to leases but the Western Lands Review in 2000 289 recommended that Aboriginal rights be protected. It is important that Aboriginal people not be the losers when governments consider law reform to address non-Aboriginal activities, issues and conflicts.

11.5.3 Preserving Crown Tenures and State Reserves in a manner which protects Aboriginal hunting and fishing rights

The Travelling Stock Reserve system (usually part of the neighbouring Lease in the Western Division) and the Camping Reserve system should be maintained and public use rights asserted.

11.5.4 Sections 47 and 48 of the NSW Aboriginal Land Rights Act, 1983.

These sections provide a strong right to negotiate access to land for the purpose of hunting, fishing or gathering. These sections apply to any type of land. This avoids invoking the entanglements of the NTA. At the same time any action taken to get access using these sections of the ALRA is an assertion of native title rights. As noted above, they have been under utilised by Aboriginal people in NSW. Section 47 states:

Subject to the provisions of any other Act and any rule, by-law, regulation, ordinance or like instrument, a Local Aboriginal Land Council may negotiate agreements with the owner, occupier or person in control of any land to permit any specified Aborigines or group of Aborigines to have access for the purpose of hunting, fishing or gathering on the land.

The limitations imposed by “subject to the provisions ...” have not been tested in court, but are understood to refer to such matters as gun laws, animal protection laws, plant protection laws and fishing regulations.

Section 48 allows a local Aboriginal Land Council to apply to the Land and Environment Court if it is unable to negotiate access. The Court may issue an access permit and may apply conditions. The Court can only grant a permit under Section 48 for access for “traditional foods for domestic purposes, being access to land traditionally used for those purposes or to land giving access to any land so used.”

These sections of the ALRA are strong and simple, especially if the access need is mainly about hunting, fishing or plant food gathering. A similar law should be passed to allow negotiations over access for other purposes, especially visiting and caring for places of cultural significance. It is likely that if a local Aboriginal Land Council negotiates access with one or two landholders, then an informal local precedent will favour Aboriginal people when seeking access to other lands. Limited experience has shown various responses from land holders to Aboriginal people utilising these provisions. In two cases access was obtained by simply showing the landholders the relevant provisions of the ALRA. This led to those land holders dropping their earlier reluctance to allowing ongoing access. Another case occurred when the lessee of a station near Wilcannia locked a gate to a favourite fishing spot and sacred site known as 'The Five Mile'. Locking the gate was a response to the shooting of a bullock. After allowing a few months as a cool-off period, Wilcannia Local Aboriginal Land Council sent a polite letter to the lessee. This landholder got legal advice and wrote to his member of parliament but eventually came back and sat down and agreed to access. These examples illustrate that the ALRA gives a strong incentive to negotiate access. Otherwise it will go to Court, cost money and the Court is likely to grant access anyway.

Sections 47 and 48 of the ALRA remain under utilised with many Aboriginal people remaining unaware of its potential effectiveness in securing access to land. Aboriginal people should be encouraged to utilise the procedure and an information package should be developed to assist Local Aboriginal Land Councils to utilise those procedures.

11.6 An Aboriginal Water Trust

Aboriginal people have been historically denied access to water extraction licences. This is in part a product of the historical dispossession of Aboriginal people in NSW of their traditional lands. Those injustices are being perpetuated by the current process of ‘commodification’ of water rights in NSW. The Boomanulla Conference stated:

The economic future of Aboriginal communities will be tied to natural resources. There must be “benefit sharing” as a principle for any planning approach.” It was added that “Given the spiritual and traditional ownership rights of Aboriginal people, the communities should have an equitable share of and real access to any proposed water markets.

290 Peter Thompson has been involved in the three known cases of using section 47, all in the far west of NSW.
291 On and around the old Pooncarie Reserve; and Keewong Station south-west of Cobar.
294 Bruce Callaghan & Associates Pty Ltd, op. cit., p. 10.
295 Bruce Callaghan & Associates Pty Ltd, ibid, p. 10.
The Conference later called for:

Access to water should be seen as a matter of social justice allowing Aboriginal communities priority access to the water market (ie of through provision allocation of water licences to Aboriginal people through an appropriate management structure such as a trust).296

The NSW government has accepted the need for such a trust and has taken steps for its establishment. The fact that the government has taken this step is commendable. At the time of writing however, the initiatives are yet to be formalised and announced and the details of how the trust will be administered are unclear. At least some record of the commitment is expressed in the 2003 budget papers where it is noted that $2.5 million dollars has been allocated “as part of a $5 million Aboriginal Water Trust to assist the Aboriginal community in the development of water-based farming and aquaculture enterprises.”297

The Aboriginal water trust has the potential to represent an important mechanism by which the historical inequities in access to water resources can be remedied and represents a mechanism by which Aboriginal people will buy into water markets. It is essential however that the water trust be used for the purposes identified in the budget papers and not be seen as an alternative to the proper observance of statutory obligations to develop and implement strategic plans to advance the objects of the WMA and the Outcomes Plan. It is also essential that the focus of the trust be to acquire interests in water. Indeed it would make a mockery of the existence of an Aboriginal water trust if it was not developed as a means of acquiring interests in water.

It is unclear whether the $5 million over two years identified in the budget papers is all that is intended to be put into the Aboriginal water trust, or whether there will be ongoing allocations to ensure that the trust can be a viable mechanism through which Aboriginal people can enter the water market. Furthermore, it is currently unclear as to how that trust will be administered, including how that administration will be resourced. Indeed, it is a significant failing of many schemes designed to assist Aboriginal people that money intended to benefit Aboriginal people is absorbed by administrative and accountability requirements rather than getting to the people who are entitled to benefit from it. Given that the former Department of Land and Water Conservation298 has been reported as saying that its best estimate of the value of the water market is in the vicinity of $5 billion dollars,299 the allocation of $5 million over two years is not a significant proportion of that value. The sum can also be assessed against the $1 billion the State is set to receive from the

296 Bruce Callaghan & Associates Pty Ltd, ibid, p. 11.
298 Now the Department of Infrastructure Planning and Natural Resources.
Commonwealth between the 2002-03 and 2005-06 financial years\(^{300}\) as payments for the National Competition Policy of which the recent water reform measures form part.

There are a number of mechanisms by which funding could be added to the trust to enhance the initiative. New South Wales Native Title Services Ltd and NSWALC have suggested that additions to the Aboriginal Water Trust could be made as a proportion of duties payable on the sale of water licences. This has the benefit of being funded by the market rather than the public at large.\(^{301}\)

A further option which may well warrant consideration is to duplicate the system that created a financial base to address the land needs of Aboriginal people in relation to water. It would be more than feasible to reintroduce requirements of a 7.5% of land tax to be included into the newly established Aboriginal Water Trust. At the very least, funding for the trust needs to be substantially increased if it is to be of any real benefit to Aboriginal people. A trust fund large enough to provide perpetual funding from interest, rather than ‘one off’ spending, is essential.

11.7 Developing Aboriginal participation in resource economies

The Aboriginal Water Trust, together with an effective land acquisition program under the ALRA, could provide the resource base for government funded programs to foster Aboriginal participation in a range of natural resource industries. When considering the need for land rights legislation in 1980, the Parliamentary Select committee noted that:

To fully understand the ramifications for Aboriginal ways of life and the destruction and disadvantage caused by their dispossession, it must be understood that land was and is the material and economic basis of Aboriginal society. It was the economic relationship that was the primary one. Religious and philosophical beliefs were an expression of, and strengthened, the basic dependence on land and nature. The land and what was contained in it was the source that supplied all needs – food, water, shelter, tools and so on. Without land and what was on it, the people simply could not have survived. Their understanding of their relationship to land was expressed in a religious and philosophical form.\(^{302}\)

The destruction of Aboriginal economies has created a social justice imperative to ensure that Aboriginal people can once again benefit from the State’s natural resources. Numerous reports and enquiries have identified the need to improve Aboriginal participation in existing rural industries and in developing industries. For example, the Rural Industry Strategy that was


\(^{302}\) First Report from the Select Committee of the Legislative Assembly Upon Aborigines, 13 August 1980, p. 32.
developed by the Aboriginal and Torres Strait Islander Commission and the Commonwealth government as part of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody. That strategy noted the need for Aboriginal resource management and made a number of recommendations identifying means by that Aboriginal commercial interests could be developed. These included:

Action 4.22: Assist Indigenous communities making claims over land and sea resources, or otherwise acquiring these resources, to prepare appropriate land management strategies in advance of claims being determined.

Action 4.24: Provide specific support for initiatives that will promote and demonstrate ecologically sustainable and multiple use of land and sea resources by Indigenous communities.

Action 4.26: Provide assistance to Indigenous communities in establishing integrated programs for harvesting and processing wild animals, with negotiated targets and environmental monitoring, in conjunction with other land holders.

Recommendations were also made in relation to conducting a national feasibility study into increasing Aboriginal participation and equity in emu, kangaroo and bush food industries as well as recommendations to support initiatives involving the establishment of cultural rights over particular species.

When considering the needs for economic development in Aboriginal communities, it is important to deal with potential conflicts with cultural values. With the benefit of best scientific advice, and the benefit of hindsight to examine the many inappropriate and non-sustainable developments by the colonisers over the last 190 years, it is relatively easy to evaluate development options against their impact on core Aboriginal values (country, kin, bush food, communication, survival despite colonisation).

Many social aspirations depend on a land base to promote life-affirming activities and a sense of independence. There is a wide range of potential enterprises which are still land based, including: tourism; permaculture; fish farming; emu farming; harvesting native animal and plant foods; growing or harvesting medicinal plants; orchards of bush food plants; collecting seed to eat or grow plants; and feral animal harvesting.

Equal standing for Aboriginal groups in such funding structures as Rural Adjustment schemes and the Local Government Grant Commission should encourage sustainable and diverse economic and social land uses. There is an urgent need to support pilot projects to use Aboriginal land for ecologically and socially sustainable purposes. Increasing the funding base of the recently established Aboriginal Water Trust may be an important means by which Aboriginal participation in such enterprises can be developed.

11.8 Greater use of negotiated outcomes


304 See Actions 1.4 – 1.7 of the *Rural Industry Strategy*.
Because Aboriginal rights are fragmented in such an arbitrary way, and always will be under western legal constructs, it necessitates that Aboriginal rights are recognised and protected through negotiation frameworks. The challenge is for governments to engage in these processes in a meaningful way. Starting with international obligations and a commitment to a social justice agenda, the NSW government should enter into a negotiation process for the recognition of Aboriginal interests in waters and Aboriginal rights generally. Indeed the Preamble to the NTA specifically encourages Australian governments to adopt such a course. It provides in part that:

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

(a) Claims to land, or aspirations in relation to land, by Aboriginal people and Torres Strait Islanders; and

(b) Proposals for the use of such land for economic purposes.

The Indigenous Land Use Agreement processes in the NTA provide a convenient means by which such agreements can be developed, but they need not be considered the only means. A regional agreement about land, water and other natural resources would be the best way to negotiate Aboriginal interests in the environment, including rivers. The framework or scope of such negotiations might include:

- A capital base of natural resources in perpetuity. One lesson from history is that groups that keep their capital base will not be marginalised in society.
- An equitable share of the land in perpetuity as a stake in the environment and in the existing and potential economy.
- A substantial land fund is needed to pay for the return of large areas of Aboriginal land and so give reality to the change in society that a regional agreement would involve.
- Access to land and bush resources; access to waters and access to cultural places.
- A real role in decision making based on Aboriginal rights as criteria for decisions. This would involve Aboriginal people in a wide range of structures including those governing catchment management, land management, vegetation management, water resources, fisheries, mining, development controls and national parks.
- Recognition of key indicators of ecosystem health and biodiversity from the Aboriginal point of view.
- Priority for employment in natural resource management and restoration.
- Encouraging a full range of sustainable uses of natural resources in keeping with the diversity of Aboriginal ideas for the economic and social uses of land and water.
Facilitating the development of small scale structures to allow many small groups to do different things, escaping the current 'straight jacket' on land use thinking imposed by the community committee structure, while still keeping land title inalienable and communal so that Aboriginal nations are never again dispossessed.

In other jurisdictions governments have seen the sense in attempting to resolve Aboriginal land and resource needs through regional and comprehensive agreements. Those agreements have included detailed agreements in relation to Aboriginal interests in freshwater.\(^{305}\) There have also been comprehensive settlements in relation to specific resources.\(^{306}\)

Australian governments are yet to appreciate the benefits of this approach. Over the past few years the NSW government has been engaged in water planning, vegetation management planning, a review of western lands and other planning that affects Aboriginal interests in NSW rivers. Despite this, and the change in ideas brought about by the *Mabo* decision, the NSW government has not adequately recognised Aboriginal peoples in these planning activities. A Regional Agreement could ensure a significant role for Aboriginal peoples and Aboriginal issues in all regional planning and reviews.

There have already been some significant campaigns related to specific Aboriginal interests in the rivers of NSW. For example, there has been Aboriginal involvement in the stopping of a further irrigation licence near Tilpa; preventing logging of river red gums along the mid Darling River; and stopping irrigation and water skiing at Boobera Lagoon. Some specific issues, such as securing the Aboriginal interests in Lake Victoria and Lake Cowal, are very complicated and seem to be difficult to resolve in the current legal and political climate. Regional Agreements would ensure a better outcome for such issues.

The economy and infrastructure of parts of NSW is in lots of ways dependent on the Aboriginal population to attract services and funding. Regional Agreements can also bring in a uniform approach to deal with rights which may otherwise go to court as many long and costly individual cases, whether under the NTA, the access provisions of the ALRA, the *Western Lands Act*, the common law or statute law. The outcomes in terms of economic equity should also be seen as reducing social problems and so making the region a better place for everyone to live.

### 9.1.3 CONCLUDING COMMENTS

\(^{305}\) See for example the Inuvialuit Agreement and James Bay Agreement in Canada and the Ngai Tahu Agreement on the South Island of New Zealand as implemented through the *Ngai Tahu Claims Settlement Act* 1998 and the Nagti Ruanui Settlement as implemented through the *Ngati Ruanui Claims Settlement Act* 2003.

Management of water and river systems will be an ongoing process that will continue to be contentious.

It would be an easy option for the current NSW Government to follow its predecessors by largely ignoring Aboriginal interests in rivers. However, the authors contend that it would be short sighted to provide only limited recognition of those interests or allow only tokenistic Aboriginal involvement in river management. Such inadequate accommodation of Aboriginal interests however, will ensure ongoing grievances and a perpetuation of the mistakes of preceding generations.

Aboriginal people successfully managed the rivers for many thousands of years before colonisation. Aboriginal interests in river systems are based on a rich cultural heritage that is increasingly valued by the community at large. The great majority of citizens are moving beyond the colonial attitude that has disregarded Aboriginal interests and led to the unsustainable exploitation of resources. Most non-Aboriginal people are ready to move towards a just and equitable sharing of rivers and other resources with Aboriginal people. This is part of genuine reconciliation.

It is essential for the government to adopt a long term view. This is not only to ensure a just and proper implementation of universally accepted human rights standards, but also to secure a better outcome for the community by improving the health of rivers. The measures outlined in this paper would go a considerable way to achieving justice and sustainable rivers. The current NSW government should ensure that Aboriginal people are central to, rather than marginalized from, the ongoing water reform process and resource management generally.
10. BIBLIOGRAPHY

Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*.
The Recognition and Protection of Aboriginal Interest in NSW Rivers


Pearson N., *Where We’ve Come From and Where We’re At With the Opportunity That is Koiki: Mabo’s Legacy to Australia*, Mabo Lecture: Native Title Representative Bodies Conference, 3 June 2003.


Pritchard, S., “The International Covenant on Civil and Political Rights and Indigenous Peoples”.


11. ANNEXURE A.

INDIGENOUS PEOPLES KYOTO WATER DECLARATION

Third World Water Forum, Kyoto, Japan
March 2003

Relationship to Water

1. We, the Indigenous Peoples from all parts of the world assembled here, reaffirm our relationship to Mother Earth and responsibility to future generations to raise our voices in solidarity to speak for the protection of water. We were placed in a sacred manner on this earth, each in our own sacred and traditional lands and territories to care for all of creation and to care for water.

2. We recognize, honour and respect water as sacred and sustains all life. Our traditional knowledge, laws and ways of life teach us to be responsible in caring for this sacred gift that connects all life.

3. Our relationship with our lands, territories and water is the fundamental physical cultural and spiritual basis for our existence. This relationship to our Mother Earth requires us to conserve our freshwaters and oceans for the survival of present and future generations. We assert our role as caretakers with rights and responsibilities to defend and ensure the protection, availability and purity of water. We stand united to follow and implement our knowledge and traditional laws and exercise our right of self-determination to preserve water, and to preserve life.

Conditions of Our Waters

4. The ecosystems of the world have been compounding in change and in crisis. In our generation we see that our waters are being polluted with chemicals, pesticides, sewage, disease, radioactive contamination and ocean dumping from mining to shipping wastes. We see our waters being depleted or converted into destructive uses through the diversion and damming of water systems, mining and mineral extraction, mining of groundwater and aquifer for industrial and commercial purposes, and unsustainable economic, resource and recreational development, as well as the transformation of excessive amounts of water into energy. In the tropical southern and northern forest regions, deforestation has resulted in soil erosion and thermal contamination of our water.

5. The burning of oil, gas, and coal, known collectively as fossil fuels is the primary source of human-induced climate change. Climate change, if not halted, will result in increased frequency and severity of storms,

floods, drought, and water shortage. Globally, climate change is worsening desertification. It is polluting and drying up the subterranean and water sources, and is causing the extinction of precious flora and fauna. Many countries in Africa have been suffering from unprecedented droughts. The most vulnerable communities to climate change are Indigenous Peoples and impoverished local communities occupying marginal rural and urban environments. Small island communities are threatened with becoming submerged by rising oceans.

6. We see our waters increasingly governed by imposed economic, foreign and colonial domination, as well as trade agreements and commercial practices that disconnect us as peoples from the ecosystem. Water is being treated as a commodity and as a property interest that can be bought, sold and traded in global and domestic market-based systems. These imposed and inhumane practices do not respect that all life is sacred, that water is sacred.

7. When water is disrespected, misused and poorly managed, we see the life threatening impacts on all of creation. We know that our right of self-determination and sovereignty, our traditional knowledge and practices to protect the water are being disregarded, violated and disrespected.

8. Throughout Indigenous territories worldwide, we witness the increasing pollution and scarcity of fresh waters and the lack of access that we and other life forms such as the land, forests, animals, birds, plants, marine life, and air have to our waters, including oceans. In these times of scarcity, we see governments creating commercial interests in water that lead to inequities in distribution and prevent our access to the life giving nature of water.

Right to Water and Self Determination

9. We Indigenous Peoples have the right to self-determination. By virtue of that right we have the right to freely exercise full authority and control of our natural resources including water. We also refer to our right of permanent sovereignty over our natural resources, including water.

10. Self-determination for Indigenous Peoples includes the right to control our institutions, territories, resources, social orders, and cultures without external domination or interference.

11. Self-determination includes the practice of our cultural and spiritual relationships with water, and the exercise of authority to govern, use, manage, regulate, recover, conserve, enhance and renew our water sources, without interference.

12. International law recognizes the rights of Indigenous Peoples to:

- Self-determination
- Ownership, control and management of our traditional territories, lands and natural resources
• Exercise our customary law
• Represent ourselves through our own institutions
• Require free prior and informed consent to developments on our land
• Control and share in the benefits of the use of, our traditional knowledge.

13. Member States of the United Nations and international trade organizations, international and regional financial institutions and international agencies of economic cooperation are legally and morally obligated to respect and observe these and other related collective human rights and fundamental freedoms. Despite international and universal recognition of our role as caretakers of Mother Earth, our rights to recover, administer, protect and develop our territories, natural resources and water systems are systematically denied and misrepresented by governmental and international and domestic commercial interests. Our rights to conserve, recreate and transmit the totality of our cultural heritage to future generations, our human right to exist as Peoples is increasingly and alarmingly restricted, unduly impaired or totally denied.

14. Indigenous Peoples interests on water and customary uses must be recognized by governments, ensuring that Indigenous rights are enshrined in national legislation and policy. Such rights cover both water quantity and quality and extend to water as part of a healthy environment and to its cultural and spiritual values. Indigenous interests and rights must be respected by international agreements on trade and investment, and all plans for new water uses and allocations.

Traditional Knowledge

15. Our traditional practices are dynamically regulated systems. They are based on natural and spiritual laws, ensuring sustainable use through traditional resource conservation. Long-tenured and place-based traditional knowledge of the environment is extremely valuable, and has been proven to be valid and effective. Our traditional knowledge developed over the millennia should not be compromised by an over-reliance on relatively recent and narrowly defined western reductionist scientific methods and standards. We support the implementation of strong measures to allow the full and equal participation of Indigenous Peoples to share our experiences, knowledge and concerns. The indiscriminate and narrow application of modern scientific tools and technologies has contributed to the loss and degradation of water.

Consultation

16. To recover and retain our connection to our waters, we have the right to make decisions about waters at all levels. Governments, corporations
and intergovernmental organizations must, under international human rights standards require Indigenous Peoples free prior and informed consent and consultation by cultural appropriate means in all decision-making activities and all matters that may have affect. These consultations must be carried out with deep mutual respect, meaning there must be no fraud, manipulation, and duress nor guarantee that agreement will be reached on the specific project or measure. Consultations include:

a. To conduct the consultations under the communities own systems and mechanisms;

b. The means of Indigenous Peoples to fully participate in such consultations; and;

c. Indigenous Peoples exercise of both their local and traditional decision-making processes, including the direct participation of their spiritual and ceremonial authorities, individual members and community authorities as well as traditional practitioners of subsistence and cultural ways in the consultation process and the expression of consent for the particular project or measure.

d. Respect for the right to say no.

e. Ethical guidelines for a transparent and specific outcome.

Plan of Action

17. We endorse and reiterate the “Kimberley Declaration and the Indigenous Peoples’ Plan of Implementation on Sustainable Development” which was agreed upon in Johannesburg during the World Summit on Sustainable Development in September 2002.

18. We resolve to sustain our ancestral and historical relationships with and assert our inherent and inalienable rights to our lands and waters.

19. We resolve to maintain, strengthen and support Indigenous Peoples’ movements, struggles and campaigns on water and enhance the role of Indigenous elders, women and youth to protect water.

20. We seek to establish a Working Group of Indigenous Peoples on Water, which will facilitate linkages between Indigenous Peoples and provide technical and legal assistance to Indigenous communities who need such support in their struggles for the right to land and water. We will encourage the creation of similar working groups at the local, national and regional levels.

21. We challenge the dominant paradigm, policies, and programs on water development, which includes among others; government ownership of water, construction of large water infrastructures; corporatization; the privatization and commodification of water; the use of water as a tradeable commodity; and the liberalization of trade in water services, which do not recognise the rights of Indigenous Peoples to water.

22. We strongly support the recommendations of the World Commission on Dams (WCD) on water and energy development. These include the
WCD report’s core values, strategic priorities, the “rights and risks framework” and the use of multi-criteria assessment tools for strategic options assessment and project selection. Its rights-based development framework, including the recognition of the rights of Indigenous Peoples in water development is a major contribution to decision-making frameworks for sustainable development.

23. We call on the governments, multilateral organizations, academic institutions and think tanks to stop promoting and subsidizing the institutionalization and implementation of these anti-people and anti-nature policies and programs.

24. We demand a stop to mining, logging, energy and tourism projects that drain and pollute our waters and territories.

25. We demand that the World Bank, the International Monetary Fund (IMF), regional banks like the Asian Development Bank, African Development Bank, Inter-American Development Bank, stop the imposition of water privatization or ‘full cost recovery’ as a condition for new loans and renewal of loans of developing countries.

26. We ask the European Union to stop championing the liberalization of water services in the General Agreement on Services (GATS) of the World Trade Organization (WTO). This is not consistent with the European Commission’s policy on Indigenous Peoples and development. We will not support any policy or proposal coming from the WTO or regional trade agreements like the NAFTA (North American Free Trade Agreement, Free Trade Area of the Americas (FTAA), on water privatization and liberalization and we commit ourselves to fight against such agreements and proposals.

27. We resolve to replicate and transfer our traditional knowledge and practices on the sustainable use of water to our children and the future generations.

28. We encourage the broader society to support and learn from our water management practices for the sake of the conservation of water all over the world.

29. We call on the States to comply with their human rights obligations and commitments to legally binding international instruments to which they are signatories to, including but not limited to, such as the Covenant on Civil and Political Rights, the Covenant on Economic, Cultural and Social Rights, International Convention on the Elimination of all Forms of Racial Discrimination; as well as their obligations to conventions on the environment, such as the Convention on Biological Diversity, Climate Convention, and Convention to Combat Desertification.

30. We insist that the human rights obligations of States must be complied with and respected by their international trade organizations. These legally binding human rights and environmental obligations do not stop at the door of the WTO and other regional and bilateral trade agreements.
31. We resolve to use all political, technical and legal mechanisms on the
domestic and international level, so that the States, as well as trans-
national corporations and international financial institutions will be held
accountable for their actions or inactions that threaten the integrity of
water, our land and our peoples.

32. We call on the States to respect the spirit of Article 8j of the Convention
on Biological Diversity as it relates to the conservation of traditional
knowledge on conservation of ecosystems and we demand that the
Trade Related Aspects of the Intellectual Property Rights (TRIPS)
Agreement be taken out of the World Trade Organization (WTO)
Agreements as this violates our right to our traditional knowledge.

33. We call upon the States to fulfill the mandates of the United Nations
Framework Convention on Climate Change (UNFCCC) and to ratify the
Kyoto Protocol. We call for the end of State financial subsidies to fossil
fuel production and processing and for aggressive reduction of
greenhouse gas emissions calling attention to the United Nations
Intergovernmental Panel on Climate Change (IPCC) that reported an
immediate 60% reduction of CO2 is needed to stabilize global warming.

34. We will ensure that international and domestic systems of restoration
and compensation be put in place to restore the integrity of water and
ecosystems.