WATER REFORM AND THE RIGHT FOR INDIGENOUS AUSTRALIANS TO BE ENGAGED

CHRISTINA SON*

Introduction

Since working for conservation back in the late 1980s I observed a consistent nagging discrepancy: Indigenous communities were rarely engaged, if at all. This held true for water rights as it did for any of the land management or property rights issues. Probably the most contentious case for South Australia in this regard was Hindmarsh Island Bridge.[1] However there clearly will be more cases with the announcement in April 2009 by the Ngarrindjeri traditional owners of the Coorong and Lower Lakes regions that a weir at Wellington would be in breach of their native title rights.[2] The fact is that Indigenous communities still suffer from participation poverty — a social exclusion where they cannot fully participate in society. True reconciliation many argue, including Dodson,[3] cannot occur until Indigenous Australians enjoy the same opportunities and standards of treatment as other Australians and this must include their right to be engaged as key stakeholders in the current water reforms. Therefore, on the 4th April 2009, when the Australian Government issued a statement supporting the UN Declaration on the Rights of Indigenous Peoples,[4] it provided an opportunity to revisit this issue.

As part of the Declaration, Indigenous Peoples have called for substantive

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* Dr Christina Son, BA; BSc (Hons); LLB (Hons); PhD, was recently appointed Senior Policy Officer with the Department of Water, Land and Biodiversity Conservation, South Australia. Prior to this she was teaching in the Law Faculty, Flinders University and, as a legal practitioner, worked for the Native Title Unit and the Aboriginal Legal Rights Movement and in 2003 prepared the Senate Inquiry position paper on Legal Aid and Access to Justice on behalf of the ALRM. Her unique combination of both an ecology and law background has seen her develop a strong research interest in land management and Indigenous groups from a rights perspective. She has published widely and was recently guest editor for the Flinders Law Reform Journal and was one of the coordinators for the 'Australian Sustainability Laws and Water Management: The Future' Symposium held in October 2008 at the University of South Australia.

[1] *Chapman v Conservation Council of SA & Others* (2002) SASC 4.

[2] No author, 'Weir in breach of native title rights', *ABC News* (23 April 2009).

[3] Professor Michael Dodson AM, recipient of the Australian of the Year 2009 award.

[4] There are several rights and treaties that support Indigenous Peoples to have customary and modern dependencies on water recognised and respected; The International Covenant on Economic Social and Cultural Rights (ICESCR) which promotes self-determination; the Convention on the Elimination of All forms of Racial Discrimination (CERD) which promotes equal rights to resources and property; and the Indigenous Declaration on water which was developed from the Third World Water Forum held in Kyoto March 2003. However until this point Australia had been reluctant to endorse or ratify any of the treaties unlike other countries, New Zealand and Canada in particular, thus this is seen as a significant victory for Indigenous rights.

involvement in policy and decision-making, as well as direct involvement in environmental management. Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples states:

> States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

'Informed consent' requires more than mere consultation. It requires active engagement and participation.

It is a fact that the extent of the Indigenous estate in Australia is significant. It has been estimated at between 15 and 20 per cent of the continent[5] including substantial water catchment areas and in some jurisdictions far more (eg 42 per cent of the Northern Territory rising potentially to 52 per cent, and over 80 per cent of the NT coastline). It can be argued that the depressed economic and social status of Indigenous people in Australia today is explicable, at least in part, by the alienation of their rights to this land and its resources, and hence from the spiritual, cultural and economic relationships that connect them with the land and water. Thus we are not dealing merely with a resource issue, but with a more complex relationship that has clearly affected the wellbeing of a Nation: Indigenous Australians are the most highly incarcerated in the world[6] and are commonly referred to as an 'impoverished minority' whose average life expectation is 17-years lower than other Australians; infant mortality three times higher; and death rates twice as high across all age groups for all age groups.[7] The significance of these links between 'country' and Indigenous Australians' wellbeing are only starting to be understood. For example, take the Ngarrindjeri[8] and their unique relationship with the Murray River:

> The Ngarrindjeri lands - in particular the River, the Lakes and the Coorong are crucial for the survival of the Ngarrindjeri people. They have a spiritual and religious connection with the land and the livng things associated with it. The fish, the birds and other living things are the Ngartjis (totems) of the Ngarrindjeri people. Many Ngarrindjeri people have a strong spiritual connection to their Ngartjis and a

[5] DP Pollack, 'Indigenous land in Australia: A quantitative assessment of Indigenous landholdings in Australia' (2001) *CAEPR Discussion Paper No. 221*, CAEPR, ANU, Canberra.

[6] Despite Indigenous Australians representing approximately 2.4% of the Australian population, at least 24% of the prison population is Indigenous. See Australian Bureau of Statistics, 'Australian Social Trends – Population – Social Circumstances of Aboriginal and Torres Strait Islander Peoples', Australian Bureau of Statistics, Prisoners in Australia 2006.

[7] 'Close the Gap on Health' campaign launched in 2007 by Australia's leading Indigenous and non-Indigenous health peak bodies and human rights organisations to address the inequality in health.

[8] For the purpose of this paper I have chosen to use the Ngarrindjeri in South Australia but all Indigenous Australians share the same connectiveness with country.

> responsibility to protect them. Without their Ngartjis they believe they cannot survive.[9]

Thus the recent closure of the Murray mouth due to the over allocation of water by irrigators as decreased water flows silted-up the river, for the Ngarrindjeri people translates to, not only a loss of biodiversity but, more importantly, the severing of their spiritual connection to their Ngartjis which will mean not only losing their cultural stories, but also their spirituality and ultimately, their identity. In addition, they lose economic development opportunities and with these, their right to equal participation in water trading and allocation.

Interestingly, we are just starting to acknowledge how our treatment of land and waters has caused significant and unsustainable costs to the environment but we still have not acknowledged the true effect this has had on Indigenous Australians. Instead of engaging with Indigenous Australians with their broad understanding and knowledge base[10] we have disempowered them at every critical turn in the water reform debates. There has been a 'clear chasm between the perceptions of available opportunities for involvement and the reality experienced by Indigenous people'[11] at all decision-making levels and, particularly, within economic considerations. This is a thought provoking statement and the gist of the issue that I will explore here which perhaps explains why even the best-intentioned negotiations have failed.[12]

Water Rights and Indigenous Engagement

There are three important elements that comprise the water property rights framework currently being advocated and they are: security of tenure, transferability and clarity of specification.[13] Arguably, these are all areas where there is enormous uncertainty from the Indigenous perspective as historically

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[9] Ngarrindjeri/RAMSAR Working Group Paper (17 June 1998), 3.

[10] Peter Cullen cited in Sue Jackson, 'Indigenous Interests and the National Water Initiative (NWI): Water Management, Reform and Implementation' (2007) Background Paper and Literature Review CSIRO Sustainable Ecosystems, NT. Furthermore the *Native Title Review* (2008) recently noted that water legislation and policy should as a minimum provide for 'the protection and recognition of Indigenous knowledge as a legal right' at 208.

[11] Scoping study on Aboriginal involvement in natural resource management decision making and the integration of Aboriginal cultural heritage considerations into relevant Murray-Darling Commission programs, Report to the Murray Darling Basin Commission by Forward NRM and Arrilla-Aboriginal Training & Development February 2003 at 7.

[12] See Bardy McFarlane, 'The National Water Initiative and Acknowledging Indigenous Interests in Planning' (paper presented at the National Water Conference Sydney 29 November 2004) <http://www.nntt.gov.au/News-and-Communications/Speeches-and papers/Documents/2004/Speeches%20National%20water%20initiative%20McFarlane%20November%202004.pdf> and where he provides specific examples.

[13] Jon Altman and Michelle Cochrane, 'Indigenous Interests in Water: A Comment on the 'Water Property Rights – Report to COAG from the Water CEOs Group' Discussion Paper, Centre for Aboriginal Economic Policy Research Australian National University, Canberra 21 February 2003.

water rights have not been regarded as property in the same way as land and mining resources.

Much work has been done on how the law recognises Indigenous land rights in Australia and as Tan notes there are two distinct forms:[14] Native Title and the *Land Rights Act*. After *Milirpum v Napalco Pty Ltd*,[15] the Commonwealth legislated the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the 'ALRA') which gives Indigenous owners title to land. Unlike the *Native Title Act 1993* (Cth) (the 'NTA'), this model did not originate from any common law recognition of native title held by Indigenous Australians. However, in neither Act, have water rights been clearly specified nor is there any specific reference to resources, such as water,[16] although there is an interesting anomaly within the land rights legislation which indirectly protects water rights in so far as it limits access to certain persons for specific purposes; this means that, even if a person holds a water licence to take water from a water source on Indigenous land the lack of physical access to the land would prevent utilisation of that licence.[17] The exclusive element within these rights was recently removed under the *Northern Territory National Emergency Response Act 2007* (Cth).[18] However whilst South Australia has granted substantial 'country' to traditional owners through land rights legislation — *Aboriginal Lands Trusts Act 1966* (SA) *Pitjantjatjara Land Rights Act 1981* (SA) and *Maralinga Tjarutja Land Rights Act 1984* (SA) — as noted above, there is no express reference to water[19] and the hope for Indigenous Australians that was present when these Acts first came into effect has somewhat subsided.

The focus on water rights has turned to native title, probably because after the landmark High Court decision in the *Mabo v Queensland (No 2)* (1992)[20] case in 1992 which recognised the existence of common law native rights and interests, it was seen as the better impetus for the definition, recognition and protection of Indigenous rights in both onshore and offshore waters. Certainly

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[14] Poh-Ling Tan, *A Review of the Legal Basis for Indigenous Access to Water* (2009) National Indigenous Water Planning Forum. A Report Prepared by the National Water Commission.
[15] (1971) 17 FLR 141.
[16] Restricted to mining and fisheries.
[17] *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 ('Blue Mud' case) the High Court accepted that land grants under s 70 of the *ALRA* meant that the Director of Fisheries had no power under the *Fisheries Act 1988* (NT) to grant fishing licences in areas of the grant).
[18] Power relationship between Indigenous Australians and non-Indigenous Australians particularly the statutory authorities is very delicate. This Act did much in terms of damaging trust and is seen as deterring future engagement because it took away the only absolute access Aboriginal people held to their lands for the purposes of their life in accordance with their cultural integrity.
[19] Robert Lawson, '*The Pitjantjatjara Land Rights Act 1981*: An Indigenous Future? Challenges and Opportunities' Bennelong Society Conference August 2003, Canberra: Lawson comments that optimisms accompanying the *Pitjantjatjara Act* has faded delivering little in the way of practical benefits to the people in whose interest it was supposedly passed.
[20] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

there was some foundation for this optimism when, in 1993, the Commonwealth government gave Indigenous Nations, under the NTA, the legislative right to exercise some title rights to customary use of resources.

Within the native title legislation, claimants or bodies for the first time had a strong case to argue for statutory engagement in the management of water. Under s 24HA all actions to manage or regulate water made are valid and are governed by the future acts regime and any action in particular, is subject under s 24HA(7)(b) to an opportunity to comment on the action or class of actions, thus translating into a clear statutory right to engage.[21]

Ambiguities within the NTA have created serious issues for Indigenous Australians in exercising these rights. Key provisions of the NTA recognise that native title rights can be extinguished or suspended to the extent that they are inconsistent with another right which includes other acts by each state and territory in the provisions of their management regimes, including the issue of permits and licencing.[22] The problem is that state jurisdictions have each taken their own approach in addressing how they provide Indigenous access to water as reflected in the inconsistency between their statutory bases for determining, issuing and regulating water rights and interests. The result: a system that is heavily over allocated, economic drivers and circumstances in dire straits, and tensions that make the demand for a national property rights based water management system that allows for sustainable principles which is politically contentious. And whilst, in accordance with the *Australian Constitution*, compensation is payable by the state under sections 24HA(5) and 24HA(6) for either extinguishment or diminution through the grant or issue of an inconsistent right, the Act does not address the loss of the right and loss of the spiritual and cultural connection to the land that right embodied.

Recent cases have further restricted the extent to which Indigenous peoples will have access to native title as a means to protect their inherent rights or to enforce their traditional laws. The *De Rose Hill*[23] native title claim, the first litigated finding of native title in SA, exemplifies the cost and time factors taken in court processes. This claim took more than 10 years to determine at an estimated cost of $15 million. In spite of the positive eventual outcome, these costs and commitments have discouraged pursuit of rights under native title.

Native title further limits the economic power of Indigenous Australians by limiting their right to consult and negotiate access and use. Although s 211 of the NTA provides a precedent for Indigenous rights to natural resources these are limited to specific categories:

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[21] Tan, above n 14.

[22] Section 24 of the NTA validates so called 'future acts' carried out by governments relating to the management of inland waters after 1 July 1993 and to other management regimes after 1 January 1994.

[23] *De Rose v South Australia* [2002] FCA 1342.

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

Tan notes that there is a 'narrow recognition space'[24] for Indigenous access to water rights, and that native title only partially covers customary user rights and less so under the legislation. This is so in spite of increasing international pressure for native title rights to include a commercial right to water. Already these rights are recognised in the USA, Canada and New Zealand,[25] however, Australian courts have refused to recognise Indigenous economic rights to water.[26] The common law has limited overt reference to economic rights in the description and scope of native title[27] with the courts tending to extinguish the most valuable rights to control access and decision-making over the use of lands and prioritise the rights of non-Indigenous interests.[28] Thus the presumption that native title would be an economic boom for Indigenous Australians remains unrealised.

Despite the fact that there is a statutory duty to engage beyond the requirement of Indigenous Land Use Agreements ('ILUA') with future acts, native title cannot be relied on. In the *Yorta Yorta*[29] native title case the government signed a cooperative land management agreement which recognised the Yorta Yorta People's connection to their traditional lands and water which included the Yorta Yorta People's inclusion in the planning, management and protection of the environment. The Yorta Yorta summed up their 'right to participate' as having profound effects not only in terms of economic viability but also that it 'will see improvements in health, wellbeing and self-respect'.[30] However these negotiations only took place as part of the ILUA process for compensation for future acts and would not have occurred otherwise for water. There have been suggestions how to address this issue: NSW has incorporated native title into its water legislation and the effectiveness of this is discussed later. McKay suggests that the Commonwealth could ask each State 'to insert a clause in the objects clause of each [water] Act to require consideration of native title'. She notes that this will be beneficial because it will '[make] the requirements to consider native title explicit and help guide the water decision makers…'[31]

[24] Tan, above n 14.
[25] Simon Young, *The Trouble with Tradition Native title and Cultural Change* (2008).
[26] Lisa Strelein, 'Taxation of Native Title Agreements' (2008) *Native Title Research Monographs*, No 1, Australian Institute of Aboriginal and Torres Strait Islander Studies.
[27] *Kaurarg People v Qld* [2001] FCA 657.
[28] *Western Australia v Ward* [2002] FCA 191.
[29] *Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.
[30] Henry Atkinson, 'Yorta Yorta Co-operative Land Management Agreement: Impact on the Yorta Yorta Nation' (2004) *Indigenous Law Bulletin* 56. Henry Atkinson is a Wolithiga Elder and is spokesperson for the Yorta Yorta Nation Aboriginal Corporation Council of Elders.
[31] Jennifer McKay, *Onshore water project: briefing paper*, Background Briefing papers: Indigenous Rights to Waters, Lingiari Foundation (2002) 33.

Moving Away from Native Title: Indigenous Interests and the National Water Initiative (NWI) and Reforming State Legislation

The NWI framework has led state governments to re-evaluate their current arrangements in terms of how they engage with Indigenous Australians. Elements of NWI that relate to community engagement, knowledge building of communities and capacity-building, potentially may take on great importance in addressing the social justice requirement for the Indigenous sector to participate as equals amongst other Australians in water reform. NWI demonstrates that the current statutory framework for native title and interpretations of Indigenous resource interests are insufficiently inclusive in many aspects.[32]

However, the NWI appears to suffer itself from some key failings. For example the wording of the NWI in paragraph 54 suggests an intention to preclude commercial uses under the definition of native title rights although the absence of definition leaves some doubt as to the real intention.[33] In light of the Australian government's commitment to overcome Indigenous disadvantage it is significant that no explicit obligation is placed on the parties to utilise the market-based policy framework proposed in the NWI to advance Indigenous Australians' economic standing.

This is in stark contrast to some of the changes within the state legislation. State water legislation has responsibility for the control and management of inland waters and waterways. Increasingly state and territory laws and policies in relation to waters are being guided by international law and national policies, including Council of Australian Governments (COAG).[34] The COAG decision of 1994 has overarching ramifications for water reform. However, organisations such as the Murray Lower Darling Rivers Indigenous Nations (MLDRIN)[35] are concerned that most of the state's water acts have limited reference to Indigenous interests. This lack of legislative recognition is reflected in the water allocation plans currently being developed or implemented in most Australian jurisdictions. Only New South Wales and, to a lesser extent Queensland legislation contain provisions dealing with distinct Indigenous rights and interests in waters under the *Water Management Act 2000* (NSW)[36] and the *Water Act 2000* (Qld)[37] respectively. NSW legislation is

[32] Jon Altman, 'Indigenous interests and water property rights' (2004) 23 *Dialogue* 29, 43.
[33] See Jackson et al, above n 10.
[34] Council of Australian Governments.
[35] MLDRIN was formed in 1998 to provide a coordinated approach to policy development and management of the Murray Darling Basin.
[36] *Water Management Act 2000* (NSW) s 13(1)(e). The definitions in this Act define native title rights to mean 'the right to take and use water for domestic, personal and non-commercial communal purposes' whilst Regulations prescribe the maximum amounts of water that can be taken and used for such purposes in any one year.
[37] Specifically see *Water Regulations 2002* s 5(I)(2). Also note the more recent *Cape York Peninsula Heritage Act 2007* provides for an Indigenous water reserve or allocation in each

the most comprehensive and includes the economic use of land and water.[38]

More significantly when it comes to engaging with Indigenous communities, the inclusion of Indigenous Australians is not the same as inclusion of Indigenous interests in water plans. One can collect advice and consult until 'blue-in-the-face', but there is no point in doing so unless you are sincere about your ultimate motives. The NWI is again an example of this serious shortfall. The NWI Inter-governmental Agreement (signed in 2004) ensures that all states and territories are committed to 'include Indigenous representation in water planning, 'incorporate Indigenous social spiritual and customary objective and strategies' and 'take account of the possible existence of native title rights to water'.[39]

Whilst NWI has been praised as 'being the most progressive template for providing for Aboriginal interests in water in a coordinated way'[40] it has been itself subject to criticism for its lack of engagement with Indigenous people in its development. This ironically has resulted in a lack of awareness of the NWI amongst the very people whose 'Indigenous interests' it seeks to protect.[41] As a result, actions such as the Murray Darling Basin Indigenous Action Plan (IAP) were doomed to be rejected because the Murray Darling Basin Commission signed off on the IAP without the informed consent of the Indigenous People.[42]

Nor should the requirement for Indigenous engagement at state level be dependent on the same level of legal recognition as native title, but should instead be extended to all policies.[43] The fact is that the Australian government has set a high benchmark in endorsing the UN Declaration which states that no decision to Indigenous rights and interest are taken without 'informed consent'. This includes environmental and resource management decisions which should be made in active consultation with Indigenous Nations. Consideration should

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proposed declaration under the *Wild Rivers Act 2005.* This allocation is intended for the purpose of helping Indigenous communities in the area achieve their economic and social aspirations136 and maintains to an extent, their capacity to meet their cultural obligations to their waters and lands.

[38] Water Sharing Plans, statutory object prepared under *Water Management Act 2000* (NSW), see <http://www.naturalresources.nsw.gov.au/water/info_aboriginal_water.shtml>.

[39] Paras [52]-[54] NWI Inter-Governmental Agreement refer specifically to Indigenous interests in water. COAG water reform agenda actually began with the Water Resources Policy of 1994 but did not address the issue of Aboriginal interests until the development of the NWI in 2004. See Jackso et al, above n 10, for a comprehensive background on Australia's water policy history leading to the development of the NWI.

[40] Virginia Simpson, *Aboriginal Access to Water across Australia* (2008).

[41] S Jackson and J Morrison 'Indigenous perspectives in Water Management, Reforms and Implementation' in K Hussey and S Dovers (eds), *Managing Water for Australia* (2004) 24.

[42] M Morgan, 'Keeping the Status Quo', MDB Indigenous In-action Plan Yorta Yorta Nation Aboriginal Corporation at <http://www.anu.edu.au/caepr/Publications/topical/Morgan_MDB.pdf>.

[43] Part of the *Indigenous Response to the Living Murray Initiative* 2003 Final Report cited in M Morgan et al. below n 65.

also be given to whether Indigenous Nations themselves are willing and able to implement appropriate measures, a point I shall return to later.

In this respect, lack of engagement and participation has changed little with the accompanying NWI at state levels. However, Western Australia and South Australia appear to be better New South Wales (NSW) and Queensland, in spite of the latter's cultural and commercial licences because of conflict in policy within the allocation of these licences.[44] The *Water Management Act 2000* (NSW)[45] allows for two Indigenous representatives on their water planning committee and therefore enables input into the establishment of water sharing plans, but there is no other evidence of arrangements to encourage inclusiveness and engagement. As noted by Tan, Indigenous involvement seems to be a gap in the process.[46]

In Queensland, there is no specific statutory or policy requirement for Indigenous engagement beyond the general duty that a Community Reference Panel (CRP) must provide for cultural economic and environmental interests in the plan area. There are special measures to engage the Indigenous community but these are considered ad hoc.[47] Queensland's Implementation Plan under NWI has been criticised for not going far enough to consult with Indigenous communities.[48]

Surprisingly the Northern Territory provides for no specific legislative provisions for Indigenous engagement. Neither does Tasmania. The Tasmanian Implementation Plan notes a deficiency for special provision for Indigenous water rights under the Plan[49] but to-date has made no change to address these deficiencies.

In Victoria, there is no mention of Indigenous access to water in the *Water Act 1989* (Vic). In 2004, Native Title Services Victoria[50] developed a paper suggesting mechanisms for consultation of Indigenous Australians regarding land and native title. The measures discussed included setting aside a percentage of water trades for Indigenous use and a holistic and comprehensive settlement which would recognise Indigenous rights, and encompass commercial as well as cultural access to fisheries, native flora and fauna and resources. It went so far as to call for a 'fair quota of tradeable water rights' and the setting up of a "Water Trust" 'to ensure that [Indigenous Australians] are

[44] Tan, above n 14.
[45] *Water Management Act 2000* (NSW) s 13(1)(e).
[46] Tan, above n 14.
[47] Ibid.
[48] Ibid.
[49] Tasmanian Government 2006 Implementation Plan was prepared specifically for the National Water Initiative.
[50] Native Title Services Victoria, *Submission from Native Title Services Victoria to the Victorian Government, Development of an Aboriginal Land and Resource Development Strategy (2004).*

not excluded from that resource'.[51] Without formative arrangements there is serious doubt about the extent of Victoria's commitment to engage and address Indigenous access to water especially given that mention is omitted from key policy documents.[52]

The two states that perhaps have been viewed as the most proactive are Western and South Australia.[53] Western Australia has developed a new approach to Aboriginal affairs policy and administration.[54] The partnership framework aims to enhance negotiated outcomes that protect and respect the inherent rights of Indigenous Australians and to significantly improve the health, education, living standards and wealth of Aboriginal people.[55] Clearly its implementation will have the potential to greatly enhance the engagement of Indigenous Australians in the water allocation process and improve opportunities.

In South Australia, Indigenous engagement is especially sought for the process of developing water plans in the state. Although there are no express references to Indigenous matter or engagement in current legislation, South Australia has, for example, established Aboriginal Focus groups on the NRM boards and these have been effective in spite of their lack of legal 'clout,' and appear to be more appropriate in terms of engagement principles than s 13 of the *Natural Resource Management Act 2004* (SA), which provides for Indigenous representation on the NRM Council. In addition, the South Australian Natural Resource Management Board has developed a practical manual on Indigenous engagement[56] which is potentially valuable but has not been evaluated to-date. There is no legislative requirement for participation elsewhere. The fact is that a great majority of water plans in South Australia still do not provide for Indigenous interests.

In general, for all states, Indigenous knowledge would improve regional management but this would require active involvement of Indigenous people at all levels of decision-making.[57] Overall most states could better provide for a state-wide comprehensive Indigenous engagement strategy.

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[51] Tan, above n 14.
[52] Ibid.
[53] Simpson, above n 42.
[54] Statement of Commitment to a New and Just Relationship between The Government of Western Australia and Aboriginal Western Australians at
< http://www.dia.wa.gov.au/Documents/Policies/StatementOfCommitment.pdf>.
[55] ATSIC *Engaging with Aboriginal Western Australians* (2005) Perth Department of Indigenous Affairs, Government of Western Australia.
[56] *Guidelines for Indigenous Engagement* have also been endorsed by the Commonwealth Government, see n 59 below.
[57] Relevant here is the Commonwealth of Australia *Ways to Improve Community Engagement: Working with Indigenous Knowledge in Natural Resource Management* (2004), Natural Heritage Trust, Canberra.

A Number of Reasons: Barriers to Effective Engagement

This chapter will examine the key barriers to engagement. Much of the work on Indigenous engagement has been previously described and barriers analysed with particular reference to examples from the environmental management sectors.[58] In fact, the Commonwealth Department of Environment and Heritage in 2004 commissioned a series of case studies on Indigenous engagement[59] with the purpose of providing the necessary information to improve Indigenous participation in regional NRM programs.[60]

The key barriers to Indigenous engagement are:

Power imbalances and the minority part played by Indigenous members of multi-stakeholder committees

As with any negotiation there is a power imbalance between Indigenous Australians and their non-Indigenous counterparts. Some of this is possibly tied to colonial attitudes entrenched in much of our government system and a historical fear of self-determination for Indigenous Australians. Ultimately the fact is that Indigenous Australians differ in how they see that goal being achieved and the role they believe they should play. This will only become more difficult with the new water markets and trading requiring national standards for water accounting, reporting and metering and so forth. Indigenous Australians have much they can contribute to the water reform debates but first they want equal participation rights and, in particular, a 'say' in how they can use water rights to develop economically and ensure a better future for their communities. It has already been noted and recommended that organisations such as the Murray Darling Basin Commission (MDBC) and Ministerial Council ensure that cultural, environmental and social values are given equal weight with economic values in policy and management decision and water pricing.[61]

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[58] See generally, Jackson et al, above n 10.

[59] D Smyth, S Szabo, and M George, 'Case Studies in Indigenous Engagement in Natural Resource Management in Australia', report prepared for the Australian Government Department of Environment and Heritage (2004), cited in Jackson above n 10.

[60] For example, Commonwealth of Australia, *Ways to Improve Community Engagement* (2004). This short report is drawn from the Workshop Outcomes Report of an Indigenous Knowledge Forum, held at Alice Springs on 28-29 May 2003. The purpose of this report is to suggest ways to improve community engagement so that Indigenous knowledge works effectively with regional natural resource management.

[61] Basin Recommendation of the Indigenous Response Final Report cited in Monica Morgan, Lisa Strelein and Jessica Weir, 'Indigenous Rights to Water in the Murray Darling Basin In support of the Indigenous final report to the Living Murray Initiative' AIATSIS Research Discussion Paper No.14 (2004) 31.

Lack of consideration of Indigenous protocols for representation and participation and guidelines that should be considered in the engagement of Indigenous people

There are different forms of decision-making and political representation within Indigenous systems. To understand these unique systems requires time, effort and expertise within the non-Indigenous sectors or parties. Western Australian cultural awareness training for government staff and the South Australian NRM Engagement Manual are positive steps towards breaking down this barrier. For example, the role of traditional owners and other members of the Indigenous community is an important consideration here[62] as generally there are defined rules in Indigenous societies as to who is authorised to speak. Unfortunately there are still many factors inhibiting acceptance of Indigenous decision-making and representation protocols. Probably the main factor has been the lack of appreciation of the importance of approaching cultural protocols, values and behaviours in engagement processes. Agreement on protocols for communication and decision-making between Indigenous groups and other parties is critical here and helps to build strong internal governance structures that can both reduce the adverse impacts of potential disputes and address any power imbalances from the outset. Therefore it is crucial that '[a]ll parties must clearly understand the rules and decision-making processes of the people that speak for that country.'[63]

Lack of evaluation of the performance of catchment management authorities in respect of their obligations to Indigenous Australians

In the first few years of establishing Indigenous community-based catchment management groups, authorities may need to accept that many of the benefits are intangible but essential to the success of the process. Engagement between Indigenous and non-Indigenous parties in catchment management needs supportive processes which facilitate mutual understanding of interests and assumptions, which are careful not to disempower or marginalise Indigenous participants. There clearly needs to be accountability by authorities in terms of the way in which Indigenous Australians are engaged and how their concerns and suggestions are implemented. Action regarding the administration or implementation of any management plans should be monitored and reported back to the community on a regular basis.[64]

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[62] Monica Morgan, Lisa Strelein and Jessica Weir, 'Authority knowledge and values: Indigenous nations engagement in the management of natural resources in the Murray-Darling Basin', in M Langton, O Mazel, L Palmer, K Shain, and M Tehan (eds) *Settling with Indigenous Peoples* (2007).

[63] M Langton and L Palmer, 'Modern Agreement Making and Indigenous People: Issues and Trends', paper presented at the National Native Title Conference (Alice Springs, 4 June 2003) <http://www.austlii.edu.au/au/journals/AILR/2003/1.html>.

[64] David Worth, 'The Natural Heritage Trust and Indigenous Engagement in NRM', National Native Title Tribunal (2005).

Incompatibility between Indigenous and non-Indigenous approach to management

Indigenous Australians view management as more co-management where social, political, cultural and economic values are intertwined and are not independent of one another. This principle of co-management was identified as an important attribute in the engagement process. Whilst initiatives such as The Living Murray, identified a need by Indigenous Basin communities to incorporate all values[65] much of the engagement process to-date has been about cultural aspects exclusive of other considerations, including economic considerations.

Incompatibility between Indigenous knowledge and aspirations for holistic management and scientific knowledge and technical forms of rationality

Many studies have described Indigenous interests in water and associated values with water as distinct, diverse, wide-ranging, holistic and interconnected.[66] How to translate these values into contemporary water management and how they relate explicitly to particular water flow regimes and to quantify or articulate allocation decisions is no doubt difficult.[67] This is a problem when engaging and seeking the views of Indigenous communities about appropriate river health goals and strategies for achieving them. Douglas explains:

> [T]he inquiries have demonstrated just how difficult it is for both local Aboriginal communities and the Commission to engage over river health issue in terms meaningful to Aboriginal people's physical spiritual and cultural needs.[68]

This divergent perspective stems from the traditional analysis of what Western law regards as property, where rights and interests are compartmentalised and clearly defined for a specific individual in terms of exclusive possession. Clearly this is distinct from an Indigenous Australian's conception of rights and interests in country.[69] The inter-connectiveness between humanity and the environment as a holistic entity for Indigenous Peoples is in general not negotiable.

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[65] Also recommended that Indigenous nations must be centrally involved in management decisions about the river system within their Nation's boundaries from the beginning.

[66] S Jackson, 'Compartmentalising culture: the articulation and consideration of Indigenous values in water resource management' (2005) 37 *Australian Geographer* 19.

[67] Ibid.

[68] P Douglas, 'Healthy rivers and Indigenous interests' (2004) 5 *Indigenous Law Bulletin* 12, 12.

[69] L Gibbs, 'Valuing water: variability and the Lake Eyre Basin, Central Australia' (2006) 37 *Australian Geographer* 73.

Need to appreciate the intra community divergence of Indigenous perspectives and the implications this may have in any negotiated outcome

Different Indigenous Nations have different concerns which are not uniform and those engaging with Indigenous Nations need to recognise and respect that diversity. There also needs to be respect where Indigenous culture prohibits the divulging of certain facts about sacred sites customs, and so forth. Secrecy presents some challenges and mutual trust and understanding become critical here as seen with the *Hindmarsh Island Bridge*[70] case. The additional potential benefits of developing agreements at the intra-Indigenous or community level is that the process can provide opportunities for community education in relation to people's legal rights and responsibilities.

Need for empowerment of Indigenous Australians and capacity-building amongst Indigenous communities

There is a need to ensure that Indigenous Australians are able to capitalise on opportunities if they were made available under the water programs planning activities and markets. Therefore Indigenous Australians should be better equipped to ensure that they have the knowledge base that they need, through education and skill capacity building programs to manage water effectively to avoid poor management and in turn unsustainable practices. The Aboriginal Water Trust in NSW provides financial assistance to groups interested in up-skilling in the field of water management and use. Some authors have also argued that the capacity building is an issue for non-Indigenous resource managers.[71] Arguably this emphasis is wrong and part of the disempowering process. We need to empower Indigenous managers but we also need to ensure that they are confident that they have the resources, funding and knowledge to be successful.

Models of Engagement

Different models can be used to incorporate engagement with Indigenous communities. As highlighted many times in this paper**,** the recognition of the Indigenous People's rights is about more than property. It is about cultural, spiritual and economic inter-connectiveness. We therefore need to ensure that we have the right partnership model to allow true reconciliation that allows Indigenous Australians to have access to all water uses in rural and regional Australia where we can all benefit. This section investigates several potential models for engagement and assesses their effectiveness in how they address the above identified barriers.

[70] *Chapman v Conservation Council of SA & Others* (2002) SASC 4.
[71] See Jackson, above n 10.

a) Co-management

Co-management includes the management of all of 'country' for each Indigenous Nation, including water management. In the Murray Darling Basin, for example, co-management is negotiated with each Indigenous Nation separately, working under an umbrella agreement with MLDRIN. MLDRIN negotiates the principles of co-management, and then each Nation has the opportunity to negotiate their own co-management arrangements, including issues of membership and governance with the MDBC. Under the new institutional arrangements, this cooperative framework to manage the Basin will remain.[72] However, co-management is only one part of the broader recognition of Indigenous rights in the Murray Darling Basin; the recognition of other substantive and procedural rights remains to be negotiated including Indigenous cultural water allocations.[73]

However there are variations on the MDBC administrative arrangements regarding co-management and the community engagement processes. For example, within the Great Artesian Basin Consultative Council, government has taken a strong non-partisan role. This is because the serious overdrawing of groundwater has led to a more participatory co-management approach where members work together closely in pursuing common environmental objectives.

b) Hybridity

Recent research at Centre for Aboriginal Economic Policy Research (CAEPR) has used the concept of a 'hybrid' model economy[74] conceptualised as consisting of three sectors: the customary, the market and the state. As noted above, the NTA recognises and protects existing Indigenous native title rights in the customary sector. But how customary elements of the hybrid economy will interact with the wider commercial water market will need careful consideration. If the articulation between customary and commercial rights is overlooked, two potentially negative outcomes are possible. First, there will be no incentive for customary use to be efficient. Potential efficiency losses here may be small scale compared to commercial use, but may nevertheless be of strategic value especially in upstream water catchment areas. Secondly, and more significantly, if commercial use impairs customary use, then there are legal avenues for recourse pursuant to native title. Such scenarios are most likely where property rights and legal regimes encompassing Indigenous land and sea rights are already exercised and where there are legally recognised

[72] M Papas, 'The Proposed Governance Framework for the Murray Darling Basin' (2007) 4 *Macquarie Journal of International and Comparative Environmental Law* 77.
[73] In the Australian Human Rights Commission's *Native Title Report 2008* it was noted that the difference between environmental and cultural water is that the 'Indigenous Peoples themselves deciding where and when water should be delivered based on traditional knowledge and their aspirations' at 208.
[74] Altman, above n 32.

native title parties. The recent Ngarrindjeri concern over the weir at Wellington[75] provides a clear example. Although Young notes that cases such as *Yorta Yorta* and *Wade*[76] illustrate that caution should be exercised when using legal avenues that in the past have had 'grievous consequences for Indigenous Australians'.[77] Thus there is a need to ensure that engagement includes rights incorporating economic activities, such as irrigation and other contemporary use, to support Indigenous Australians' natural development of their traditional use of resources.

Morgan et al believe that the allocation of water directly to Indigenous Nations and or local Indigenous communities is the most appropriate model — consistent with allocating water for cultural allocations but without use restrictions. [78] This model could be used with the MLDRIN co-management model where cultural and economic opportunities are combined or, where, as under NSW legislation, cultural and economic are treated separately. Ultimately, however, both these models require engagement with Indigenous people to decide what they want and how they want it.

c) Regional Water Use Agreements

Regional Water Use Agreements that parallel the ILUA framework[79] can address issues pertaining to power imbalances because they facilitate power sharing and allow direct participation in the water planning processes. The use of Indigenous Land Use Agreements as negotiated settlements under native title has helped to illuminate the issues surrounding engagement with Indigenous Australians. In spite of the approach being criticised as 'onerous and complex',[80] ILUA's require parties to embrace cross-cultural learning, the development of new capabilities and a mutual understanding and respect.[81]

The issue with ILUA models is their long term frameworks. This is a clear disadvantage and not compatible with, for example groups, such as the Ngarrindjeri people's urgent workloads, but this model could be developed further for shorter but high priority engagement processes.

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[75] No author, 'Weir in breach of Native Title Rights', *ABC Adelaide* (23 April 2009) <www.abc.net.au/news/stories/2009/04/23/2550317.htm>.
[76] *Wade v New South Wales Rutile Mining Co Pty Ltd* [1969] HCA 28.
[77] S. Young *The Trouble with Tradition: Native Title and Cultural Change* (2008) 443.
[78] Monica Morgan, Lisa Strelein and Jessica Weir, 'Indigenous Rights to Water in the Murray Darling Basin' (in support of the Indigenous Final Report to the Living Murray Initiative), Native Title Research Unit AIATSIS Research Discussion Paper No 14 (2004).
[79] Altman, above n 32.
[80] Tan, above n 14, 10.
[81] P. Crooke, B. Harvey and M. Langton, 'Implementing and Monitoring Indigenous Land Use Agreements in the Minerals Industry: The Western Cape Communities Co-existence Agreement' in M Langton, O Mazel, L Palmer, K Shain and M Tehan (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (2006).

d) Participation Agreements

Participation Agreements involving title holders and traditional owners operate within the native title sector, but unlike ILUA's outside the process of *NTA*. Traditional owners have authority to speak for country and are more and more asserting a right to be engaged and, in turn, are being sought out by proponents of development to be involved in decisions affecting their 'country'. For example, MLDRIN is a confederacy of traditional Aboriginal land owners who signed an agreement with the Commonwealth and state agencies over management of the Murray Darling Basin, and has since 2002 been engaged in this process. More and more industry groups are entering into negotiations with Indigenous groups with traditional owners and it has long been the practice of mining companies.[82]

Engagement with Indigenous traditional owners in this way may help identify cultural activities which require a certain amount of water for extraction which will not be recognised under environmental water provisions. NSW recently recognised this fact with the introduction of Cultural Access Licences.[83]

A New Framework for Genuine Engagement?

Clearly there is a role for government to play in resourcing the development of Indigenous governance arrangements in a manner that is responsive to the needs and aspirations of specific Indigenous groups for self-sufficiency and self-determination. Providing resources for permanent structures of engagement can lead to efficient policy development and meaningful outcomes built on sound human rights principles.

However, imposed operations and systems of governance as they currently stand are still very rigid and have undermined the integrity of the internal authority structures of the Indigenous Nations and destabilised the outcomes of engagement. Indigenous Australians have their own rights and obligations under Indigenous law and customs. The laws of Indigenous nations regulate the transmission of property rights, access to land and waters, responsibilities relating to land and waters, use of resources, and a myriad of other rights, responsibilities and community controls.[84]

There have been opportunities for positive developments through, for example, MLDRIN or Aboriginal Focus groups on NRM boards, to provide direction toward the processes and frameworks to give recognition to the unique and

[82] ACIL Consulting Report (December 2001) *Agreements between Mining Companies and Indigenous Communities* A Report to the Australian Minerals and Energy Environment Foundation.
[83] Part of the NSW Water Sharing Plans, see above n 38.
[84] Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary and Materials* (2009).

diverse governance of Indigenous Nations. These processes will allow for the development of special measures: to set out procedures for negotiated agreements; to facilitate adequate representation; and, to gain the informed consent of the Indigenous Nations centrally involved in policy and management decisions on water.

However, involvement in planning and management is only part of the picture. It does not deal with Indigenous aspirations for a share of the economic benefits or the desired shift from consultation to negotiation on matters that affect traditional owners. These are well expressed in the 11 principles of engagement developed by Indigenous People at the Boomanulla Conference:[85]

1. Any planning must respect the timeframes of Indigenous Peoples. This must be defined and honoured in future protocols.
2. Indigenous identity and traditional ownership and custodianship must be recognised in natural resource planning process.
3. Indigenous culture and values must be identified respected and incorporated in natural resource planning and implementation.
4. Indigenous knowledge about vegetation water and catchments must be recognised as important and where appropriate active measures must be made to ensure the legal protection of community intellectual property rights.
5. Cultural diversity must be respected — there is not one Indigenous community culture or and view. Culture and traditional practices differ across communities.
6. Indigenous Peoples 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 Indigenous communities as Indigenous People have a traditional custodian's right in relation to natural resources which they have never given up.
8. Plans which affect the lives of traditional owners must be made on the basis of their informed consent.
9. In recognising the rights and interests of Indigenous Peoples, government (and other) agencies must be prepared to "negotiate" with Indigenous People — not merely "consult".
10. Biodiversity must as a minimum be maintained at its current level.
11. The only Indigenous 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 representations.[86]

[85] The Boomanulla Conference Caring for Country held on 5-6 March 2002 was jointly sponsored by the N.S.W. Aboriginal Land Council (NSWALC) and the NSW Department of Land and Water Conservation (DLWC).
[86] Boonmulla Principles developed from Conference above n 87.

Early and Sustained Engagement.

Piecemeal opportunities for engagement are no longer acceptable. In the past, engagement has occurred in a disjointed and time-limited manner. Hemming et al comment in regards to the Ngrarridjeri that:

> [T]here are a growing number of opportunities for Ngarrindjeri input into planning processes but these often come with limited resources and limited time frames and become further burdens on the over-worked Ngarrindjeri leaders.[87]

We can no longer expect Indigenous representatives to make short-term decisions or be dealing with representatives who have no mandate to speak for 'country' or if they have authority, have not been provided with the information to make an informed decision or given the time they need to consult with their communities.[88]

Also we need to ensure at the beginning of any planning process that there is a consistency of approach to maximise any benefits for engaging with Indigenous Australians. And as noted above that any process for participation in water planning programs and markets that any procedural and administrative barriers be removed.[89]

Non-Discrimination Principle

The *Racial Discrimination Act 1975* (Cth) (the 'RDA') provides protection for Indigenous Peoples' individual and collective rights. The RDA creates an obligation on governments to deal with Indigenous interests in a non-discriminatory manner. Equal treatment in this context must take into consideration the equal enjoyment of rights as citizens, the particular interests of Indigenous Australians and the history of discrimination.[90]

Under the RDA, any act that occurred after the introduction of the RDA is invalid if it extinguishes native title without just terms compensation or fails to deal with native title interests as it would have treated any non-Indigenous property interests. However, it is clear that the law still prioritises non-Indigenous interests, particularly when it comes to water trading. The *Principles for Trading Rules Schedule G*[91] note that management of features of

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[87] Steve Hemming, Daryle Rigney and Meryl Pearce, 'Justice and economy for the Ngarrindjeri nation' in E Potter, A Mackinnon, S McKenzie and J McKay (eds), *Fresh Water: New Perspectives on Water in Australia* (2007) 217.

[88] Jason Behrendt and Peter Thompson, 'The recognition and protection of Aboriginal interests in New South Wales rivers' (2004) 3 *Journal of Indigenous Policy* 37.

[89] Recognised in COAG National Framework of Principles for Delivering Services to Indigenous Australians.

[90] The marginisation of Indigenous water interests is well-documented throughout history. See J McKay, 'Water Institutional Reforms in Australia' (2005) 7 *Water Policy*, 35-52.

[91] National Water Initiative Agreement.

major indigenous cultural heritage or spiritual significance may form the basis of restrictions on extraction diversion or use of water resulting from a trade. However, the scope of these restrictions is discretionary and negotiated on a case-by-case basis. Again, the level of input the Indigenous people would have into the assessment process is unclear and inconsistent across jurisdiction. The implications of failing to return health to the river system will clearly have a disproportionate impact on Indigenous Australians, such as the Ngarrindjeri and their relationship with the River Murray.[92]

Thus it remains that economic opportunities from water resources remain unavailable in most jurisdictions to Indigenous Australians.

Conclusion

The Indigenous voice has not been widely heard in newly emerging debates about efficient and equitable allocation of water rights. Whilst there have been some interesting developments, including the Commonwealth government endorsing the UN Declaration on the Rights of Indigenous Peoples and the new arrangements under the NWI, the efficacy of these developments remains to be seen.

It is well recognised that Indigenous Australians have a unique relationship with water stemming from their cultural and spiritual connection to the environment. We now need to accept responsibility as a nation for the disconnection with 'country' that Indigenous Australians have suffered for too long since white settlement and its consequences on their social, spiritual cultural and economic wellbeing. The water reform debates in Australia provide an opportunity to reengage with Indigenous Australians and forge new positive relationships. This means reinstating Indigenous access to water and its management and bridging the gap between how Indigenous Australians want their rights to be delivered and how they are currently being delivered.

Innovative and new models of engagement could provide great benefits by engaging the whole of Indigenous communities to the point where they reap active economic benefits by participating and engaging in the commercial water industry through the water market and acquiring allocations. To achieve these goals we need to actively remove the barriers that have been preventing parties from effectively engaging with each other, particularly at the state government level and stop repeating past mistakes. Primary among the barriers is the lack of understanding by non-Indigenous people of the values, perspectives and perceptions that Indigenous People have and their inter-connectiveness to the land and its resources. Deeper reconciliation will come, as McFarlane notes, from reconciling the 'fundamentally different starting

[92] Aboriginal and Torres Strait islander Social Justice, *Native Title Report* (2008), chapter 6 ('Indigenous Peoples and Water') <http://www.hreoc.gov.au/social_Justice/nt_report/ntreport08/chapter6.html>.

points between the way Indigenous and non-Indigenous people view water and the landscape in which it sits'.[93]

[93] McFarlane, above n 12, at 16.