THE RIGHTS OF INDIGENOUS PEOPLES TO WATER: INTERNATIONAL ENVIRONMENT AND HUMAN RIGHTS STANDARDS

NEVA COLLINGS*

> *"No matter how much laws the White man makes, no matter how much decisions he makes also and sits down and plans and talks about things…..…he can never shake us out of the Land. Because we in the Land, we in the running water, we in the air we breathe, we in the day and the night, the wind the rain, in each blade of grass, each grain of sand and all that represents the history and the chapters if you like, if you want to put it in White Man's terms." Robert Bropho, Nyoongar Elder* [1]

The national water reform process has separated on-shore water from land by abolishing[2] riparian common law rights and creating tradable property rights, a process that has for the most part excluded Australia's Indigenous people in terms of their status as first peoples with customary decision-making protocols.

It is only in the jurisdictional roll out that Indigenous people are mentioned, in queue with other stakeholder interest groups, competing for allocations and priority access, and even then only in some jurisdictions not others. In fact some stakeholders groups have far greater decision-making power than Indigenous people in terms of selecting their own representation on catchment committees.

This overarching national exclusion and limited jurisdictional inclusion runs counter to international legal principles concerning the fundamental rights of Australia's Indigenous people whose matrix of rights associated with water - spiritual, social, economic, cultural, civil and political - should take precedence over other commercial interests.

Only the *Water Management Act 2000 (NSW)* and the *Water Act 2000 (QLD)* contain any reference to the interests of Aboriginal people.[3] The shortfall of this legislation is its limited recognition of the full gamut of Indigenous rights.

The NSW Act is regarded by the Lingiari Foundation Water Rights Project as a 'baseline for the express recognition of native title and broader spiritual, cultural, social and economic rights and interests in water and their accommodation within water management legislation.' However, even in NSW

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* Neva Collings is an Australian Aboriginal lawyer who has worked in international Indigenous issues, and resource management for Indigenous people. Neva is currently completing her Masters of Laws.

[1] See: <http://www.omen.com.au/~onelife/neopag/aborig.html>

[2] In-land waters include all water on and under the land and include rivers, lakes, waterholes, springs, creeks and groundwater, and the intertidal zone: s.253 Native Title Act 1993 defines onshore as land or water within the limits of a State or Territory.

[3] Lingiari Foundation Water Rights Project "Chapter 3: *General Legal and Policy Positions*" 2002 citing McKay 2002. <http://www.atsic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp> at 1 November 2004.

there are deficiencies in the representation of Aboriginal people in decision-making coupled with the almost impossible task of proving native title in order to use water for cultural purposes which are 'frozen in time' and limited to non-contemporary uses.[4](As discussed below.)

In other jurisdictions there is very little reference to any consultation with peak Aboriginal bodies or with local Aboriginal groups in the policy papers that have emerged.[5]

Concerned that the voice of Indigenous people has not been heard, that the participation of Indigenous people in water reform has been stymied, and their fundamental human rights sidelined, ATSIC and the Lingiari Foundation[6] collaborated to provide a vehicle for the Indigenous voice.

The Lingiari Foundation published and circulated a collection of briefing papers to inform the debate and collated the recommendations of national consultations with Indigenous people. Nationwide the project received about one hundred responses from Indigenous people, communities, community meetings and organisations within the tight timeframe. An Indigenous 'Rights to Waters Think Tank' was convened by the project in Adelaide in March 2002.

The Significance of Water to Indigenous People

'Water',[7] like land, has many different meanings for Aboriginal and Torres Strait Islander peoples throughout the continent of Australia. 'Freshwater and saltwater territories are distinct and separate, a distinction which is not merely economic or bio-geographic, but social and spiritual as well.'[8]

Aboriginal peoples have never drawn a distinction between the land and the waters that flow over, rest upon or flow beneath it. The land and waters are equal components of 'country', all require care and nurturing, and for which there are ongoing responsibilities.[9]

An explanation of the cultural importance of water to Indigenous people has been provided by the Lingiari Foundation Water Rights Project to inform the water reform process:

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[4] s.55 *Water Management Act 2000* (NSW).
[5] P Lane "Native Title and Inland Waters" in *Indigenous Law Bulletin* Vol 4, Issue 29 at 13.
[6] The Lingiari Foundation is a national Aboriginal organization, focusing on advocacy, research, education and development to advance Indigenous rights, develop Indigenous leadership and to promote reconciliation. It is chaired by Pat Dodson.
[7] **Offshore** waters (seas and oceans) and **onshore** waters including marine (coastal (salt or brackish) waters, lagoons, swamps, wetlands, and fresh waters in artesian, underground, springs, swamps, wetlands, lakes, rivers, streams, lagoons, billabongs and intermittent streams and potable drinking waters and non- potable process water).
[8] M Langton, D Epworth, V Sinnamon, *Indigenous Social, Economic and Cultural Issues in Land, Water and Biodiversity*, Vol. 1, Northern Territory University, (1999) at 30.
[9] Lingiari Foundation Water Rights Project *Onshore Water Rights Discussion Booklet* February 2002 at 6.

> Across Indigenous Australia, mythic beings, like water snakes, inhabit and create waterholes, the seabed, tidal creeks, springs and rivers. They are responsible for making storms, and can be seen in the formation of clouds, wind and rain. They are powerful and volatile beings, which look after their country and its people. They have to be approached in the right way, culturally, and can only be pacified by people who have the right to approach them - that is, by the people of the country to which they belong…. Water places are often at the heart of a person's, or group's country. This shows in, for example, how people paint their country (especially desert peoples). In the Kimberley such permanent water sources are referred to as 'living waters.'

The central role of water to Indigenous people is evident through the native title process in which applicants asserting native title are required to demonstrate that traditional laws and customs confer entitlement and responsibilities in relation to water. This will include, where water is seasonally scarce, knowledge of seasonal variation and the capacity of the country to support large communities.[10] The traditional laws and customs concerning country form a complex matrix of economic, social and spiritual relationships[11] in which access to water governs the lifestyle and use of these sites.[12]

Despite this fundamental centrality, access to water and the participation of Indigenous people in decision-making is severely limited even in jurisdictions such as NSW and QLD that are relatively progressive. This exclusion impinges on the ability of Aboriginal people to holistically function as a 'people'.

> As noted by a member of the Native Title Tribunal 'it is difficult to describe rights to water in terms of an entitlement to carry out certain activities (eg fishing) when the performance of the activity expresses several aspects of the relationship (eg fishing for domestic sustenance, fishing to carry out an obligation to relatives, fishing as part of ceremonial practice).[13]

In NSW the draft Tomago Water Sharing Plan contains the following statement generated by a workshop held with Aboriginal community representatives:

> Life giving water is of extreme significance to Aboriginal culture for its domestic, traditional and spiritual values. Whilst water supplied for the environment will provide protection for native flora and fauna, fishing, food gathering and recreational activities, it is important that the community respects the spiritual significance of water to the Aboriginal people.[14]

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[10] P Lane, '*N*ative Title and Inland Waters' in *Indigenous Law Bulletin* Vol 4, Issue 29 at 11.
[11] See *Bropho v Ball* (Unreported, Federal Court of Australia, 1 February 1997.
[12] See *Ward v Western Australia* (1998) 159 ALR 483, 513.
[13] P Lane, 'Native Title and Inland Waters' in *Indigenous Law Bulletin* Vol 4, Issue 29 at 11: Evidence of continuing specific activities may be insufficiently persuasive of the existence of any continuing law and custom concerning those activities. See *Yorta Yorta people v Victoria* (Unreported, Federal Court of Australia, Olney J, 18 December 1998) 122 and *Wik Peoples v Queensland* (1998) 187 CLR 1, 183 (Gummow J).
[14] <http://www.dipnr.nsw.gov.au/water/sharing/guides/tomago-guide.pdf>

The NSW Water Sharing Plans acknowledge the importance of Indigenous heritage and cultural values associated with water systems, however this is traded off against the needs of irrigators. By way of contrast, the *New Zealand Natural Resource Management Act* gives greater priority to Maori cultural values as against other water users.[15]

Culture is pigeon-holed by definition to a traditional model where in fact culture is elastic and has many facets in contemporary life. For example, it is questionable whether the definition of native title use under s.55 of the *NSW Water Management Act* would allow watering a football field as a contemporary cultural use in addition to 'making artefacts'.

The National Water Reform Agenda and Aboriginal People

The national water reform agenda is driven by a realisation that access to water is essential to sustaining an increasing population and the need to improve the dire environmental impact of over use through a system that will ensure waterways have at least a minimum environmental flow. However, it seems that the environment and other stakeholders have taken precedence over Indigenous interests.

Some jurisdictions have opted to specifically address Indigenous needs in water reform legislation i.e. the *NSW Water Management Act* 2000. Under the Federal Constitution responsibility for the control and management of inland waters and waterways rests primarily with the states. The Constitution does not provide the Commonwealth Parliament with an express power to make laws that regulate and manage inland waters. Increasingly, however, State and Territory laws and policies in relation to waters are being guided by international laws and national policies. The principal forum in which these national policies are developed and implemented is through COAG. This is a forum attended by respective heads of the Commonwealth, State and Territory governments.

The principle COAG (Council of Australian Governments) Water Reform Agreement (the Agreement) was made in February 1994 and established a framework and principles for the profound reform of water management in Australia. Federal, State and Territory government agreed that action needed to be taken to address significant environmental damage caused by past water management regimes.

The application of national competition policy to water resource management is a foundation of the reforms designed to result in a market based value being placed on water resources to drive their more efficient and sustainable use. The Agreement links economic, social and environmental objectives to be carried forward by legislative amendment, institutional reforms

[15] Lingiari Foundation Water Rights Project "Chapter 3: *General Legal and Policy Positions*" 2002 citing McKay 2002. see <http://www.atsic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp> at 1 November 2004.

and administrative reforms in each jurisdiction. Cultural rights and objectives are peripheral.

To this end, the abolition of riparian rights, the separation of water rights from land title and the creation of private property rights in water is designed to facilitate water trading thus according to COAG 'allowing water to move to its highest value use, subject to physical and ecological constraints and the protection of third parties'.[16] This, it is argued, will encourage efficient water use.

However, it is the impact of water reform on Australia's Indigenous people that is the subject of this paper and includes the following issues:

- Obligation to recognise fundamental human rights;
- Access to Resources, Subsistence Rights & Sustainable Development; and,
- Governance - how Aboriginal people participate in the decision making process.

In 1995 the COAG Taskforce on Water Reform published its *Occasional Paper Number 1: Water Allocations and Entitlements: A National Framework for the Implementation of Property Rights in Water*. This national policy position paper does not mention native title, or any other form of Indigenous entitlement that might require recognition and accommodation when developing national principles designed to 'turn current water entitlements … into full property rights which will form the basis for inter-jurisdictional trade….'[17]

The COAG water reform process should be expanded to include principles for recognition of the spiritual, cultural, social and economic character of Indigenous rights, and to require their legislative protection in State and Territory legislation that implements the COAG agenda.[18] Tranche payments would only be granted by the Federal government when this is satisfied, as with other requirements. This would in turn create general uniformity as compared with the present jurisdictional disparity.

The barrier to recognition of Indigenous rights to waters, argued by ATSIC and the Lingiari Foundation Water Rights Project, is based on a 'profound ignorance amongst non-Indigenous Australians concerning the relationship of Aboriginal and Torres Strait Islander people to water in all its forms.'[19] Further, the "current approach to rights to waters by the Australian

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[16] Lingiari Foundation Water Rights Project "Chapter 2: Principles for the Recognition of Indigenous rights to Water citing High Level Steering Group on Water, January 2001: See <http://www.atsic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp> at 1 November 2004.

[17] Ibid citing COAG 1995: i.

[18] Lingiari Foundation Water Rights Project 'Chapter 2: *Principles for the Recognition of Indigenous Rights to Water*' 2002 see <http://www.atsic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp> at 1 November 2004.

[19] Ibid.

legal system and government policy does not reflect Indigenous cultural perspectives. Nor does it accommodate rights and responsibilities relating to waters and water resources under Indigenous law.'[20]

But the current approach to the recognition of Indigenous rights to water is deeply flawed by the constraints of the common law, the terms of the *Native Title Act* 1993 (Cth), and government policy that relegates Indigenous people to the status of merely another stakeholder.[21]

The NSW White Paper on Water reform states that:

> [The] proposed water legislation will not affect the operation of the Commonwealth or NSW Native Title Act in respect of the recognition of native title rights and interests. The State will comply with that legislation before granting any rights or interests in water.[22]

The difficulty of requiring native title in order to access water rights is that native title will only provide Aboriginal people with legal rights to access their land and sea country in some areas. Native title holders first need to satisfy the Federal Court as to their traditional laws and customs which may be a significant obstacle for some Indigenous communities, as shown in the Yorta Yorta[23] case which found that native title had been washed away by the tide of history.

The obligations of Government to recognise and protect Indigenous interests in relation to waters goes beyond the terms of the *Native Title Act 1993 (Cth)*. Australia has an obligation to protect and respect Indigenous cultures, not just artificial manifestations of those rights that the Australian legal system might construct. That obligation arises not only as a moral obligation. It arises under Australia's international human rights obligations regarding the right to protect property,[24] the right to freedom from discrimination,[25] and in relation to the protection of Indigenous cultures.[26]

Aboriginal heritage legislation such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) provides protection in certain circumstances for particular sites, including waters, of cultural significance to

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[20] Ibid.
[21] Ibid.

[22] NSW Department of Land and Water Conservation, Sydney, *White Paper: A Proposal for Updated and Consolidated Water Management in NSW* (December 1999) 23.
[23] *Yorta Yorta People v Victoria* (Unreported, Federal Court of Australia, Olney J, 18 December 1998).
[24] See Art. 17 of the *Universal Declaration of Human Rights and Art. 5 of the International Covenant on the Elimination of All Forms of Racial Discrimination.*
[25] See Art 2 of the *Universal Declation of Human Rights,* Art. 2 of the *International Covenant on Civil and Political Rights,* Art. 2 of the *International Covenant on the Elimination of All Forms of Racial Discrimination,* Art. 2 of the *International Covenant on Economic, Social and Cultural Rights.*
[26] NSW Native Title Services Ltd, 'Submission to the Commonwealth Position Paper "Achieving Sustainable Water Management"', citing Art 27 of the International Convention on the Elimination of All Forms of Racial Discimination, Art 8(j) of the Convention on Biological Diversity.

Aboriginal people. However, these laws do not recognise or create rights in relation to waters that are held by Indigenous peoples.[27]

Obligation to Recognise Fundamental Human Rights: International Legal Principles

The obligation to recognise Indigenous claims to water should be viewed in the context of international legal obligations on Australia, as a Nation State, to protect Indigenous culture and associated rights. Such obligations arise through the very existence of Aboriginal and Torres Strait Islander peoples as the first peoples of this continent, and the original inhabitants of the nation: the living cultural traditions, subsistence practices, inter-related political economies, and transmission of knowledge to future generations.[28]

International legal principles are embodied in a range of international legal agreements that uphold the civil, political, social, economic and cultural rights of all 'peoples'. The spectrum of rights that underpin the functioning of a 'people' are articulated in such agreements some of which have been have been ratified by the Australian government. They include the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), *International Convention on the Elimination of All Forms of Discrimination* (ICERD), and the *Convention on Biodiversity* (CBD).

The ICCPR and ICESCR evolved from the *Universal Declaration of Human Rights*, which upholds the ideal that free human beings, enjoying freedom from fear and want, can only be achieved if conditions are created whereby everyone may enjoy his or her economic, social and cultural rights, as well as his or her civil and political rights.

Article 1 of the ICCPR and the ICESCR articulates that all 'peoples' have the right to self-determination, and to this end flow fundamental freedoms of an economic, civil, political, social and cultural nature. Article 4 of the *Draft Declaration on the Rights of Indigenous Peoples* reiterates Article 1 however this agreement has not been approved by member states of the United Nations because the consensus is that Indigenous peoples are not a 'people'.

The debate over people or peoples is a highly contentious issue. For the purposes of this paper, it is assumed Australia's Indigenous people are a people with inherent rights not just as individual citizens but with a collective identity. This is the assertion of Aboriginal and Torres Strait Islander peoples asserting their right to self-determination.

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[27] Lingiari Foundation Water Rights Project 'Chapter 3: General Legal and Policy Positions' 2002 citing O'Donnell (2002):103. see: <http://www.atsic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp> at 1 November 2004.

[28] N Collings 'Water Rights and International Law' in *Background Briefing Papers: Indigenous Rights to Waters* ATSIC/ Lingiari Foundation (2002) at 65.

The on-going cultural attachment of Aboriginal and Torres Strait Islander peoples to 'water' is recognised as creating a right or entitlement to continue this affiliation, and the social, political and economic foundations that exist. The entitlement of Aboriginal and Torres Strait Islander peoples to carry out their cultural practices affiliated with water, both traditional and contemporary, include other indivisible rights for the sustenance of the community as a whole.

However, recognition of Indigenous rights that flow from water are limited in comparison to rights that are attach to land due to the artificial legal distinction between land and water under domestic legislation. The result is inadequate protection of the rights and traditions of Aboriginal and Torres Strait Islander peoples for whom the water and land are connected.

This shortfall was recognised by the Human Rights Committee at its 69th session when it considered Australia's periodic report. The Committee was concerned with the prioritisation of interests over the protection and recognition of Indigenous culture, traditional economy and subsistence rights under Article 27 of the *International Covenant on Civil and Political Rights* (1976) ('ICCPR'), including specific reference to 'fishing' and protection of sites of cultural significance:

The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of Indigenous minorities (hunting, fishing, and gathering), and protection of sites of religious or cultural significance for such minorities, that must be protected under Article 27, are not always a major factor in determining land use.

The obligations of Australia to recognised Indigenous claims to water should be viewed in the context of obligations on Australia, as nation state, to protect Indigenous culture and associated rights. Such obligations arise through the very existence of Aboriginal and Torres Strait Islander peoples as the first peoples of the continent: their living cultural practices, subsistence practices.

Inter-related political economies, and transmission of knowledge to future generations.

A wide reading of 'cultural rights' is prescribed by Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which requires that States Parties recognise the right of everyone to take part in cultural life. This includes the right to participate in the life of society.

Article 27 of the ICCPR requires that:

> In those States in which ethnic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture, to practice their own religion, or to use their own language.

Article 27 is reiterated verbatim in the *Convention on the Rights of the Child* under Article 30.

The Human Rights Committee has provided further comment on what is meant by Article 27. General Comment 23 states:

> … the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. ***That right may include such traditional activities as fishing or hunting*** and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them.

The importance of General Comment 23 is that minorities, such as Aboriginal and Torres Strait Islander peoples, have a distinct right that is additional to other rights they are entitled to enjoy as individuals. According to the Committee, 'positive measures by States may….be necessary to protect the identity of a minority and the rights of its members.' Further:

> … although the rights protected under Article 27 are individual rights they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of the minority.

Many of the international treaties and reports use language of 'land, territories and resources', not specifically 'water'.

'Land' is broadly defined in Chapter 26 of the *Agenda 21: Programme of Action for Sustainable Development*, and though it is not ratified by Australia, it could be interpreted as extending to water within the total environment: '… in the context of this chapter the term lands is understood to include the environment of the areas which the people concerned traditionally occupy.'

The Human Rights Committee General Comment 23 makes reference to fishing rights when clarifying use of land resources, indicating that cultural rights under Article 27 of the ICCPR includes water 'territories':

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.

The draft *Declaration on the Rights of Indigenous Peoples* provides a detailed description of 'territory' under Article 26 including specific reference to 'water':

> Indigenous people have the right to own, develop, control and use the lands and territories including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment of these rights.

The *International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* refers to 'territories' that impliedly extends to water territories and resources as part of the 'total environment' of Indigenous peoples, although Australia has not signed this convention.

The positive obligation to not only protect but revitalise culture is stated in General Recommendation XXIII (51) of the *Committee for the Elimination of All Forms of Racial Discrimination* (CERD Committee) and General Comment 23 of the Human Rights Committee which requests states parties to ensure that indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and to practice their languages in 'community with other members of the group'.

The importance of maintaining cultural traditions associated with 'water' in the present, for future generations, is stated by Article 25 of the draft *Declaration of the Rights of Indigenous Peoples* which says:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, ***waters*** and coastal seas and other resources that they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

The obligation of the Australian Government to take positive measures to protect the cultural practices of Aboriginal and Torres Strait Islander peoples is based on the principles of equality and self-determination. States are required to recognise and protect the rights of Indigenous people to own, develop, control and use their communal lands, territories and resources, including water. The underlying principle is one of 'substantive equality'. Not the 'shoulder to shoulder' stakeholder approach of the COAG reform agenda.

Access to Resources, Subsistence Rights & Sustainable Development

The cultural rights of Aboriginal and Torres Strait Islander peoples, recognised and protected under international law, are inextricably linked to all other covenant rights because Covenant rights are indivisible. This is in accordance with the *Universal Declaration of Human Rights*, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his or her economic, social and cultural rights, as well as his or her civil and political rights.

Therefore the exercise of cultural rights, over water, will necessarily involve the exercise of economic, social, and political rights.

Subsistence rights are essential to maintaining longevity and health of Aboriginal and Torres Strait Islander communities in the practice of cultural traditions under Article 27 of the ICCPR. Without means of subsistence, cultural rights can be regarded as mere window dressing. Similarly, subsistence rights exercised over a territory depleted of resources are meaningless unless the positive obligations upon Governments to uphold and protect Covenant rights are acted upon. i.e. Protected Zones by Treaty.

The subsistence rights of 'peoples' (which are taken to include Aboriginal and Torres Strait Islander peoples) are stated in Article 1(2) of the ICESCR and the ICCPR:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. ***In no case may a people be deprived of its own means of subsistence.***

Article 10 of the *Convention on Biological Diversity* (1993) ('CBD') requires governments to protect and encourage customary use of biological resources in accordance with traditional cultural practices. This includes marine resources specifically referred to under Article 8(j).

General Recommendation XXIII(51) of the CERD Committee calls upon States parties to the Convention: '… to provide indigenous peoples with conditions allowing for a ***sustainable economic and social development*** compatible with their cultural characteristics.'

The interpretations of what is a traditional lifestyle often render terms of access to resources unworkable. For example, fishing may be permitted using only traditional means and when competing with commercial fishing licensees efforts are futile. In this case Covenant rights cannot be realised. The purpose of the practice should be the focus.

The *Convention on the Law of the Sea* (198X) obliges States parties to ensure that living resources are managed and conserved to produce 'maximum sustainable yield' while taking into consideration the 'economic needs of coastal fishing communities'.[29] However, there is no mention of Indigenous peoples, or the conflicts that arise as a result of commercial fishing for maximum yield and the traditional practices of Indigenous communities and their economic needs.

The *Torres Strait Treaty* (1978) creates a protected zone and protects the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement.

It has been argued that similar legal protection should, as a matter of equity, be afforded to other Indigenous peoples with cultural affiliations and subsistence rights over marine areas in Australia.[30]

The issue of commercial use of resources by Aboriginal and Torres Strait Islander communities is less clear-cut. Section 211 of the *Native Title Act* 1993 provides that Commonwealth, state or territory restrictions on hunting, fishing, gathering and a cultural or spiritual activity do not apply if the activity is for the satisfaction of personal, domestic or non-commercial communal needs.

'Traditional' economic development, and in particular 'trade', is a practice of many Indigenous communities including those culturally affiliated with water.

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[29] Article 61.

[30] Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Annual Report*, Human Rights and Equal Opportunity Commission, (2000) AGPS.

The *World Summit for Social Development* that took place in Copenhagen in 1995 identified the need for economic development of Indigenous communities. The Summit made a commitment to:

> 26(m) Recognise and support indigenous people in their pursuit of economic and social development, with full respect for their identity, traditions, forms of social organisation and cultural values.

The Human Rights Committee, during its consideration of Australia's periodic report 22 July 2000 suggested steps be taken to secure the sustainability of forms of Indigenous economic life in relation to competing use of land and resources in relation to forms of modernisation.[31]

Further, the Committee stated that:

> …to some extent, we must stop the clock in order to see what we have in the form of traditional economies and traditional ways of life, and to some extent …… wind the clock backwards in order to see where there are vital traditions of the indigenous peoples of Australia and what are the sustainable traditions, and what can be done to give them a new sound economic basis so that their sustainability in the future could be secured.[32]

Linked to the right to subsistence are issues of sustainable development. The right to use marine resources in a sustainable way while protecting such resources for future generations is stated in Articles 8(j) of the CBD, which Australia has signed:

> Indigenous peoples have a right, recognised in international legal principles, to not only use their marine resources on a sustainable basis but also to protect them for future generations by participating in management regimes, exercising a right to negotiate over proposed developments and developing agreements with other stakeholders.

Traditional fishing practices in competition with commercial fishing licensees do not necessarily result in enjoyment of subsistence rights when there are no fish, nor quotas that are impossible for communities to survive on. The *Convention on the Law of the Sea* (1984) talks about conserving living resources in consideration of the economic needs of fishing communities, but there is no mention of Indigenous peoples.

Governance and Participation in Decision Making

An important criterion of resource use and management is the effective participation of Aboriginal and Torres Strait Islander peoples in decision making that affect them. This is in accordance with the fundamental right of self-determination that must be read in conjunction with all other human rights.

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[31] Human Rights Committee, *Transcript of the 69th session consideration of Australia's periodic report*. See <www.faira.org.au>.
[32] Ibid.

The World Summit on Sustainable Development highlighted the good governance as a prerequisite to sustainable development where at Article 4 of the Introduction to the Plan of Implementation it states: 'Good governance within each country and at the international level is essential for sustainable development.'

At the Third World Water Forum one of the key issues was the need for effective governance and that 'inclusive community level public participation is fundamental to achieving these goals.[33] The forum also stated 'the need for capacity building, education and access to information for enhanced effectiveness in water management is unquestioned.'

The Dublin Principles at Guiding Principle No 2 states that:

> Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels.
> The participatory approach involves raising awareness of the importance of water among policy-makers and the general public. It means that decisions are taken at the lowest appropriate level, with full public consultation and involvement of users in the planning and implementation of water projects.[34]

Article 1 of the ICCPR and the ICESCR states:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 2(3) of the ICCPR requires that members of minorities participate effectively in decisions that affect them:

> … the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[35]

In terms of the participation of Aboriginal people at the national level, the Lingiari Foundation Water Rights Project noted 'there are no formal barriers at all to Aboriginal participation in COAG, whose processes appear to be regulated more by protocol than by formal agreements.' Concern was raised at the fact:

> New Zealand is represented at the Ministerial Council for Natural Resource Management and Papua New Guinea had also attended. Given the lack of formal barriers, and the inclusion of representatives from outside Australia, it is disappointing that this nation's traditional owners are not included in, and welcomed at, such forums.

Further, the Lingiari Foundation explained:

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[33] March 16-23, 2003 in Kyoto, Shiga, and Osaka, Japan.
[34] See: <http://www.wmo.ch/web/homs/documents/english/icwedece.html>.
[35] Human Rights Committee, 69th session, *Concluding Observations Australia*, UN Doc CCPR/CO/69/AUS 28 July 2000.

> …the involvement of Aboriginal people in boards and committees alone cannot be equated with the recognition of Aboriginal people's right to be heard. In most cases appointments to these boards and committees are made by Ministerial appointment. Aboriginal people have no statutory power to influence these appointments.[36] This can be contrasted with the statutory power in come instances of interest groups such as farmers, recreational fisherman and environmentalists, to put forward the names of their preferred committee members to the relevant Minister.[37]

Traditional owners are not recognised at all in any of the legislation that governs these boards and committees. These matters of acknowledging Indigenous values and decision-making processes can be dealt with through a protocol, or framework agreement. For instance the Murray and Lower Darling Basin Indigenous Nations (MLDRIN) have signed a protocol with the Department of Land and Water Conservation in NSW that contains, amongst other things, an acknowledgement of Aboriginal processes of decision- making. According to the MLDRIN, getting to this stage required years of work, much of which involved Indigenous nations coming together to talk about how they saw their part of the Murray and Darling Rivers and to share information.

It has been recommended by the Lingiari Foundation Water Rights Project that:

> … for any process of negotiation, or structure for Indigenous participation to succeed a foundation of understanding and recognition of the unique status of the Aboriginal and Torres Strait Islander peoples, as Australia's first peoples, is essential. Respect for Indigenous protocols is prerequisite.[38]

There are steps towards greater participation of Aboriginal people in the management of 'water' and marine parks, however the question remains whether the social, cultural, economic, and intellectual property rights of Aboriginal and Torres Strait Islander people can be exercised through their roles on such management committees.

In NSW the Water Sharing Plans were based on a participatory approach in accordance with international legal principles, but it could be argued that participation of Indigenous peoples and other groups have been diminished by the Water Management Authorities where representatives are appointed by government. It remains to be seen whether the WMAs will take decisions at the 'lowest appropriate level' in accordance with the Dublin Principles.

An example of the exclusion of Aboriginal people from the decision making process in water management is Boobera Lagoon where water skiing

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[36] The only possible exception is the Murrary Darling Basin Community Reference Group where the ILC has the power to nominate 2 of the 28 members.

[37] For example *PIERD Act 1989* (Cth); *Water Resources Act 1997* (SA); Catchment *and Land Protection Act 1994* (Vic); see Volume II Appendix 2.

[38] Lingiari Foundation Water Rights Project 'Chapter 3: General Legal and Policy Positions' 2002 citing McKay 2002. see <http://www.atsic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp> at 1 November 2004

was approved despite opposition from the Aboriginal community for whom the lagoon is sacred and part of the rainbow serpent dreaming tract.

At the 69th session of the Human Rights Committee a committee member queried Boobera Lagoon and proposed that if the right under Article 27 had legislative authority, had been legislatively ordained, the Aboriginal people affected could have gone to court. They could have asked for a remedy under Article 2(3) and that remedy would have entitled them to have a direct and primary say in what constitutes their culture and traditions and would have enabled the court to make a judgment about the priority, for example, of water skiing over cultural and religious rights. The court would have the opportunity of deciding on these priorities, cultural rights of certain minorities guaranteed under the Covenant and property rights not guaranteed under the Covenant but guaranteed elsewhere.

The response of the Australian government to the concerns raised by the Committee indicate the way in which rights of Indigenous peoples, including rights associated with water, are balanced. It was said that the way heritage protection works in Australia is that judgments are made about the balance between heritage protection and other considerations such as the interests of other stakeholders. Further, that even though there's a *prima facie* argument that Indigenous people are entitled to have their heritage protected, the Australian government representative said there will be other considerations. For example, if there's a mine to be built, there may be economic considerations that the party eventually decides outweigh the requirement to protect heritage.[39]

The draft *Declaration on the Rights of Indigenous Peoples* deals with the issues of participation rights under Articles 3 & 4:

> Article 3 - Indigenous people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> Article 4 - Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Principle 22 of the *Rio Declaration of the UN Conference on Environment and Development* (1992) concerns sustainable management and the need to protect Indigenous lands and resources. It also talks about 'effective participation' in the management of sustainable development, although it has not been ratified by Australia:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their ***effective participation*** in the achievement of sustainable development.

[39] Human Rights Committee, transcript of the 69th Session, *Consideration of Australia's Periodic Report*, see < www.faira.org.au >

This can be achieved by, for example, participating in management regimes, exercising a right to negotiate over proposed developments and developing agreements with other stakeholders.

The CERD Committee has called upon states:

> … to ensure that members of indigenous peoples have equal rights in respect of their effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.[40]

Also the *World Conference on Human Rights* in Vienna 1993 produced the *Vienna Declaration and Programme of Action* and urged States 'to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them.'.[41]

In consideration of Australia's periodic report of its compliance with the ICCPR, the Human Rights Committee formally concluded that the State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art. 1, para. 2).

This can be achieved by actively supporting capacity building to enable Indigenous communities to participate in decision-making. In the NSW consultations this was a common theme.[42]

Upholding international legal principles and Obligations

The central question is how can Aboriginal and Torres Strait Islander peoples assert their fundamental rights and freedoms as they relate to water? Unlike the proprietary rights attached to land, rights over coastal and inland public waters are non-exclusive. The resulting competition for resources and access can hinder the enjoyment of rights and freedoms enjoyed by Aboriginal and Torres Strait Islander peoples with traditional affiliations to water 'territories'. Equal access to 'aquatic' resources may not result in equitable outcomes hence the principle of substantive equality.

One solution proposed by the Human Rights Committee is for Australia to legislate a Bill of Rights or equivalent over-arching protection that would embody and entrench Covenant rights at the highest level. This would then be binding on all levels of government, in all states and territories, and provide appropriate enforceable remedies. It need not be called a Bill of Rights. It could be called a Treaty. The outcome is what is important – to guarantee all peoples the rights they are entitled to enjoy.

Presently, not all Covenant rights are guaranteed by law, nor is there then a remedy for violation of Covenant rights such as Article 27 being the right to enjoy culture in community with other members of the group. There is

[40] General Recommendation XXIII(51).
[41] Paragraph 31
[42] Copy of document summarising Indigenous consultations available from the Department of Land and Water Conservation.

legislation and agreements that uphold some Covenant rights but it does not cover the full spectrum, particularly the collective dimension of Article 27.

The full protection of all Covenant rights is required by Articles 1 & 50 of the ICCPR, where the latter prevents the Government from hiding behind a cloak of federalism as an excuse:

> Article 2(2) – Each State Party to the Covenant undertakes to take the necessary steps in accordance with its constitutional process to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the Covenant
> Article 50 - The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

A further important requirement of the ICCPR is for a remedy to be available for breach of Covenant rights, including Article 27:

> 3. Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy …:
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

As noted by the Lingiari Foundation Water Rights Project:

> … the design of effective measures to enable the exercise and enjoyment of Indigenous rights in contemporary circumstances requires not only the recognition of existing rights, but also the restoration of rights lost through historical circumstances.[43]

This requires positive measures and special consideration.

The *National Water Act of South Africa* 1998 is an example of legislation dealing with resource management that can be based on clear principles of social justice as well as sustainable development, and can work to restore rights lost through past lack of recognition. The objects of this Act expressly include 'promoting equitable access to water…redressing the results of past racial…discrimination [and] meeting international obligations.'[44]

National principles for the recognition and restoration of the rights to waters of Indigenous Australians should be broadly defined to enable the exercise of the right to self-determination at the regional and local level. The precise forms of the exercise and enjoyment of rights to country is a matter for those who speak directly for their traditional estates within the terms of the law.

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[43] Lingiari Foundation Water Rights Project 'Chapter 2: Principles for the Recognition of Indigenous Rights to Water' 2002 see <http://www.atsic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp> at 1 November 2004.
[44] Ibid.

Unfortunately, the horse has bolted, so to speak, in terms of state and territory legislation in the roll out of water reform. It is hoped water management committees and authorities will better represent Indigenous people according to Indigenous law and custom, and for water allocations to be accessible to Indigenous people on an equitable basis. i.e. water trusts, wider definition of native title use.