

A Web of Aboriginal Water Rights: Examining the competing Aboriginal claim for water property rights and interests in Australia

Virginia Anne Marshall

Student No: 40675521

Master of Laws (Australian National University)

Graduate Diploma of Legal Practice (University of Wollongong)

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Abstract

Around the time that this doctoral research into Aboriginal water rights and interests in Australia commenced a former Prime Minister of Australia remarked that Australia was in the ‘worst drought for a hundred years’. During the following eight years of thesis research a regular review of media articles about Australia’s ‘worst drought’ highlighted the dire effects of restricted water access and its use on the farming community, irrigators and other non-Indigenous interests in water. From this point it was clear to the author that the water rights and interests of Aboriginal peoples in Australia were rarely mentioned in the Australian media. An Aboriginal perspective on these national issues demanded ‘a voice’ to examine and analyse why Aboriginal water values and concepts relating to the use of water was effectively a non-issue in the national consciousness. In 2014 various media organisations have again declared that Australia is in ‘the worst drought in living memory’.

The Aboriginal claim to a property right and interest is examined from an Aboriginal perspective. The thesis examines Aboriginal concepts and values of water and posits that Aboriginal values not only exist as ancestral rights, but should be formally incorporated within the body of Australian water law. The thesis argues that although an Aboriginal ancestral water use and contemporary use of water represent different ideological concepts, as the chapters discuss, it is reasonable to submit that the cultural and economic water requirements of Aboriginal communities in Australia should be recognised and incorporated into Australia’s legal system on the basis of how Aboriginal peoples value water and its use.

The argument is developed in a number of ways. In applying an Aboriginal perspective to water rights and regulation in Australia, the thesis establishes a new understanding in the significance of water to Aboriginal peoples and that, the value of water for Aboriginal peoples is inextricably connected to, and informed by, a wider system of laws and customs which govern its use and protection. The thesis demonstrates how Aboriginal peoples continue to maintain their cultural rights to water in Australia and why they require national recognition. As the thesis will show, Western and European perceptions of Aboriginal peoples relationship to land and water and the continued devaluation of Aboriginal ways of understanding and relating to an Aboriginal

environment impeded the recognition and protection of Aboriginal water rights and interests in Australia.

However it is not the aim or purpose of this thesis to compare and evaluate Aboriginal laws alongside Western and European legal frameworks. The intention of this thesis is to focus on Aboriginal perspectives of water and how it is distinguished from Western and European perspectives in water values, use and management. The thesis recounts how Western and European policies and laws sought to frustrate and exclude Aboriginal peoples from their inherent relationship with water. In saying this, the thesis does recommend specific solutions to address the rights and interests of Aboriginal communities on the basis of fundamental human rights.

Through the lens of Aboriginal cultural knowledge and law the thesis begins by examining the differences in Western and European concepts and Aboriginal conceptualisations of the meaning of ownership in water. The thesis examines how these different frameworks of knowledge have clashed in ways that have undermined Aboriginal peoples enjoyment of their water rights – in particular, in the context of the thesis, their rights to access and use water. Although rights to water continue to be asserted by Aboriginal communities and maintained by them, the development of Australian law post-contact has impeded their full recognition and protection.

The thesis chapters examine and analyse a range of themes in Aboriginal water rights and interests in Australia that present current gaps in Indigenous academic research. The thesis analyses and develops an Aboriginal perspective on the impact of native title in respect to Aboriginal water rights and interest, and seeks to analyse the Western and European treatment of Aboriginal water values, customs and practices in Australia. It examines the general failure of the Australian legal system to formalise Aboriginal peoples' ownership of water as an Aboriginal property right and how this failure to recognise has negatively impacted Aboriginal peoples' rights to make decisions on water resources. This examination of the nature of Aboriginal water rights and interests is positioned from a holistic understanding of kinship relationships which the thesis argues would restore Aboriginal peoples' ownership to water and use of water for cultural or other uses; and improve the health outcomes for Aboriginal peoples.

The thesis research examines the Murray-Darling Basin region under the Basin Plan and argues that the Basin is a significant case study highlighting the failure to value and protect Aboriginal water rights and interests, primarily because of ineffective policy development and a poor legislative framework. Both have failed to acknowledge and incorporate the cultural and economic needs of Aboriginal communities in the Murray-Darling Basin Plan.

The final chapters of the thesis argue that Aboriginal wellbeing is integral in the development of water policy and its legislative system in order to achieve positive outcomes in Aboriginal health and self-determination, and to maximise the potential for future Aboriginal economic development. Although not all Aboriginal communities seek to exploit water rights through commercial opportunities or seek to trade their water rights for financial gain, as this doctoral research highlights, there is the potential for wealth creation through water ownership.

The current dispossession experienced by Aboriginal peoples in Australia from their legitimate water rights and interests rests should be addressed through the reservation, or setting aside, of Aboriginal water rights, prioritised above the water rights and interests of other groups. The idea of a reservation of water rights evolved out of a state review of Aboriginal water rights and interests which I undertook, commissioned by the Department of Water in Western Australia. As a result of my review I submitted to the department that legal recognition of Aboriginal autonomy over water rights and interests ‘on country’ is essential to redress the unjust treatment of Aboriginal water rights and interests since colonial settlement and to guarantee water use for Aboriginal communities.

Finally, the thesis argues that Aboriginal water rights and interests in Australia should be viewed through the lens of human rights, and not merely through Indigenous race theory or post-colonial theory, because it is vital that Aboriginal water rights dialogue is implemented upon the values, beliefs and expectations of human rights instruments. The thesis includes an analysis of international and domestic human rights which provide Indigenous peoples with fundamental frameworks and internationally recognised standards that advocate persuasive reasons why Indigenous communities should be recognised with a guaranteed cultural and legal right to water.

The thesis conclusion puts forward recommendations which seek to acknowledge and to protect Aboriginal water rights and interests in Australia, not as a 'special interest group', as current water policy has determined, but as 'the First Peoples' of Australia. Aboriginal peoples in Australia are unable to assert their water rights and interests through treaty instruments and domestic legislative instruments have failed to deliver the expectations of Aboriginal communities. A new paradigm is required.

For my children Alecander, Natasha, Duncan and Stewart

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The following people are acknowledged for their contribution in their inspiration, guidance and support in my journey that assisted my unswerving persistence in completing this thesis, my husband Paul Marshall and the cultural mentoring of Gavin Andrews and Frances Bodkin of Dharawal and my original supervisor Dr Andrew Buck, local Exeter resident Anthony Russell, David ‘Wardong’ Collard in Western Australia, as well as the staff of the Postgraduate Law Faculty at Macquarie University, and especially Dr Paul Taylor who provided editorial assistance. The everlasting inspiration of Aboriginal laws articulates the spiritual marriage of the land to the waters, and the significance thousands of years of superior land and water management by Indigenous communities. During the later stages of my thesis my Nyikina Mangala family has provided support and love.

Note the author upon her marriage in 2010 changed her surname from Falk to Marshall.

Declaration

This is to certify:

that this thesis is comprised of my original work towards the PhD, except where indicated in the Preface; that due acknowledgement has been made in the text to all other material used; and that the thesis is less than 100,000 words in length, exclusive of tables, maps, bibliographies and appendices.

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Chapter 1: Introduction to a Web of Aboriginal Water Interests

Water has and always will play a significant role in my life. As a young child I swam and went fishing. I remember swimming through the ocean waves far from the shoreline and wiping the beads of saltwater off my skin. The freedom of being surrounded by glistening water, either in the river or the ocean is an important part of my being. Since embarking upon this thesis research I have been more acutely aware of the integral spiritual relationship water conveys in Aboriginal society and also within my own family.

My family identity and kinship as Wiradjuri Nyemba is central to my thesis writing and the Aboriginal and Indigenous perspective of the various themes on water rights and interests dealt with in the thesis chapters. Since living in Derby Western Australia and my marriage in 2010, I have kinship with Nyikina Mangala peoples and have been given a skin name to ensure the marriage is ‘straight’; that is, ‘my skin relationship with my Nyikina Mangala family and the roles and social obligations in family relationships’.¹ This familial relationship with Nyikina Mangala has opened my eyes to the significant water issues faced by Aboriginal peoples in the Kimberley region of Western Australia and the commonalities with other Aboriginal peoples in Australia on the exercise of water rights and interests.

At the commencement of the thesis research I took on the role of Executive Officer in a new state Aboriginal water project for the Department of Natural Resources in New South Wales, which required the design, administration and implementation of this project so as to increase the participation of Aboriginal peoples in water enterprise. The administration and establishment of this project also alerted me to the bureaucratic and legal challenges experienced by various Aboriginal communities across New South Wales, who sought to access water rights, whether proprietary or customary rights under

¹ Gracie Greene, Joe Tramacchi and Lucille Gill, *Tjarany: Tjaranykura Tjukurrpa ngaanpa kalkinpa wangka tjukurrjanu*, (Magabala, Broome, revised 1993) 38.

Australian water law. Essentially, the inclusion of Aboriginal interests in water was poorly recognised - interests that have existed well before English 'settlement'.

In the first year of undertaking my doctoral studies, Australia was in the midst of a cycle of devastating drought and a great number of Australians experienced the personal and economic impact of water scarcity. I have included public commentary from news articles because this was the medium used by commentators and the public to debate their concerns on Australia's water management and to advocate their right to use water above the rights and interests of others.

The national dialogue on Australia's 'drought of the century' omitted the generations of Aboriginal water knowledge, including Aboriginal knowledge of seasonal weather cycles and intimate knowledge of drought, as a cyclical condition inherent to the Australian landscape. Australian society at this time failed to recognise that this ancient knowledge was the result from thousands of generations in Aboriginal habitation. From my daily reading of various media and regular internet 'surfing', as well as researching various media articles and opinion media columns, I noted that only a few articles mentioned Aboriginal water issues.

Australia's short timeline of European occupation virtually ignored Aboriginal water rights and interests. Aboriginal water knowledge would have been instructive for Australian society during this 'hundred year drought' – for example in evaluating the human and cultural relationships of water, how to maintain water access and water quality, to identify the parameters of water use during cyclical conditions of drought and appreciate the significance of Aboriginal water creation stories to understand Australia's ecological environment.

1.1 An Aboriginal Perspective on Water under Aboriginal Laws

The traditional knowledge of Senior Law men and women holds the key to the comprehension and implementation of Aboriginal laws. Water is sacred. Through

thousands of years, the spiritual relationship of being part of ‘country’ has remained integral to Aboriginal peoples in Australia.

In spite of the significant political and social change heaved upon the lives of Aboriginal communities, the sacredness of water still remains formative in shaping the identity and values of Aboriginal peoples. The nurture of water landscapes holds meaning and purpose. Under Aboriginal laws water is inseparable from the land.

Walmajarri Senior Lawman Joe Brown explains the laws for water on ‘country’:²

If the jila is dry we know the proper way to dig them out. And when we take the sand and clay out we know the right story to sing as we dig and how to do it properly. This has saved a lot of people’s lives. It was our knowledge of jila that allowed guddeyus to live in this country. Water is the basis for our songs and our culture. We have been looking after our waterholes and rivers for thousands of years. We have respect because we know that if you don’t treat it right many things can happen. This is the lesson that we need to make other people learn. People see water just as a thing that can be drunk or used. They don’t see it as part of everything. They think they can own it. We know better. Many things fail because people don’t understand this.³

Walmajarri law, or the laws held by other Aboriginal communities in Australia, is complex to understand from a non-Aboriginal perspective because Aboriginal laws and values in water are a dimension apart from Australian society and Australian law. The ‘cultural ontology’ of Aboriginal peoples, ‘the inherited ideas, beliefs and values and knowledge held by Aboriginal communities’, is a unique cultural paradigm.⁴ Aboriginal

² Kimberley Aboriginal Law and Culture Centre, *New Legend: A Story of Law and Culture and the Fight for Self-Determination in the Kimberley* (Kimberley Aboriginal Law and Culture Centre, revised ed, 2007) 39.

³ Ibid 38-39. In Nyikina ‘jila’ means water that is found in soaks. ‘Guddeyus’ means white people.

⁴ Craig Anthony Tony Arnold, ‘The Reconstruction of Property: Property as a Web of Interests’ (2002) 26 *Harvard Environmental Law Review* 281, 318-319. As quoted by Arnold ‘cultural ontology’ means the nature of being and the principles and categories which represent the cultural embodiment of a group of people.

cultural obligations and Aboriginal cultural practice remain steeped in numerous layers of Aboriginal knowledge.

The foundation principle in examining Aboriginal water rights and interests of Aboriginal communities in Australia is to understand the structure of Aboriginal laws and how they operate within Aboriginal water concepts. The thesis analyses the nature of Aboriginal concepts and values held in water and why conceptualising these values neatly into legal non-Aboriginal constructs is difficult; thesis chapters 4 and 5 articulate the contestation between Western legal frameworks and Aboriginal concepts in water.

In Australia, an Aboriginal person from Nyikina country, in describing their relationship to the land and waters and all things tangible and intangible, may begin by saying:

Yoongoorrookooni yamoo Woonyoombooni mardoowarra yirramanamirri banoo
yamoo koolarrkoordany. Marloo walaninada mardoowarra yoolbooroo.
Woonyoombooni yinmany kinya mardoowarra. Nyardoo ningarra
Bookarrakarrayoonoo.⁵

The snake and Woonyoomboo created the Fitzroy River, running upstream from Mijirrikan through the waterholes from Nookanbah and up to Fitzroy Crossing. Before that there was no river. Woonyoomboo made that river.⁶

The creation story recognises the relationship of Nyikina peoples to the river system, the land and the 'liyan' (spirit) in its peoples and all things on Nyikina 'country'.⁷ Nyikina

⁵ Nyikina Mangala Community School, Jarlmadangah Community (WA), *Woonyoomboo* (Jarlmadangah Burru Aboriginal Corporation, 2nd ed, 2004) 26. I am in kinship with Nyikina Mangala in marrying Paul Marshall, who is recognised as a son of John Watson; my husband's 'skin' is Tjangala and my 'skin' is Nangarrayi. A 'skin' name is the kinship (group) one belongs to; for a marriage to be 'straight way' ensures the correct kinship marriage for a male or female.

⁶ Ibid 26. The English translation for the Nyikina language, and interpreted by members of the Nyikina community. See also Paul Marshall (ed), *Raparapa: Stories from the Fitzroy River Drovers* (Magabala Books, 2nd ed, 2011).

⁷ Nyikina Mangala Aboriginal Corporation, Draft Mardoowarra Wila Booroo Plan (2010) 8. See generally that the word 'country' broadly means the Aboriginal land and waters recognized by Aboriginal peoples to establish the particular boundaries or shared 'country'.

peoples have a name for the river, ‘mardoowarra’ (Fitzroy River), and ‘yimardoowarra’ means Nyikina peoples ‘belong’⁸ to the lower part of the ‘mardoowarra’.⁹ Underground water which travels through the ‘country’ of neighbouring Aboriginal land creates a joint responsibility to this water.¹⁰ Nyikina Elder Lucy Marshall explains the boundaries on ‘country’:

Aunty’s grandmother come from saltwater country. We don’t talk about that country. They gotta talk about it, people from that side. We only meet them half way. People from riverside, that’s yimardoowarra people, they meet and go back. They don’t go over.¹¹

Nyikina peoples relationship and kinship connection, since time immemorial, is based upon a Nyikina value system. Water values on Nyikina ‘country’ encompass seasonal cycles and water availability, the location of the water, the water quality and type of water such as rivers and springs.¹² For example, during the wet season the floods cleanse the waters and provide food sources¹³ and the source of ‘bush medicines’ found on ‘country’ such as the ‘mudjala’ tree grow on the river banks; formed through ancestral beings.¹⁴

The cultural integrity of the land and waters on ‘country’ is maintained by Aboriginal peoples interpreting how all things were formed through Aboriginal laws and creation story. The inherent relationships of Aboriginal peoples with land and water are regulated by this knowledge. The thesis chapters demonstrate that Aboriginal language is a conduit for water knowledge, and language misinterpreted by poor translation into English may

⁸ The word ‘belong’ in broadly means that a person who holds kinship under Nyikina law and the exercise of use, obligation to and rights on land, waters and resources.

⁹ Nyikina Mangala Aboriginal Corporation ‘Draft Mardoowarra Wila Booroo Plan’ (2010) 3, 4-7. The meaning of ‘wila booroo’ is the living water of Nyikina ‘country’ and ‘country’ means the land, the water and all tangible and intangible things that exists within the Nyikina boundaries under Nyikina law.

¹⁰ Ibid 14.

¹¹ Lucy Marshall and Colleen Hattersley, *Reflections of a Kimberley Woman* (Mudjalla, 2005) 94.

¹² Ibid 13.

¹³ Ibid 32.

¹⁴ Jarlmadangah Burru Aboriginal Corporation, (2009). John Watson, Senior Lawman of the Nyikina Mangala peoples has cultural responsibility for the story about the ‘mudjala and Woonyoomboo, the creator of the ‘mardoowarra’ used the ‘mudjalla’ tree.

seriously misrepresent the nature of Aboriginal water rights and interests. The thesis chapters examine how the interface of Aboriginal water knowledge and water values present challenges for government and water authorities in drafting policy and legislative instruments that meets the needs of Aboriginal communities and regulates Australia's water resources.

The creation stories of Aboriginal peoples across Australia have often been interpreted by non-Aboriginal writers to communicate simple Aboriginal narratives. During the early to mid 1900s many non-Aboriginal writers were fascinated about what was generally referred to as 'Aboriginal mythology'.¹⁵ However, as the thesis shows, Aboriginal knowledge is encoded within ceremony, creation story and cultural subtleties.¹⁶ Chapter 4 examines the ontological context for interpreting Aboriginal values in water conceptualised through a unique cultural identity and the problems that arise in transferring these values into Western concepts of policy and law.

An Aboriginal creation story interpreted by Charles P Mountford, on the 'Salt Lakes of Kiti', illustrates a reconstruction of Aboriginal knowledge into Western narrative:

Gumuduk was a tall, thin, medicine man, who belonged to the hills country. He owned a magical bone of such power that he could use it to make rain fall in season, the trees bear much fruit, the animals increase, and the fish multiply. Because of such good fortune the hills people always had plenty of food.

However, the tribe that lived on the fertile plain below the Kiti range captured the medicine man and his bone, convinced that they, too, would in future have more food.

¹⁵ See generally 'Aboriginal mythology' is defined as 'the totality of the mythology which consists of beliefs, values, traditions etc. of a society or culture or group'. See also 'mythos' 799 and 'logos' 706 in the Macquarie Concise Dictionary.

¹⁶ Kimberley Aboriginal Law and Culture Centre, *New Legend: A Story of Law and Culture and the Fight for Self-Determination in the Kimberley* (Kimberley Aboriginal Law and Culture Centre, revised ed, 2007) 16.

But instead of bringing them prosperity, the theft resulted in a calamity which totally destroyed their country. For the medicine man escaped, and was so angry over the indignity he had suffered that, plunging his magical bone into the ground, Gumuduk decreed that wherever he walked in the country of his enemies salt water would rise in his footsteps.

Those waters not only contaminated the rivers and lagoons, but completely inundated the tribal lands. And when these waters dried up, the whole area was changed to an inhospitable desert of salt lakes, useless to both creatures and the aborigines.¹⁷

Mountford employs words such as ‘magical’ to describe the ‘bone’ belonging to the ‘medicine man’. The reference of the ‘medicine man’ conjures up powerful symbolism of Aboriginal primitive powers. The reconstruction of Aboriginal story and knowledge through a Western interpretation of Aboriginal values, beliefs and practices is however often inaccurate. It has rightly been pointed out that the ‘ethnographic writing of frontier settlers, colonial writers and diarists, is founded upon the writer’s preoccupation, prejudice and assumptions about Aboriginal peoples’.¹⁸

Deborah Rose commented that Olney J in the *Yorta Yorta Aboriginal Community v Victoria*¹⁹ decision ‘relied heavily on the diarised observations by settler and diarist Edmund Curr’.²⁰ Rose argues that the judge ‘failed to question Curr’s credibility, the context of the author’s observations and the prejudicial attitudes of Curr himself’.²¹ The court held that Curr’s diary accurately portrayed the traditional customs and practices of the Yorta Yorta peoples.²²

¹⁷ Charles P Mountford, *The Dreamtime Book: Australian Aboriginal Myths* (Rigby, revised ed, 1976) 36. Mountford was an amateur ethnographic writer around the 1940s to 1960s.

¹⁸ Kingsley Palmer, ‘Understanding another Ethnography: The Use of Early Texts in Native Title Inquiries’ in Toni Bauman (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2010) 72, 72-73.

¹⁹ [1998] FCA 1606, 104.

²⁰ Ken Jagger and Helen Kurz, ‘Native title and the Tide of History: The *Yorta Yorta* Case’ (December 2002-January 2003) 17(6) *Australian Property Law Bulletin* 41.

²¹ Ibid.

²² Ibid.

The High Court *Yorta Yorta*²³ decision introduced the notion of a ‘normative system and society’ of Aboriginal peoples based upon the trial judges interpretation of evidence about the laws and practices of the Yorta Yorta peoples; and narrowed the proof in native title.²⁴ The legal construction of what defines a ‘normative Aboriginal society’ is invariably constructed from a non-Aboriginal perspective of customary laws, practices and traditions and very often fails to deliver the cultural construction of Aboriginal laws.

The thesis demonstrates that the Western reconstruction of Aboriginal water values, such as the native title paradigm, often compromises an Aboriginal claim to rights and interests because the requirements of Australian law deconstructs Aboriginal laws and practices, to then reconstruct them into less complex Western legal concepts. Legal academic, Bradley Bryan, states that,

we are accustomed to see land and territory in terms of Cartesian space, and to see ownership as based in transactional value. The ontological structure of Aboriginal life necessarily means that ‘ownership’ per se never actually occurs or exists, because such things are simply not enframed as we would enframe them.²⁵

The thesis hypothesis frames the research question firstly as ‘a web of Aboriginal interests’ in relation to examining Aboriginal rights and interests in water. The concept of a ‘web of interests’ in property rights was argued by Craig Arnold, that ‘property concepts applied to understand human being’s relationship with an object of property such as private property rights or the concept of the property right require a new metaphor’.²⁶

²³ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 214 CLR 422.

²⁴ Paul Burke, ‘Overlapping Jural Publics: A Model for Dealing with the Society Question in Native Title’ in Toni Bauman (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2010) 55, 56.

²⁵ Bradley Bryan, ‘Property as Ontology: On Aboriginal and English Understanding of Ownership’ (2000) 13(3) *Canadian Journal of Law and Jurisprudence* 1, 12
<<http://au.westlaw.com/result/documenttext.aspx?RS=WLAU4.09&VR=2.0&SP=Fed...>>.

²⁶ Craig Anthony Tony Arnold, ‘The Reconstruction of Property: Property as a Web of Interests’ (2002) 26 *Harvard International Law Review* 281-284.

The purpose of my thesis research is to cultivate a new understanding of Aboriginal water rights and interests for the purpose of analysing some of the key features such as Aboriginal water concepts, Aboriginal water management and Aboriginal water policy development. When I commenced this thesis there was rarely any attention given to Aboriginal rights and interests in water or research study conducted on this theme by Australian universities and Indigenous academics.

According to Sue Jackson, a CSIRO researcher, Australian water management policy has failed to achieve outcomes for Indigenous water rights and interests and in particular failed to view Aboriginal water rights as ‘property rights’:

[l]ittle guidance is provided to water resource managers and regional bodies seeking to meet the objectives relating to Indigenous access and involvement. Researchers, Indigenous groups and policy makers will need to collaborate to overcome several key challenges that may impede progress in this area; namely, limited knowledge of the means of addressing Indigenous water requirements.²⁷

My initial research stage led me to reading various essays and journal articles on the connectivity of Western law to property rights, especially in relation to environmental concepts. Arnold (2002) argued that there had been no attempt in legal scholarship to produce a broad metaphor of property based upon the interconnection of the property right to the person, to integrate the ‘humanness and the thing, and to understand the interests of the property holders to each other’.²⁸ Arnold’s essay influenced the way I approached the initial research proposal and the concept of a ‘new metaphor’ was relevant to understanding how we as Aboriginal peoples conceptualise water values within Western legal concepts and how Australian law seeks to merely accommodate Aboriginal water values into Western concepts of water management. The concept of using a metaphor such as ‘a web of interests’ in the area of Aboriginal water rights and interests was in my view, a new way to understand the Aboriginal relationships to water

²⁷ Sue Jackson and Joe Morrison, ‘Indigenous Perspectives in Water Management, Reforms and Implementation’ (Draft Manuscript, LWA.NW1x4.doc, 2006) 3.

²⁸ Ibid 283-284.

and to demonstrate the depth and complexity of what water rights and interests represent to Aboriginal peoples.

Bradley Bryan's essay, 'Property as Ontology' (2002), impressed upon me the importance of understanding Aboriginal ontology through conceptualising ownership rights and cultural rights in property.²⁹ Bryan's arguments were influential in my early research, encouraging me to develop a new framework and to compare Aboriginal conceptions and values in water as property rights to Western legal concepts; concepts which seek to define the culturally complex norms of Aboriginal society.³⁰

Bryan's essay argued that the values and concepts of property, such as ownership and cultural authority over land, water and resources, must be understood as Aboriginal norms, because Western concepts in property and their respective values and beliefs are very different. Bryan's essay ignited my reflection on how different the concepts are to those held by Aboriginal peoples and non-Aboriginal peoples (particularly non-Indigenous water stakeholders such as farmers, irrigators and pastoralists). My thesis research examination of Aboriginal ontology has strongly influenced my analysis of Australian water policy and legislation and has been informative in how to deconstruct Australian concepts of water use.

From an Aboriginal cultural perspective, water is characterised through many layers of customary knowledge and equates to much more than a water utility, aesthetic water value and drinking water. In terms of understanding how Aboriginal water rights and interests can be recognised in national policies and laws it is important to discuss the concepts of Aboriginal property concepts as they are interpreted by Australian property concepts because the national dialogue has legally recognised water as a type of property right; as a response to managing the generations in the overuse of water by farmers, irrigators and pastoralists on a nominal or no cost basis.

²⁹ Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000) 13(3) *Canadian Journal of Law and Jurisprudence* 1-23.

³⁰ *Ibid* 1-3.

These national reforms were initially undertaken in the 1990s without the inclusion or setting aside water rights and interests for Indigenous peoples. In 2004 the entry of the discussion of Aboriginal water rights and interests occurred as a result of the protests of peak Australian human rights agencies, Aboriginal organisations and Aboriginal Local Land Councils.

Since the introduction of the national water reform policy and the National Water Initiative framework, which legislated the separation of water from the land, water became a new category of property right. Consequently, the question of interests and rights to water became more complex for all stakeholders and the inclusion of an Aboriginal 'web of interests' in water or Aboriginal relationships within the national water reform process posed additional challenges for governments, stakeholders and Aboriginal communities. This was particularly so for Aboriginal communities because federal, state and territory laws had, until then, virtually ignored the water rights and interests of Aboriginal peoples in Australia. This thesis will contribute to the emerging dialogue on Aboriginal water rights and interests in Australia, foster a deeper understanding of water rights issues in Aboriginal jurisprudence, and will provide a cross-cultural framework for carrying out future research with Aboriginal communities on these issues.

Similarly, in the way national water reforms impacted Australia's concept of water, the landmark decision in *Mabo v Queensland [No 2]* (1992)³¹ reformed the national dialogue on the concept of common law and statutory property rights. The Mabo decision changed the way all Australians had been conditioned to understand *terra nullius* and the notion that British colonial settlement had extinguished Aboriginal rights to land, water and resources.³² From an Aboriginal perspective, contemporary norms in Aboriginal society

³¹ (1992) 175 CLR 1.

³² Kent McNeil, *Common Law Aboriginal Title*, (Clarendon Press, 1989) 298-306. Kent McNeil published his research these undertaken at Oxford. A comprehensive examination on how English law would bestow title on Indigenous people where they occupied their lands at the time of settlement, and under the doctrine of tenure could the British have legally claimed Indigenous territories. In his conclusion McNeil argues that the Crown would have had international recognition to claim Indigenous land because of the Crown's prerogative and deny Indigenous peoples sovereignty. However McNeil submits that at the municipal level the Crown could not ignore that Indigenous peoples occupied their land or the presumptive title which is

are far more diverse and at times fragmented than they were before British colonisation in Australia. Prior to British contact and the staggered stages of colonisation, Aboriginal communities applied Aboriginal laws within their respective 'country' to manage and resolve land or water issues. The thesis examines some examples in the contestation of water access and use experienced by Aboriginal communities and the introduction and expanse of British and Australian groups such as settlers, squatters and pastoralists.

The introduction of native title and the development of native title case law recognised that Aboriginal and Torres Strait Islanders had a lawful right to use water. Although conceptualising Aboriginal traditions, laws and customs within the framework of native title, which in itself is a creature of Australian law and distinct from the creation of Aboriginal laws, practices, customs and value systems, native title was welcomed by many. However the introduction of native title legislation and the legal interpretation of Aboriginal, laws and customs have unduly complicated the Aboriginal community concepts of water and land rights. The thesis research examines some of these complex issues in relation to water and utilises some of the native title case law to highlight these issues.

The thesis research makes an important academic contribution because it provides a new understanding of the multiple issues involved with incorporating Aboriginal water rights and interests in what appears to be the narrow thinking by Australian governments. The chapter themes highlight, from an Aboriginal perspective, why there needs to be a formal recognition of Aboriginal water rights and interests. They also highlight the impacts of failure to be responsive to change to the current water policy and legislation. Further, this type of legal research study in Australia has not been previously attempted from the perspective of an Aboriginal researcher and no legal textbook has been produced on these particular issues.

held by Indigenous peoples as tenants at the point of the Crown acquiring title. The scope of my thesis does not allow a deeper analysis of McNeil's research.

Lastly, the importance of research being undertaken by Aboriginal peoples on water rights and interests is crucial, and over time incrementally increases the critical mass of legal researchers and academics writing about these issues. In the words of Valerie Cooms, an Aboriginal Judge of the National Native Title Tribunal and Traditional Owner of the Nunukul people of North Stradbroke Island, “unless there are more Indigenous people writing and publishing, there’s not a lot for other scholars to hang their theory on”.³³

1.2 The Scope of the Thesis Chapters

Chapter 1 introduces why I embarked upon doctoral research on Aboriginal water rights and interests in Australia and why such rights should be conceptualised as a ‘web of Aboriginal interests’ or relationships and rather than as a ‘bundle of rights’, as often expressed by some academics in understanding property concepts. Further, this chapter attempts to show why Aboriginal water rights and interests require Australian governments and other stakeholders to understand that the current treatment of these interests is unsatisfactory and problematic.

Chapter 2 examines and analyses a review of the thesis literature and demonstrates that the inherent values, beliefs and law in Western and Aboriginal ontological concepts exist within polarised cultural and legal paradigms. The review of these sources forms the basis of understanding Australia’s historic and contemporary relationship with Aboriginal communities within water management discourse. The chapter also undertakes a comprehensive literature analysis and traverses a multi-disciplinary approach to examine the particular cultural issues which form the basis of Aboriginal perspectives on the value of, and use of water.

Chapter 3 articulates a general overview of the thesis research and highlights the background to the thesis methodology, the justification for the approach taken, the

³³ Lisa Strelein, *AIATSIS: An incubator for Indigenous Researchers?* 21 January 2014 Australian Institute of Aboriginal and Torres Strait Islander Studies
<<http://www.innovation.gov.au/HigherEducation/IndigenousHigherEducation/ReviewOfIndigenousHigherEducation/Documents/CommissionedResearch/Strelein.pdf>>.

significance of the research study, the rationale behind the methodology, and the ontological framework. The methodology for the thesis research is to examine and analyse the primary and secondary sources through the lens of an Aboriginal researcher in order to examine what are the competing issues within the Aboriginal water rights and interests discourse and how they impact the lives of Aboriginal peoples in Australia. The approach of my thesis research is undertaken through a qualitative method and to provide an action based research approach to the treatment of the research process.

Chapter 4 examines how the nature of water rights in Australia has changed since first contact for Aboriginal peoples, and to what extent has this impacted upon Aboriginal ownership of the waters and the historic conflict resulting from British settlement in respect to Aboriginal and non-Aboriginal usages of water. The chapter will analyse the impact of Western water values and Australia's views on the use of and access to water resources. How the nature of Aboriginal water rights and Aboriginal water resource access was forced to change, due to the expansion of settlement and the demands of Australia's emerging states and territories, to prioritise water resources for non-Aboriginal use.

The chapter examines the impact of the *Mabo v Queensland [No 2]*³⁴ decision on the cultural recognition of Aboriginal water rights and interests and whether this landmark decision led to paradigm change in water rights and ownership for Aboriginal communities. The chapter provides examples of the legal requirements for native title recognition in contrast to the customary recognition of water rights and interests under Aboriginal laws.

The interpretive challenges of constructing and reconstructing native title to fit into Australian legal concepts are examined, using various native title decisions to show how these legal interpretations are not satisfactory. Aboriginal values in water are held by Aboriginal peoples exercising cultural obligations under Aboriginal laws. Aboriginal

³⁴ (1992) 175 CLR 1.

water values, water access and use underpin Aboriginal relationships and community ‘belonging’.

For example, in the distinction of Aboriginal water values and Aboriginal identity as saltwater, freshwater and bitter water peoples. Chapter 4 analyses these characteristics in water, Aboriginal property rights and kinship, and utilises various native title decisions to analyse the distinct approaches in Aboriginal and non-Aboriginal water values, as well as exploring how the Western legal system creates challenges in interpreting Aboriginal values and beliefs. The chapter attempts to show the differences between the conceptualisation of Aboriginal ontological values, beliefs and laws and that of Australian or Anglo-Australian concepts in water.

Chapter 5 examines how water scarcity in the Murray-Darling Basin impacts upon Aboriginal water rights and interests and whether the customary, cultural, social, economic and spiritual water needs of Aboriginal communities are effectively represented in water allocations. The chapter is limited to examining the general position of Aboriginal communities within the Murray-Darling Basin, and the effect of the proposed water reforms under the Basin Plan.

The chapter also examines the overall impact on Aboriginal communities water rights and interests under the *Water Act* 2007 (Cth) and the *Water Act* 2008 (Cth), in relation to the provisions that directly affect Aboriginal communities and their water requirements. The chapter does not examine the particular water needs of other water users and stakeholders.

Chapter 6 examines the opportunities and barriers that exist to improving the standard of Aboriginal health through provision of water rights for Aboriginal peoples, and for the capacity to exercise self-determination. The chapter identifies the opportunities to improve the state of Aboriginal health and to ensure that Aboriginal communities have cultural and economic certainty through the mechanism of a reserved allocation in water rights, outside the consumptive pool. It also examines the implications for Aboriginal

communities of the minimal benefits generated from prevailing water reforms and the inferior allocation of water rights and interests.

Chapter 7 examines the potential in wealth development for Aboriginal peoples through the ownership of water rights, preferably implemented by the allocation of ‘reserved water rights’. The allocation of reserved water rights as perpetual rights was the result of my commissioned report to the Western Australian Government. The chapter also analyses the Australian government’s limited recognition of Aboriginal water rights under the National Water Initiative and the poor policy and legislative outcomes this has created for Aboriginal communities.

Chapter 8 examines the treatment of Aboriginal water rights and interests in legislative instruments and how Aboriginal cultural customs and practices are considered in the regulation and management of water resources in Australia. The chapter also analyses Aboriginal water rights and interests and their position within the hierarchy of other water interests and whether Aboriginal cultural and customary practices are effectively represented and recognised.

The chapter also examines the participation and representation of Aboriginal peoples in the allocation of water rights and interests within Australian water policy, and provides examples of the lack of appropriate inclusion of Aboriginal water rights and interests in the legislative regimes. The chapter analyses how Australian governments have dealt with sharing water allocations between Aboriginal and non-Aboriginal groups. The chapter includes a case study on the development of Western Australia’s water policy reforms.

Chapter 9 examines the relevance of international human rights instruments in relation to securing water rights for Aboriginal peoples in Australia and whether their water rights and interests are protected under these instruments within the context of Australian water law and policy. The chapter analyses whether international human rights concepts can

influence the protection of Aboriginal peoples water rights in Australia and provide a persuasive tool to realise future recognition for Aboriginal water rights and interests.

Chapter 10 articulates the conclusions and recommendations of this thesis research which have been examined and analysed within the thesis chapters, setting out the recommended changes to meaningfully respond to a ‘claim for Aboriginal water rights and interests’ in Australia. The recommendations are not presented as an exhaustive list but are drawn from the research undertaken for this thesis.

1.3 Overall Aim and Structure

The aim of the thesis is to encourage a more informed national discussion between water users where policy and legislative reform is directly guided and informed by Aboriginal communities. The thesis applies a reform-oriented approach that is based upon foundational Aboriginal concepts, values and relationships in water which prioritises traditional knowledge. Bradley Bryan suggests that ‘Aboriginal concepts of property cannot be articulated into singular concepts of Aboriginal ontology’.³⁵ The perspective of this thesis is to recognise the diversity of the Aboriginal values in water and the rich dialogue of Aboriginal knowledge and to examine why a narrow view of Aboriginal water rights should not exclude concepts of property rights in water.

When I embarked upon developing the thesis structure it was important to me personally that it should offer solutions and recommend reasonable reforms that might transform current thinking on Aboriginal water rights and interests. Equally important to me was that the thesis should be written in a user-friendly form to ensure that it could be read and debated within Aboriginal communities, as well as others.

The thesis literature review acknowledges the various definitions of Indigenous identity in Australia, which includes broader references of identity as Aboriginal, Indigenous,

³⁵ Bradley Bryan, ‘Property as Ontology: On Aboriginal and English Understandings of Ownership’ (2000) 13(3) *Canadian Journal of Law and Jurisprudence* 23-24. Bryan argues that centralising the meaning of Aboriginal definitions such as *sui generis*, expresses Aboriginal concepts by a universality approach and fails to interpret these values through their own cultural concepts.

Indigenous people, Aboriginal people, Aboriginal peoples, Indigenous peoples and by the language group which an individual belongs to, and connection to ‘country’ such Walmajarri, Nyikina Mangala or Wiradjuri.

I have adopted the use of various references for identity that suit the context of the situation and where other sources identify Aboriginality with certain meanings in language. I have used the words, Indigenous peoples and Aboriginal peoples in the thesis interchangeably throughout the chapters to recognise the communal or collective diversity of Indigenous peoples for mainland Australia. The thesis research does not include an examination or analysis of the perspectives of Torres Strait Islander peoples; references to *Mabo v Queensland* [No 2]³⁶ are included for the purposes of analysing particular issues in relation to the judgement and decisions which have affected Aboriginal communities.

In preparing the literature review in Chapter 2, I undertook to address and examine significant themes which have shaped and informed the thesis research and informed the readings for the chapters. The review of the literature is intended to be comprehensive, on the issues and themes put forward by the research, but it is not exhaustive. Firstly, because the thesis research in this area is an emerging Aboriginal jurisprudence, in my view this requires an interdisciplinary approach to identify the range of Aboriginal issues which interface with Australian water management; these include human rights, Aboriginal ontological concepts of water and the impact of Australia’s national reform in redefining water and its use. Secondly, the detailed analysis in the literature provides future researchers with a comprehensive set of sources on Aboriginal water rights and interests within the Australian jurisdiction.

In the process of gathering research material for this thesis, it became apparent that there is a lack of written research by Aboriginal authors in Australia. During the course of my research it was also a recurring theme that Aboriginal community representatives and expert Aboriginal speakers were frequently excluded, or overlooked as presenters at

³⁶ (1992) 175 CLR 1.

water conferences or government summits across Australia. For the coming years I remain hopeful that the recognition of Aboriginal water rights and interests will gain the same traction as native title and Aboriginal land rights; however, in the final stages of completing this research the political climate does not bode well.

Chapter 2: Literature Review

2.1 Framework for Examining Aboriginal Water Rights and Interests in Australia

A conundrum arises when one tries to define Aboriginal property interests through Western legal concepts, because the values, beliefs and law inherent in Western and Aboriginal ontological concepts exist within polarised cultural paradigms. At the outset, the research involves the traversing of a multi-discipline area of literature in order to examine and analyse Aboriginal water rights and interests in Australia, such as law, social science and the humanities, and Indigenous studies. The various stages of my investigation in researching my proposal led to a comprehensive literature review of the most relevant sources which relate to my thesis research, as well as many academic presentations of my postgraduate progress during my thesis writing. I have read and analysed the collection of primary and secondary sources and provided a contextual critique in whether these sources identified gaps in this research area and, if so, how my research informs academic scholarship in Aboriginal water rights and interests in Australia.

The distinct colonial history of Australia experienced by Aboriginal peoples and settler societies has resulted in complex and historically difficult relationships, and such relationships continue to create conflict for resources. It also raises significant policy issues for developing Australian water policy and law that is inclusive. This research into Aboriginal water rights and interests seeks to fill the gap that exists in understanding the themes among Aboriginal water values and Australian water management. The literature review has assisted in developing the conceptual framework of the thesis, to identify the most relevant research chapters and to identify the theoretical framework that is most appropriate to examine Aboriginal water rights and interests – that is, as a complex ‘web of relationships’.

This research is not about accommodating or integrating Aboriginal water rights and interests into mainstream water management, mainly because this type of treatment has been adopted and has failed to recognise and protect Aboriginal peoples' right to use water according to Aboriginal laws, their beliefs and their values. The complexity of the interplay between Aboriginal and Western perspectives demands that the thesis examines a broad range of interconnected research themes, because the Australian legal system has developed over time distinct non-Indigenous legal concepts that are at odds with Aboriginal water use.

Smith and Weisstub (1983) in *'The Western Idea of Law'* explain that 'Western legal cultures are basically recognised through two traditions, that of Judeo-Christian culture and Greco-Roman culture'; the Judeo-Christian tradition emphasises a 'moral basis in justice and law' and the Greco-Roman emphasises the elements of 'reason and the law'.³⁷ Australia has inherited legal traditions and a system of laws derived from English law and the religious foundation of Australia at the commencement of British settlement was based upon the Judeo-Christian beliefs. Because of the Western legal traditions which Australia has been shaped upon such as these concepts above, those beliefs and values are deeply rooted in the values, beliefs, practices and customs held by governments, institutions and among various groups of Australians such as farmers, pastoralists, irrigators and pioneer families. These worldviews are, I would argue, distinguished from Aboriginal world views.

The thesis research use of the word 'Western' is to identify and acknowledge that Australian and British ontology holds divergent worldviews in water management and water use than that of Aboriginal belief systems.

The thesis chapters have been constructed to examine and investigate the research question, which includes:

- the contested concepts of water between Aboriginal and Western ontology;

³⁷ J C Smith and David N Weisstub, *The Western Idea of Law* (Butterworths, 1983) 195.

- the impact upon Aboriginal peoples by settler demands for increased water resources in Australia's social and economic development;
- the integral nature of Aboriginal water values and exercising cultural obligations and maintaining familial relationships within these values;
- the implications for Aboriginal customary water rights and interests in light of legal developments in native title;
- Australian water law and policy and the incorporation of Aboriginal water rights and interests;
- Aboriginal water requirements in the context of the Murray-Darling Basin Plan;
- the nexus between Aboriginal health, Aboriginal water rights and self-determination;
- the potential for Aboriginal wealth development through a reservation of Aboriginal water rights; and
- the examination of Aboriginal water resources within a human rights paradigm.

2.2 The Scope of the Literature Review

In arguing from an Aboriginal perspective, this research extends the limited scholarship written by Aboriginal researchers in Australia and also encourages further Aboriginal academic legal research in this area. Adopting this approach to the research process allows me to consider the critical question, 'How, from an Aboriginal perspective, are Aboriginal water rights and interests recognised and valued against the competing rights and interests of other stakeholders in Australia?'

The water interests of the Torres Strait are not addressed because of my personal belief that Torres Strait research is preferably instructed by Torres Strait Islander peoples, who are innately connected to the cultural knowledge and interpretative water dialogue of the Torres Strait community.

Informing the research through an Aboriginal perspective means that these arguments are represented through the lens of Aboriginal ontology, and not from the Anglo-Australian perspective, or beliefs, values and interpretation of Aboriginal water rights. To unbundle the many layers of Aboriginal meaning in water resources requires a particular emphasis on developing an Aboriginal voice and Aboriginal narrative within the thesis. The literature that informs the bulk of the research is limited to the collective experience of Aboriginal peoples in Australia and it is not meant to assert or presume the experience or the political voice of particular Aboriginal communities, individuals or regions.

Since the commencement of my doctoral thesis research, and ensuing years of preparing the thesis chapters, Australian policy issues in relation to Aboriginal water rights and interests have slowly emerged into the national dialogue on water management. Notably, what is meant by Aboriginal water values and what relationship do Aboriginal peoples have with water? The thesis examines various stages in the ad hoc development of Aboriginal water policy, the implementation of recognising some distinct Aboriginal water interests such as held under native title and the degree of minimal inclusion of Aboriginal water rights and interests under Australian water law.

Although the research spans three eras of elected Prime Ministers – namely the Howard, Rudd and Gillard governments – the literature reviewed will not include the intricacies of water reform during these times as it is beyond the scope of this thesis.

The thesis submits recommendations for reform; however, this is not to be construed as a exhaustive list and is made within the context of the research and the author's professional and community experience in the area of Aboriginal water rights jurisprudence. The chapter themes also surfaced from my professional experience with establishing a state water Aboriginal program that was the first of its kind in Australia. Although I have considered these themes as fundamental to addressing the question, this by no means limits further discussion of other research themes. The research literature has strongly informed the various investigative stages of my research; however, there are

also gaps and weaknesses which I have discovered require attention such as the absence of ethical principles in Australian water management policy.

2.3 Literature on Aboriginal Water Values: Oral Story

The literature review begins from the timeline of Aboriginal sovereignty, prior to British contact in 1788. This is an appropriate approach because Aboriginal peoples ruled over their lands and waters under the Aboriginal laws of the particular language groups.

The process of research into Aboriginal water values also connects to familial kinship held under Aboriginal laws. I have included various accounts of how Aboriginal laws operate and why they are valued by many Aboriginal peoples, individually and as a language or kinship group. Because the thesis discusses an Aboriginal timeline from pre-British government contact to contemporary Australia, the Aboriginal narratives on Aboriginal values are recounted in English and in Aboriginal languages. The nuances of Aboriginal language is critical to understand Aboriginal water resource use and the relationship of Aboriginal peoples within their Aboriginal environment, for example, through Aboriginal oral story, native title claimant testimony, relevant reports and secondary sources.

Collins and Falk (2008) describe the spiritual relationship of Aboriginal peoples to waterscapes and that land and water are not separate:

In Aboriginal culture in Australia, there is no clinical distinction between land and water, either of water that flows over the land, rests upon it or flows beneath it.

Land and water interface as equal components of country.³⁸

³⁸ Neva Collins and Virginia Falk, 'Aboriginal peoples in Australia and their Spiritual Relationship with Waterscapes' in Elliot Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 131.

The Aboriginal ontological narrative of the ‘inter-connective’ cultural relationship to the Aboriginal environment has been repeatedly expressed by Senior Law men and women. Aboriginal values in the land, the waters and all ‘things’ are centred upon a sacred relationship and their words generate an understanding of the concept of ‘connection’.

Rock stays
I die and put my bones in cave or earth
Soon my bones become earth ...
My mother.
Our story is in the land ...
It is written in those sacred places.³⁹

To establish the voice of Aboriginal peoples in the thesis research, requires illustrating Aboriginal value systems within the Aboriginal environment such as those relating to water resources such as oral Aboriginal narratives. In recounting to the court in *Harrington-Smith Wongatha People v Western Australia* proceedings, Cyril Simms expressed what ‘country’ means:⁴⁰

There is a difference between having an interest in a country and claiming it. I might marry a woman whose country is around Jamieson, live on her land for years, learn the business for country, but I still will not claim that country.⁴¹

The oral narrative depicts the care and protection for water landscapes within ‘country’ as a legal obligation and a cultural expectation ‘on country’ to know Aboriginal laws for ‘country’. Mr Simms’ testimony recounts the parameters of ownership to ‘country’.

³⁹ Big Bill Neidjie, Stephen Davis and Allan Fox, *Australia's Kakadu Man Bill Neidjie* (Resource Managers, revised ed, 1986) 14.

⁴⁰ Transcript of Proceedings, *Harrington Smith on behalf of the Wongatha People v Western Australia* (Federal Court, No 9, Lindgren J, 28 November 2002) (Cyril Simms during witness evidence for ‘Autobiographical and Claims to Country’) 1.

⁴¹ Ibid.

In giving evidence, Harvey Murray, Traditional Owner, describes the cultural obligation to care for water sites:

Asked whether there are things I must do for my ngurra, I say that sometimes we go around cleaning the rockholes so that we can have fresh clean water. We can hunt on my ngurra.⁴²

In the native title evidence given by Gawirrin Gumana, the range of rights that exist to land and waters under Aboriginal laws can, even though there are no living members left to speak for ‘country’, include those who are indirectly related, that is the ‘gutharra’⁴³ and ‘mari’⁴⁴ for whom ‘looking after and speaking for country’ was also an obligation.

Johnny Jango through an interpreter gave evidence in *Jango v Northern Territory*,⁴⁵ about the ancient story of ‘country’ that was passed down orally for generations within the Docker River Elders, through grandfather to grandfather.⁴⁶ Jango recalled that ‘ancestral stories were passed on from knowledge kept in their head, without the use of pencils and books’.⁴⁷

Reggie Uluru, *in situ* at the Yulara Waterhole, provided oral evidence of the significance of water for Traditional Owners.⁴⁸ Mr Uluru was questioned about the relationship of the water-hole for ‘country’ and responded that numerous waterholes in the area required regular cleaning under Tjukurrpa (Aboriginal law), where men, women and children

⁴² Transcript of Proceedings, *Harrington-Smith on behalf of the Wongatha People v Western Australia* (Federal Court, No 9, Lindgren J, July 2002) (Harvey Murray during witness evidence for ‘Autobiographical and Claims to Country’) 5. Transcript states ‘Ngurra’ means ‘country’ which one belongs to by birth and skin group.

⁴³ *Gumana v Northern Territory* (No 2) [2005] FCA 1425, 103. See generally Gutharra in Yolgnu language describes a complex family relationship of ‘daughters child (woman speaking), as cited in the decision.

⁴⁴ Ibid. Note Mari is the reciprocal term in the mari-gutharra kinship relations, as cited in the case.

⁴⁵ *Jango v Northern Territory* [2004] FCA 1539.

⁴⁶ Transcript of Proceedings, *Jango v Northern Territory* [2004] FCA 1539 (Federal Court, Weiner J) (Johnny Jango during evidence-in-chief by D Parsons SC *in situ* in November 2003) 21. Transcript provides ‘evidence of country’.

⁴⁷ Ibid.

⁴⁸ Transcript of Proceedings, *Jango v Northern Territory* [2004] FCA 1539 (Federal Court, Weiner J), (examination-in-chief of Reggie Uluru by D Parsons SC *in situ* in November 2003) 45. Transcript provides evidence of country’.

drank ‘many, many years ago’ and today, the ‘Tjukurrpa story’ is for men only.⁴⁹ This oral narrative explains the conceptualisation of Aboriginal knowledge and that the cultural restrictions on sharing the resources for water sites are underpinned by Tjukurrpa.

Johnny Jango relates Aboriginal water values and the use of water under Anangu laws which underpins water quality knowledge:

During the rainy time they would get water from the rock holes in the Ranges and the rocks all around. He learnt where to find water following the old people, who would know where to get water when it ran out. They were taught to swim in muddy waterholes, but not clear ones, as they were used for drinking.⁵⁰

Matthew Rigney, a Ngarrindjeri of the Murray Lower Darling River Indigenous Nations, expressed the inherent Aboriginal connection with water in simple terms:

[w]e belong to water ... We represent ‘country’ ...⁵¹

A Senior Lawman of the Bunitj, Gagudju, describes that the distinct cultural identity of Aboriginal people intrinsically exists as an inseparable part of the environment:

If you feel sore ...
headache, sore body,
that mean somebody killing tree or grass.
You feel because your body in that tree or earth.
Nobody can tell you,
You got to feel it yourself.⁵²

⁴⁹ Ibid.

⁵⁰ Transcript of Proceedings, *Jango v Northern Territory* [2004] FCA 1539 (Federal Court, Weiner J) (Johnny Jango during evidence-in-chief by D Parsons SC *in situ* in November 2003) 18.

⁵¹ Matthew Rigney, ‘Broad Principles on Indigenous Engagement on Water Issues’ (Speech delivered at the Australian Indigenous Water Focus Group, National Water Commission, Adelaide, South Australia, 18 November 2008).

An Aboriginal claimant in the *De Rose*⁵³ case provided testimony for the criteria of the Nguraritja's⁵⁴ relationship to water sources on 'country' and stated:

[a] claimant had been born of the claim area ... the claimant had a long-term physical association with the claim area ... his or her ancestors had been born on the claim area; or the claimants had a geographical and religious knowledge of the claim area ... the claimant is recognised as Nguraritja for the claim area by the other Nguraritja.⁵⁵

The role of Nguraritja (Traditional Owner) for Yuta (De Rose Hill Station) sets out that:⁵⁶

[a] person could be Nguraritja for a creek, or part of a creek ... the karu-karu (watercourse) at Apu Maru, which was said to be the path that the Malu (kangaroo), Kanyala and Tjurki took as they travelled across the landscape.⁵⁷

These oral Aboriginal narratives provide the necessary context for understanding Aboriginal values and laws such as those relating to water resources and the environment. The narratives succinctly describe how Aboriginal law orders the distinct relationship to 'country', as well as identifying the fundamental ideology that underpins Aboriginal beliefs. Although Aboriginal concepts are not easily interpreted within a non-Aboriginal law system, as the following chapters will discuss, Aboriginal beliefs are better expressed in an Aboriginal narrative of lived experience.⁵⁸

⁵² Big Bill Neidjie, Stephen Davis and Allan Fox, *Australia's Kakadu Man Bill Neidjie* (Resource Managers, revised ed, 1986) 52.

⁵³ *De Rose v South Australia* (No 1) [2003] FCAFC 286.

⁵⁴ The word means 'Traditional Owner, as cited in the case.

⁵⁵ *De Rose v South Australia* (No 1) [2003] FCAFC 286. See Westlaw, *Case Law* (11 November 2004) <<http://au.westlaw.com/result/documenttext.aspx?RS=WLAU4.09&VR=2.0&SP=Fed>>.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee *Inquiry of the Evidence Amendments Bill 2008* (17 February 2009) 13<https://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A1D6037-1C23-CACD-2217-F114180C6C4E&siteName=Ic>.

The literature research process was informed by anthropological reports, by both examining the context and dynamics of Aboriginal water values within Aboriginal law systems through analysing specific native title claims of Aboriginal claimant groups. For example, with the Paakantji, the Lake Victoria area and the Walbunga peoples, anthropological reports reveal substantial material on cultural relationships that has been documented since the 1800s. These reports also document the cultural significance and connection of Aboriginal groups to their respective 'country', which are comprised of laws, traditions, customs and kinship.

The Paakantji and Walbunga reports represent the collective experience of Aboriginal peoples through ethnographic descriptions; which includes research analyses from A W Howitt (1898), R H Mathews (1900) and Norman Tindale (1940). Although the observations and analyses of the ethnographers are written through a Western lens and value system, these observations and personal accounts provide some insight into Aboriginal values, beliefs and traditional practices.

For example, in Sarah Martin's (1997) 'Lake Victoria report' the traditional marriage patterns of the Aboriginal communities of the Lower and Upper Murray-Darling Rivers is evidenced by reference to the anthropological research of the Berndts which states:

Marriages between the Lower Murray people and the people they called walkendi-woni from further upstream than usual became more common after contact. The Lower Murray people called those areas other than the Murray River of Lower Darling River 'strangers' and they were not regarded as suitable partners.⁵⁹

A reference in Martin's report includes further comment by the Berndts that 'the Murray River is an important route for trade and exchange of ceremonies and songs, and marriage

⁵⁹ Sarah Martin, 'Lake Victoria Environmental Impact Statement Anthropological Report' ('Research Report', Department of Land and Water Conservation (NSW) and Murray-Darling Basin Commission, June 1997) 19-20.

partners'.⁶⁰ The record of genealogy in these anthropological reports provides relevant and remarkable research about Aboriginal families, their relationship to 'country', and an invaluable insight into the use of Aboriginal water resources and how Aboriginal laws determine the relationship between Aboriginal groups.

Further, the accounts of early non-Aboriginal contact by amateur and professional writers provide evidence that concepts existed in Aboriginal societies that 'implied social organization and the existence of an organised Aboriginal society'.⁶¹

The anthropological reports about Aboriginal communities are important for this thesis research into Aboriginal water rights and interests because they demonstrate how Aboriginal peoples hold possession to water, as exclusive and non-exclusive property rights. For example, Thomas Mitchell, an explorer, commented in 1848 that 'the Paakantji occupied different portions of the river and owned the resources and the section of that river'.⁶² Similarly, Beckett in 1959 in his account on Aboriginal ownership to land and the waters stated:

Every man owned a series of swamps, all of which would be adjacent to one another. He shouted their names as he came onto ceremonial ground ... He was not the sole owner but he had the right to hunt in them and to give others permission to do so, whereas hunting in another man's swamp necessitated giving the owner half the kill.⁶³

These examples of Aboriginal rights and interests to water for their respective claim area identify the ontological construct of how ownership is held by Aboriginal peoples to the land and the waters, which describes when a right to access is allowed and that the use of water requires 'payment'.

⁶⁰ Ibid 20.

⁶¹ Michael Niblett, 'Preliminary Anthropological Report on the Walbanga (Walbunja) Application Area NC 96/29 NSW South Coast' ('Research Report', NSW Aboriginal Land Council, 2002) 67.

⁶² Sarah Martin, 'The Paakantji Claimants Wentworth Native Title Claim NC 95/10: Applicants Irene Mitchell and Ray Lawson Snr' ('Research Report', NSW Aboriginal Land Council, December 1998) 60.

⁶³ Ibid 58.

The significance of Aboriginal water resource management extends to the cultural values held in preserving Aboriginal burial sites, ensuring the correct flow of water for burial preservation.

[A]boriginal peoples believe that it is quite acceptable for some lower burials, such as those along levee banks ... to be covered for short periods of time by natural floodwaters ... covering most of the burials for long periods of time by artificially high water is an unnatural interference ... our people didn't put them under water.⁶⁴

A contemporary understanding of Aboriginal peoples' association and use of the land and waters is evident in research reports informing on the co-management of national parks with Aboriginal peoples and their descendants, such as the Biamanga and Gulaga National Parks management project. For some Aboriginal peoples within the co-management area there were consequences from colonial settlement such as physical interference with maintaining cultural linkages to 'country'. However, the ongoing cultural relationships have since been revitalised to sustain Aboriginal identity and traditional lands and waters. The following example explains this contemporary cultural revitalization:

[u]nder the pressures of assimilation policy in the immediate post-war period, [Aboriginal peoples] left for places like Sydney to seek work or better paying positions. As these people have reached mid-life or later, some have returned to live in the cultural area. Frequently their absence may be used against them in public, or behind their backs, when issues to do with rights to resources and the like come up ...⁶⁵

⁶⁴ Sarah Martin, 'Lake Victoria Environmental Impact Statement Anthropological Report' ('Research Report', Department of Land and Water Conservation (NSW) and Murray-Darling Basin Commission, June 1997) 68.

⁶⁵ Brian Egloff, Nicholas Peterson and Sue Wesson, 'Biamanga and Gulaga: Aboriginal Cultural Association with Biamanga and Gulaga National Parks' ('Research Report', Office of the Registrar *Aboriginal Land Rights Act 1983* (NSW) (2005) 59.

Further reports have highlighted the information gained from Aboriginal heritage and catchment research as to how Aboriginal laws underpin the relationship of a particular Aboriginal group to their water resources. The Wiradjuri Heritage Study (2001) had the primary purpose to report on the historical context of Aboriginal sites and areas of significance, to identify the Aboriginal land use history and Aboriginal places of contemporary significance.⁶⁶

In the Wiradjuri Heritage Study an oral story about the creation of the Murrumbidgee River (Bila Murrumbidya)⁶⁷ tells of how the river was formed by the actions of the female Goannas, and ‘when the flood of water was released, then rushing down the valley into the Murray River’.⁶⁸ Aboriginal oral story reveals the creation and attachment of the Wiradjuri to Bila Murrumbidya and the connection of the river to the Murray River, the story acknowledging that the Murray River was created prior to the Bila Murrumbidya.

The ‘cultural landscape’ for the Wiradjuri is a contemporary term used in heritage management and archaeology which defines both the ‘material and non-material’ and the tangible and intangible environment.⁶⁹

A cultural landscape consists of the fabric of the land and its natural resources, traditional sites and other evidence of material together with sites of ceremonial and spiritual significance.⁷⁰

Wiradjuri water resources within this ‘cultural landscape’ included ‘billabongs, swamps, lakes, flood plains and tributary creeks’,⁷¹ as well as ‘freshwater springs that supported seasonal Wiradjuri occupation’.⁷² Lagoons played an integral role in supplying fish and,

⁶⁶ Dick Green in conjunction with the Community of Wagga Wagga, ‘Wiradjuri Heritage Study: For the Wagga Wagga Local Government Area of New South Wales’ (‘Research Report’, Wagga Wagga City Council and NSW Heritage Office, revised ed, 2003) 1.

⁶⁷ Ibid 23.

⁶⁸ Ibid 20-23.

⁶⁹ Ibid 67.

⁷⁰ Ibid.

⁷¹ Ibid 58-59.

⁷² Ibid 59.

where the rising waters came from the river end, Wiradjuri men would trap the river water with a tree log to control fish movements.⁷³

Kabaila's (1998) research project, on behalf of the Wiradjuri Regional Aboriginal Land Council, concerns the Aboriginal association with the three river systems, the Murrumbidgee, the Lachlan and the Macquarie, and includes in its chapters an examination of the Warangesda Mission and Aboriginal reserves, as well as the significance of Aboriginal heritage and Anglo-Australian impact.⁷⁴ This research includes historical and oral story from Aboriginal peoples, and recollections by Aboriginal families living on the reserves about their significant relationships to water resources.

Additional resources such as Aboriginal Community Catchment Working Papers and books informed by Aboriginal communities clearly express a personal and familial relationship to water resources and engage with modern themes such as Aboriginal land management and resource stewardship. The Balladong Noongar Working Group generated a document which relates to the significance of Noongar 'country' and how 'spiritual beings created the rivers, the rocks, the trees, the animals', and how 'the land was formed later, then man and woman, and the Law was handed to both to obey'.⁷⁵

In *Bennell v Western Australia*⁷⁶ Nyoongar peoples equated 'boundaries in country' with the traditional exclusivity for waterways. The Court held that Nyoongar peoples still asserted and exercised their rights and interests, for example, in hunting for turtles in the local swamps, the protection of sacred sites⁷⁷ and in the Nyoongar belief of the Wagyl; a carpet snake that created the rivers, rock holes and waterways on 'country'.⁷⁸ The Wagyl is said to bring rain and ensure water.⁷⁹

⁷³ Ibid 150.

⁷⁴ Peter Rimas Kabaila, 'Wiradjuri Places: The Murrumbidgee River Basin Volume 1 and Ngunawal' (Black Mountain Projects, revised ed, 1998) 8.

⁷⁵ Balladong Natural Resource Management Working Group, Avon Catchment Council, 'Balladong Noongar Budjar: Healthy Country, Healthy People' ('Project Study', Australian Government, 2006) 5.

⁷⁶ *Bennell v Western Australia* [2006] 153 FCR 120.

⁷⁷ Ibid 232.

⁷⁸ Ibid 176.

⁷⁹ Ibid 178.

The value of such documents and oral testimony from Aboriginal peoples recognises different perspectives on the creation of certain things. It also establishes evidence of an inherent connection and obligation under Aboriginal laws and how water resources have been formed across Australia, for example:

The sensitivity to the natural environment led Nyoongars to see the world in six seasons. All seasonal changes and patterns of life were part of a group's collected knowledge, and portrayed in ritual, mime and lore. Participation in special ceremonies ensured that the cycle of life continued.⁸⁰

The oral histories of Noongar peoples in the southern part of Western Australia are documented in 'Ngulak Ngarnk Nidja Booja (Our Mother, This Land)' in the same manner as the Wiradjuri oral history, which links the lived Aboriginal experience of the past to a vibrant and meaningful relationship with 'country' that has survived in spite of the British invasion of Australia.

Kathy Yarran, a Noongar-Kija Elder, expressed her meaning of Aboriginal values for belonging to 'country':

My memory of the land is of something that we owned. We have always owned the land because we have always been here on this land. It is a beautiful feeling to walk on the land as our ancestors have always done before us. We ran free.⁸¹

The strength of Aboriginal oral story written in these various forms of literature particularises how multi-faceted the layers of Aboriginal water values are, and how the environment is framed within a holistic relationship for the Aboriginal individual and Aboriginal communities.

⁸⁰Ballardong Natural Resource Management Working Group, Avon Catchment Council, 'Ballardong Noongar Budjar: Healthy Country, Healthy People' ('Project Study', Australian Government, 2006) 7.

⁸¹ Centre for the Indigenous History and the Arts, 'Ngulak Ngarnk Nidja Boodja: Our Mother, This Land' ('Research Project', University of Western Australia, 2000) 62.

2.4 Aboriginal and Torres Strait Islander Social Justice Commissioner Reports

The Social Justice and Native Title Annual Reports are prepared and submitted to the Federal Attorney-General by the Aboriginal and Torres Strait Islander Social Justice Commissioner. The Commissioner monitors a range of national and state Indigenous issues, in consultation with Indigenous peoples, such as discrimination, native title, water rights, human rights, assessments of international perspectives in Indigenous policy and evaluating the performance of Indigenous community programs.⁸²

In addition, the Commissioner is responsible for the implementation of the ‘National Congress of Australia’s First Peoples’, which established a new model of Indigenous national representation following the abolition of the Aboriginal and Torres Strait Islander Commission.⁸³ The role of the Commissioner encompasses a broad range of annual research themes, and in 2008 the Native Title Report introduced its first chapter on Aboriginal water rights and interests.

The Social Justice and Native Title Reports provide an annual analysis of the progress and development of Indigenous rights, where the reports examine whether the human rights of Indigenous peoples in Australia are exercised under international standards such as expressed in the *United Nations Declaration on the Rights of Indigenous Peoples*.⁸⁴

Human rights are not just abstract concepts that exist in documents such as treaties, conventions and declarations alone. They become meaningful only when they are able to be exercised.⁸⁵

⁸² Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Social Justice Report 2010’, (Australian Human Rights Commission, 2011) ix, xii.

⁸³ Ibid xi.

⁸⁴ Ibid 2-3.

⁸⁵ Ibid 4.

The 'Social Justice Report 2008' has cautioned on the use of general statistics alone to represent the experience of all Indigenous peoples in Australia, and stated:

Statistics on Indigenous peoples are subject to a range of data quality concerns. In addition to cultural considerations in relation to statistical matters (such as concepts, definitions, collection practices), data quality issues arise from the relatively small size of the Indigenous population in comparison with the total population, the dispersion of the Indigenous population, particularly across remotes areas of Australia, and the way in which Indigenous persons are identified in statistical collections.⁸⁶

Aboriginal peoples were only first counted as citizens in the 1971 Census,⁸⁷ so the lack of information about Australia's Indigenous population, since Federation, and the depth of national research is limited. For example, in the identification of community trends and the impact of various indicators such as health, housing and exercising cultural activities.⁸⁸

Most states and territories have been slow to enter into partnerships with Indigenous peoples, despite the 1992 National Commitment. It is only in the past five years that they have begun to enter into partnership agreements with the Aboriginal and Torres Strait Islander Commission on behalf of Indigenous peoples on issues such as housing and infrastructure, health and law and justice.⁸⁹

The Australian Government pursued a social justice philosophy through the establishment of the *Council for Aboriginal Reconciliation*⁹⁰ to address 'Aboriginal disadvantage in land, housing, law and justice, cultural heritage, education, employment,

⁸⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice Report 2008' (Australian Human Rights Commission, 2009) 284.

⁸⁷ Ibid.

⁸⁸ Ibid 283.

⁸⁹ Amanda Cornwall, 'Restoring Identity: Final Report of the Moving Forward Consultation Project' ('Research Report', Public Interest Advocacy Centre, August 2002) 23.

⁹⁰ *Council for Aboriginal Reconciliation Act 1999* (Cth).

health, infrastructure, economic development and other matters'.⁹¹ During this era of change, the Australian Government did not specifically include Aboriginal water rights and interests in the Reconciliation Council's 1994 report or in the following decade of the reconciliation movement.

The 1994 National Aboriginal and Torres Strait Islander Survey reported that approximately 60 per cent of Indigenous peoples surveyed recognised familial links to a traditional community or language group.⁹² In light of this thesis research, even eighteen years on, this figure identifies that Indigenous peoples hold a cultural identity to being Aboriginal and implies an ongoing relationship to 'country', the land and the waters.

In view of the National Survey, further research should be undertaken to understand the extent to which traditional access and use of water or the revitalisation of traditions and practices of water carry meaning for Aboriginal communities relationships. Especially in relation to the use of Aboriginal cultural flows⁹³ and accessing cultural water licences.

Since the national dialogue on water reform commenced in the 1990s, the Australian Government has not adequately addressed the water rights and interests of Indigenous peoples, or in undertaking national research projects to collect comprehensive quantitative and qualitative data on Indigenous communities water access and use.

The Native Title Reports delivered by the Commissioner in the period 2005 to 2011 are important to the thesis research because the reports indicate the national development, progress and critical issues for Indigenous peoples in the native title system and they also indicate the gaps which should be addressed by governments. The reports are also relevant because they identify how land and water rights have been dealt with under native title over the past seven years. A chapter on Indigenous water rights and interests was published in the 2008 report, including interviews with the author.

⁹¹ Council for Aboriginal Reconciliation, 'Walking Together: The First Steps, Report of the Council for Aboriginal Reconciliation 1991-1994 to Federal Parliament' (Australian Government, Canberra, 1994) 14.

⁹² Ibid 268.

⁹³ Aboriginal cultural flows is water that is used for cultural purposes to benefit Aboriginal communities.

At June 2005 the Commissioner reported statistics on the status of native title claimant applications, which reveal that the Northern Territory represented 32.9 per cent, Queensland 31.5 per cent and Western Australia 21.6 per cent, while other State and Territory claims were in low single figures.⁹⁴ For the majority of Aboriginal peoples a native title claim to water rights is not feasible because of the stringent registration tests and because the burden of proof rests on Aboriginal claimants. The excessive costs in running a native title case over a decade or more are simply untenable for impoverished Aboriginal communities.

The 'Native Title Report 2005' points to a review by the Productivity Commission Report 'Overcoming Indigenous Disadvantage: Key Indicators 2005', which indicated that Indigenous peoples access to traditional lands, and ownership and control of land creates positive socio-economic factors to alleviate disadvantage.⁹⁵ An Indigenous perspective that water and the land are inseparable reinforces the author's position that Aboriginal ownership and management of water should underpin national water policy and native title rights. According to the National Survey on Land, Sea and Economic Development in 2006 by the Human Rights and Equal Opportunity Commission, 'cultural heritage protection of land and sea was the highest priority identified by traditional owners'.⁹⁶

It is useful to refer to the Commissioner's Reports because regular consultation with Indigenous communities is undertaken and the annual reporting identifies recommendations to government on the progress of native title claims. The 'Native Title Report 2007' argued that 'the native title system is not delivering substantial recognition and protection of native title, essentially the system was not meeting the objects of the native title legislation'.⁹⁷

⁹⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2005' (Human Rights and Equal Opportunity Commission) 206.

⁹⁵ Ibid 14-15.

⁹⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2006' (Human Rights and Equal Opportunity Commission) 22.

⁹⁷ Aboriginal and Torres Strait Islander Commissioner, 'Native Title Report 2007' (Human Rights and Equal Opportunity Commission, 2008) 9.

As mentioned previously, the ‘Native Title Report 2008’ dedicated a chapter to ‘Indigenous Peoples and Water’ and argued that ‘Indigenous water rights were not adequately recognised in Australia’.⁹⁸ The 2008 report notes that legislation is often silent on such issues of Indigenous water rights, access to water as entitlements and water allocations.⁹⁹ In Australia, the *Native Title Act 1993* (Cth) defines the waters as ‘sea and freshwater’.¹⁰⁰ Section 211 of this Act preserves the right of native title holders to fish and to engage in traditional activities, whereby s 212 confirms the Crown’s right to use and control the flow of water.¹⁰¹

The ‘Native Title Reports’ recognise the complexity of native title jurisprudence and the determination of Aboriginal claims to traditional lands and waters. Such rights to inland waters in Australia are recognised as exclusive possession and non-exclusive rights, for example, ‘where non-exclusive rights to take water hold pre-existing interests determined by statutory legislation’.¹⁰² Exclusive rights to ‘flowing and subterranean waters for native title holders were determined, but are limited in scope’,¹⁰³ as held in *Ngalpil v Western Australia*,¹⁰⁴ *Nangkiriny v Western Australia*,¹⁰⁵ *Brown v Western Australia*,¹⁰⁶ and *James on behalf of the Martu People v Western Australia*.¹⁰⁷

⁹⁸ Aboriginal and Torres Strait Islander Commissioner, ‘Native Title Report 2008’ (Human Rights Commission, 2009) 169.

⁹⁹ Ibid 179. See also interview with Virginia Falk on 16 December 2008 in the Native Title Report (2008).

¹⁰⁰ Aboriginal and Torres Strait Islander Commissioner, ‘Native Title Report 2008’ (Human Rights Commission, 2009) 192. See *Native Title Act 1993* (Cth) ss 223 and 253.

¹⁰¹ Ibid 27. See also *Native Title Act 1993* (Cth) ss 221 and 212.

¹⁰² Email from David Collard to Virginia Falk, State Solicitor’s Office, Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’, 12 December 2007, 5.

¹⁰³ Ibid.

¹⁰⁴ *Ngalpil v Western Australia* [2001] FCA 1140 (Tjurabalan People). See Email from David Collard to Virginia Falk, State Solicitor’s Office Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’, 12 December 2007, 5.

¹⁰⁵ *Nangkiriny v Western Australia* [2002] FCA 660 (Karajarri Determination Area A). See Email from David Collard to Virginia Falk, State Solicitor’s Office Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’, 12 December 2007, 5.

¹⁰⁶ *Brown v Western Australia* [2001] FCA 1462 (Kiwirrkurra People). See Email from David Collard to Virginia Falk, State Solicitor’s Office, Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’, 12 December 2007, 5.

¹⁰⁷ *James v Western Australia* [2002] FCA 1208 (Martu People). See Email from David Collard to Virginia Falk, State Solicitor’s Office Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’, 12 December 2007, 5.

In addition, the 'Native Title Report 2008' stated that 'some procedural rights for Indigenous peoples in relation to leases, licences and permits which regulate the management of water have been weakened under the *Native Title Act 1993* (Cth). For example, to waive an obligation in order to comply with the common law rules of procedural fairness'.¹⁰⁸ The *Native Title Act 1993* (Cth) held that native title holders had a procedural 'right to negotiate' in future development activity on lands and waters and for the ownership and use of natural resources.¹⁰⁹

After native title amendments in 1998 the legislation only allowed a 'right to comment' to the relevant representative body, prescribed body corporate and registered native title claimants before activities could be carried out.¹¹⁰ The 'right to comment' amendment excludes native title holders from the development of water management plans and the protection of cultural rights to water.¹¹¹

The legacy of the High Court decision in *Mabo v Queensland* [No 2]¹¹² 'exemplified the eradication of historical discrimination' and ignored the legal rights of Indigenous peoples'.¹¹³ The result in *Mabo v Queensland* [No 2]¹¹⁴ determined that Australian jurisprudence would recognise native title, where Brennan remarked in this High Court decision that not to do so would be 'unjust and discriminatory'. In *Mabo v Queensland* [No 1]¹¹⁵ a joint majority held that extinguishing native title would simply 'impair human rights'.¹¹⁶ As the Commissioner's reports on native title point out, the outcomes for realising native title recognition are difficult to achieve.

¹⁰⁸ Ibid.

¹⁰⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' (Human Rights and Equal Opportunity Commission, 2009) 27. See Chapter six of 'Indigenous peoples and Water' in the 'Native Title Report 2008'.

¹¹⁰ Ibid. See *Native Title Act 1993* (Cth) s 24HA.

¹¹¹ Ibid.

¹¹² (1992) 175 CLR 1.

¹¹³ James S Anaya and Robert A Williams Jr, 'The Protection of Indigenous Peoples' Rights over Natural Resources Under the Inter-American Human Rights System' (2001) *Harvard Human Rights Journal* 10.

¹¹⁴ (1992) 175 CLR 1.

¹¹⁵ (1988) 166 CLR 186 (Brennan, Toohey and Gaudron JJ)

¹¹⁶ James S Anaya and Robert A Williams Jr, 'The Protection of Indigenous Peoples' Rights over Natural Resources Under the Inter-American Human Rights System' (2001) *Harvard Human Rights Journal* 10.

The 'Native Title Report 2010' strongly argued that the native title system had failed and that significant obstacles existed for Indigenous peoples in realising the exercise and enjoyment of their legal and human rights, in particular the burden of proof required to meet the evidential standards of an Aboriginal claim.¹¹⁷ The introduction of the *Native Title Amendment Act* [No 1] 2010 (Cth) created a new future act process that may operate to circumvent agreement processes with Indigenous peoples and their rights to exercise self-determination, thus hindering the participation of Indigenous peoples in the decision-making process and developing strategies to protect their lands and resources.¹¹⁸

The Commissioner's reports clearly identify significant changes in the objects and the purpose of the *Native Title Act 1993* (Cth) since its introduction. The importance of the reports should not be undervalued in researching the context of Indigenous peoples experience in Australia. These reports have informed my broader research into the thesis chapters on native title, water policy and legislation.

2.5 Report on Indigenous Rights to Water: ATSIC

The level of advocacy maintained by the Aboriginal and Torres Strait Islander Commission both in Australia and internationally has left a legacy of important research resources and academic literature. Although relations between the Australian Government and the Commission were often challenging and openly combative on Indigenous policy development and human rights, the Commission held the view it was acting on a legislative charter to represent Indigenous Australians.

ATSIC maintained a presence in the media to remind the Government of its failures. The tension between the Federal Government and ATSIC was obvious,

¹¹⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2010' (Australian Human Rights Commission, 2011) 12-13.

¹¹⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011' (Australian Human Rights Commission, 2011) 36-37.

and it was clear that Indigenous Australians would be left to deal with the outcomes of this uneasy relationship.¹¹⁹

The Parliamentary Select Committee report (2005), 'After Aboriginal Torres Strait Islander Commission', acknowledged that the abolition and transfer of the functions of the Aboriginal and Torres Strait Islander Commission led to a rudimentary 'mainstreaming of Aboriginal programs within the Commonwealth government'.¹²⁰ The abolition of the Commission also diminished the available research material on Aboriginal water rights and interests in Australia.¹²¹

Our rights in relation to waters struggle to find recognition within the structure of common law, and the categories of rights and interests in water that are capable of recognition within the common law tradition. There is no genuine acknowledgement of their true character within our law and their *sui generis*, or unique, nature ...¹²²

The 2002 report by the Aboriginal and Torres Strait Islander Commission and the Lingiari Foundation on 'Indigenous Rights to Waters for Offshore and Onshore Waters', provides insight into domestic and international contexts for Indigenous peoples, including the development of a national 'Rights to Waters' database for Indigenous communities.¹²³ As the Report identified, 'there was no reference to Indigenous peoples

¹¹⁹ Virginia Falk, 'The Rise and Fall of ATSIC: A Personal Opinion' (2004) 8(4) *Australian Indigenous Law Reporter* 18.

¹²⁰ Senate Select Committee on the Administration of Indigenous Affairs, Parliament of Australia, *After ATSIC: Life in the Mainstream?* (March 2005) [1.3].

¹²¹ Aboriginal and Torres Strait Islander Commission and the Lingiari Foundation, *Onshore, Offshore: Indigenous Rights to Waters Report and Recommendations* (15 November 2004) Aboriginal and Torres Strait Islander Commission

<http://astic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp>. See Virginia Falk, 'The Rise and Fall of ATSIC: A Personal Opinion' (2004) 8(4) *Australian Indigenous Law Reporter*.

¹²² Ibid.

¹²³ Ibid. See *Offshore, Onshore: Indigenous Rights to Water Report and Recommendations* in chapter 1 'Project Background and Existing Government Policy Environment'.

and their rights and interests to water in the Council of Australian Governments policies'.¹²⁴

There is a profound disjuncture between Indigenous and non-Indigenous perspectives on water, in all its forms. This disjuncture existed at the time of first contact and persists today. It results in a lack of recognition of Indigenous rights and interests in waters by government policy, and by the Australian legal system.¹²⁵

The recommendations of the Report identified outstanding issues in establishing the recognition of Indigenous peoples rights and interests in water, both onshore and onshore. One of the recommendations was 'the formation of a key water portfolio for Indigenous peoples to provide legal recognition for Indigenous rights and interests and identify best practice in the protection of Indigenous cultural rights in significant waterways sites'.¹²⁶ The Background Briefing Papers (February 2002) informed the 'Offshore, Onshore: Indigenous Rights to Waters Report' which included various essays on the analysis of freshwater and coastal water resources held under Indigenous ownership and under Indigenous water management.

2.6 The Garma Conference 2008: Indigenous Water Knowledge, Indigenous Water Interests

The Garma Water Conference (2008) was held in the Northern Territory and invited Indigenous and non-Indigenous experts in water policy and law from Australia and overseas. I was invited to attend and participate, in acknowledgement of my doctoral

¹²⁴ Ibid. See *Offshore, Onshore: Indigenous Rights to Water Report and Recommendations* in 'National Water Quality Management Strategy'.

¹²⁵ Ibid. See *Offshore, Onshore: Indigenous Rights to Water Report and Recommendations* in 'Indigenous Rights to Waters in Australia'.

¹²⁶ Ibid. See *Offshore, Onshore: Indigenous Rights to Water Report and Recommendations* in chapter 5 in recommendations 6, 29, 36.

research on Indigenous water rights and interests in Australia¹²⁷ and my professional experience as the Executive Officer of the NSW Aboriginal Water Trust. The Garma conference provided an opportunity to exchange relevant water expertise and to collaborate on significant advocacy issues in Indigenous water rights.¹²⁸ Issues we discussed included: increasing the recognition from Western science of Indigenous water knowledge, identifying emerging water issues for Indigenous peoples, facilitating international discussion and drafting recommendations for an Indigenous declaration on water policy and law.¹²⁹

We also documented a comprehensive list of key issues emerging from the Indigenous water rights dialogue which included: adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* into domestic Australian law, recognition by the Nation States of Indigenous Intellectual Knowledge and for Indigenous knowledge to remain the property of Indigenous Knowledge Holders.¹³⁰ Addressing these key issues would seek to increase the engagement of Indigenous researchers in water, advocate against the privatisation of water and investigate the nexus between water use and climate change.¹³¹

Carlos Batzin, a Kaqchikel Maya, and an advisor to the Central American Indigenous Council delivered a presentation at the Conference on behalf of the Indigenous peoples of Central America and stated:

¹²⁷ The author participated at the Garma Indigenous Water Knowledge, Indigenous Water Interests Conference Festival, Gove, Northern Territory, on the panel 'Identifying Commonalities: Development of Draft Observations and Recommendations', with Dr Marcia Langton, Renee Gurneau and Steven Ross.

¹²⁸ United Nations University - Institute of Advanced Studies, Information delegate letter for 'Indigenous Water Knowledge, Indigenous Water Interests Conference', Garma Festival, Northern Territory (7-8 August 2008).

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ The author and other selected expert water delegates attending the Garma "Indigenous Water Knowledge, Indigenous Water Interests Conference, were selected to draft a declaration and set of key recommendations for presentation at the World Water Forum in Turkey, 2009. The final document was titled 'Garma International Indigenous Water Declaration' (August 2008) Northern Australian Indigenous Land and Sea Management Alliance <<http://www.nailsma.org.au/nailsma/forum/downloads/Garma-International-Indigenous-Water-Declaration.pdf>>.

Water is powerful ... modern development for consumption is a problem that has created problems in the modern world ... national laws to make water dearer, the rise of privatisation and the exploitation of our resources by others has affected our spiritual relationship and access to water. Governments have conceptualised water as a public good ... they look at water in isolation. Consumerism is our destruction ... we all use water.¹³²

Statements such as these were deeply moving and had an impact on identifying the commonalities that Indigenous peoples share with other Indigenous communities, and an opportunity to recognise that water resources represent more than utility purposes.

During the Conference, Sir Tipene O'Regan, a Maori Chief and treaty negotiator in Maori fishing rights, expressed that 'from their belief, God owns the water and the fish'.¹³³ This thesis articulates throughout the chapters, the Aboriginal perspective in Australia that the Creator and the ancient spirit beings were formative in defining foundation values in water resources. The consensus among the Indigenous participants at the Garma Water Conference reaffirmed the fundamental tenet that water is sacred.

Shortly after Garma, the author was invited to participate in the National Water Commissions 'Australian Indigenous Water Focus Group', which was to progress the guiding principles for Indigenous water planning and Indigenous engagement in future policy development.¹³⁴ Although a range of Indigenous water issues were discussed with the National Water Commission's representative, the Government's policy position did not prioritise Indigenous ownership in water, Indigenous peoples management of their water resources or any direct input into national strategic water planning. My participation in the 'Water Focus Group' enabled me to fully engage in national water policy discussions and to evaluate the federal government's commitment to Indigenous

¹³² Carlos Batzin, 'Panel Discussion from South America' (Speech delivered at the Garma Indigenous Water Knowledge, Indigenous Water Interests Conference, Gove, Northern Territory, 7 August 2008).

¹³³ Sir Tipene O'Regan, 'Draft Declaration and Recommendations for Indigenous Water Knowledge and Interests' (Speech delivered at the Garma Indigenous Water Knowledge, Indigenous Water Interests Conference, Gove, Northern Territory, 8 August 2008).

¹³⁴ National Water Commission, Australian Indigenous Water Focus Group, National Water Commission, Adelaide, South Australia, 18 November 2008.

water rights and interests. The Australian Government did not meet the expectations articulated in our discussions.

2.7 Government Reports on Indigenous Water Issues and Property Regimes

Around 2004 Indigenous water rights and interests were only superficially considered by the Australian Government, and only as a result from bodies such as the NSW Aboriginal Land Council, the Aboriginal and Torres Strait Islander Commission and the Lingiari Foundation, who advocated for Indigenous representation and inclusion. The increased interest in Indigenous water issues commenced around 2007, including themes in government reports on how the implementation of the National Water Initiative and national water reform agenda might accommodate Indigenous water requirements. A number of Australian Government reports informed my doctoral research and in particular developed the chapters on the Murray-Darling Basin and Australian water policy and law; in particular on technical water issues and progress on accommodating Indigenous provisions under the National Water Initiative.

The Commonwealth Scientific and Industrial Research Organisation (CSIRO) published a report that facilitated discussion on whether the National Water Initiative sufficiently recognised Indigenous interests and whether Indigenous peoples were able to participate in the water reform framework.¹³⁵ Jackson (2007) in the CSIRO report ‘Indigenous Interests and the National Water Initiative’ identified a gap in the literature on Indigenous interests in water policy and management in Australia,¹³⁶ and stated:

The literature surveyed is recent and contains substantial knowledge gaps. It is geographically biased towards cultural studies of northern Australian

¹³⁵ Sue Jackson, ‘Indigenous Interests and the National Water Initiative: Water Management, Reform and Implementation’ (‘Background Paper and Literature Review’, Northern Australian Indigenous Land and Sea Management Alliance and Commonwealth Scientific and Industrial Research Organisation Sustainable Ecosystems, October 2007) 4.

¹³⁶ Ibid 5.

circumstances where there are fewer pressures, with much of the discussion focussed on speculative discussion on the nature and extent of Indigenous rights.¹³⁷

Jackson's quote above highlights the discrepancy in the treatment of Indigenous peoples water rights and interests in Australia and a reluctance to address national Indigenous water issues.

Jackson also examines the state recognition of Indigenous water rights and interests under the New South Wales legislation *Water Resource Management Act 2000* (NSW), in the objectives of the NSW legislation, that is, 'Water Plans [are to] provide for the protection of spiritual, social and customary Aboriginal values'.¹³⁸ Although the objectives of the Act are to provide for 'Aboriginal values' in water, further research would need to examine if these benefits flowed to Aboriginal peoples. The NSW Aboriginal Water Trust was to provide a practical example in how benefits to water could engage Aboriginal communities to participate in water-based enterprise.¹³⁹

Jackson highlights further gaps in water research such as: the need to understand the barriers and incentives for Indigenous participation in water,¹⁴⁰ the particular characteristics of Indigenous property rights,¹⁴¹ and the recognition of Indigenous communities in the national strategic water plans.¹⁴²

Cooper and Jackson (2008), from CSIRO were commissioned to report on Indigenous water values and water interests for Indigenous peoples in Katherine, Northern Territory, and to consider research gaps within the Katherine region.¹⁴³ As Cooper and Jackson

¹³⁷ Ibid.

¹³⁸ Ibid 74.

¹³⁹ Ibid 76. The author was formerly Executive Officer of the NSW Aboriginal Water Trust, as quoted by Jackson (2007) in the report 76-77.

¹⁴⁰ Ibid 95.

¹⁴¹ Ibid 96.

¹⁴² Ibid 97.

¹⁴³ David Cooper and Sue Jackson, 'Preliminary Study on Indigenous Water Values and Interests in the Katherine Region of the Northern Territory' ('Research Report', Commonwealth Scientific and Industrial Research Organisation Sustainable Ecosystems, March 2008) 1-2.

(2008) state, ‘water features strongly in Aboriginal creation stories’.¹⁴⁴ However, the recommendations in this report fail to deal with Aboriginal ownership rights to water within the Northern Territory legislation (including native title rights), the redistribution of water allocations to Aboriginal communities, or relevant law reform to develop a legal system for protecting any research and collection of Aboriginal water knowledge sourced by government and other agencies.¹⁴⁵ I am not aware if these issues have since been addressed.

The Australian Government through its statutory research corporation, Land and Water Australia¹⁴⁶ identified a key theme that ‘a nexus’ emerged from their literature review on the effective engagement of Indigenous peoples in natural resource management,¹⁴⁷ notably the Indigenous relationship between land, water and health.¹⁴⁸ The authors indicate that ‘it is important to understand and quantify the nexus’ in these relationships.¹⁴⁹ Chapter 6 of the thesis examines the issues surrounding Aboriginal health and the allocation of water resources to Indigenous communities in Australia.

The report by Roughley and Williams (2007), ‘The Engagement of Indigenous Australians in Natural Resource Management’, discusses the theme of Indigenous rights and interests to water, and highlights a number of issues on native title determinations, the establishment of the NSW Aboriginal Water Trust,¹⁵⁰ and references to the Indigenous clauses under the National Water Initiative.¹⁵¹ This report was not comprehensive in

¹⁴⁴ Ibid 26.

¹⁴⁵ Ibid.

¹⁴⁶ Alice Roughley and Susie Williams, ‘The Engagement of Indigenous Australians in Natural Resource Management: Key Findings and Outcomes from Land and Water Australia and the Broader Literature’ (‘Research Report’, Land and Water Australia, November 2007) 1 <www.aiatsis.gov.au/research/publications/Land&Water/pn21610.pdf>.

¹⁴⁷ Ibid 18.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 23.

¹⁵⁰ Ibid 31. Roughley and Williams (2007) state incorrectly that, ‘the NSW Aboriginal Water Trust was instigated through the Murray-Darling Basin Commission’s ‘Living Murray Program’. The author was formerly the Executive Officer of the NSW Aboriginal Water Trust, the Water Trust was a protected state water project within the Department of Natural Resources (NSW). The department was later renamed the Department of Infrastructure, Planning and Natural Resources (NSW).

¹⁵¹ Ibid. See also Stephen Garnett and Bev Sithole ‘Sustainable Northern Landscapes and the Nexus with Indigenous Health: Healthy Country Healthy People’ (‘Research Report’, NTU07, Land and Water Australia, 2007). Garnett and Sithole (2007) researched the linkage between natural resource management

examining Indigenous water issues, Indigenous water rights or the Indigenous management of water resources. However, the report did identify some relevant themes for consideration in this thesis such as reviewing the scope and nexus of Aboriginal health issues and water use.

Additional reports from 'Land and Water Australia' provided insight in understanding Australian property rights in water and the changed notions of property emerging from the introduction of national water reform to separate water from the land. For example, the report 'An Effective System of Defining Water Property Titles' (2004) develops a contextual reading of the Western water property framework, types of property rights and property ownership in water; noting that 'a right in water can exist without ownership in water'.¹⁵² Indigenous water rights are acknowledged in this report as a 'property right' within the framework of statutory and common-law systems such as 'stock and domestic, groundwater and environmental water requirements'.¹⁵³ There is no further discussion within the report on the theme of Indigenous water rights and interests.

2.8 Reports and Reviews: University and Other Organisations

The Aboriginal and Torres Strait Islander Social Justice Commissioner in 2001 undertook a review of the 1994 Water Report and made findings, since the release of the Australian Governments 1994 Water Report, as to whether improvements had occurred for Indigenous communities in the provision of water supply and water quality.¹⁵⁴ The Commissioner's report (2001) was of particular assistance in examining the status of Aboriginal health in relation to the Australian Government's national water reform

on Indigenous lands through Indigenous management of the land in order to increase positive outcomes for Indigenous health.

¹⁵² ACIL Tasman in association with Freehills, 'An Effective System of Defining Water Property Titles' ('Research Report', Australian Government, Department of Agriculture, Fisheries and Forestry and Land and Water Australia, March 2004) 13.

¹⁵³ Ibid 26. See also 'Property: Rights and Responsibilities, Current Australian Thinking' ('Research Papers', Land and Water Australia, 2002) which provides background papers on property rights regimes in Australia.

¹⁵⁴ William Jonas, 'Review of the 1994 Water Report' (2001) Human Rights and Equal Opportunity Commission 2 <http://www.hreoc.gov.au/racial_discrimination/water_report/index.html>.

agenda and how these reforms would address the interrelated issues of dire living standards among Indigenous peoples and inadequate water servicing in rural and remote Australia.¹⁵⁵ The report indicates that the international literature in this area has ‘abandoned targeting health in isolation and instead identifies human development and the alleviation of poverty as critical responses to these issues’.¹⁵⁶

The Centre for Aboriginal and Economic Policy Research in Canberra has published both discussion and working papers on Indigenous issues. Relevant research material to inform upon public policy issues emerges from John Taylor’s discussion paper ‘Tracking Change in the Relative Economic Status of Indigenous People in New South Wales’ (2005),¹⁵⁷ Jon Altman’s ‘Freshwater in the Maningrida Region’s Hybrid Economy: Intercultural Contestation over Values and Property Rights’ (2008),¹⁵⁸ Altman and Arthur’s ‘Commercial Water and Indigenous Australians: A Scoping Study of Licence Allocations’ (2009),¹⁵⁹ and Melanie Durette’s ‘Indigenous Legal Rights to Freshwater: Australia in the International Context’ (2008).¹⁶⁰ These discussion papers have highlighted various critical issues in Indigenous water policy.

Melanie Durette (2008) in her paper highlights the New South Wales Aboriginal Water Trust and how the Trust assists Aboriginal peoples to participate in the commercial water market under its grant funding scheme,¹⁶¹ and grant funding for capital water infrastructure, commercial business and other water-based enterprises. The NSW Aboriginal Water Trust was allocated \$5 million by government to administer the

¹⁵⁵ Ibid 9.

¹⁵⁶ Ibid 38.

¹⁵⁷ John Taylor, ‘Tracking Change in the Relative Economic Status of Indigenous People in New South Wales’ (‘Discussion Paper’, No 277, Centre for Aboriginal Economic Policy Research, Australian National University, October 2005).

¹⁵⁸ Jon Altman assisted by V Branchut, ‘Freshwater in the Maningrida Region’s Hybrid Economy: Intercultural Contestation over Values and Property Rights’ (‘Working Paper’, No 46, Centre for Aboriginal Economic Policy Research, Australian National University, August 2008).

¹⁵⁹ Jon Altman and William Arthur ‘Commercial Water and Indigenous Australians: A Scoping Study of Licence Allocations’ (‘Working Paper’, No 57, Centre for Aboriginal Economic Policy Research, Australian National University, September 2009)

¹⁶⁰ Melanie Durette, ‘Indigenous Legal Rights to Freshwater: Australia in the International Context’ (‘Working Paper’, No 42, Centre for Aboriginal Economic Policy Research, Australian National University, May 2008) 27.

¹⁶¹ Ibid.

funding over two years.¹⁶² Durette argues that the Trust's funding allocation is 'small in comparison to other Indigenous global water initiatives'.¹⁶³

However, Durette¹⁶⁴ did not provide sufficient data in her report on global comparatives to measure the financial support to Indigenous peoples in Canada, the United States or New Zealand. In Durrettes' working paper, the analysis of Indigenous water rights in Australia is less comprehensive than her discussion on water rights in international jurisdictions.

In Australia the Indigenous policy cycle for government programs is based upon short-term funding cycles resulting from government electoral cycles, and the lack of economic and political lobbying influence of Indigenous communities. For example, in 2006 New South Wales farmers succeeded in gaining over \$500 million in compensation for the socio-economic hardship experienced by farmers from the introduction of the *Native Vegetation Act 2003* (NSW), an Act to improve natural resource management through the reduction of vegetation clearance.¹⁶⁵ In 2005 the New South Wales and Australian Governments invested \$110 million for compensating irrigators who were affected by the reforms to groundwater entitlements.¹⁶⁶ To the best of my knowledge, the impact of national water reforms has not granted compensation to Aboriginal water users.

Altman's (2008) research paper on the freshwater economy in the Maningrida region of the Northern Territory acknowledges the 'considerable literature from government sources about the water governance and cultural water values of Aboriginal peoples in this area, which dates back to the 1950s'.¹⁶⁷ Altman describes at length the 'hybrid

¹⁶² Virginia Falk, personal communication with Department of Natural Resources (NSW) 2007.

¹⁶³ Melanie Durette, 'Indigenous Legal Rights to Freshwater: Australia in the International Context' ('Working Paper', No 42, Centre for Aboriginal Economic Policy Research, Australian National University, May 2008) 27.

¹⁶⁴ Ibid.

¹⁶⁵ Department of Natural Resources (NSW), 'Chief Executive Officer Report to National Resources Advisory Council' (16 August 2006) 2.

¹⁶⁶ Ibid.

¹⁶⁷ Jon Altman assisted by V Branchut, 'Fresh Water in the Maningrida Region's Hybrid Economy: Intercultural Contestation over Values and Property Rights' ('Working Paper', No 46, Centre for Aboriginal Economic Policy Research, Australian National University, August 2008) 3.

economy model' which seeks to describe the Maningrida economy of Aboriginal peoples as consisting of a state, a market and a customary economy; which challenge the private and public models of economic production.¹⁶⁸ On Maningrida and over '30 outstations in the hinterland' Aboriginal Land Trust areas were recognised as inalienable Aboriginal title under the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976*.¹⁶⁹

The outstation movement ... known as the homeland movement – began in the 1970s and was seen as a way to get people living in bigger Aboriginal townships to reconnect with their traditional lands ...¹⁷⁰

The research by Altman (2008) highlights the contestation over fresh water resources between Western and customary perspectives of water access, water use and the ownership of water in the Maningrida regions; highlighting grounds for a potential challenge in the assertion by the Northern Territory Government that the government holds an exclusive right in water.¹⁷¹ The primary issue throughout Altman's research points to 'the need for clarity for traditional owners about water property rights and the recognition of customary water rights under *Native Title Act 1993* (Cth) and the Crown's assertion to exclusive ownership'.¹⁷²

The scoping study from Altman and Arthur (2009) is cursive research into the jurisdictional data on Indigenous individuals or organisations that hold water licences and water allocations for commercial use in Australia.¹⁷³ From the limited empirical data sourced from various Indigenous agencies it is difficult to determine the Indigenous use of water for commercial purposes such as irrigation, business or pastoral use.¹⁷⁴ Altman

¹⁶⁸ Ibid 12-13.

¹⁶⁹ Ibid 1.

¹⁷⁰ Paul Toohey, 'Outstations Days in the Sun are Over', *The Australian* (Sydney), 11-12 October 2008, 8.

¹⁷¹ Jon Altman, 'Fresh Water in the Maningrida Region's Hybrid Economy: Intercultural Contestation over Values and Property Rights' ('Working Paper', No 46, Centre for Aboriginal Economic Policy Research, Australian National University, August 2008) 27. See *Water Act 1992* (NT) s 9.

¹⁷² Ibid 32-33.

¹⁷³ Jon Altman and William Arthur, 'Commercial Water and Indigenous Australians: A Scoping Study of Licence Allocations' ('Working Paper', No 57, Centre for Aboriginal Economic Policy Research, Australian National University, September 2009) 1.

¹⁷⁴ Ibid 3.

and Arthur submit that there is an under-allocation of commercial water to Indigenous peoples, with more emphasis being placed upon the federal government's '*Closing the Gap*' policy than Indigenous economic development in water activities.¹⁷⁵

2.9 Departmental and Consultant Reports on Indigenous Water Issues in Western Australia

My capacity as the Executive Officer of the NSW Aboriginal Water Trust, and leading this project, provided me with comprehensive insights and experience on state and national water issues in regard to Indigenous water rights and interests. I acted as a consultant in a commissioned report to the Western Australian Government on developing Aboriginal water policy across the state, and from time to time advised the government's Indigenous Water Coordinator with the Department of Water, David Collard, who is a Noongar Traditional Owner. From these communications with Mr Collard a body of correspondence on Indigenous rights and interests relating to water resources was exchanged, and is referred to in this thesis with his permission.¹⁷⁶

In December 2008 the Department of Water (WA) commissioned my report '*Indigenous Access to Water Entitlements in Western Australia*' (2008) to provide advice to the department on the development of an Aboriginal water policy for Western Australia, and to identify particular water issues and water requirements for Aboriginal peoples.¹⁷⁷ The Department of Water (WA) was to utilise this report to further develop a state water policy in relation to Indigenous access to water.¹⁷⁸ The recommendations in the report

¹⁷⁵ Ibid 7. See also John Taylor, 'Tracking Change in the Relative Economic Status of Indigenous People in New South Wales' ('Discussion Paper', No 277, Centre for Aboriginal Economic Policy Research, Australian National University, October 2005).

¹⁷⁶ See email from David Collard annexed to this thesis which confirms permission for my use in this thesis of these emails and other correspondence between Mr Collard and me. In accordance with Australia's *Copyright Act 1968* (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹⁷⁷ Memorandum from the Department of Water (WA) from David Collard to Virginia Falk, 7 January 2009. In accordance with Australia's *Copyright Act 1968* (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹⁷⁸ Ibid.

were to inform the government on how to address the broad water rights and interests of Aboriginal communities and the inequitable water allocation and planning strategies for Aboriginal water users.¹⁷⁹

My report prepared for the Department of Water (WA), recommends a legislative framework for the Draft Water Resources Management Bill.¹⁸⁰ This report identifies that the legislation should ‘recognise and protect the benefits of water resources for Indigenous people and recognise the role of Indigenous people in managing water resources’,¹⁸¹ ‘include principles of intergenerational equity’,¹⁸² ‘avoid any contestation with native title holders where aquifer recharge reverts to Crown ownership’¹⁸³ and include ‘the recognition of native title rights as a class of basic rights’.¹⁸⁴ These recommendations do not appear in the Western Australian Government’s ‘Implementation Plan for the National Water Initiative’ (2007).

My report was endorsed by the Western Australian Department of Water and the Department’s Indigenous Coordinator. The Department of Water delayed the implementation of the report on Indigenous water policy until 2013, which set back community consultation and stalled further opportunities to develop Indigenous water policy in Western Australia.¹⁸⁵ The Water Resources Bill (WA) in 2014 remains in limbo and the Western Australian Government policy and legislative framework on Indigenous water rights issues remains unresolved.

¹⁷⁹ Email from David Collard to Virginia Falk, 17 December 2008. See also Virginia Falk, ‘Draft Indigenous Access to Water Entitlements in Western Australia’ (Department of Water, Government of Western Australia, 2008). In accordance with Australia’s *Copyright Act* 1968 (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹⁸⁰ Beckwith Environmental Planning, ‘Draft Water Resources Management Bill: Recommended Legislative Framework’ (Water Reform Implementation Committee, Department of Water, Western Australia, May 2007).

¹⁸¹ Virginia Falk, ‘Draft Indigenous Access to Water Entitlements in Western Australia’ (Department of Water, Government of Western Australia, 2008) at Recommendation 4.

¹⁸² *Ibid* Recommendation 5.

¹⁸³ *Ibid* Recommendation 13.

¹⁸⁴ *Ibid* Recommendation 59.

¹⁸⁵ Email from David Collard to Virginia Falk, 17 December 2008 See also Virginia Falk, ‘Draft Indigenous Access to Water Entitlements in Western Australia’ (Department of Water, Government of Western Australia, 2008). In accordance with Australia’s *Copyright Act* 1968 (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

David Collard, former Indigenous Coordinator for the Department of Water (WA), commented that the Western Australian Government had still not addressed Aboriginal water requirements under the National Water Initiative Plans. Mr Collard stated:

The Western Australian government have watered down Aboriginal rights and interests ... COAG Reconciliation Committee didn't address water or resources for Aboriginal people ... Government will look how much it will cost them and not Aboriginal people ... There is no budget for Aboriginal consultation for Aboriginal engagement.¹⁸⁶

The implementation plan for the National Water Initiative by the Western Australian Government (2007)¹⁸⁷ provided strategies for adopting the national water reform objectives under the Australian Government's Intergovernmental Agreement with the States and Territories. Western Australia became a signatory to the National Water Initiative in 2006.¹⁸⁸

The implementation plan for the National Water Initiative actions by the Western Australian Government sets out comprehensive policy on how the state will meet the national water reform actions under the national agenda, setting aside two pages to deal with Aboriginal engagement in water resource planning.¹⁸⁹ Indigenous water planning is considered for non-consumptive cultural use; however, the Department's state water plan does not consider how native title rights to water will be accounted for.¹⁹⁰

The foreword of Western Australia's Implementation Plan states that the plan 'draws and expands upon extensive consultation undertaken in developing the 'State Water Strategy',

¹⁸⁶ David Collard, 'Indigenous Panel Discussion' (Speech delivered at the National Water Commission, Australian Indigenous Water Focus Group, National Water Commission, Adelaide, South Australia, 18 November 2008).

¹⁸⁷ Department of Water, 'Western Australia's Implementation Plan for the National Water Initiative' ('Report', Government of Western Australia, April 2007) 5.

¹⁸⁸ Ibid 6.

¹⁸⁹ Ibid 33-34.

¹⁹⁰ Ibid 33.

the 'State Water Plan' and 'A Blueprint for Water Reform in Western Australia'.¹⁹¹

However, the Implementation Plan overlooks the water requirements, as well as the legal rights and interests of Aboriginal communities across the state.

The Western Australian Government as a signatory to the Intergovernmental Agreement has agreed to 'allocate water to native title holders and agreed that the allocation will be accounted for under clause 54'.¹⁹² In the drafting of the Western Australian Aboriginal water policy document, the government suggests capping the volume of water for native title holders. This policy decision is not supported by the Indigenous provisions of the National Water Initiative. The Western Australian Government stated:

The quantification of water use on Aboriginal lands held under a native title determination should not be restricted under statutory legislation. The draft State Aboriginal Water Policy intends to 'quantify water use for native title holders in Western Australia at 5 per cent'.¹⁹³

The lack of discussion on the geographically and culturally diverse Aboriginal water requirements exhibits a disregard for Aboriginal water rights and interests. The region of Western Australia includes significant water resources:

[t]here are 44 surface water management areas in Western Australia, primarily determined with reference to major river systems and natural catchments ... into four drainage divisions: Timor Sea, Indian Ocean, South West and Western Plateau.¹⁹⁴

¹⁹¹ Ibid.

¹⁹² Department of Water, 'Western Australia's Implementation Plan for the National Water Initiative' ('Report', Government of Western Australia, April 2007) 33.

¹⁹³ Virginia Falk, 'Draft Indigenous Access to Water Entitlements in Western Australia' ('Report', Department of Water, Government of Western Australia, 2008).

¹⁹⁴ Department of Water, 'Western Australia's Implementation Plan for the National Water Initiative' ('Report', Government of Western Australia, April 2007) 144. See also Water Reform Implementation Committee, 'A Blueprint for Water Reform in Western Australia: Final Advice to the Western Australian Government' ('Report', Government of Western Australia, December 2006).

Under the National Water Initiative reforms, ‘a common law right to take naturally occurring water, including water courses, wetlands, springs, groundwater and unconfined surface water, regulated under a statutory right’ was abolished.¹⁹⁵

Glenn Kelly, Chief Executive Officer of the South West Aboriginal Land and Sea Council in Western Australia, has also expressed concerns that the Western Australian Government has failed to address Aboriginal water issues:¹⁹⁶

[i]n relation ‘to Nyoongar customary value in water resources there is an absence in statutory water provisions by government in accepting the Nyoongar identification in the cultural and spiritual environmental values of Nyoongar connection to aquifers, ground water replenishment, water quality and other water knowledge’.¹⁹⁷

The Western Australian Plan for the National Water Initiative’ (2007) indicates that the Western Australian Government ‘seeks Indigenous ecological knowledge to make allocations for the environment’.¹⁹⁸ Western Australia’s Plan does not indicate whether Aboriginal community consultations will be forthcoming and how the provision for an environmental water allocation will harmonise with non-consumptive cultural water use. There is also no discussion on how the government will provide intellectual property protection for any Indigenous ecological knowledge that is collected during these community consultations.

In the context of Aboriginal communities living in remote and discrete regions of Western Australia and analysing the nexus in the health status of Aboriginal communities and the provision of water and water services, the ‘Report for the Minister for Water

¹⁹⁵ Email from David Collard to Virginia Falk, State Solicitor’s Office Western Australia, ‘Water Resources Management Bill, Water Entitlements and their Administration’, 18 April 2008, 27.

¹⁹⁶ Email from David Collard to Virginia Falk on Glen Kelly, 28 February 2008. In accordance with Australia’s *Copyright Act* 1968 (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹⁹⁷ Ibid.

¹⁹⁸ Department of Water, ‘Western Australia’s Implementation Plan for the National Water Initiative’ (‘Report’, Government of Western Australia, April 2007) 1.

Resources on Water Services in Discrete Indigenous Communities' (2006)¹⁹⁹ is significant because it identifies serious water issues in that essential services are not delivered for '300 discrete Indigenous communities'.²⁰⁰

The report highlights, among other things, the need for a 'specific policy advisor on water services for Indigenous communities',²⁰¹ the 'poor water infrastructure and operational maintenance',²⁰² 'elevated levels of uranium, arsenic and heavy metals which contravene the revised Australian Drinking Water Quality Guidelines',²⁰³ the need for 'whole-of-government responsibility and investment in providing legislated standards of water services to discrete Aboriginal communities'.²⁰⁴

The *Country Areas Water Supply Act 1947* (WA) outlines the protection of water quality in water catchments. Aboriginal communities have had 'few water catchments proclaimed' where Aboriginal water use exists.²⁰⁵

Aboriginal communities located in remote areas ... have a long history of sub-standard services and circumvention of state or local government approval processes, and are affected by legacies of discriminatory practices, of insufficient and *ad hoc* funding and poor quality infrastructure.²⁰⁶

As a journalist highlighted, in 'Western Australia mining provides \$334 billion of budget windfall for the Federal Government and [is] a substantial contributor to Australia's gross

¹⁹⁹ Department of Water Western Australia, 'Report for the Minister for Water Resources on Water Services in Discrete Indigenous Communities' (December 2006).

²⁰⁰ Ibid 22.

²⁰¹ Ibid 6. Page 51 identifies the policy advisor employed 'at the executive level of government'.

²⁰² Ibid 17.

²⁰³ Ibid 50.

²⁰⁴ Ibid 52. Page 78 states that governments are to abide by Article 25 of the *Universal Declaration of Human Rights* and expresses, 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family including food, clothing, housing and medical care and necessary social services'.

²⁰⁵ Department of Water, Government of Western Australia, 'Report for the Minister for Water Resources on Water Services in Discrete Indigenous Communities' (2006) 31.

²⁰⁶ Ibid 17.

domestic product'.²⁰⁷ There is a significant disparity in the state's investment and commitment to Indigenous water requirements and health conditions in discrete and remote Western Australia.

In Western Australia Aboriginal communities did not receive \$700 million in government funding for water services and infrastructure because Aboriginal communities refused to sign Shared Responsibility Agreements because it suspends their human rights.²⁰⁸

A review of natural resource management reports can provide insights for understanding the meaning of water and its use by Aboriginal communities. The 'Indigenous Reconciliation in Primary Industries and Natural Resource Management Annual Report' (2006-2007) reported on themes such as land management, and water management and water supply were introduced as a new theme.²⁰⁹

As that report identifies, 'water is a critical issue for Natural Resource Management and Primary Industries in Indigenous communities as many communities have [an] unreliable water source or lack of potable water'.²¹⁰ The report highlights several critical factors in achieving success in Indigenous communities such as 'recognising the diversity in the process of applying Indigenous knowledge and traditions', to 'ensuring outcomes beyond individual projects', providing 'a long-term commitment and ongoing support by governments in a multi-agency approach' and the need to 'build capacity for Indigenous communities to manage and implement programs'.²¹¹

²⁰⁷ Jessica Irvine, 'Mineral Boom Frittered Away', *The Sydney Morning Herald* (Sydney), 8-9 March 2008, 13.

²⁰⁸ David Collard, personal communication with Virginia Falk on 18 November 2008.

²⁰⁹ Working Group for Advancing Indigenous Reconciliation in Primary Industries and Natural Resource Management, 'Indigenous Reconciliation in Primary Industries and Natural Resource Management: Annual Report 2006-2007' ('Report', Natural Resource Management and Primary Industries Ministerial Councils, November, 2007) 3.

²¹⁰ Ibid 14.

²¹¹ Ibid 39.

Additional research material informs the literature – for example, material from the Indigenous management plans for the Ord River Agreement between the Department of Water (WA) and the Traditional Owners, the Muriuwung-Gajerrong Aboriginal Corporation – the High Court decision in *Western Australia v Ward*²¹² determined that their native title rights and interests had been extinguished.²¹³ In relation to the department and the Traditional Owners identifying their respective plans to improve and protect the water resources in this reserve, the department on one hand articulates goals for the reserve in ecological language such as ‘aquatic ecosystems, sediment loads, and waterways management’, while the Traditional Owners on the other hand use terms such as the ‘respect old people, looking after country and protecting cultural sites’ in their discussion.²¹⁴

This thesis will demonstrate that the meaning attached to water, the landscape and the use of water by Aboriginal peoples is different from the meaning attached to these phenomena in the Australian discourse on water resources.

Language can be a barrier in cross-cultural research and often complex ideas cannot be easily translated across languages. Indigenous language relates strongly to context (place) and can further explain why extracting data and knowledge from a specific place is often inappropriate. Western language within the National Resources Management field can be esoteric and laden with acronyms.²¹⁵

Understanding Aboriginal peoples’ relationship with groundwater and the cultural water values held in particular areas or sites is described through research reports such as the ‘Gnangara Mound Study’ (2005) of the Swan Coastal Plain in Western Australia, which

²¹² [2002] 213 CLR 1.

²¹³ Department of Water, Western Australia and the Muriuwung-Gajerrong Aboriginal Corporation, ‘Interim Management Plan for Reserve 31165’ (August 2006) 14.

²¹⁴ Ibid 17. See also Kallip, ‘Mooditj Yorgas: Women’s Workshop’ (‘Cultural Awareness Paper’, Department of Water, Western Australia, April 2008).

²¹⁵ Susie Williams, ‘Land and Water: Australia’s Research and Development with an Indigenous Focus’, (Land and Water Australia, May 2005) 14.

are the traditional lands and waters of the Nyoongar peoples.²¹⁶ Although there is a rich use of ethnographic literature in reports of this type, which explain the various Aboriginal cultural associations and cultural values, Australian historic observations and records by non-Indigenous researchers tend to interpret Aboriginal values through the lens of Western social values.

Daisy Bates, who is regularly quoted in the ‘Study of the Gnangara Mound’, described Aboriginal peoples in Australia through the social values of her time:

So far as their origin is concerned, that, too, belongs to the dreamtime. I am doubtful that it will ever be established, except in theory. I do not regard them as a race apart, but as a mixture, a nomad people picking up scraps of racial character in their different environments, and at last, in primitive Australia, gravitating to the primitive life that they have led here for centuries.²¹⁷

As with many non-Aboriginal perspectives about Aboriginal peoples, Bates’ observations are by modern standards offensive and disturbing. When research and interpretation is collated about Aboriginal peoples, and filtered through Western concepts and the framework of ethnographic literature, Aboriginal values in water are misrepresented. It is necessary for the purposes of community agency, through the active participation of Aboriginal peoples informing upon Aboriginal water values, to develop water policy and legislative framework from an Aboriginal perspective that is relevant.

The Aboriginal community consultation and workshop facilitated by the Department of Water (WA) for Nyoongar communities to participate in the South West Water Plan review provided substantial advice to the department and an opportunity for Nyoongar

²¹⁶ Edward McDonald, Bryn Coldrick and Linda Villiers, ‘Study of Groundwater-Related Aboriginal Cultural Values on the Gnangara Mound, Western Australia’ (‘Research Report’, Department of Environment Western Australia, October 2005) 22.

²¹⁷ Daisy Bates, *The Passing of the Aborigines: A Lifetime Spent among the Natives of Australia* (John Murray, first published 1938, 1972) 30.

participants to question technical water experts and government representatives.²¹⁸ For example, the review acknowledges many ‘important water issues for Nyoongar communities and existing Nyoongar water knowledge on water resource management’. I was invited as a guest speaker to address the Nyoongar community about the opportunities in the commercial water market which were provided by the NSW Aboriginal Water Trust.²¹⁹ The final report from the department provided considerable evidence of the ongoing relationship of Nyoongar communities to water; and of the definitive Nyoongar knowledge on the cultural and spiritual water values that inform and frame Nyoongar identity to ‘country’.²²⁰

2.10 Chapters and Essays: Water Management and Aboriginal Peoples

To understand the impact on Aboriginal peoples of the competing interests for water in Australia and how Aboriginal peoples relationship with water resources is undermined by water demands from other interest groups, an analysis of the water resource allocation is critical to evaluate the national water needs across Australia.

National legislation is often an expression of post-colonial positivist equality discourses. Equality refers to the right (and duty) to become equal to, among others, the image of the non-indigenous citizen or water user, to equalise the norms, rights and principles of ‘modern’ water management, to adopt occidental water use technology and to adapt exogenous forms of organisation.²²¹

Journal articles by Poh-Ling Tan examine water management in New South Wales, Queensland and Victoria and consider the historical, as well as the policy reform process

²¹⁸ Brad Goode, Colin Irvine and Melinda Cockman, ‘Report on Conferences held with the Nyungar Community for the South West Water Plan’ (‘Research Report’, Department of Water, Western Australia, June 2007) 3-4.

²¹⁹ Ibid 4.

²²⁰ Ibid.

²²¹ Rutgerd Boelens, ‘Water Law and Indigenous Rights: Research, Action and Debate’ (2002) Wageningen University <<http://www.indigenouswater.org/user/Water%20Workshop%20Summary.pdf>>.

among these states. In Tan's paper, 'An Historical Introduction to Water Reform in New South Wales: 1975 to 1994' (2002), the historical patterns of water use in the state are discussed, as well as the consumptive use of water for the development of the colony, the increased focus on irrigation and water extraction from major river systems, the progress of dam construction, and the conversion of water rights to property rights.²²² However, this article does not include an analysis of Indigenous water interests.

Tan (2002) argues that the patterns of 20th century water use and water management were primarily aimed at supporting irrigation schemes, and stock and domestic and riparian access rights, and not at conserving water and maintaining river and ecosystem health.²²³

As Tan points out, 'water licences were over-allocated because water agencies approved the over consumption of available water resources'.²²⁴ The introduction of volumetric allocations, where limits were applied on licence-holders and catchment water extraction, did not impede the over-use of water, as diverted surplus river flows due to high rainfall were stored on farms.²²⁵ The definition of water flows in the landscape, under the *Water Act 1912* (NSW), within the common law meaning of a river and a creek, was determined by Lee J in *Latta v Klinberg*.²²⁶ A river was defined under the meaning of a watercourse, where a river features 'continuity, permanence and unity'.²²⁷ These Australian water concepts were in contrast to the Aboriginal values held in water:

Under the National Water Initiative reforms, 'a common law right to take naturally occurring water, including water courses, wetlands, springs, groundwater and unconfined surface water, regulated under a statutory right' is abolished.²²⁸

²²² Poh-Ling Tan, 'An Historical Introduction to Water Reform in NSW – 1975 to 1994' (December 2002) 19(6) *Environmental and Planning Law Journal* 445-446.

²²³ *Ibid.*

²²⁴ *Ibid* 448.

²²⁵ *Ibid* 449.

²²⁶ *Latta v Klinberg* [1977] NSWSC (1 July 1977) Lee J.

²²⁷ Poh-Ling Tan, 'An Historical Introduction to Water Reform in NSW – 1975 to 1994' (December 2002) 19(6) *Environmental and Planning Law Journal* 450.

²²⁸ Email from David Collard to Virginia Falk, State Solicitor's Office, Western Australia, 'Water Resources Bill, Water Entitlements and their Administration', Reference 1851-08, 18 April 2008, 27.

The water reforms in New South Wales, as in the other states and territories of Australia, were introduced into water management systems that had not recognised or included Aboriginal water rights and interests into these systems. Other stakeholders maximised water and topped up already over-allocated water use, exploiting the practice of ‘licence stacking’ which was prevalent prior to national water reform; a method of requesting licences in bogus names to increase water holdings.²²⁹ Tan (2002) acknowledges that the ‘ad hoc’ approach to water management in New South Wales resulted in significant problems in auditing water use and addressing systemic issues such as ‘integrated catchment management, floodplain management, water quality and pollution control’.²³⁰

The National Audit stated:

[t]he change in the condition of Australia’s river basins is most strongly linked to intensity of land use; increased nutrient and sediment loads; and loss of riparian vegetation ... only 3 per cent of rivers in NSW were classed as largely unmodified, with 18 per cent extensively modified.²³¹

Although Tan’s (2002) paper does not discuss or reflect upon the effect of these problematic issues on Aboriginal water resource management, what is important to glean from this discussion is the need to question whether, in a historically over-allocated water system, is it possible for Aboriginal communities to claw-back their rights to water. After a century or more, the inability of government and water agencies to recognise the legitimate water rights of Aboriginal peoples has created significant hurdles to restoring water rights or interests to Aboriginal communities.

²²⁹ Poh-Ling Tan, ‘An Historical Introduction to Water Reform in NSW – 1975 to 1994’ (2002) 19(6) *Environmental and Planning Law Journal* 453. Tan explains ‘licence stacking’ as a practice of purchasing land to gain increased water supply, where a person would buy parcels of land and transfer the licence/s between the land holdings. See also Gary Sturgess and Michael Wright, *Water Rights in Rural New South Wales: The Evolution of a Property Rights System* (Centre for Independent Studies, 1993); Poh-Ling Tan, ‘Water Law Reform in NSW – 1995 to 1999’ (2003) 20 *Environmental and Planning Law Journal*.

²³⁰ Ibid 454. See also J Burton, *Review of Reforms in the Water Industry* 1988, Report to the Minister for Natural Resources (June 1988).

²³¹ Stewart Smith, *Water Reforms in NSW: Briefing Paper* 4/98 (6 November 2006) NSW Parliament <<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/435D6C31A6EA...>>.

Tan (2000) also addresses the water resource conflict among stakeholders in the Lower Balonne region of Queensland and the historic and contemporary water issues that exist there; in particular the use of floodplain flows and water storage impact on downstream water users.²³² Tan argues that the history of water management in the Lower Balonne is symbolic of 'State water management under its legislative practices which were, to disregard overuse and to allow unfettered access.'²³³ The Queensland Government for more than a hundred years, has failed to recognise the importance of floodplain flows and environmental issues, and in the late 1990s the government continued to allow farmers and other irrigated water users to flout the inadequate water legislation.²³⁴

The result of ineffective monitoring and management of the state's water resources inevitably led to environmental problems, which were experienced by all stakeholders. These poor management practices impacted on the rights and interests of Aboriginal peoples because they directly affected water quality, increased water scarcity and damaged the water landscape.

The lack of Indigenous participation in the development and implementation of national water reforms and the lack of national discussion on appropriate levels of ownership and allocation of water to Aboriginal communities is a further indication that Aboriginal water rights and interests remain a low priority. The Virginia Simpson Report (2007) highlighted that in Queensland Aboriginal participation in water planning processes remains 'unremarkable'.²³⁵

The issue of compensating irrigators and farmers for various water reforms under state water management is a little ironic given the lack of discussion of compensation for Aboriginal communities and the significant changes upon Aboriginal cultural water rights

²³² Poh-Ling Tan, 'Conflict over Water Resources in Queensland: All Eyes on the Lower Balonne' (December 2000) 17(6) *Environmental and Planning Law Journal* 567.

²³³ Ibid 566.

²³⁴ Ibid 567.

²³⁵ Email from David Collard to Virginia Falk on Virginia Simpson, 13 November 2007. In accordance with Australia's *Copyright Act* 1968 (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

and access. Sixty five per cent of rivers existing in cleared areas have been reported to be in poor condition.²³⁶

Current policy recognises that water should be allocated for the environment and where river systems have been over allocated ... some sort of compromise between competing interests must be reached.²³⁷

Tan (1999) argues that the basis for providing compensation to irrigators, because of the reduced water entitlements under the national water reforms is small.²³⁸ In contrast, a case for compensation was raised where a water licence was held in perpetuity and a perpetual water right was granted under the *Irrigation Act 1922* but was subsequently amended under the *Water Resources Act 1989* (Qld).²³⁹

The regulation of water resources in Victoria also incorporated 'perpetual water rights' for irrigators and in the drawing of water from channels.²⁴⁰ The expectation held by irrigators when Bulk Entitlements²⁴¹ were introduced was that they would confer perpetual tenure on their consumptive water right.²⁴²

The purpose of water law reform was to clearly define and simplify private rights to use water, reduce potential for dispute between neighbours over drainage and water, and to make sure that disputes are resolved in ways which protect the wider interests of the community.²⁴³

²³⁶ Poh-Ling Tan, 'Water Licences and Property Rights: The Legal Principles for Compensation in Queensland' (1999) 16(4) *Environmental and Planning Law Journal* 179.

²³⁷ Ibid 289.

²³⁸ Ibid 284.

²³⁹ Ibid 288.

²⁴⁰ Poh-Ling Tan, 'Irrigators Come First: Conversion of Existing Allocations to Bulk Entitlements in the Goulburn and Murray Catchments, Victoria' (April 2001) 18(2) *Environmental and Planning Law Journal* 172.

²⁴¹ Ibid 163-165. Tan (2001) comments that the *Water Act 1989* (Vic) introduced a recognition of property rights over private water rights, where a 'Bulk Entitlement' was used to allocate water for public interests, environment and for authorities to divert or sell on water to individuals'.

²⁴² Ibid 180.

²⁴³ Ibid 182.

Tan (2001) concludes that, ‘water bureaucrats’ primary concern was to protect the irrigators’ in ‘framing the objectives to the *Water Act 1989* (Vic)’;²⁴⁴ which also appears to be a common theme in the history of water use in Australia, where farming and pastoral interests were prioritised by government. The Australian environment *is* the Aboriginal environment, and Aboriginal peoples had only competed for water when the expansion of farming and pastoral interests was driven by economic benefits. Aboriginal peoples’ use of water was permitted to ‘co-exist’ in the areas of land where Aboriginal peoples were tolerated, but not to challenge the water use of farmers, pastoralists and squatters.

Clark and Heydon (2004) point to the 1878 ethnographic record of Smyth of the Port Philip Aboriginal Protectorate in Victoria, describing Aboriginal peoples’ spiritual relationship to water.²⁴⁵ Smyth observed:

[a]ccording to the Woiwurrung people, *Bunjil*, the creator spirit, made the earth and formed the creeks and rivers by cutting the earth with the large knife he always carried. Smyth noted that rivers were the homes of Aboriginal people in their ‘original’ condition in Victoria. Merri Creek provided the Woiwurrung with a diverse range of aquatic resources, especially plant foods such as murrnong ... eels, fish, mussels, and waterfowl.²⁴⁶

The development of state policy in managing water resources in Australia did not include legislative recognition of Aboriginal water interests and a right to water was not seriously considered until the *Mabo v Queensland* [No 2]²⁴⁷ decision. From early settlement of the colonies and during the federation of the states, there have been countless documents that record the inherent and cultural connection of Aboriginal peoples to their land and waters. As Tan has highlighted in her research papers, the development of water

²⁴⁴ Ibid 187.

²⁴⁵ Ian D Clark, and Toby Heydon, *A Bend in the Yarra: A History of the Merri Creek Protectorate Station and Merri Creek Aboriginal School 1841-1851* (‘Report Series’, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004)

²⁴⁶ Ibid 10.

²⁴⁷ (1992) 175 CLR 1.

management policy and water law did not incorporate any right or interest for Aboriginal peoples.

The Victorian Government White Paper, 'Securing Our Future Together' (2004), does not include any specific inclusion of Aboriginal water rights and interests in the government's 'principles for sustainable water allocation'.²⁴⁸ The state's water allocation system consisted of tier one, in rights held by the Crown, tier two, in environmental water, caps and non-consumptive rights, and tier three, in individual water rights.²⁴⁹ A review of Victoria's White Paper does not indicate how Aboriginal water rights and interests were to be allocated, if at all.

Sue Jackson's article, 'Compartmentalising Culture: The Articulation and Consideration of Indigenous Values in Water Resource Management' (2006) argues that there is more interest in the 'human dimensions of natural resource management and conservation in identifying the values and relationships which exist to inform the policy paradigm'.²⁵⁰ Jackson suggests the reasons for the emergence of 'human perspectives of culture' was due to the development of ecological economies and a pluralistic consideration for embracing knowledge, environmental use and values of social groups.²⁵¹

In relation to Aboriginal peoples and government interest in acknowledging the concepts of Aboriginal cultural values in water, I would argue that this policy shift has developed as a result of the activism and the increased agency of Aboriginal peoples and their peak bodies. The incorporation of Aboriginal values in water within the framework of national water reforms did not occur until Aboriginal organisations urged government to recognise Aboriginal rights and interests. An Aboriginal 'ecological' economy has always existed through barter, trade and environmental stewardship.

²⁴⁸ Department of Sustainability and Environment, *Securing Our Water Future Together* (June 2004) 18 <<http://www.dse.gov.au>>.

²⁴⁹ Ibid 19.

²⁵⁰ Sue Jackson, 'Compartmentalising Culture: The Articulation and Consideration of Indigenous Values in Water Resource Management' (March 2006) 37(1) *Australian Geographer* 19.

²⁵¹ Ibid 20.

Australia has taken a leading role in recognising unique biodiversity:

Australia was one of the first countries to sign the Convention on Biological Diversity ... which came into force in December 1993 ... In light of the indifference or active antagonism towards native fauna and flora during the settlement process, and the destruction of habitat on a grand scale ... these landscapes especially in the south-east, coincide with the earliest pastoral operations ...²⁵²

Australian society has a long history in devaluing Aboriginal culture and Aboriginal peoples, which has permeated the development of government policy as evidenced by various policy and legislative instruments such as the aim to assimilate Indigenous peoples and segregate Indigenous peoples on reserves and missions. Henry Reynolds (1987) has suggested that racial 'stereotypes' held about Aboriginal peoples have been prevalent throughout Australia's history:

Racism flourished in Australia in the nineteenth and in the early twentieth century. It shaped an orthodox view of Aborigines which survived intact until the 1940s and 1950s.²⁵³

It would be fair and reasonable to recognise that racial stereotypes of Indigenous peoples have influenced the conceptualisation of Aboriginal values in Australian society and in how governments identify the importance of Aboriginal water values and use.

Jackson (2006) highlights the deficiency of the Northern Territory water resource legislation in broad definitions used in the legislation to identify cultural values: for example, the *Water Act 2004* (NT) defines these values as 'aesthetic, recreational and

²⁵² Chris Williams, *Old Land, New Landscapes: A Story of Farmers, Conservation and the Landcare Movement* (Melbourne University Press, 2004) 2-3.

²⁵³ Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Allen and Unwin, 1987) 127.

cultural needs'.²⁵⁴ The conceptual framework of water values from an Aboriginal community perspective is not addressed. Hence, the generic reference to 'cultural values' has a pluralistic meaning and can apply to the water values of Aboriginal and non-Aboriginal groups. It does not assist in defining cultural values in water for Aboriginal peoples or seek to protect the existing Aboriginal use of water.

An 'Aboriginal cultural landscape' is defined by the International Council on Monuments and Sites (1996) as

[a] place or area valued by an Aboriginal group (or groups) because of their long and complex relationship with that land. It expresses their unity with the natural and spiritual environment. It embodies their traditional knowledge of spirits, places, land uses and ecology.²⁵⁵

Jackson (2006) identifies the inadequate usage of Western concepts used to filter information on natural values from the Daly River Aboriginal Community Reference Group; the four values to be equally weighted were economic, environmental, cultural and social values.²⁵⁶ As Jackson argues, the 'Daly River Community Reference Group did not articulate their values by a theory of value or some other methodology which Western science might use to analyse and evaluate the cultural value paradigm'.²⁵⁷ Their construction of water values arises not through their value as a utility resource, but through the cultural relationship that Aboriginal peoples have with water and the recognition that cultural knowledge according to its values in the seniority of the individual:

²⁵⁴ Sue Jackson, 'Compartmentalising Culture: The Articulation and Consideration of Indigenous Values in Water Resource Management' (2006) 37(1) *Australian Geographer* 21.

²⁵⁵ Gavin Andrews, 'Negotiating Aboriginal Access Agreements to Culturally Significant Land, Water and Natural Resources in New South Wales' ('Working Paper', Department of Natural Resources NSW, 2006) 2. See email from Gavin Andrews to Virginia Falk, 2006 which provided paper as an attachment.

²⁵⁶ Sue Jackson, 'Compartmentalising Culture: The Articulation and Consideration of Indigenous Values in Water Resource Management' (2006) 37(1) *Australian Geographer* 24.

²⁵⁷ *Ibid* 26.

In Aboriginal society, knowledge is a function of age and status. It is imparted by degrees, as and when appropriate, by those steeped in knowledge. Knowledge may be held in common by people of varying ages and rank ... Cultural inhibitions may well cause such a person to give the impression that he or she does not know the information sought.²⁵⁸

‘Indigenous Perspectives in Water Management, Reforms and Implementation’ by Sue Jackson and Joe Morrison (2007) deals with the statutory acknowledgement of Indigenous Cultural Values under the National Water Initiative; the authors indicate that the inclusion of these water values maintains a ‘symbolic part’ of being Indigenous.²⁵⁹ Aboriginal water values, from my thesis research, exhibit more than symbolism and expressions of Aboriginal peoples relationship to the land, the waters and resources; they are the life-blood connection for Aboriginal identity. Jackson and Morrison’s (2007) article considers how these Indigenous water perspectives may be understood beyond being values defined as ‘water property’.²⁶⁰ They note that the majority of the ethnographic literature on water values is from northern Australia but relevant to other Indigenous groups.²⁶¹

Jackson and Morrison (2007) suggest that the incorporation of Indigenous water values and objectives into water planning will present challenges such as how would international literature develop the concept of power-sharing in environmental management.²⁶² An example of power-sharing can result from a determination of native title rights to water that are non-exclusive and do not include commercial water values.²⁶³ According to Jackson and Morrison future challenges also exist in allocating water to native title holders within water sharing plans, however the National Water Initiative

²⁵⁸ Tony Neal, ‘The Forensic Challenge of Native Title’ (September 1995) *Law Institute Journal* 880, 883.

²⁵⁹ Sue Jackson and Joe Morrison, ‘Indigenous Perspectives in Water Management, Reforms and Implementation’ in Karen Hussey and Stephen Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges* (Commonwealth Scientific and Industrial Research Organisation, 2007) 23.

²⁶⁰ Ibid 24.

²⁶¹ Ibid 25.

²⁶² Ibid 26.

²⁶³ Ibid 28.

framework does not outline how this can be achieved.²⁶⁴ As native title represents property rights, how then are native title holders to be compensated for the loss or frustration of their water use?²⁶⁵

The research gaps identified by Jackson and Morrison include ‘understanding the barriers and incentives for Indigenous participation in water’,²⁶⁶ and quantifying Aboriginal water resource values within the Indigenous economy.²⁶⁷ The authors also recognise a lack of empirical data on Aboriginal peoples for those who wish to pursue commercial interests and innovation in developing customary water economies.²⁶⁸ As Jackson and Morrison point out, the National Water Initiative does not foster economic aspirations among Aboriginal peoples, whereas the recognition of Aboriginal water rights as property rights would provide such opportunities.²⁶⁹

Neva Collins and Virginia Falk (2008), in examining the spiritual relationship of Aboriginal peoples to water, argue that any reference to the definition of environment without reference to Aboriginal peoples is ‘meaningless’, and instead based upon the creation stories and beliefs inherent in these cultural landscapes and their human context.²⁷⁰ It would also be unacceptable if this research process fails to engage Aboriginal researchers in identifying the research gaps in Indigenous water knowledge.

[I]ndigenous criticism places the spotlight directly on the activities of non-indigenous researchers working within a range of disciplinary fields and raises questions about the very act of ‘research’ defined within the broad intellectual

²⁶⁴ Ibid.

²⁶⁵ Ibid 29, 35.

²⁶⁶ Ibid 32.

²⁶⁷ Ibid 33.

²⁶⁸ Ibid 34.

²⁶⁹ Ibid 35.

²⁷⁰ Neva Collins and Virginia Falk, ‘Water: Aboriginal Peoples in Australia and their Spiritual Relationship with Waterscapes’ in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2008) 131.

traditions of the West ... Western research itself cannot be simply understood as one homogenous set of perspectives and practices.²⁷¹

Subsequent to the Garma Water Conference in 2008 and after the publication of the chapter by Collins and Falk (2008), a small Indigenous group of Garma participants, including the author, drafted the 'International Indigenous Water Declaration'. The Preamble of the Garma International Indigenous Water Declaration (2008) states:

Recognising and Reaffirming that the Indigenous peoples of the World are and have been since time immemorial sovereign over their own lands and waters and that Indigenous peoples obtain their spiritual and cultural identity, life and livelihood from their lands and waters.²⁷²

Further, the body of this Declaration clearly calls on the States to 'fully adopt, implement and adhere to the international instruments recognising the rights of Indigenous peoples to land and water'.²⁷³ Collins and Falk (2008) highlight that national water reforms in Australia are 'modest' reforms particularly the Indigenous clauses 52 to 54 of the National Water Initiative.²⁷⁴

The National Water Initiative does not incorporate recognition of Indigenous water rights and interests as they are expressed under international instruments; nor has the Australian Government adopted the 'Garma International Indigenous Water Declaration' as a framework for articulating Indigenous rights to water. Without a national Indigenous framework that clearly expresses international standards, Australian governments will, in all likelihood, continue to give a low priority to Indigenous water rights and interests.

²⁷¹ Kim Humphery, 'Indigenous Health and 'Western Research' ('Discussion Paper', No 2, VicHealth Koori Health Research and Community Development Unit, University of Melbourne, December 2002) 11.

²⁷² Northern Australian Indigenous Land and Sea Management Alliance, *Garma International Indigenous Water Declaration* (24 May 2012) NAILSMA <<http://nailsma.org.au/nailsma/forum/download/Garma-International-Indigenous-Water-Declaration.pdf>>. The author contributed to the drafting of this Declaration.

²⁷³ Ibid.

²⁷⁴ Neva Collins and Virginia Falk, 'Water: Aboriginal Peoples in Australia and their Spiritual Relationship with Waterscapes' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 141.

The former Federal Minister for Indigenous Affairs, Mal Brough, had acknowledged prior to the 2007 Federal election campaign that ‘there are no votes in Aboriginal policy’.²⁷⁵ Similarly, during the Goulburn electoral launch of Pru Goward in 2007, Barry O’Farrell, the then State Liberal Deputy Leader for New South Wales, responding to a question on the Liberal Party’s Aboriginal policy, remarked that ‘there are no election votes on Aboriginal issues and a formal policy is not required’.²⁷⁶

The recognition of Aboriginal interests in water resources is a jurisdictional conundrum. Sharon Beder (2006) argues that Indigenous minorities endure a lesser right in the management of environmental principles and policies²⁷⁷ and this disenfranchises Indigenous communities and leaves them with less than the minimum living standard on their traditional lands.²⁷⁸

Nicolas Peterson and Bruce Rigsby (1998) examined the customary marine tenure of Aboriginal peoples in Australia; and research into Aboriginal marine tenure has attracted minimal attention since the 1970s.²⁷⁹ Since the High Court decision *Mabo v Queensland* [No 2]²⁸⁰ and the enactment of the *Native Title Act 1993* (Cth), the water rights and interests of Indigenous peoples have created a need for academic research on native title claims.²⁸¹ Peterson and Rigsby analysed how native title research into the customary marine tenure of Aboriginal communities also addressed the issue of property rights in the sea.²⁸²

²⁷⁵ Australian Broadcasting Corporation, ‘Aboriginal Intervention on the Removal of Aboriginal Children in the Northern Territory’, *Dateline*, October 2007 (Mal Brough).

²⁷⁶ Barry O’Farrell, ‘Media Launch’ (Speech delivered at the Goulburn Liberal Party Office, Goulburn NSW, February 2007).

²⁷⁷ Sharon Beder, *Environmental Principles and Policies: An Interdisciplinary Approach* (University of New South Wales Press, 2006) 71-90.

²⁷⁸ *Ibid.*

²⁷⁹ Nicolas Peterson and Bruce Rigsby (eds), ‘Customary Marine Tenure in Australia: Introduction’ (1998) 48 *Oceania Monograph University of Sydney* 1.

²⁸⁰ (1992) 175 CLR 1.

²⁸¹ Nicolas Peterson and Bruce Rigsby (eds), ‘Customary Marine Tenure in Australia: Introduction’ (1998) 48 *Oceania Monograph University of Sydney* 1.

²⁸² *Ibid* 2.

It is evident that Aboriginal access to the sea has undergone a number of changes. The most recent of these, prior to European arrival, was the adoption of the dugout canoe in one of several forms. Its adoption clearly facilitated sea travel, made it possible to reach distant islands more regularly and influenced hunting and fishing patterns.²⁸³

According to Peterson and Rigsby, the archaeological literature on Aboriginal coastal Aboriginal economies is significant and provides indisputable evidence of Aboriginal peoples relationship to and use of water – fish traps, middens and shell trading.²⁸⁴ The authors' examination of Aboriginal customary tenure and values in the sea is relevant to any analysis of Aboriginal water values, because Aboriginal peoples themselves identify as 'saltwater' or 'fresh water' peoples in coastal or inland areas. The water values held by Aboriginal communities are integral to the kinship relationships of all Indigenous peoples in Australia through either marriage or birth.

These concepts in customary tenure are analysed in Peterson and Rigsby's (1998) book in a chapter by Scott Cane (1998), which identifies research undertaken in preparing the defended hearing for the Aboriginal fishing case in *Mason v Tritton*.²⁸⁵ Cane's chapter looks at fishing as an inherent right and customary economy, as distinguished from the analysis of Peterson and Rigsby's (1998) research about the 'social construction' of Aboriginal peoples' marine tenure.²⁸⁶

²⁸³ Ibid 6.

²⁸⁴ Ibid 9.

²⁸⁵ Scott Cane, 'Aboriginal Fishing on the New South Wales South Coast: A Court Case' (1998) 48 *Oceania Monograph University of Sydney* 66-83. Kevin Mason and other Aboriginal defendants were arrested and charged under the *Fisheries and Oyster Farms Act 1935* (NSW) with possession of various abalone above the statutory quota. The proceedings were heard in the local court and on appeal to the Court of Appeal from 1992 to 1994. The author was the instructing solicitor in defended hearings for Legal Aid NSW in 2004 for defendants connected with the Mason case. See also Scott Cane, *Aboriginal Fishing on the South Coast of New South Wales*, Report to Blake Dawson and Waldron and the NSW Aboriginal Land Council (Narooma, NSW, July 1992).

²⁸⁶ Nicolas Peterson and Bruce Rigsby (eds), 'Customary Marine Tenure in Australia: Introduction' (1998) 48 *Oceania Monograph University of Sydney* 10.

The Commonwealth Native Title Amendment Bill 1997 rested on the constitutional power in s 51(xxvi) of the *Australian Constitution*, known also as the ‘Races Power’.²⁸⁷ The ‘Races Power’ provides the Commonwealth Parliament with

[p]ower to make laws for the peace, order, and good government of the Commonwealth with respect to the people of any race for whom it is deemed necessary to make special laws.²⁸⁸

In her statement to the Parliamentary Senate Committee, Jennifer Clarke said that the Court’s characterisation of the *Native Title Act 1993* (Cth) could be used as a power to discriminate either in favour or against Indigenous peoples, for example in the High Court decision of *Western Australia v Commonwealth*.²⁸⁹

The literature review has attempted to show that Indigenous peoples in Australia hold unique and complex belief systems in the creation of water, and the cultural values are linked to a system of Indigenous laws which require observance for the purposes of ensuring environmental health of the water, the land and of Indigenous communities. The theoretical framing of water concepts within the framework of native title reports and Aboriginal oral story are integral to understanding the web of interests and law relationships of Aboriginal peoples and illustrate the reasons for Aboriginal water values in relation to developing policy and law in Australia on Aboriginal water issues.

In Australia, it has been widely reported by governments, organisations and the international community that the standard of living for Aboriginal peoples and the marginalisation of Aboriginal communities on their traditional lands has not substantially improved, as the various reports in the literature have concluded. The national water reforms have failed to provide legal certainty for Aboriginal communities in native title, cultural flows and commercial interests in water and governments have also failed to

²⁸⁷ Evidence to the Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, July-December 1997, vol 3 159 (Explanatory Memorandum Races Power).

²⁸⁸ Ibid.

²⁸⁹ Ibid 175 (Jennifer Clarke). See *Western Australia v Commonwealth* [1995] 183 CLR 317.

accept that Aboriginal water requirements must be linked to Aboriginal ontological water concepts.

The literature review also clearly highlights that, in spite of Australia's national water reforms, no meaningful actions by governments have been provided to recognise and protect Indigenous water values in national policy and law. Although the introduction of native title rights was initially hailed as the means to legally recognise Aboriginal rights and interests to 'country', the amendments to the native title body of laws have narrowed the window of opportunity to reclaim the lands and the waters which have been held by Indigenous communities for countless generations. The various reports and research undertaken examined by this literature review clearly identify that there has been a failure by successive Australian governments to address Indigenous rights and interests to water and to legally recognise these water rights in all sources of water use in Australia.

Chapter 3: Methodology

3.1 Background to the Thesis Methodology

In the first half of 2004 when I commenced legal research on my hypothesis on Aboriginal rights and interests in water within Australia, the country was in a cycle of severe drought, and water scarcity was a critical issue. The desperation of farmers, pastoralists and irrigators during the drought was regularly reported in newspapers and on radio and television. However, the media was relatively silent on the experience of Aboriginal communities during the drought and how this national crisis was affecting Aboriginal peoples. My approach in developing a methodology for this thesis included the need to provide a 'voice' for Aboriginal communities through the Aboriginal ontology in Aboriginal water values and beliefs that is central to allow Aboriginal voices to be heard. My professional and community experience was drawn upon as an Aboriginal researcher to address the limited research undertaken by Aboriginal researchers in Australia.

The thesis methodology was influenced significantly by legal positions I have held and academic research projects that I have been involved in over the years. Firstly, my role in the Federal Court as an Indigenous Researcher and Associate provided wide ranging advice for the judiciary within competitive research environment, but this environment allowed access to a comprehensive range of Australian and international resources which informed the thesis structure. Secondly, my appointment as Senior Legal Officer with the Australian Law Reform Commission led to conducting complex legal research and law reform material in reviewing and making recommendations on the Australian Government's income management scheme and other areas of commonwealth laws.²⁹⁰

The reports tabled by the Australian Law Reform Commission result in high quality publications of detailed, evidence-based research that is informed by community and

²⁹⁰ See Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, Report No 117 (November 2011) 247.

agency consultation and specific advice from expert panel groups.²⁹¹ My methodological approach in this thesis is also to focus on law reform in the water rights and interests of Aboriginal peoples in Australia, chiefly because the policy process and the legislative framework, much like the native title system, has failed to ensure the essential participation of Australia's First Peoples. I have included recommendations for law reform in the thesis conclusion in order to highlight the need for the implementation of these crucial reforms and to address some of the gaps for Aboriginal water rights and interests within the Australian water management regime.

The background to developing a methodology for the thesis necessitated an examination and analysis as to why Aboriginal water rights and interests have been ignored among the interests of other groups. As a practising lawyer and a lecturer in Aboriginal Studies my response was to explore whether this exclusion of Aboriginal peoples could be examined 'by the use of legislation, policy and case law to critique a claim for Aboriginal water rights and interests'²⁹² rather than argued through decolonization theory, critical legal theory or purely through the lens of social justice and human rights theory, natural law, liberalism and economic theory. Noel Pearson, Chair of the Cape York Land Council has argued that 'when we equate Aboriginal titles with normal titles this obscures the nature of Aboriginal title'.²⁹³

In my development of a theoretical framework for this thesis I have been purposive in prioritising the Aboriginal voice and Aboriginal ontological water values and beliefs of Aboriginal peoples in Australia and generally reluctant to frame this thesis research with non-Aboriginal 'titles' or other methodological frames that are not Indigenous to Aboriginal Australia. This has been difficult because of the limited academic and legal research undertaken on these issues by Aboriginal researchers.

²⁹¹ Peter Hennessy, 'Independence and Accountability of Law Reform Agencies' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 86.

²⁹² Terry Hutchinson, *Researching and Writing in Law* (Thomson Lawbook, 2nd ed, 2006) 89. See chapter 5.7 for further discussion on Action Research.

²⁹³ Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 51.

I would submit that a perspective of Aboriginal water rights and interests is not meaningful when Aboriginal water values are forced to fit into Western or Australian concepts of property such as those in native title, as the characteristics of these Aboriginal water values are seriously altered. As the quote in the previous page by Noel Pearson has attempted to explain, Western legal concepts are inadequate to Aboriginal ontology. The analysis of Aboriginal water rights and interests is an evolving area of Aboriginal legal scholarship and from an Aboriginal perspective the normative system of law *is* Aboriginal law.

Whilst working in the West Kimberley region of Western Australia as a Senior Research Fellow with Traditional Owners, my research project was focused upon developing sustainable livelihoods for the Fitzroy River (mardoowarra). The project's research methodology was designed upon the principles of 'Action Research'²⁹⁴ because it reflects a participatory methodology, and described as

[a]n ideology; a way of thinking about our world, our social conditions and relationships and how to improve them in terms of justice for all. It is about how to change people and organisations.²⁹⁵

The 'Action Research' approach is derived from my research experience as an Executive Officer for the New South Wales Aboriginal Water Trust and later as a Senior Research Fellow with the Fitzroy River project in remote Western Australia. This type of research requires the participation of the researcher to actively challenge their own attitudes and behaviours and to generate appropriate knowledge that is required for community research outcomes.²⁹⁶ For the community participation in 'participatory action research' there is a deeper interaction and 'shared power relationship' within the research process because the focus of the researcher and participants is to build respectful and meaningful

²⁹⁴ Terry Hutchinson, *Researching and Writing in Law* (Thomson Lawbook, 2nd ed, 2006) 104.

²⁹⁵ Ibid 105.

²⁹⁶ Iain Hay, *Qualitative Research Methods in Human Geography*, (Oxford University Press, 3rd ed, 2010) 275-276.

involvement.²⁹⁷ My experience in the Kimberley region was enriched by adopting this approach to my doctoral thesis during the stages of preparing, reading and writing on the thesis chapters. Although this research examines the hypothesis from sourcing, examining and analysing the written literature and not in conducting interviews with community or individuals, the discourse analysis of Aboriginal oral story and Aboriginal narrative provides a 'voice' for Aboriginal communities to be heard. The analysis of Aboriginal ontological concepts of water provides a culturally appropriate method to engage in evaluating the normative system of Aboriginal values, beliefs and laws.

In an Action Research methodological framework, the researcher participates with the groups on 'country' to elucidate the cultural perspectives and issues, where all parties continually reflect upon the 'objective, planning, implementation, observation and evaluation cycles'.²⁹⁸ The methodology allows a flexible interaction between the researcher and the participant that is based upon understanding the relationships and ideology of each other in order to inform the research process and outcomes. Although I have studied a range of theoretical frameworks academically in multi-discipline fields such as law, education, communications and sociology, I believe that an Action Research methodology provides the essential frame for Aboriginal ontology.

This type of methodology allows for a holistic approach to analyse themes such as Aboriginal law, relationships to the land and water, community values and the principles which underpin culturally appropriate outcomes. I have applied this approach to the thesis methodology, drawing upon my participation in community meetings, workshops, field visits and my own cultural education from Senior Elders and Aboriginal Law men and women.

²⁹⁷ Ibid 259-261.

²⁹⁸ Ibid. See Ortrun Zuber-Skerritt (ed), *New Directions in Action Research* (Falmer Press, London, 1996).

3.2 Theoretical Frameworks in Articulating Aboriginal Water Rights and Interests

To understand the impact of Western property concepts on Aboriginal water rights and interests, and how Western social constructs struggle to accommodate Aboriginal water values – which permeate the relationship of Aboriginal peoples connection to ‘country’ – an analysis of the impact of private and public property rights on Aboriginal communities is important, such as water management, native title and licences. Aboriginal water rights and interests within Australia exist within a highly regulated system of domestic laws and policies which can be structured to allow or limit the exercise of these rights. In contrast to a Western concept of property, which ‘characterizes property as a bundle of rights or a right or collection of rights, not to a thing’,²⁹⁹ is directly opposed to Aboriginal ontological concepts of property, as the thesis chapters will discuss.

‘The Reconstruction of Property: Property as a Web of Interests (2002)’ by Craig Arnold examines the Western concepts of private and public property regimes in relation to their effect on environmental values and the impact of the modern property concept in identifying property as a ‘bundle of rights’.³⁰⁰ Arnold argues that the contemporary metaphor of property as a ‘bundle of rights’ fails to recognise the ‘importance of the human relationship and the environment’,³⁰¹ and he rejects the contention that property is about ‘things’ and ‘relationships to things’.³⁰² His concept of ‘property as a web of interests’ impressed upon me how Aboriginal rights and interests to water could be articulated within various cultural and contemporary Aboriginal concepts of water values and Aboriginal water use. The idea of developing a metaphor for Aboriginal property rights, in my view, would be a useful tool to aid conceptualisation of the Aboriginal relationship to water, and how Aboriginal peoples identify themselves through water such as ‘freshwater peoples’ or ‘saltwater peoples’.

²⁹⁹ Bruce Ziff, *Principles of Property Law* (Carswell, Thomson Reuters, 5th ed 2010) 2.

³⁰⁰ Craig Anthony Tony Arnold, ‘The Reconstruction of Property: Property as a Web of Interests’ (2002) 26 *Harvard Environmental Law Review* 281.

³⁰¹ *Ibid.*

³⁰² *Ibid* 282.

Arnold's article prompted my attention on how the settlers and convicts transported to Australia interpreted and applied Western concepts of property and their environmental values in their initial interaction with Aboriginal peoples and in the conflict which often occurred on issues such as clearing Aboriginal land for development, water resource use, removal of Aboriginal sites and ceremonial areas and moving Aboriginal people off their traditional camp sites. As well as the difficulty Aboriginal communities had in understanding the nature of Anglo-Australian property rights.

Arnold (2002) argued that a 'new metaphor' is required to 'accommodate the human to human, human to object' relationships, and to 'define the legal interests' within these relationships of property rights.³⁰³ Arnold's notion of a 'new metaphor' for property interests is relevant to developing the dialogue on Aboriginal water rights and interests because it can provide recognition for Aboriginal water requirements under the National Water Initiative and a re-evaluation by governments in defining these rights and interests. Arnold's 'new metaphor' concept provides the opportunity to discuss and address the lack of inclusion of Aboriginal rights and interests in terms of property rights conceptualised through Aboriginal ontology.³⁰⁴

Arnold also argues that 'environmental law scholars narrowly focus research on environmental protection and not on the interconnection of the uniqueness of the objects of property and 'things', which engages distinct values of human beings with the natural environment' within the paradigm of property concepts.³⁰⁵ Aboriginal water values and Aboriginal environmental concepts are perceived and interpreted by Anglo-Australian knowledge systems as 'cultural beliefs and practices', which in the view of Australian property concepts are not representative of property rights. According to Arnold, a 'web of relationships' exists within 'all aspects of property'.³⁰⁶

³⁰³ Craig Anthony Tony Arnold, 'The Reconstruction of Property: Property as a Web of Interests' (2002) 26 *Harvard Environmental Law Review* 282.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid* 283.

³⁰⁶ *Ibid* 282, 296.

Terms like ‘social relations’, ‘entitlements’, ‘efficiency’, ‘economic advantage’, ‘valuable resources’, ‘public policy’, and ‘bundle of rights’, while helpful contributions to our understandings of property, are insufficient without more.³⁰⁷

In his article Arnold describes the different academic positions on the concept of property rights and how they develop academic discourse on redefining human relationships as a ‘web of interests’³⁰⁸ in order to understand other concepts of property.

According to Arnold, Thomas Grey in ‘The Disintegration of Property’ (1980) asserted the notion that ‘property as a distinct and coherent concept was redundant’. Grey argued that property is a ‘bundle of rights equally malleable, divisible, disaggregable and functional rights among people’.³⁰⁹ Arnold (2002) argues that Grey’s position is ‘inconsistent with the tenets of an environmental ethic’ and that the value of the object within the property concept is more important’.³¹⁰

The ‘bundle of rights’ concept appears in judgements on determinations of native title, neatly compartmentalising cultural or legal rights as unconnected separate rights. According to Lisa Strelein the debate on characterising ‘rights and interests was distracting’³¹¹ in the judicial reasoning of the High Court decision in *Western Australia v Ward* [2002]³¹². The High Court held that ‘native title was not a possessory title’³¹³ and ‘raised issues on whether native title was an interest in land or characterised as a bundle of rights’.³¹⁴ On the face of it Grey’s position contrasts with the conceptualisation of Aboriginal culture and laws, because the ‘bundle of rights’ approach as outlined above is not ‘divisible or malleable’ within Aboriginal water values because such values are

³⁰⁷ Ibid 331.

³⁰⁸ Ibid 282.

³⁰⁹ Ibid.

³¹⁰ Ibid 283.

³¹¹ Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed 2009) 121.

³¹² 213 CLR 1.

³¹³ Ibid 117.

³¹⁴ Ibid 121.

exercised in accordance with Aboriginal laws and on the basis of these law relationships, as will be examined in Chapter 4 of this thesis.

Glaskin (2003) argued that the legal recognition of Aboriginal land rights is steeped in contested property ideology of competing interests.³¹⁵ The notion of Australian property concepts is foreign to Aboriginal belief systems. Glaskin states:

In Western societies, the concept of property is constrained by assumptions about economic value and governed by commodity logic that assumes the detachability of persons and things.³¹⁶

According to Arnold (2002), the ‘bundle of rights’ theory fails to grasp the concepts of ‘interconnection between things and human relationships in property’.³¹⁷ Glaskin (2003) highlights the problems associated with attempting to ‘detach persons and things’ in conceptualising property. In regulating water management over Aboriginal water rights and interests, problems will arise when governments and regulators ‘detach’ or separate Aboriginal water values, laws and relationships from property concepts. In my view, the ‘bundle of rights’ theory applied from a Western legal perspective on Aboriginal water rights and interests would fragment and weaken Aboriginal relationships and the meaning of water. Penner states that conceptualising property as a ‘bundle of rights is not a useful’ and does not assist the judiciary in determining property rights’.³¹⁸

The articulation of Western property theory within a ‘broader legal system’ is declared by J W Harris in ‘Property and Justice’ as ‘ubiquitous, complex, socially important and controversial’.³¹⁹ Private property law is divided into either, real property (res) which represents corporeal and incorporeal interests such as easements and restrictive covenants, personal property which represents real chattels (leases) and personal chattels

³¹⁵ Katie Glaskin, ‘Native Title and the Bundle of Rights Model: Implications for the Recognition of Aboriginal Relations to County’ (2003) 13(1) *Anthropological Forum* 67.

³¹⁶ Ibid 68.

³¹⁷ Craig Anthony Tony Arnold, ‘The Reconstruction of Property: Property as a Web of Interests’ (2002) 26 *Harvard Environmental Law Review* 283.

³¹⁸ J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 1.

³¹⁹ J W Harris, *Property and Justice* (Clarendon Press, 1996) 6.

(choses in action are intangibles and choses in possession are tangibles) and unique interests such as Aboriginal title.³²⁰ The central aspect of private property is ‘the right of an owner to the use, possession and enjoyment of the object to the exclusion of the rest of the world’; as a right *in rem*.³²¹ In Blackstone’s *Commentaries* it states that the ‘way to acquire title to property that belongs to no one is by occupancy and the actual possession of such property’.³²² Property interests also include equitable proprietary interests, statutory proprietary interests or movable chattels.³²³

The perspective of Sir William Blackstone’s theory of property law, asserts human beings hold an ‘absolute dominion and control over all things’,³²⁴ this is based upon ‘natural law and the will of God which is underpinned by rules and regulations to govern society’.³²⁵ Blackstone declared that human beings have free will but the law of nature and the law of revelation require the observance of human laws.³²⁶ Like the Western legal perspective of Blackstone’s time, other ‘legal systems emerge from cultural contexts, social relations, and concepts of law’, which ‘predetermine legal obligations and legal rights’.³²⁷

Arnold’s proposal of describing a ‘new metaphor’³²⁸ in property concepts and law is a significant development in research on Aboriginal water rights and interests in Australia. By way of a legal discussion on determining norms in property concepts, the Western academic dialogue simply applies its own conceptualisation of what ‘norms’ are, and the determination of those ‘norms’ in property is understood through Western values, legal theory and the characteristics of property rights.³²⁹

³²⁰ Bruce Ziff, *Principles of Property Law* (Carswell, 5th ed, 2010) 76-77.

³²¹ Samantha Hepburn, *Principles of Property Law* (Routledge-Cavendish, 3rd revised ed 2006) 3.

³²² Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989) 11.

³²³ Samantha Hepburn, *Principles of Property Law* (Routledge-Cavendish, 3rd revised ed 2006) 15-16.

³²⁴ Craig Anthony Tony Arnold, ‘The Reconstruction of Property: Property as a Web of Interests’ (2002) 26 *Harvard Environmental Law Review* 287.

³²⁵ Samantha Hepburn, *Principles of Property Law* (Routledge-Cavendish, 3rd revised ed 2006) 7.

³²⁶ J C Smith and David N Weisstub, *The Western Idea of Law* (Butterworths, 1983) 384-387.

³²⁷ *Ibid* 1.

³²⁸ Craig Anthony Tony Arnold, ‘The Reconstruction of Property: Property as a Web of Interests’ (2002) 26 *Harvard Environmental Law Review* 284.

³²⁹ *Ibid* 295.

Collins (2003) argued that the ‘balancing of interests’ in Australia is weighed against Aboriginal interests and that Aboriginal claimants in native title are required to conform to legal minutiae which entail a more complex, time consuming and cost exigent legal process than any other legal process of Australian law.³³⁰

Warwick Anderson (2002) suggests that, as the colonists to Australia arrived, they carried with them particular values and meanings from their homeland and interpreted the Australian landscape from their values and concepts of place:

Whether as convict, officer or free settler, coming to Australia was no simple transposition. Those who stepped ashore at Port Jackson in 1788 had entered a new territory, unsure of the character of the seasons, the prevailing winds, the fertility of the soil, the quality of the water. As later colonists moved inland from Sydney or established outposts along the coast, they too were assaying the land and climate as they went, using their own bodily sensations, their feelings of comfort or unease, to judge whether the land they coveted was a properly British territory.³³¹

Burrows (1997)³³² argued that Aboriginal rights in Canada are continually ‘downgraded and infringed by governments and the courts’ in order to ‘dictate how the laws and traditions of Aboriginal peoples can be reconciled with non-Aboriginal interests’.³³³

[n]on-aboriginal peoples exercise exclusive rights all the time. In fact, exclusive rights are one of the distinguishing features of western legal systems. Why should there be extra concern when aboriginal peoples exercise exclusive rights? What can explain the concern in assigning aboriginal peoples exclusive rights ...³³⁴

³³⁰ Richard B Collins, ‘Sacred Sites and Religious Freedom on Government Land’ (2003) 5(2) *Journal of Constitutional Law* 250.

³³¹ Warwick Anderson, *The Cultivation of Whiteness: Science, Health and Racial Destiny in Australia* (Melbourne University Press, 2002) 11.

³³² John Burrows, ‘Fish and Chips: Aboriginal Commercial Fishing and Gambling Rights in the Supreme Court of Canada’ (1996) 50 *Criminal Reports* 230.

³³³ Ibid.

³³⁴ Ibid.

British Parliamentary records show that Aboriginal peoples in Australia had the legal capacity to exclude the British Government from their lands and waters:

[r]especting the aborigines, it appears that they are by no means devoid of capacity, that they have laws and usages of their own, that treaties should be made with them.³³⁵

The use of conceptualising property concepts and relationships that exist in an interconnected paradigm as Arnold (2002) proposes, enriches the property concept through understanding the rights to a ‘thing’ for instance, in the case of land rights, the recognition of an Aboriginal relationship that interconnects with land characterises cultural values to property. In contrast Blackstone’s approach to property ownership asserts ‘absolute control and dominion’ over the land and lacks the nuance of cultural values.³³⁶ Arnold (2002) points out that where competing interests to a resource exists, ‘economic considerations in optimizing wealth may impair the recognition and protection of other interests to property rights’.³³⁷ For example, in the first report to the Colonial Office on the colonisation of South Australia the following observations were made of Aboriginal peoples and their property interests:

We propose that the cessions of territory over which the Aborigines may have any proprietary right shall not only be perfectly voluntary upon their part, but shall be considered a stipulation that the Aborigines by whom the ceded lands may have been occupied or enjoyed shall be permanently supplied with subsistence, and with moral and religious instruction.³³⁸

³³⁵ British Parliament, ‘British Parliamentary Records 1841’, Papers Relate to the Aborigines Australian Colonies of New South Wales’, No 41, 151.

³³⁶ Craig Anthony Tony Arnold, ‘The Reconstruction of Property: Property as a Web of Interests’ (2002) 26 *Harvard Environmental Law Review* 286.

³³⁷ *Ibid* 339.

³³⁸ Shaun Berg, ‘A Fractured Landscape: The Effect on Aboriginal Title to Land by the Establishment of the Province of South Australia in Shaun Berg (ed), *Coming to Terms: Aboriginal Title in South Australia* (Wakefield Press, 2010) 4.

It is noteworthy that, in the establishment of the Western Australian colony, an observation under the heading of ‘Measures affecting the Swan River and other New Australian Colonies,’ dated 19 August 1835, noted that Aboriginal peoples held ownership of the lands and waters, and advised settlers to ‘[m]ake treaties with the natives before proceeding farther’.³³⁹ This did not occur.

David Lametti, in ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003), also proposed ‘a new metaphor’ in property relationships where ‘the objects of social wealth – whether tangible or intangible,³⁴⁰ are recognised as central to understanding private property concepts among the rights, responsibilities and moral perspectives of society’.³⁴¹ Lametti stated:

[a] rights-based view can result in a variety of terminological distortions; the equation of ownership with private property, the decreased importance of objects of property, the downplaying of uses that affect the substance of further discussion.³⁴²

Lametti argues that Western society’s notion of ‘private property is a social institution that engenders objects of social wealth and a variety of individual and collective purposes’.³⁴³ He suggests that the Western focus on individual ownership in property rights characterises the private entitlement or property title in such a way as ‘to exude the ultimate control and power over lesser entitlements’.³⁴⁴ For example, the powers of the Crown prerogative in England framed Australia’s colonial powers:

In the time of the Stuarts the doctrine was maintained, not only by the King, but by lawyers and statesman who, like Bacon, favoured the increase of royal

³³⁹ British Parliament, ‘British Parliamentary Records 1841’, Papers Relate to the Aborigines Australian Colonies of New South Wales’, No 41, 151.

³⁴⁰ David Lametti, ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003) 53 *University of Toronto Law Journal* 14.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

authority, that the Crown possessed under the name of the ‘prerogative’ a reserve, so to speak, of wide indefinite rights and powers, and that this prerogative or residue of sovereign power was superior to the ordinary law of the land.³⁴⁵

This example of the Crown holding ‘absolute control and ownership in property’ is argued by Harris, who conceptualises a ‘hierarchy of rights, whereby a “full-blooded” ownership qualifies the owner above the rights and entitlements of others’.³⁴⁶ Such concepts of ownership under common law rights were created through the feudal origins of English real property, where land interests developed into fee simple estates by a grant of seisin from a superior lord.³⁴⁷ Ownership rights held under the common law doctrine of estates are not as straightforward, for example, in land held in trust in the interests of the beneficiaries, protected under equitable rules and case law.³⁴⁸

Lametti (2003) examines other theories in private property and the ambiguities that exist, in particular, where legal discourse articulates that property relationships connect to ‘things or people’.³⁴⁹ He points out that the definition of ‘property’ to refer to ‘things’ and ‘values in resources’ or ‘property rights’ incorporates inherent ambiguities in legal discourse.³⁵⁰ Lametti (2003) acknowledges that the meaning of ‘property’ changes when values or relationships to property are conceived differently in political, social and legal paradigms, such as in the pronounced difference between Western and Aboriginal conceptions of property.³⁵¹ Such differences between Western and Aboriginal conceptions of property rights and interests are well recognised in the point of first contact of British settlement (invasion) when the existence of Aboriginal laws and Aboriginal occupation were recognised but disregarded.

³⁴⁵ A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, first published 1885, 1908) 61.

³⁴⁶ David Lametti, ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003) 53 *University of Toronto Law Journal* 14.

³⁴⁷ J W Harris, *Property and Justice* (Clarendon Press, 1996) 68-69.

³⁴⁸ *Ibid* 74-75.

³⁴⁹ David Lametti, ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003) 53 *University of Toronto Law Journal* 14.

³⁵⁰ *Ibid*.

³⁵¹ *Ibid*.

Lametti also examines various property theories, such as that of Hohfeld, who characterised ‘jural relationships in private property and rights as existing within relations between and among people’ and does not include the object.³⁵² Honoré’s definition of ‘ownership’ identifies the ‘thing’ (*res*) as ‘incidental’ whereby possession and control by the owner is absolute.³⁵³ Penner characterises property norms as ‘norms *in rem*’, not as a bundle of rights, but the relationship of one person among many others, in the use of the objects of property.³⁵⁴ Further Penner in his chapter on ‘The Elements of a Normative System’ in ‘The Idea of Property in Law’ provides a comprehensive analysis of notable legal theorist’s characterisation of ‘norms *in rem* and norms *in personam*’ systems, concluding that exigibility explains these rights and that violation of such rights must focus on the individual and not the thing (*res*).³⁵⁵

The social aspect of private property is introduced by Lametti with the words of Aristotle, who recognised that social benefits in ownership should flow to others, as captured in the phrase, ‘private in ownership, common in use’.³⁵⁶ Lametti argues that the ‘degree of control and exclusivity continues to be the hallmark of private property, which includes usage rights and limitations in private rights’.³⁵⁷ Aboriginal customary property concepts recognise property relationships that also identify ‘a right to exclude’, ‘a right to control’, and ‘usage rights to property that are limited for customary purposes and regulated by laws’. In contrast, the communal title of Aboriginal ownership is at odds with the Western concept of private ownership.³⁵⁸ There are distinct and historic reasons for these stark differences, which are examined in the following chapters.

For example, the Aboriginal ‘permission’ system is underpinned by Aboriginal laws that establish a legal right for the Traditional Owners to exclude ‘others’, and this permission system informed the Aboriginal permit system in the *Northern Territory Land Rights Act*

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 7-31.

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ Michelle Grattan and Lindsay Murdoch, ‘Labor Cool on any Change to Leases’, *The Age* (Melbourne), 8 April 2005, 4.

1976 (NT). A Senior Elder of an Aboriginal community clearly expresses the adherence of the permission system under Australian law and the observance of Aboriginal laws:

In early days the white man just put trouble all over blackfellas ... he was under a pastoral property ... they didn't want to talk. [If] they just wanted to put something up there, they just went on ahead and put it up. But now we comin' in together. We should share something, then we happy to do that. But it gotta be court proper way proper processes which recognise our right of consent, whether we can give him go ahead to put the bore in there, or might be we say no, might be find another place away from that sacred site. Well, we have to negotiate the proper way, good relationship for share the water, together. Because [it's] their water and our water too, same way. Well, government say, 'no, everything under the ground belong to us', but we got our dreaming too, you know, all the way. That's what our ceremony and law is, underneath the ground.³⁵⁹

Lametti (2003) draws a nexus between property rights and social wealth that indicates that values held in private property, in the context of his argument, does not apply to traditional and customary values regarding the Aboriginal property rights. In making his point Lametti identifies that notion of 'scarcity linked to social values which produces economic worth', and in the 'value of the resource measured by its fulfilment to human needs'; value is the critical concept in the object's assessment.³⁶⁰ The contextual analysis of Aboriginal concepts of property and the relationships which connect communities or individuals to land, water or other resources are normative law systems.

The view of colonial Governor Gawler in the settlement of South Australia indicates a fuller appreciation of what the land represents to Aboriginal peoples and to what extent Australian law should recognise Aboriginal rights and interests:

³⁵⁹ David Cooper and Sue Jackson, 'Preliminary Study on Indigenous Water Values and Interests in the Katherine Region of the Northern Territory' ('Research Report', Commonwealth Scientific and Industrial Research Organisation Sustainable Ecosystems, March 2008) 54. The report quotes a Senior Elder of Katherine in the Northern Territory.

³⁶⁰ David Lametti, 'The Concept of Property: Relations through Objects of Social Wealth' (2003) 53 *University of Toronto Law Journal* 11.

Governor Gawler, in particular, tried, in accordance with his instructions, to adopt the principle that the aboriginal inhabitants of this province have an absolute right of selection ... of reasonable portions of the choicest land, for their special use and benefit, out of the very extensive districts over which, from time immemorial, these Aborigines have exercise distinct, defined, and absolute rights of proprietary and hereditary possession.³⁶¹

According to Lametti, the use of ‘definitions can influence the substantive discussion on rights-based property paradigms’, such as in the concept of private property ownership which is the most powerful of these.³⁶²

Dean Lueck and Thomas Miceli, in ‘Property Rights and Property Law’ (2004), examined how the economics of property rights is useful for understanding that the underlying purpose of property law is to maximise social wealth. Water rights are included in their analysis.³⁶³ Lueck and Miceli examine various property theorists to define the relationship between economics, property law and property rights law.³⁶⁴ A discussion of early theorists includes the work of Hobbes (1651), who argued for ‘a state of nature’ and open access dissipation in resource rights. The consideration of property rights as a ‘social institution of incentives to use assets’ was analysed by the Enlightenment group of Blackstone (1766), Hume (1739-1740), Locke (1690) and Smith (1776).³⁶⁵ The analysis of each theorist’s material is beyond the scope of this thesis however it is acknowledged that in terms of the development of Western legal theories these individuals have had a significant influence.

If I relate the theories of Blackstone, Hume, Locke and Smith to the Aboriginal beliefs, values and laws to explain the Aboriginal use of land or water, the following assumptions would result. From John Locke’s theoretical position Aboriginal peoples are to

³⁶¹ *Milirrpum v Nabalco* (1971) FLR 141, 259. This section refers to the colony being settled in South Australia in 1840.

³⁶² David Lametti, ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003) 53 *University of Toronto Law Journal* 22.

³⁶³ Dean Lueck and Thomas J Miceli, ‘Property Rights and Property Law’ (2004) *University of Arizona* 1.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

acknowledge that land and the resources upon it or beneath it have been created by God.³⁶⁶ Where Aboriginal peoples do not seek to use the lands and resources, for example, in developing and labouring on the land, this is against God's declaration that humankind has dominion over the land and resources.³⁶⁷ Proprietary rights and interests are based on natural law which underpins a natural right to property. If Aboriginal peoples do not labour and maximise these resources, then no private property rights or interests would exist.³⁶⁸ Locke's theory is said to have 'legitimated the theft of lands and resources of the native peoples in America' on the basis of natural law assumptions.³⁶⁹

David Hume³⁷⁰ rejected the position held by natural law theorists but viewed property rights through a utilitarian approach, and putting forward that such laws were the result of social convention and individuals thus subordinate to the law.³⁷¹ Hume held the view that by the creation of wealth and private property there would be benefits flowing onto the community at large; however, the disadvantaged and the oppressed would still exist.³⁷² Hume's position would force Aboriginal peoples to reject communal or customary title and Aboriginal laws which govern law relationships in order to buy in to private property in the expectation that most or some of the community members would create wealth from owning property; those that did not achieve property ownership would remain socially and financially disadvantaged or at the will of those in the community who accumulated wealth. Hume's perspective on private property appears to resemble the Australian Government's (both Labour and Liberal) Aboriginal policy to convert Aboriginal communal land to leased land to create private land ownership in lots.

³⁶⁶ Bruce Ziff, *Principles of Property Law* (Carswell, 5th ed, 2010) 36-41. See J Locke, *Two Treatises of Government* (New York: American Library, Mentor ed, 1963, 1690) and J Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration*, J W Gough (ed), Basil Blackwell, Oxford, 1946).

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Ibid 39.

³⁷⁰ See David Hume, *A Treatise of Human Nature*, T H Green and T H Grose (eds), (Longmans, Greens and Co, 1874) in Bruce Ziff, *Principles of Property Law* (Carswell, 5th ed, 2010).

³⁷¹ Samantha Hepburn, *Principles of Property Law* (Routledge-Cavendish, 3rd revised ed 2006) 7-8.

³⁷² Ibid.

If Adam Smith's 'Wealth of Nations'³⁷³ theory is applied, then the economic competition in the open market would eliminate any inequality or inefficient institutions, companies, Aboriginal organisations, or not-for-profit bodies because the market would create balance through competition.³⁷⁴ If this policy were to be implemented on Aboriginal communities, who numerically do not have the critical mass as a community nor the wealth to enter into competitive markets, it would prevent Aboriginal individuals or communities from having any major role in the Australian economy; chapter 6 of the thesis examines the issue of increasing Aboriginal wealth creation through water property rights and interests.

Lueck and Miceli highlight a failure to link the economics of property law and property rights within a property paradigm.³⁷⁵ Attention to economics in property rights and property law is justified, Lametti (2003) states, because they are 'objects of social wealth'³⁷⁶ in society and focus on the economic value of natural resources and land. Since the introduction of national water reforms, 'objects of social wealth' are accumulating through the economic value in water as a property right and asset.

The water rights and interests themes examined by Lueck and Miceli address relevant issues for Aboriginal peoples. One of the significant water issues is the inalienability of property rights such as native title, which is highly relevant to Aboriginal wealth creation. According to Lueck and Miceli, the principle of inalienability suspends or restricts the transfer of an asset or water resource, or prohibits a particular water use, and ensures the water resource is not transferred or traded out of the location where the water exists.³⁷⁷

Lueck and Miceli argue that to 'measure and define water according to consumptive use is very costly', because water is a 'complex asset' where instead 'water rights should be defined above water diversion, consumption and water quality'; defining water rights as

³⁷³ J C Smith and David N Weisstub, *The Western Idea of Law* (Butterworths, 1983) 581.

³⁷⁴ Ibid.

³⁷⁵ Dean Lueck and Thomas J Miceli, 'Property Rights and Property Law' (2004) *University of Arizona* 1.

³⁷⁶ David Lametti, 'The Concept of Property: Relations through Objects of Social Wealth' (2003) 53 *University of Toronto Law Journal* 14.

³⁷⁷ Ibid 54-55.

property rights does not allow for economic fundamentals when restrictions are required.³⁷⁸

In Michael Crommelin's 'Economic Analysis of Property' (1984) a redefinition of the concept of property rights is examined through an economic analysis. Crommelin uses case law to analyse the characterisation of property rights – for example, *Milirrpum v Nabalco*,³⁷⁹ *Dorman v Rodgers*³⁸⁰ and *Commonwealth v Tasmania*.³⁸¹ Crommelin's essay shows a lack of depth in his discussion of property rights and various legal issues of constitutional law, professional practice and Aboriginal land rights, wherein the proprietary interests in these cases were diverse and the traditional relationship of Aboriginal peoples to the land was not analysed.³⁸²

Crommelin points out that there should be further debate on the ethical considerations in Posner's position on property rights, where Posner argues that the law promotes efficiency in resource allocation.³⁸³ The incorporation of ethical considerations in property law discourse is a valid point and relevant to any discussion on resource rights.

James Tully (1994) analysed the property system of the conceptual framework of Aboriginal property in relation to Western theory concepts,³⁸⁴ arguing that most Western theories of property do not provide an impartial framework for Aboriginal peoples.³⁸⁵ Although Tully (1994) analyses his position in comparison with New Zealand, Canada and the United States, the author provides a comprehensive summation of Western property theorists and the influence that their interpretations of property have generally

³⁷⁸ Ibid 53-55.

³⁷⁹ (1971) 17 FLR 141.

³⁸⁰ [1982] 148 CLR 365.

³⁸¹ [1983] 158 CLR 1.

³⁸² Michael Crommelin, 'Economic Analysis of Property', in D J Galligan (ed), *Essays in Legal Theory* (Melbourne University Press, 1984) 74-77.

³⁸³ Ibid 83.

³⁸⁴ James Tully, 'Aboriginal Property and Western Theory: Recovering a Middle Ground' in E F Paul, F D Miller and J Paul (eds), *Property Rights* (Cambridge University Press, 1994) 153.

³⁸⁵ Ibid.

had – that is, a significant negative impact on the recognition of Aboriginal property rights.³⁸⁶

Given the vastly different ways in which British law and institutions were introduced and in which native peoples were treated in various regions ... it is not surprising to find certain First Nations armed with better common law, treaty and/or legislative arguments than other First Nations when formulating their claims to lands and resources.³⁸⁷

Tully acknowledges the importance of Indigenous legal scholars ‘reconstructing’ and shifting the paradigms of Western theories to assert the full recognition of Aboriginal property systems.³⁸⁸ In relation to the water rights of Aboriginal peoples in Australia, the examination of Western property theories is important to understand how Aboriginal water rights and interests are framed within Western proprietary rights and interests. Australian Government policy of separating the water from the land and importing a Western economic framework, such as in the National Water Initiative, in regulating water resources as a commodity has had significant and lasting consequences for Aboriginal water use.

As the following discussion highlights – Western theories of property take the view that people were in a ‘state of nature’ prior to the establishment of a legal property system, are bound by their shared history of authoritative traditions derived from European history.³⁸⁹

Tully argues that there are two views in the literature on Aboriginal property, one proposes Aboriginal self-government separate to the Western legal system and the other view recognises that the colonial occupation is ‘just and effective’.³⁹⁰ Tully proposes the recognition of Aboriginal and non-Aboriginal systems as normative frameworks and that

³⁸⁶ Ibid 154.

³⁸⁷ Mark Walters, ‘Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada’ (1998) 23 *Queens Law Journal* 368.

³⁸⁸ Ibid 154.

³⁸⁹ Ibid 155.

³⁹⁰ James Tully, ‘Aboriginal Property and Western Theory: Recovering a Middle Ground’ in E F Paul, F D Miller and J Paul (eds), *Property Rights* (Cambridge University Press, 1994) 157.

any changes to or reconstructions of property law should be negotiated through both systems.³⁹¹

Historically, Western conceptions of property have harmed Indians. The earliest settlers used their understanding of property and ownership to expropriate tribal lands ... the Court has repeatedly upheld the imposition of Western property values upon Indian tribes as a means of determining the future of Indian lands ... *McIntosh* opinion demonstrated how courts, as institutions created by the Western legal tradition cannot escape from Western notions of property even when the Court believes those notions produce unjust results.³⁹²

Tully also points out that the property theory argued by John Locke³⁹³ was used by governments to establish and justify Western property systems in the colonisation of Indigenous countries,³⁹⁴ because Locke argued that when the land is ‘vacant and uncultivated’ by labour it can be settled by Europeans.³⁹⁵ Locke bypassed the Western legal systems, ‘principle of consent’³⁹⁶ in his theory, in spite of his self-asserted knowledge of Native American society Locke argued against Aboriginal property rights.³⁹⁷ However, in 1823 the United States Supreme Court in *Johnson v M’Intosh*³⁹⁸

³⁹¹ Ibid 157-158.

³⁹² Marcia Yablon, ‘Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land’, (2004) 113 *Yale Law Journal* 1623, 1634-1635. Yablon (2004) quoting Eric Kades ‘The Dark Side of Efficiency: *Johnson v M’Intosh* and the Expropriation of American Indian Lands’ (2000) 148 *University of Pennsylvania Law Review* 1065, 1076 refers to *Johnson v M’Intosh* (1823) 21 US whereby the British government in the New World refused to recognize the Indians as true title holders; the decision of *Johnson v M’Intosh* (1823) provided Virginia’s earliest settlers with a theoretical basis to deny Indian title, as the Puritans could not accept that hunter-gatherers were really occupants of their lands.

³⁹³ James Tully, ‘Aboriginal Property and Western Theory: Recovering a Middle Ground’ in E F Paul, F D Miller and J Paul (eds), *Property Rights* (Cambridge University Press, 1994) 158-160. Tully (1994) refers to John Locke’s four sets of arguments presented in the ‘Second Treatise of the Two Treatises of Government (1690) in John Locke, *Two Treatises of Government*, Peter Laslett (ed), (Cambridge University Press, 1970).

³⁹⁴ Ibid 158.

³⁹⁵ Ibid 160.

³⁹⁶ Ibid. As quoted in Tully (1994) ‘quod omnes tangit ab omnibus tractari et approbari debet’ meaning ‘what touches all must be agreed by all’; a founding principle for a legitimate property acquisition.

³⁹⁷ Ibid 163-164.

³⁹⁸ *Johnson v M’Intosh* (1823) 21 US.

held that Native Americans were ‘admitted to be rightful occupants of the soil, with a legal as well as a just claim to retain possession’.³⁹⁹

Tully⁴⁰⁰ refers to Marshall CJ held in *Worcester v State of Georgia* (1832) to point out the Court’s recognition of Native peoples, ‘rightful occupancy’:⁴⁰¹

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter could have rightful original claims of dominion over the habitants of the other, or over the lands they occupied ...⁴⁰²

In his concluding argument, Tully argues that in Canada and the United States there exists a normative constitutional history between Aboriginal peoples and the common-law system which has been negotiated within a range of adversarial relations, and based upon the concept of guardianship in the United States and on the concept of fiduciary trust between the Crown and the First Nations in Canada.⁴⁰³ The earliest legal recognition by the Crown transpired when Canadian Indigenous rights to occupation were recognised under the Royal Proclamation of 1763.⁴⁰⁴

As Tully points out, property theories cannot ignore the existence of Aboriginal property, and Western ‘institutions and traditions’ cannot claim exclusive authority in property

³⁹⁹ Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Federation Press, 1987) 134.

⁴⁰⁰ James Tully, ‘Aboriginal Property and Western Theory: Recovering a Middle Ground’ in E F Paul, F D Miller and J Paul (eds), *Property Rights* (1994) 155.

⁴⁰¹ *Worcester v State of Georgia* 6 Peter 515 (USSC 1832).

⁴⁰² James Tully, ‘Aboriginal Property and Western Theory: Recovering a Middle Ground’ in E F Paul, F D Miller and J Paul (eds), *Property Rights* (1994) 153-155. As quoted in Tully (1994) from John Marshall, *The Writings of Chief Justice Marshall on the Federal Constitution*, (Littleton and Fred B Rothman, 1987) 426-427.

⁴⁰³ Ibid 179.

⁴⁰⁴ Ibid 159.

law.⁴⁰⁵ However, for many Native peoples in the United States, recognition of their property rights has failed to meet their expectations:

Neither the courts, nor legislatures, nor agencies have defined the two key elements of the right: its scope, including the quantity of water affected and the priority of the right, and its uses, including transferability of the right and permissible applications ...⁴⁰⁶

Bradley Bryan, in 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000), examines the philosophy that underpins Western conceptions of property law and questions whether Western property regimes are a compatible methodology for interpreting Aboriginal culture.⁴⁰⁷ Bryan points out that cross-cultural interpretation to understand these property regimes are complex and that our ontological cultural identity provides the concepts for property, our social relations and how we interpret the environment.⁴⁰⁸ For example, when Europeans arrived to settle North America and the settlers constructed their property law on the land as *terra nullius*, the Western concept of Aboriginal property norms was viewed as inconsistent with Western liberal principles of property.⁴⁰⁹ Simpson (1978)⁴¹⁰ explains that:

[t]he common law right of American Indians to self-government is an inherent right which stems from their own retained sovereignty and not from governmental recognition. Treaties did not provide the source of the relevant rights.⁴¹¹

Bryan argues that understanding Aboriginal ontological concepts in property does not translate into the same values contained in Western legal concepts of property:⁴¹²

⁴⁰⁵ Ibid.

⁴⁰⁶ Anon, 'Indian Reserved Water Rights: The *Winters* of Our Discontent' (1979) 88 *Yale Law Journal* 1694 <http://www.garfield.library.upenn.edu/histcomp/posner-econ-anal_all/node/185.html>.

⁴⁰⁷ Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understanding of Ownership' (2000) 13(3) *Canadian Journal of Law and Jurisprudence*.

⁴⁰⁸ Ibid 1.

⁴⁰⁹ Ibid 2.

⁴¹⁰ Tony Simpson, 'Submissions Re: Domestic Dependant Nations' ('Unpublished Working Paper', 2004)

1.

⁴¹¹ Ibid 4. Simpson (2004) cites *United States v Wheeler* (1978) 435 US 313 [327, 328].

As we approach Aboriginal society in our quest to find property, we inevitably name practices and customs ... we set out on a dialogical excursion that is neither invited nor welcomed by Aboriginal peoples. This is because to re-describe native reality is to actually change native reality: changed descriptions create new webs of meaning, and hence practices, identity, and worldviews will all be affected.⁴¹³

Bryan's analysis of English conceptions of property argues that the ontological status of English conceptions is rooted in the fundamental identity of the English, where language conveys a metaphysical understanding.⁴¹⁴ The ontological understanding of Aboriginal property, on the other hand, is blended through Western property concepts – for example, by applying simplistic interpretations of the Aboriginal creation story, blending the meaning of ownership into common law framing and constructing a false Aboriginal identity.⁴¹⁵

Neither the common law nor the provisions of the *Native Title Act 1993* (Cth) constitute a bulwark against the presence of Western influences,⁴¹⁶ whereby Western conceptions of native title have resulted in the reconstruction of Aboriginal traditional laws and customs, with the result that they now bear little resemblance to Aboriginal ontological meanings.

In Australia, the *De Rose* decisions of 2003 and 2005⁴¹⁷ articulated the depth of human relationships to water resources experienced by Anangu peoples. The language embeds Aboriginal meaning into the right to use water and the traditional obligations to water resources managed by Nguraritja under a direct personal interface to 'country' from birth. The depth of the Anangu relationship with water is unfamiliar to Western tenure systems. The examination of ontological discourse argued by Bryan (2000) shifts the property paradigm towards understanding how Western reconstructions often misrepresent

⁴¹² Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understanding of Ownership' (2000) 13(3) *Canadian Journal of Law and Jurisprudence* 2.

⁴¹³ Ibid.

⁴¹⁴ Ibid 7.

⁴¹⁵ Ibid 8.

⁴¹⁶ *De Rose v South Australia* No 1 (2003) 133 FCR 325.

⁴¹⁷ Ibid. See *De Rose v South Australia* No 2 (2005) 145 FCR 290.

Aboriginal property concepts in looking to contextualise Aboriginality through English property concepts. These themes will be examined throughout the thesis chapters.

3.3 The Justification of the Thesis Methodology

The reason that the thesis is focused upon an Aboriginal narrative in the articulation of water property rights and interests is because it is a legitimate belief, from an Aboriginal perspective, that land and water are inseparable and Aboriginal ownership exists in both. The development of Indigenous methodologies by Indigenous Australians with respect to the nature of Aboriginal water rights and interests is in the early stages of legal and academic enquiry. Although there are commonalities among Indigenous peoples in other common law countries such as Canada, New Zealand and the United States, their approach and their respective treatment of legal research in Aboriginal jurisprudence is written from a different historic and contemporary experience that flows from their relationship with the invading colonial nation.

According to Indigenous lawyers Megan Davis and Hannah McGlade, ‘the problems that Indigenous peoples experience within state legal systems are common among other Indigenous groups around the world’.⁴¹⁸ Further research on a comparative analysis of Australia to similar common law jurisdictions would be beneficial in developing Aboriginal water rights jurisprudence.

However, a comparative analysis and treatment of the commonalities and points of difference between other jurisdictions and Australia on the question of Aboriginal water rights and interests would be vast, and beyond the scope of this thesis.

Aboriginal peoples in Australia have experienced a distinct relationship with an invading colonial power and an extensive literature exists on the deconstruction of colonisation

⁴¹⁸ Megan Davis and Hannah McGlade, ‘International Human Rights Law and the Recognition of Aboriginal Customary Law’ (‘Background Paper’ No 10, Law Reform Commission of Western Australia, March 2005) 3.

and Aboriginal land rights. Over time, a body of Aboriginal legal theory will analyse Aboriginal water rights and interest through Aboriginal scholarship, whereby a Aboriginal Australian deconstruction and conceptual framework will evolve. The legal, social and cultural paradigms that have informed land rights discourse in Aboriginal jurisprudence, as a legitimate contribution to legal systems, is equally important for Aboriginal water rights and interests in Australia.

The analysis of Aboriginal water tenure exhibits a complexity of its own.

Traditional tenure systems have a profound and complex influence in the present. There is multiple ownership, where, for example, a single land area of say 500 km² may have five large families who can claim the use of that area through their grandmothers' or grandfathers' lines.⁴¹⁹

There are a number of approaches I could have taken to examine Aboriginal water rights and interests in Australia. One approach would have been to argue from a theoretical framework of human rights or to critique the conceptual framework through the impact of colonisation. My approach for this thesis research was to examine the broader framework of legal and institutional settings in Aboriginal water rights and interests but at the same time ensure that Aboriginal water values were recognised and characterised within their unique value systems. Mick Dodson, former Aboriginal and Torres Strait Islander Social Justice Commissioner, has argued that 'Aboriginal people must take responsibility for defining themselves in order to articulate and reinforce their own identity'.⁴²⁰ The approach taken in this thesis is to 'articulate and reinforce Aboriginal identity'⁴²¹ through the lens of Aboriginal ontological values in water.

The methodology I have adopted is designed to investigate the way in which Australian law and policy frameworks have systematically failed to recognise the inherent, ancestral

⁴¹⁹ Fiona Walsh and Paul Mitchell (eds) *Planning for Country: Cross-Cultural Approaches to Decision Making on Aboriginal Lands* (Jukurrpa Books, 2002) 9.

⁴²⁰ Christine Choo, *Mission Girls: Aboriginal Women on Catholic Missions in the Kimberley, Western Australia, 1900-1950* (University of Western Australia Press, revised ed, 2004) 20.

⁴²¹ Ibid.

water rights and interests of Aboriginal peoples and failed to recognise that Aboriginal water rights and interests should be elevated above the water use of other stakeholders; and analysis of the issues are dealt with in the thesis.

It will be argued that this systematic failure stems from a set of legal fictions analogous to *terra nullius* – that is, the failure to accept Aboriginal ontological concepts of water tenure, the failure to incorporate the holistic Aboriginal law concepts of the inseparability of land and water rights, and the centrality of these rights and interests in the tangible and intangible well-being of Aboriginal peoples.

The Aboriginal and Torres Strait Islander Social Justice Commissioner highlighted in the Social Justice Report 2008 that

As both international and Australian research has documented extensively, improvements to the general wellbeing of Indigenous peoples are most effectively achieved in a framework that recognises Indigenous rights and culture, and supports Indigenous governance mechanisms.⁴²²

3.4 The Significance of the Thesis Methodology

The significance of the thesis is that it provides an important contribution to Aboriginal water law discourse and jurisprudence, and examines Aboriginal water values within the framework of Aboriginal laws and ontological meaning, relates the impact of British settlement upon the continued access and use of water by Aboriginal peoples, identifies the impact of Western concepts of water on Aboriginal water concepts, the notion of water property rights in native title, provides an analysis of the legal and policy framework of Aboriginal water rights and interests in Australia. Further, in Chapter 5 on the Murray-Darling Basin system, it examines the significant impact of the national water

⁴²² Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice Report 2008', (Human Rights Commission, Sydney, 2009) 24.

reforms on Aboriginal water use and the serious effects of over-allocation of water resources in this Basin system to a range of stakeholders.

The Action Research approach as discussed earlier in this chapter has provided substantial guidance in my approach to analysing the themes within the chapters. The thesis examines the regional and national significance of recognising and responding to Aboriginal peoples' water rights and interests, and sets out to identify the national 'priority to engage with Aboriginal peoples in the policy reform process'.⁴²³ Because 'the Australian water framework is dominated by managing water resources through market values',⁴²⁴ it poses challenges to the rights and interests of Aboriginal peoples. The thesis will contribute to understanding the significant impact of separating water from the land and the consequences this has for Aboriginal water values. It argues the importance of meaningful Aboriginal consultation and participation, in order to fully incorporate Aboriginal water rights and interests in the national water reform process.

In the National Water Commission's 2011 Biennial Assessment to assess the jurisdiction's implementation of sustainable water resource management targets under the National Water Initiative, the Commission reported that meeting the Indigenous water provisions of the National Water Initiative was a 'legitimate strategy for contributing to the national policy strategies in *Closing the Gap*'.⁴²⁵

⁴²³ Sue Jackson, 'Indigenous Interests and the National Water Initiative: Water Management, Reform and Implementation' ('Background Paper and Literature Review', Northern Australian Indigenous Land and Sea Management Alliance and Commonwealth Scientific and Industrial Research Organisation Sustainable Ecosystems, October 2007) 99.

⁴²⁴ Jon Altman assisted by V Branchut, 'Fresh Water in the Maningrida Region's Hybrid Economy: Intercultural Contestation over Values and Property Rights' ('Working Paper', No 46, Centre for Aboriginal Economic Policy Research, Australian National University, 2008) 37.

⁴²⁵ National Water Commission, 'The National Water Initiative: Securing Australia's Water Future' ('Report', Australian Government, 2011 Assessment) 46. See the Australian Government 'Closing the Gap: Indigenous Economic Development Strategy 2011-2018' (November 2011) <<http://resources.fahcsia.gov.au/IEDS/intro.htm>>. The 'Indigenous Economic Development Strategy 2011-2018' does not include recognition of Indigenous water rights and interests within the strategy. See Council of Australian Governments 'National Indigenous Reform Agreement *Closing the Gap*' (September 2012) <http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/national-agreement_sept_12.pdf>. The 'National Indigenous Reform Agreement' does not include Indigenous water rights and interests within the reform agenda.

Further, the Commission identified the need for ‘more effective mechanisms to identify and address the social, spiritual and customary water interests of Indigenous peoples’.⁴²⁶ This thesis research will contribute to an emerging body of knowledge on Aboriginal rights, and demonstrate the crucial role of shaping water policy and law upon a social, economic and cultural Aboriginal framework.

3.5 The Rationale to the Thesis Methodology

The decision to adopt this methodology is based upon a number of factors – in particular, the recognition that an Aboriginal paradigm of land, water and other resources is bound by Aboriginal laws and the laws of Australia. That the cultural diversity of Aboriginal communities represents distinct and particular water values, where Aboriginal water rights and interests discourse incorporates social, cultural and economic frameworks.

To embark upon examining and analysing how Aboriginal communities currently exercise water rights and interests under the National Water Initiative, and the native title system within Australia, it is necessary to question whether Aboriginal communities enjoy the same rights and interests to water that they have always enjoyed. Both Aboriginal and non-Aboriginal parties in contesting water held that a right existed, as a property right:

In Uluru and Nitmiluk National Parks of the Northern Territory, the recognition of traditional ownership was challenged on the basis that ‘national parks should belong to all Australians’.⁴²⁷

The rationale for positioning the question as an ‘Aboriginal claim for water property rights and interests’ is predicated on the premise that Aboriginal communities assert their

⁴²⁶ Ibid 45.

⁴²⁷ Robert Blowes, ‘From *terra nullius* to Every Person’s Land: A Perspective from Legal History’ Australian Institute of Aboriginal and Torres Strait Islander Studies Report Series, Jim Birkhead, Terry De Lacy and Laurajane Smith (eds), (Paper presented at a conference in Albury NSW 22-24 July 1991 ‘Aboriginal Involvement in Parks and Protected Areas’) 149.

claim because they are ‘First Peoples’ of Australia, and their sovereignty has not been ceded. In contrast, Western water values from Blackstone’s ‘*Commentaries*’ on water rights, articulate water use ‘as a type of corporeal right that is transient to the public but subject to individual property and title’.⁴²⁸

This Western legal perspective exercises its powers as a ‘derivation of legal practice from immemorial custom of the common law’.⁴²⁹ Joshua Getzler asserts that an intellectual conceptualism resides in common law concepts to ‘capture the meaning and significance of its evolution’.⁴³⁰

When Aboriginal peoples articulate the meaning of ‘claiming property rights in water’, the notion of property is derived from Aboriginal laws. An Aboriginal creation story may define the communal property rights in water. For example, where serpents and other ancestral spirits live on or beneath the water, this governs the right to access and use water. The methodological approach of the thesis is to facilitate the discourse from an Aboriginal perspective and not to limit the thesis in a narrow theoretical analysis.

Whatever governments might say, customary law is a reality for many indigenous people. I think a great challenge is how we come to terms with that. Do we just deny its existence? Do we try and repress it, stamp it out? Or do we find some appropriate, democratic way to accommodate it and to respect it within limits? And of course much of the debate around this issue will depend on what those issues might be.⁴³¹

The Western economic value attributed to water resources created by the separation of land from water has positioned Aboriginal customary water use as less important.

⁴²⁸ Joshua Getzler, *A History of Water Rights at Common Law* (Oxford University Press, revised ed, 2006) 154.

⁴²⁹ Ibid 156.

⁴³⁰ Ibid 342.

⁴³¹ Robert Tickner, *Indigenous Customary Law Forum*, Parliament House, 18 October 1995 (Australian Government, 1996) 6.

The courts may find it difficult to accept that a native title holder who, for example, takes water from a river for the purpose of watering his/her domestic garden, is doing in furtherance of a 'cultural or spiritual' activity, even though the activity is for the purpose of satisfying his/her personal, domestic and non-commercial needs and pursuant to a native title right.⁴³²

Trade and reciprocity in Aboriginal communities has been documented to exist in traditional marine systems and land. Aboriginal marine tenure forms an inherent part of Aboriginal water values and rights.

The concept of customary marine tenure, or any native title rights in the sea, is particularly problematic for the dominant, largely European culture in Australia, which regards the sea as open common.⁴³³

Connor and Dovers (2002)⁴³⁴ defined four types of property rights, which do not include Aboriginal customary rights.

Open access as the absence of well defined property rights, often unregulated and free to everyone;

Common property as a resource held by community users, excluding outsiders, may self-regulate, appropriate uses may still be defined by larger society or external power;

State property as resource rights held by government that may regulate access and exploitation, may grant free public access, and use force to enforce rules; and

⁴³² Email from David Collard to Virginia Falk, State Solicitor's Office Western Australia, 'Water Resources Management Bill, Water Entitlements and their Administration', Reference 1851-08, 18 April 2008, 4.

⁴³³ Dermot Smyth and Johanna Sutherland, 'Indigenous Protected Areas: Conservation Partnerships with Indigenous Landholders' ('Report', Environment Australia, November 1996) 156.

⁴³⁴ Robin Connor and Stephen Dovers, 'Property Rights Instruments: Transformative Policy Options' in *Property: Rights and Responsibilities, Current Australian Thinking* ('Discussion Paper', Land and Water Australia, 2002) 119.

Private property, where the individual has a right to specified use of the resource, to exclude others from use, and to sell or rent the property to others.⁴³⁵

Bradley Bryan, in 'Property as Ontology' (2000), examines the Aboriginal and English conceptions of property and property law, arguing that Aboriginal property values exist within a 'complex metaphysical understanding of relations'.⁴³⁶ The cultural differences in Aboriginal economic values or property rights consist of Aboriginal values and do not resemble Western value systems and norms.⁴³⁷ Aboriginal cultural identity is far more complex.

Indigenous Australians express their cultural identity through many ways including songs, stories, dance and art. This intangible cultural heritage is interconnected with land, seas, places and objects. Despite this, the debate regarding protection of Indigenous cultural heritage has focussed on the land, seas, places and objects. The non-Indigenous laws relating to Native title, land rights and cultural heritage have developed to protect tangible culture. However, for Indigenous people, cultural heritage is holistic in that the tangible is interconnected with the intangible.⁴³⁸

Bryan argues that 'property accords an indicator of social relations, as a socio-cultural and philosophical concept'.⁴³⁹ In Aboriginal communities the traditional concept of water forms the familial property relationship, as following chapters will analyse. Aboriginal water use and the exercise of these customary legal obligations are simply inherent within

⁴³⁵ Ibid. Connor and Dovers (2002) cite Burger et al (2001).

⁴³⁶ Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000) 13(3) *Canadian Journal of Law and Jurisprudence* 1
<<http://au.westlaw.com/result/documenttext.aspx?RS=WLAU4.09&VR=2.0&SP=Fed>>.

⁴³⁷ Ibid.

⁴³⁸ Terri Janke, 'Indigenous Cultural Expression and Intellectual Property' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 61.

⁴³⁹ Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000) 13(3) *Canadian Journal of Law and Jurisprudence*
<<http://au.westlaw.com/result/documenttext.aspx?RS=WLAU4.09&VR=2.0&SP=Fed>>.

the whole paradigm of Aboriginal water concepts, including social, cultural, spiritual and economic values.

The central point in Bryan's essay is that interpreting Aboriginal property rights through Western ideology is ineffective.⁴⁴⁰

By focussing on a comparison of English conceptions and Aboriginal conceptions, we highlight the method that lies hidden in our own conception. That method is a very particular kind of social relation ... The main issue, then, is not whether Aboriginal societies have conceptions of property and what those are, but *rather how an analysis of other culture's ways of life, using our terms, serves to rationalize that other way of conceiving of the human's relationship with the world-at-large in our own terms ... at best, an over-the-counter cultural interrogation that colonizes by actually creating a picture of society and reality that is not there. The purpose of our comparison, therefore, is to demonstrate that what we risk in subsuming Aboriginal social relations into the language of proprietary institutions is a full-scale eradication of those specific ontological grounds.*⁴⁴¹

However Arnold (2002), in his attempt to articulate a new metaphor for 'understanding property through a web of interests' and not as 'individual sticks in the property bundle' establishes a metaphor which is more analogous to Aboriginal ontology.⁴⁴²

[t]he rights most commonly identified with the property bundle include the right to exclude others, the right to possess, the right to use, and the right to alienate or to manage, receive income, be secure and maintain quiet enjoyment.⁴⁴³

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

⁴⁴² Craig Anthony Tony Arnold, 'The Reconstruction of Property: Property as a Web of Interests' (2002) 26 *Harvard International Law Review* 285.

⁴⁴³ Ibid.

Arnold's critique suggests that 'people are connected to things' in a 'web of rights', not as a 'bundle of rights'.⁴⁴⁴

[t]here is a less cohesive body of theoretical scholarship with an expectations theory of property law than the environmental and personhood theories, in spite of a wide range of scholars and judges who emphasise the role of property in protecting peoples' justified expectations.⁴⁴⁵

Bryan (2000) also argues that Aboriginal and Western concepts have a 'specific web of intra-specific meaning' that repels 'centralized' meanings because of the 'fundamental difficulty in cross-cultural interpretation'.⁴⁴⁶

The bundle of rights theory is the dominant paradigm applied by Western legal philosophers, combining the theories of Hohfeld and Honore. The difference between personal and proprietary rights is that proprietary rights can be enforced as against the rest of the world ...⁴⁴⁷

The bundle of rights concept as explained earlier is not useful for explaining native title or Aboriginal rights and interests because its values are not Aboriginal. To understand Aboriginal values in water within an Aboriginal property paradigm it is fundamental to define 'value'. Lametti (2003) defines the meaning of 'value' within a social resource concept.⁴⁴⁸

Value is a critical concept; the way in which we assign value focuses on use and exchange of particular resources. The common method of valuation in Western

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000) 13(3) *Canadian Journal of Law and Jurisprudence* <<http://au.westlaw.com/result/documenttext.aspx?RS=WLAU4.09&VR=2.0&SP=Fed>>.

⁴⁴⁷ Katy Barnett, 'Western Australia v Ward One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' (2000) 24 *Melbourne University Law Review* 469. Barnett cites Hohfeld (1923), Honoré (1961), Penner (1996), Becker (1977) and Waldron (1988).

⁴⁴⁸ David Lametti, 'The Concept of Property: Relations through Objects of Social Wealth' (2003) 53 *University of Toronto Law Journal* 14.

market society is the exchange mechanism ... such is the case with land and water.⁴⁴⁹

Lametti (2003) argues that the social nature of property precludes the concept of property as only a creature of legal positivism because property is equally immersed in morality.⁴⁵⁰ From an Aboriginal perspective, Aboriginal laws inform on morality because of the social order incorporated within the laws of Aboriginal peoples and inherent kinship relationships.

The Boomanulla Principles maintain that the recognition of cultural diversity leads to recognition of vast sources of Aboriginal knowledge about water catchments and recognises Aboriginal communities as a major stakeholder in natural resource management and having a justified claim to a share of the economic benefits.⁴⁵¹ The Report (2002) argues that

[g]iven the spiritual and traditional ownership rights of Aboriginal people the communities should have an equitable share of and real access to any proposed water markets.⁴⁵²

The contextual meaning of Aboriginal water values and property rights to water under customary rights and interests are not easily defined in a Western policy framework because concepts such as 'cultural, social and spiritual' are limited in their capacity to identify Aboriginal values. The bundle of rights concept fails to describe Aboriginal rights and interests because among other things, it fails to take account of kinship relationships and communal title.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid 23.

⁴⁵¹ Jason Behrendt and Peter Thompson, 'The Recognition and Protection of Aboriginal Interests in NSW Rivers' (2004) 3 *Journal of Indigenous Policy* 67.

⁴⁵² New South Wales Aboriginal Land Council and the Department of Land and Water (NSW), 'A Report on the Boomanulla Conference for Country' (Paper presented at the Boomanulla Conference for Country, Canberra, 5-6 March 2002) 10.

Customary Aboriginal laws are not bundles of separate values. Aboriginal meanings in water hold ontological ‘expression’ that is interconnected to the tangible and intangible, as a holistic paradigm. In addition, Australian concepts used to express economic values in water legislation are ineffective because Aboriginal marine tenure and other inland and coastal water rights exist within ‘a web of Aboriginal interests’ that are defined through relationships, with the environment and with one another. In contrast, Australian economic values in water are in the main determined through private property ownership where market values are determined by supply and demand.

The thesis methodology forms the foundation to examine and analyse a range of significant issues in Aboriginal water rights discourse, as cross-disciplinary jurisprudential research, with the aim of identifying areas for law reform in water law and policy.

3.6 Methodology for the Thesis Research

The basic methodology used for this research is library research, including electronic sources in legal research when hardcopy sources were not available, and use was also made of the internet as a supplementary tool. Primary sources of law such as legislation, Bills, the Australian Constitution, and case law were thoroughly analysed to provide a systematic exposition of the law.

Further, a thorough coverage and examination of publicly available international and Australian resources was undertaken, which included reports, parliamentary committee reports, research papers, journals, textbooks, books, articles, conference papers, public commentary, Aboriginal oral stories, policy manuals and newspaper articles. The purpose of including newspapers as a source was to reflect the handling of the issues within public and media commentary during the national and regional debate on water rights and interests.

During various stages of my discussions with my doctoral supervisors I had flagged on a number of occasions that I would not be undertaking human research or gathering data from human subjects (or researching animals) and that my research did not include the use of surveys, questionnaires or like. Therefore the instructions that I received from my supervisors that I did not need to apply for ethical clearance with Macquarie University. At no time has the university communicated to me that I would be required to make an application to the Research Ethics Committee of the university for the research purpose I have outlined.

The information gathered during periods of my employment by way of my own personal communication with other individuals, such as my emails and memos, and in personally drafting and preparing non-classified legal and policy advice (which has provided a significant body of knowledge for unpacking the legal issues in water rights and interests). My personal emails included in this thesis have been chiefly by communications between myself and David Collard in Western Australia; Mr Collard has provided written permission for me to include these in the thesis. I have recently investigated the Australian intellectual property laws governing ‘fair use’ dealings under the *Copyright Act 1968* (Cth) which provides an exemption for using such communications for the purposes of research and study. In addition I have requested the professional advice of Professor Natalie Stoinanoff, Director at the Faculty of Law at UTS Sydney and expert in intellectual property, and Professor Stoinanoff has confirmed that under the ‘fair use provisions’ there is no restriction on including my personal emails. In referencing the emails I have followed the Australian Guide to Legal Citation (3rd ed) to ensure the emails are cited under the guidelines.

Over the years I have received a cultural education from Senior Law men and women and Elders within community and I have included the most relevant communications in this thesis to particularise the passing on of knowledge and cultural events.

From the commencement of the thesis research I was acutely aware that using a quantitative methodology was not possible due to significant constraints on funding, as

well as the physical distances involved in the surveying, interviewing and collecting data from various Aboriginal communities on the question of water rights and interests, was highly impracticable, especially in view of my personal and employment responsibilities to family and community. The primary consideration in deciding on a methodology for undertaking this research was to providing an Aboriginal 'voice' on these issues and to contribute original research for the jurisprudential development of Aboriginal water law.

Other water stakeholders discussed in the thesis, such as the relevant departments, water user groups, legal practitioners and water agencies, raised my awareness in how Aboriginal water rights and interests were treated in Australia. The thesis draws upon an Aboriginal knowledge base which encompasses the diversity within Aboriginal culture in mainland Australia, as well as rural and remote regions.

Chapter 4: The Nature of Water Rights – Contested Notions of Water Use

This chapter examines how the nature of water rights in Australia has changed for Aboriginal peoples, from Aboriginal ownership in the waters, as a traditional, exclusive or shared possession, to the rising conflict between two distinct world views after British-European settlement. This chapter also examines why values in water held by Aboriginal peoples are integral to their exercising cultural obligations under Aboriginal laws. Aboriginal water values have often been described by non-Aboriginal Australia as cultural myths. An examination of how Aboriginal water values, water access and use represent Aboriginal relationships that sustain Aboriginal ‘belonging’ to water is undertaken.

Further, this chapter analyses the distinctions within Aboriginal water values in interpreting Aboriginal identity as ‘saltwater, freshwater and bitter water’ (brackish water, where fresh water meets saltwater) Aboriginal communities and their purpose in water rights. It explores the nature of Aboriginal community water rights and interests as customary property rights through examples of Aboriginal kinship and laws. The areas of incompatibility between Western philosophies of water resource use and the nature of Aboriginal water rights and use are explored through various examples of contested water values. This chapter does not attempt to make an Aboriginal critique of common law concepts of property. However the chapter argues the incompatibility of the Western legal system and Aboriginal system of laws.

4.1 Settler Competition for Water Resources

This part of the chapter will examine particular examples from the fierce battle which has stemmed from the competition for water and land rights on the arrival of the First Fleet from England in 1788. The chapter discusses the continual tension between Aboriginal peoples and the British settlement and its effect on Aboriginal peoples’ water use.

The chapter also examines how competing water interests, from settlement, affected Aboriginal peoples' customary property rights and interests. Aboriginal efforts to maintain their existing traditional boundaries and to exercise customary rights of access in the face of settler territorial expansion had dire consequences.

The disputed ownership between Aboriginal customary law and British law has centred upon two very different authorities, those of Aboriginal law and the Crown. The introduction of the colonial use of the land, waters and natural resources for exploitation was not compatible with Aboriginal resource use. British colonisation had imposed British values which were inapposite for land and water use policies held under Aboriginal values. Subsequent fierce competition over time disempowered Aboriginal peoples from exercising their customary rights and interests. The following statement illustrates that the British concept of common law riparian rights was inappropriate for Australian conditions:

[r]iparian rights were governed by the Common Law of England, a country where the climate is temperate and relatively humid, and where conditions are entirely different to those obtained in the arid and semi-arid lands, which constitute so large a part of the interior of America and of Australia.⁴⁵³

The encroaching growth of the British settlement from Sydney to the outer regions led to contention over the new colonial settlement and the demarcation of extant ancient Aboriginal boundaries. The significant weaponry used to ensure colonial establishment severely impeded Aboriginal resistance,⁴⁵⁴ and led to broader alienation from customary Aboriginal lands and waters.

Botany Bay, which had had a penal history of nearly half a century since 1788, was expanded and transformed so that before another half-century had passed the

⁴⁵³ H H Dare, *Water Conservation in Australia* (University of Queensland and Simmons, September 1939) 15. Dare was the former Commissioner, Water Conservation and Irrigation Commission, NSW and Commissioner of the River Murray Commission.

⁴⁵⁴ Bruce Elder, *Blood on the Wattle: Massacres and Maltreatment of Australian Aborigines Since 1788* (National Book Distributors, revised ed, 1994) 17.

Australasian group of colonies was next to India as the most important field for investment in the British colonial empire.⁴⁵⁵

An organised Aboriginal society was ‘observed’ and recorded in government archives as land was surveyed for settlement purposes. Howitt and Mathews, both anthropologists, wrote from their studies about Aboriginal ‘identifiable groups and communities that they had maintained traditional law, custom and rights’.⁴⁵⁶

An early account noted by a settler informed of:

[o]bservations of constructed ceremony grounds, and of ceremonies involving participants performing particular roles, indicative of the existence of an organised society.⁴⁵⁷

The commencement of the British colony in Australia had introduced not only a new legal system, but imposed upon Aboriginal peoples a new regime of social and political beliefs which bore no similarity to Aboriginal laws. In the expansion of the Sydney region towards the Hawkesbury, Parramatta, the Southern Highlands and Goulburn regions of the first colony of New South Wales, colonial planning impacted upon the exclusive Aboriginal use of water and land.

The progress of land grants made by the colonial Governor was often in a state of confusion prior to 1833 in New South Wales, which adopted a Court of Claims because the land was often sold numerous times prior to the final occupant being issued with the deeds in the settler’s name. Tenure was resolved with written documentation by the court.⁴⁵⁸

⁴⁵⁵ Brian Fitzpatrick, *The British Empire in Australia: An Economic History 1834-1939* (Melbourne University Press, 1941) xiii.

⁴⁵⁶ Michael Niblett, ‘Preliminary Anthropological Report on the Walbanga (Walbunja) Application Area NC 96/29 NSW South Coast’ (‘Research Report’, NSW Aboriginal Land Council, 2002) 67.

⁴⁵⁷ Ibid.

⁴⁵⁸ Valerie Ross, *A Hawkesbury Story* (Library of Australian History, 1981) 22.

In the early references of Governors Phillip, Hunter and King in the New South Wales colony, the D'harawal peoples in the Sydney region were documented by government and settler records 'as travelling widely'.⁴⁵⁹ The colonial lands survey lines to establish the Victorian colony intersected Aboriginal trade routes and creation tracks, disturbing traditional Aboriginal water and land access, and created competition with other Aboriginal groups because they were pushed onto other group territories.⁴⁶⁰

The later introduction of martial law by various colonial Governors prevented Aboriginal peoples from entering their traditional land and waters, which were often near white districts, as martial law was not uncommon in the early years of New South Wales⁴⁶¹ and Tasmania.⁴⁶² In Tasmania conflict arose in establishing the colony through land clearing:

At the close of what became known as the 'Black War' of the 1820s and early 1830s, this story says those Aborigines who had not been shot dead by settlers and troopers were rounded up and transported to Flinders Island in Bass Strait.⁴⁶³

In the early stage of the New South Wales colony Aboriginal peoples were sighted gathered in great numbers:

In 1798 one hundred thousand Aboriginal people in the Camden area were sighted by William Howe, where various Aboriginal groups met to resolve conflict and other Law matters.⁴⁶⁴

⁴⁵⁹ Frances Bodkin and Gavin Andrews, 'Experiencing a Cultural Landscape: The D'harawal Lands of the Yandelora and Wirrimbirra' ('Course Information', 1-2 May 2003) unnumbered pages.

⁴⁶⁰ D B Caldere and D J Goff, *Aboriginal Reserves and Missions in Victoria* (Department of Conservation and Environment Victoria, 1991) 1-2.

⁴⁶¹ Frances Bodkin and Gavin Andrews, 'Experiencing a Cultural Landscape: The D'harawal Lands of the Yandelora and Wirrimbirra' ('Course Information', 1-2 May 2003). The work identifies that Governor Lachlan Macquarie enacted martial law in NSW as a reaction to settler and Aboriginal conflict during the early 1800s.

⁴⁶² Clive Turnbull, *Black War: The Extermination of the Tasmanian Aborigines* (Sun, revised ed, 1973) The book includes colonial government letters; one letter cites Lieutenant-Governor of Tasmania on 9 September 1830 proclaiming martial law to drive out Aboriginal peoples from settled districts by removal or death. See Turnbull (1973) *Black War* 115-116 and 120-123.

⁴⁶³ Keith Windshuttle, *The Fabrication of Aboriginal History: Volume 1 Van Diemen's Land 1803-1847*, (Macleay Press, 2002) 13.

⁴⁶⁴ Ibid.

With a severe drought in New South Wales in 1813, the Gundungarra were allowed by the D'harawal to come down from the Blue Mountains and share the resources on D'harawal lands and waters.⁴⁶⁵ D'harawal descendants recount observations passed on through oral story:

Sometime after, Bitjugali, a Gundungarra war leader had been granted permission by the D'harawal to enter into their lands. However, after the murder of Bitjugali's child and wife by John Macarthur's stockmen Bitjugali revenged these violent acts in 1814. Through a Declaration of War in 1816 by Governor Lachlan Macquarie, and by the lobbying of Elizabeth Macarthur to 'rid the land of troublesome blacks' ... the slaughter of innocent D'harawal and the waring Gundungarra were decimated by a civilian and military government sanctioned campaign.⁴⁶⁶

Colonial settler conflict occurred whenever a new colony was formed. The disruption to pre-colonial Aboriginal boundaries and the pressure of Imperial Government orders to expand and exploit Australia's natural resources were some of the dramatic changes which caused displacement of Aboriginal communities' kinship areas.

Aboriginal communities regularly organised travel for a variety of cultural and legal purposes to exercise obligations under Aboriginal laws. However, with Australia's emerging colonies the government required unfettered possession of the land:

[p]re-European Aboriginal *country* was a set of complex and changing rights over land which does not translate into British 'real estate' land subdivision.⁴⁶⁷

⁴⁶⁵ Frances Bodkin and Gavin Andrews, 'Experiencing a Cultural Landscape: The D'harawal Lands of the Yandelora and Wirrimbirra' ('Course Information', 1-2 May 2003). See 'Ora Minarkelo Nandri' in this work.

⁴⁶⁶ Ibid.

⁴⁶⁷ Peter Rimas Kabaila, 'Wiradjuri Places: The Murrumbidgee River Basin Volume 1 and Ngunawal' (Black Mountain Projects, revised ed, 1998) 11.

Water resources were a central commodity in colonial Australia, and the necessity to secure water for the townships of Sydney and Melbourne was paramount in further developing these areas.

Sydney's first fifty years relied upon water supplied by private wells and holding tanks.⁴⁶⁸ After 1791, when the Tank Stream was excavated on the site of Sydney's Hunter and Pitt Streets, barrels were carted from there and from neighbouring swamps.⁴⁶⁹ Some 12,000 feet of tunnel water was conveyed from the Lachlan Swamp, now known as the Moore Park Showground, through the use of water carts.⁴⁷⁰ From the 1830s Melbourne townspeople pumped their water near the modern Flinders Street Railway Station and freshwater was drawn from the Yarra River falls.⁴⁷¹ Melbourne's Water Works Company supplied water from a well at the modern Flinders and Elizabeth Streets, in water barrels for retail consumption.⁴⁷²

The water supply for the New South Wales colony was improved by Busby's bore completed in 1837.⁴⁷³ From 1844 the use of reticulated pipes fed colonial water supplies into public fountains.⁴⁷⁴ For nearly 100 years little was done by any of the respective government authorities to conserve water, except for the needs of the goldfields, and by the provision of tanks along stock routes.⁴⁷⁵

The Tank Stream Creek in Sydney assured the survival for colonial settlement and underpinned future town planning.⁴⁷⁶ Reliable access to water sources fulfilled colonial water requirements and provided settlers with unfettered access to harbours, major rivers

⁴⁶⁸ Brian Fitzpatrick, *The British Empire in Australia: An Economic History 1834-1939* (Melbourne University Press, 1941) 106.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid 107.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³ F A Larcombe, *The Origin of Local Government in New South Wales 1831-58* (Sydney University Press, 1973) 24.

⁴⁷⁴ Ibid.

⁴⁷⁵ H H Dare, *Water Conservation in Australia* (University of Queensland and Simmons, 1939) 14, 15.

⁴⁷⁶ Ibid 107.

and estuaries. But water exploitation alienated Aboriginal peoples, interfered with their water rights, and interrupted Aboriginal cultural ‘business’.⁴⁷⁷

The contestation for water rights and interests by Aboriginal communities, and their efforts to reclaim cultural property rights to water landscapes, is tied to a series of historic and modern events. The historical impact of the development of an expanding colonial settlement had undermined Aboriginal peoples’ familial cultural connection to ‘country’.

Inevitably, Western values regarding water have laid the foundation for modern concepts of water use in Australian society, and the exploitation of water resources. This section demonstrates that Western water concepts have always been at odds with customary Aboriginal water concepts and values because of different world views.

4.2 The Demands for Water by the Emerging States and its Effect on Aboriginal Water Use

Aboriginality has an inherent connection with all intangible and tangible water landscapes, which is represented by male and female genders of water, plants and other things in the environment.⁴⁷⁸ Aboriginal property rights and interests to water exist as a cultural ‘web of Aboriginal interests’ that is not easily extruded from the Aboriginal environment. The ensuing conflict between Aboriginal peoples and the Crown for land and water has had serious consequences:

The Crown’s conception of a rightful relationship to land was in many ways incompatible with that of Aboriginal people and before long the occupation of land by colonists was accompanied by violent conflict between black and white

⁴⁷⁷ Virginia Falk in personal communication with D’harawal peoples, Frances Bodkin and Gavin Andrews during my cultural teaching on D’harawal history (2006).

⁴⁷⁸ John Cawte, *The Universe of the Warramiri: Art, Medicine and Religion in Arnhem Land* (New South Wales University Press, 1993) 12.

...They ignored the colonists' fences and hunted their domestic animals. Those who were caught, were shot, jailed or transported out of the colony.⁴⁷⁹

Since the thirteenth century England recognised the importance of controlling its water resources, not only to advance economic development but to advance areas of industry, transport and urbanisation in the late 1700s to the mid 1800s.⁴⁸⁰ Water doctrines were derived from Roman law and civil concepts of common goods and rights of ownership.⁴⁸¹ Australia's historic approach to the control and conceptualisation of water use has evolved from the introduction of the British common law system.

In the nineteenth century legal positivism dominated legal theory and also influenced the development of Australian law.⁴⁸² This theoretical position took the view that 'the validity of a legal rule depends solely on whether the authority issuing the rule had the legal power to do so as a self-contained universe of discourse'.⁴⁸³ The colonial states in Australia managed water resources in an ad hoc fashion until the introduction of irrigation commenced in the late 1880s in New South Wales, South Australia and Victoria; fifty years later the use of artesian bores was advanced.⁴⁸⁴

After Alfred Deakin reported to the Victorian parliament on his investigation as Royal Commissioner to the United States to assess the viability of American irrigation schemes for use in Australia, and these irrigation schemes were lauded and supported by parliament, the *Irrigation Act 1886* (Victoria) on its assent vested all riparian rights in the Crown.⁴⁸⁵ Chapter 5 further examines the impact of irrigation and water use in the Murray-Darling Basin.

⁴⁷⁹ Centre for the Indigenous History and the Arts, 'Ngulak Ngarnk Nidja Boodja: Our Mother, This Land' ('Research Project', University of Western Australia, 2000) 1.

⁴⁸⁰ Joshua Getzler, *A History of Water Rights at Common Law* (Oxford University Press, revised ed, 2006) 1.

⁴⁸¹ Ibid.

⁴⁸² Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, (Federation Press, 2nd ed, 1998) 8.

⁴⁸³ Ibid.

⁴⁸⁴ Brian Fitzpatrick, *The British Empire in Australia: An Economic History 1834-1939* (Melbourne University Press, 1941) 220.

⁴⁸⁵ Ibid 219-220.

Common law riparian rights were abolished in Australia and replaced with a new class of water rights under national water reforms which commenced in the 1990s. For example, the national water reforms establish statutory environmental water benchmarks and water licences to enable the trading of water to third parties who do not have to be land-owners.⁴⁸⁶

The Western concept of exploiting the natural environment was underpinned by Western values, as the following quote highlights:

Land is described in Western contexts as ‘an area of the surface of the earth together with the water, soil, rocks, minerals and hydrocarbons beneath or upon it and the air above it’. ‘It embraces all things which are related to a fixed area or point of the surface of earth’.⁴⁸⁷

The private and government interest for a growing economy in Australia was controlled by a majority of wealthy landholders, who were also members of the Legislative Council of New South Wales, the judiciary, the banks and the pioneer pastoral fraternity.⁴⁸⁸

William Macarthur and the signatories of 41 magistrates in 1838 sought the support of the New South Wales Government and England to supply the pastoral economy with additional ‘free labour’,⁴⁸⁹ and this bolstered future land sales and other resources.⁴⁹⁰

Economic development in Australia was influenced by the abolition of convict transportation:

⁴⁸⁶ Miles Burt and Russell McVeagh, ‘Water Securities and the Case for an Australian Personal Property Securities Act’ (2004) 20(2) *Australian Banking and Finance Law Bulletin* 17. The PPSA regulates personal property securities transactions including security interests registered against water rights.

⁴⁸⁷ Clare Brazenor, *The Spatial Dimensions of Native Title* (Master of Geomatics Science, University of Melbourne, August 2000) 2. Brazenor cites Kaufmann and Steudler (1998) ‘Cadastre 2014: A Vision for Future Cadastre Systems’; Kaufman and Steudler (1998) explain that the Western concept of land and resources is opposed to the Indigenous concept of ‘country’.

⁴⁸⁸ Brian Fitzpatrick, *The British Empire in Australia: An Economic History 1834-1939* (Melbourne University Press, 1941) 87.

⁴⁸⁹ Ibid 88- 89.

⁴⁹⁰ Ibid 89.

[t]he transportation committee in England recommended the abolition of assignment and transportation, [so] it is feasible that they acted upon considerations similar to those which decided the United States Congress, thirty years before, to forbid further importation of Negro slave labour ... Shrewd observers questioned the economic advantages of a system which in effect hindered the inflow of artisans and adventurous capital.⁴⁹¹

After convict transportation ground to a halt, the pastoral economy rapidly expanded throughout the Australian colonies. The economic exploitation of natural resources and the push for future land sales by major colonial landholders imposed restrictions on the amount of accessible land and water available for Aboriginal communities.

The utility demand for water resources and the government's control over land supported the expansion of emerging Australian colonies. The Western subdivision of land holdings often resulted in Aboriginal communities being expelled from their 'country'.⁴⁹²

In the early attempts of the Sydney settlers to farm in European methods their crops failed and when farming became more fruitful an expansion to the fertile riverbanks of the Hawkesbury and the Nepean Rivers were targeted for the colony, and Aboriginal owners repelled.⁴⁹³

In colonial Victoria Aboriginal groups were in direct competition for land and resources because of the pastoral economic goals of settlers and government town planning.⁴⁹⁴ The pastoral industry became the backbone of the burgeoning colonial economy, and provided 90 per cent of the colony's exports.⁴⁹⁵ Many members of the first New South

⁴⁹¹ Ibid.

⁴⁹² Heather Goodall, 'New South Wales' Ann McGrath (ed), in *Contested Ground: Australian Aborigines under the British Crown* (Allen and Unwin, 1995) 64.

⁴⁹³ Ibid.

⁴⁹⁴ Richard Broome, 'Victoria' Ann McGrath (ed), in *Contested Ground: Australian Aborigines under the British Crown* (Allen and Unwin, 1995) 129.

⁴⁹⁵ Henry Reynolds and Dawn May, 'Queensland' Ann McGrath (ed), in *Contested Ground: Australian Aborigines under the British Crown* (Allen and Unwin, 1995) 172.

Wales parliament were squatters or had direct financial interests in expanding the industry for personal gain.⁴⁹⁶

The policy at the heart of frontier violence in Tasmania to expand land and water use, underpinned the near eradication of Aboriginal communities.⁴⁹⁷ Government records show ‘settler support for genocide policy to protect natural resources in order to secure colonial wealth creation during the 1800s’.⁴⁹⁸ This human eradication policy was referred to by Tasmanian settlers as ‘the destruction of black crows’.⁴⁹⁹ Pastoralists flocked to Tasmania in the 1800s to farm sheep and to secure large land grants at minimal or nil cost, where the impact upon Aboriginal communal land and water was not considered relevant.⁵⁰⁰

In Queensland, the Darling Downs and the Brisbane Valley were alive with frontier hostility towards Aboriginal communities, which continued into central Queensland.⁵⁰¹ By the late nineteenth century Aboriginal peoples had established fringe camps on the outskirts of practically every town in the colony, as Aboriginal peoples were discouraged from entering town borders.⁵⁰²

The South Australian colony was established in 1836 by the British on the River Torrens, on the lands of the Kaurna peoples.⁵⁰³ The Kaurna peoples were forced to move away from their communal lands because of frontier violence.⁵⁰⁴ Around 1880, the settlers in South Australia were demanding the release of more land for pastoral agriculture, and

⁴⁹⁶ Ibid.

⁴⁹⁷ Ann McGrath (ed), ‘Tasmania:1’ in *Contested Ground: Australian Aborigines under the British Crown* (Allen and Unwin, 1995) 307.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid 315.

⁵⁰⁰ Ibid.

⁵⁰¹ Henry Reynolds and Dawn May, ‘Queensland’ Ann McGrath (ed), in *Contested Ground: Australian Aborigines under the British Crown* (1995) 172.

⁵⁰² Ibid 180.

⁵⁰³ Peggy Brock, ‘South Australia’ Ann McGrath (ed), in *Contested Ground: Australian Aborigines under the British Crown* (Allen and Unwin, 1995) 213-215.

⁵⁰⁴ Ibid 213.

this exerted more pressure on Aboriginal communities to move further away from their traditional lands into neighbouring lands.⁵⁰⁵

Western Australia, invaded by the British in 1829, saw Aboriginal lands subdivided into 98 colonial blocs, and the Western Desert was the last to experience the impact of pastoral advancement.⁵⁰⁶ The Swan River Colony commenced a series of violent contacts between Aboriginal and 'settler' groups, where the settlers held different views on land ownership from the Aboriginal peoples.⁵⁰⁷

The Northern Territory had a similar history of 'frontier violence and dispossession', much like Tasmania's history. In the Territory Aboriginal peoples of both sexes were exploited as a non-cash employment source under the frontier motto, 'work or be shot'.⁵⁰⁸ Aboriginal peoples outnumbered Europeans for many years in the Northern Territory and remained relatively ignored for decades because governments believed that the Territory was 'uneconomic' and difficult to irrigate or develop.⁵⁰⁹

The emerging creation of State and Territory boundaries effected a national disenfranchisement of Aboriginal peoples and marginalised their access to land and water resources. Aboriginal notions of sacredness in 'country' presented challenges to Western exploitation.

Aboriginal communities relate to and contemplate value in the environment as integral to Aboriginal identity in a way that articulates both communal and individual rights and interests. The land, the waters and the creation stories are the essence of Aboriginal identity, where 'sacredness' particularises an inherent relationship to the environment unique to Aboriginal peoples. According to Glaskin,

⁵⁰⁵ Ibid 215.

⁵⁰⁶ Sandy Toussaint, 'Western Australia' Ann McGrath (ed), in *Contested Ground: Australian Aborigines under the British Crown* (Allen and Unwin, 1995) 242.

⁵⁰⁷ Ibid 243-244.

⁵⁰⁸ Peter Read, 'Northern Territory' Ann McGrath (ed), in *Contested Ground: Australian Aborigines under the British Crown* (Allen and Unwin, 1995) 273-274.

⁵⁰⁹ Ibid 271.

The abstraction of rights and interests and resulting fragmentation is at odds with the view of country that many Indigenous Australians continue to hold: that the country is not in some sense external to them; they *are* instantiations of country, which is consequently inalienable from them.⁵¹⁰

Aboriginal law does not separate the land from the water, nor can Aboriginal laws allow unrestricted economic exploitation of the land or waters without compromising customary cultural values and obligations. To advance an Aboriginal economy on the values and beliefs relevant to a Western economy model fragments the nature of Aboriginal water rights and interests.

Langton (2005), in describing the property relationship of Pama customary land owners, states:

Property relations are structured by the places as events, and by memories that spring up in a person's mind about that place. Landscapes are perceived not just as geographical places but as metaphorical entities laden with spiritual and moral agency. The property-object of Pama relations is not merely the land estate *qua* geographical space, but the confluent spatiality, temporality and sociality of the landscape, the people and the ancestral beings.⁵¹¹

An Aboriginal paradigm of water property rights presents a clear challenge to Western property rights in Australia. The categorisation of tangible and intangible Aboriginal water values brings out a conceptual difference between Aboriginal and Western property relationships. The Aboriginal spatial concepts of 'spiritual and moral agency' described by Langton (2005) represent unique relationships with water and land that have no common thread with Western water values and concepts.

⁵¹⁰ Katie Glaskin, 'Native Title and the Bundle of Rights Model: Implications for the Recognition of Aboriginal Relations to Country' (2003) 13(1) *Anthropological Forum* 78.

⁵¹¹ Marcia Langton, *An Aboriginal Ontology of Being and Place: The Performance of Aboriginal Property Relations in the Princess Charlotte Bay Area of Eastern Cape York Peninsula, Australia* (D Phil Thesis, Macquarie University, 2005) 434.

An articulation of what defines Aboriginal water property rights in Western terms remains value-laden with social, cultural, economic and Western legal constructs that generally diminish the nature of Aboriginal rights and interests. The overarching framework of Western property rights:

[e]xist to facilitate the acquisition, control, and exchange of assets. While many definitions of property rights are similar, the literature shows disagreement as to the source and origin of property rights, particularly the role that the state plays in originating, specifying and developing these rights.⁵¹²

However, Aboriginal communities' authority over property is governed by Aboriginal laws and the water values that attach to a relationship with land and water.

In Australia, Aboriginal cultural values are generally regarded as subservient to the economic progress of the nation. Where any public purpose or planning requirement is proposed, the value of Aboriginal sites is doomed ... Natural waterways continue to succumb to the urgency of improving and expanding the 'frontier'.⁵¹³

There is a clear understanding from Langton's description of Pama relationships that these ancient 'property relationships' are unable to be severed from the landscape or the Pama community.

⁵¹² Robert Brooks, Sinclair Davidson and Robert Faff, 'Sudden Changes in Property Rights: The Case of Australian Native Title' (2003) 52 *Journal of Economic Behaviour and Organisation* 429.

⁵¹³ Neva Collins and Virginia Falk, 'Water: Aboriginal peoples in Australia and their Spiritual Relationship with Waterscapes' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 141.

4.3 Asserting Aboriginal Water Rights under Australian Law: Interpretive Challenges of Native Title

The distinct character of Aboriginal water rights and interests requires greater recognition in water legislation because Aboriginal values in water are distinct from Western notions of water use. The Australian legal system has recognised the existence of a *sui generis* approach to land and the waters under native title which presents ongoing conflict with views of Indigenous ownership to ‘country’. The following section is written as a contextual analysis of the issues and not in case law chronology.

The notion of country from a regional Aboriginal perspective is inclusive of fresh water, a form of inclusiveness that goes well beyond the western notion of riparian rights to include all surface and ground water. While from a legal perspective land and water can be separated as distinct forms of property (as it is in the National Water Initiative), from a customary Aboriginal perspective the term ‘country’ actually incorporates water and land.⁵¹⁴

The *Milirrpum v Nabalco* (1971) case occurred well before the recognition of native title in Australia and the court rejected the notion of Aboriginal proprietary rights because Australian law had not recognised such rights. Milirrpum, a member of the Rirratjingu Peoples, in the north-east corner of the Northern Territory,⁵¹⁵ asserted that ‘his people had been unlawfully invaded by Nabalco mining activities, granted by lease from the Commonwealth’.⁵¹⁶ Milirrpum asserted his proprietary rights to his ancestral lands and waters,⁵¹⁷ as communal rights⁵¹⁸ shared with the Gumatj people of Arnhem Land.⁵¹⁹

⁵¹⁴ Jon Altman assisted by V Branchut, ‘Fresh Water in the Maningrida Region’s Hybrid Economy: Intercultural Contestation over Values and Property Rights’ (‘Working Paper’, No 46, Australian National University, 2008) 27.

⁵¹⁵ *Milirrpum v Nabalco* (1971) 17 FLR 141 (‘Gove Land Rights Case’) 146.

⁵¹⁶ *Ibid* 150.

⁵¹⁷ *Ibid*.

⁵¹⁸ *Ibid* 151.

⁵¹⁹ *Ibid* 146.

Blackburn J held in the *Milirrpum* decision⁵²⁰ that ‘there was no trace of any doctrine of communal native title in Blackstone’s *Commentaries*, and the legal issue of communal property could not be dealt with’,⁵²¹ because this concept ‘does not apply in a settled colony’.⁵²²

However, Blackburn J did acknowledge the existence of a ‘system of Aboriginal laws’ in *Milirrpum v Nabalco*.⁵²³

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called ‘a government of laws, and not of men’, it is that shown in the evidence before me.⁵²⁴

The implication for Aboriginal water rights and interests when Aboriginal water is quantified by volume is that formidable barriers are created for Aboriginal peoples to claim water. Western legal concepts restrict the correct interpretation of Aboriginal concepts. For example, Aboriginal customary transition areas, which are shared by more than one traditional Aboriginal owner where traditional boundary lines overlap, are not accepted concepts under native title.

Native title must *fit within* the existing system of Australian property rights. Therefore native title, and in particular its spatial dimensions, may bear little resemblance to the system of Indigenous laws and customs upon which it is based. To find a place with the taxonomy of property rights, native title must be

⁵²⁰ Ibid.

⁵²¹ Ibid 206.

⁵²² Ibid 207.

⁵²³ (1971) FLR 141.

⁵²⁴ Ibid 267.

presented in a form that can be located alongside and compared with other forms of estates and land tenures.⁵²⁵

In Australia the primary definition of common law native title is found in s 223 of the *Native Title Act* 1993 (Cth). The statutory framework for the definition of native title legislation is drawn from the interpretation of Brennan J in *Mabo v Queensland* [No 2] (1992); this interpretation by the Court is considered to be a very narrow concept in comparison to the majority judgements.⁵²⁶ Section 223 in the *Native Title Act* 1993 (Cth) states:

Common law rights and interests

- (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where
- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered in the Act

- (2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing, rights and interests.

Statutory rights and interests in the Act

⁵²⁵ Alex Reilly, 'Cartography, Property and the Aesthetics of Place: Mapping Native Title in Australia' (2004) in Kenyon and Rush (eds), 34 *Aesthetics of Law and Culture: Texts, Images, Screens* 230.

⁵²⁶ Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 117.

(3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression native title or native title rights and interests. Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act. Subsection (3) does not apply to statutory access rights. (3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).⁵²⁷

Under s 223(1)(a) to (c) of the *Native Title Act 1993* (Cth) the recent development of case law, discussed in this chapter, shows that s 223(1)(a) and (b) are not interpreted in a legal vacuum. The interpretation of the common law native title definition has been conceptualised by the courts to narrow the rights and interests of Indigenous claimants. In particular where ‘native title or native title rights and interests of communal, group or individual rights and interests, to land or waters’ under s 223(1)(a) of the Act are the ‘traditional laws and the traditional customs observed by Indigenous peoples’. However, the impact of Australian settlement, government policies or other events have required Indigenous peoples to adapt this laws and customs or revitalize these practices.

In s 223(1)(b) of the Act Indigenous peoples must show evidence of their ‘laws and customs’ in order to prove they have a ‘connection with the land or waters’. The ‘uneasy interrelationship between the common law definition of native title and the *Native Title Act 1993* (Cth) has resulted in ambiguity; the Federal Court has applied a ‘textual’ interpretation to the proof requirements under s 223(1).⁵²⁸ The Courts have significantly influenced the ‘setting the context in how native title legislation operates’⁵²⁹ and

⁵²⁷ *Native Title Act 1993* (Cth).

⁵²⁸ Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 118.

⁵²⁹ *Ibid* 148-149.

‘interpreting the words and legal concepts within the law’;⁵³⁰ Aboriginal claimants and those working in the native title system recognize the doctrinal limitations of native title’.⁵³¹

In *Yarmirr*⁵³² the High Court held that ‘international principles’ are ‘a more persuasive source in a decision about whether certain exclusive rights in the determination area may be recognised by the common law’.⁵³³ This argues that the determination of native title cases should be interpreted under international human rights principles.

[t]he Act cannot be construed to allow the common law to operate in a discriminatory way preventing the recognition of traditional rights to the sea ... in making a determination of native title rights and interests, the assertion of such rights be considered in the context of the relevant traditional laws and customs rather than applying English common law notions of exclusion.⁵³⁴

In *Gumana v Northern Territory* (2005)⁵³⁵ (*Blue Mud Bay Case*) the Yolngu Peoples sought to exclude all others from fishing their traditional land and waters.⁵³⁶ The court acknowledged, among other things, that ‘it was clear from the evidence that Yolngu law provided for the succession of rights and obligations between clans’.⁵³⁷

Gawirrin Gumana gave evidence that under Yolngu law he is entitled to speak for ‘country’, and explained succession rights for the Manatja and the Dhupuditj.⁵³⁸

⁵³⁰ Ibid 149.

⁵³¹ Ibid.

⁵³² *Commonwealth v Yarmirr* (2001) 208 CLR 1.

⁵³³ Ibid (292).

⁵³⁴ Jelita Gardner-Rush, ‘Judicial Treatment of International Law in *Yarmirr*’ (2004) 23 *Australian Year Book of International Law* 192.

⁵³⁵ 141 FCR 457.

⁵³⁶ Ibid 16.

⁵³⁷ Ibid 81.

⁵³⁷ Ibid.

⁵³⁸ Ibid.

Datjirri ... is a gutharra for Manatja country – his actual mari was a member of the Manatja clan. There are no living members of the Manatja clan. My father told me that members of this clan were killed in the Gangan massacre ... Manatja is Yirritja country. Within the claim area, there is an area of Manatja country known as Dhurrwanmirriwuy ... associated with Birrkuda, the Yirritja honey ancestor. I know and look after songs, dances and patterns for Manatja country. My father taught me these.⁵³⁹

The High Court decision in *Western Australia v Ward*⁵⁴⁰ illustrates the misconception of Aboriginal peoples ‘speaking for country’ as the same concept as the Crown’s right:

[I]f it was correct that native title rights flowed from a ‘right to speak for country’, then, by parity of reasoning, because the Crown undoubtedly has ‘spoken’ for the land since the first non-indigenous settlement, that would be evidence of extinguishment of native title, for two authorities could not in practical terms speak for the land.⁵⁴¹

‘Speaking for country’ cannot be translated into literal English because Aboriginal law is an unequivocal authority for decisions by the Traditional Owner. ‘The Crown’ as a Western common law concept has several meanings, such as ‘the monarch of England’ or ‘the cluster of political institutions held within the concept of the State’.⁵⁴² Under the modern concept of the Crown in the Australian Constitution the meaning is more symbolic in nature.⁵⁴³ The analogy adopted by the Court in *Western Australia v Ward*⁵⁴⁴ was deficient because the authority of the Crown, under any of the above definitions, does equate to Aboriginal rights, obligations and birthright to ‘speak for country’. The right in ‘speaking for country’ cannot be challenged and is not diminished by other interests.

⁵³⁹ Ibid.

⁵⁴⁰ [2002] 191 ALR 1.

⁵⁴¹ Ibid 821.

⁵⁴² Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Theory* (Federation Press, 2nd, 1998) 20.

⁵⁴³ Ibid.

⁵⁴⁴ [2002] 191 ALR 1.

A customary 'right to speak' is, for example, held by a Senior Lawman or woman who holds intimate knowledge of sites under Aboriginal laws and has the only authority over any issues for that area. The kinship authority 'to speak for country' is an ancestral right from the Creation, where a person from a different kinship and community cannot 'speak' for others. In the early concept of the Crown, the monarchs' powers were absolute for all,⁵⁴⁵ and in a similar manner Traditional Owners command authority.

Interpreting the meaning of the ancient water rights of Aboriginal peoples is an ongoing challenge for the legal system. Applying Western meaning to explain Aboriginal values and concepts can often lead to the misrepresentation of Aboriginal rights and interests and concepts of ownership.

Scott Hawkins in 'Caught, Hook, Line and Sinker' (1992) examined communal sharing of Aboriginal fishing rights in New South Wales and highlighted the communal relationships and purpose of fishing:

The purpose of continuing these practices is not only a practical answer to supplementing food and nutritional sources because of economic pressures or availability considerations, but also as a means of continuing traditional and cultural practices. These include communal sharing and trading for both subsistence and ceremonial and cultural purposes as well as the passing on of knowledge and custom from one generation to the next through these activities. Fishing and its associated activities form a major part of many Aboriginal people's lives.⁵⁴⁶

Djambawa Marawilli, in the Blue Mud Bay claim, declared that he was assured victory at court by his dream, which affirmed that Yolngu ownership continues on out to sea:

⁵⁴⁵ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Theory* (Federation Press, 2nd, 1998) 21.

⁵⁴⁶ Scott Cane, 'Caught, Hook, Line and Sinker' (1992) 3 *Journal of Indigenous Policy* 4.

I was in my home in Baniyala, paddling into the sea, as far as I could go. My canoe was just about getting drowned. So I had to turn it around and paddle back. That was the point that told me how much of the sea belongs for indigenous people.⁵⁴⁷

Teresa Crowley (2003) argued that interpreting Aboriginal culture is not a simple exercise to embark upon because the concept of culture for Aboriginal peoples in Australia maintains cultural relationships.

Culture defines stewardship for land and community and these attributes are reinforced to ensure societal continuity. Culture extends to stories and songs of creation, ritual and ceremonial dances, painting and the use of natural materials including feathers, bone, wood, bark, ochres, pigments, leather, clay, stone and water, to express community events and important issues and to preserve indigenous knowledge.⁵⁴⁸

The intrinsic nature of Aboriginal customary property rights in water resources, whether in salt or freshwater, requires a paradigm shift in order to understand and recognise that the Aboriginal characterisation of water resources is the antithesis of the Western legal system. Therefore neither understanding nor legally recognising Aboriginal water rights and interests can be resolved adequately within the existing framework of the Australian legal system, or by using generic Western definitions which attempt to interpret or explain them.

Resolving this impasse will require a more nuanced approach to evaluating Aboriginal water rights than merely applying Australian law using definitions that are too simple to explain Aboriginal laws. Aboriginal ownership has a unique conceptual framework that

⁵⁴⁷ Paul Toohey, 'Fishing for Votes Ends as a Dream becomes Reality', *The Australian* (Sydney), 6 August 2008.

⁵⁴⁸ Teresa Crowley, 'Culture and Common Property: Indigenous Tenure Issues within Western Society' (Paper presented at 15th Annual Colloquium of the Spatial Information Research Centre, University of Otago, New Zealand, 1-3rd December 2003) 2, quoting W Caruana, *Aboriginal Art* (Thames and Hudson, 1993); R Hill, *Native American Expressive Culture* (Akwe Kon Press, 1995) and L Dorais, *Quatag: Modernity and Identity in an Inuit Community* (University of Toronto, 1997).

has complex cultural characteristics for determining types of rights and interests in water. Aboriginal law is central to how communal or individuals' rights are exercised and for deciding who has authority to speak for any activity on the land or waters.

Mabo v Queensland [No 2]⁵⁴⁹ has advanced the cultural recognition of Aboriginal water rights and interests, and whether native title law has generally been an effective system for Aboriginal peoples to 'reclaim' ownership in water. In effect, Aboriginal peoples and other Indigenous groups in Australia have had to engage with the native title system in order to establish their ownership rights, which have become an onerous burden for Aboriginal claimants.

Mabo itself demonstrates that the development of the common law to recognise a new right may conflict with pre-existing understandings of the common law, even contained in precedent.⁵⁵⁰

Patton (2000) argues that the legal recognition of the existence of Aboriginal law has been long overdue.⁵⁵¹

Australia is a special case in the modern history of colonization in that neither treaty nor conquest played any part in its acquisition by the British Crown ... indigenous inhabitants were considered incapable of being sovereigns over their territories ... without law ... too low in the hierarchy of civilized races.⁵⁵²

Patton (2000) further says that

[i]n parallel with the official account of the legal acquisition of the Australian territories, and despite many examples of legal pluralism in other parts of the

⁵⁴⁹ (1992) 175 CLR 1.

⁵⁵⁰ Ibid 193.

⁵⁵¹ Paul Patton, 'The Translation of Indigenous Land into Property: The Mere Analogy of English Jurisprudence' (2000) 6(1) *Parallax* 28.

⁵⁵² Ibid 28-29.

British Empire, the domestic law of the new colonies persistently refused any recognition of Aboriginal law and custom.⁵⁵³

The concept of legal pluralism is shaped by various political and legal constructs of colonisation to acquire land, water or resources, and generally exercised in the subordination of Indigenous groups by aggression or in some cases, in retaining some elements of an Indigenous laws or practices within the imposed colonial legal system to ensure social order.⁵⁵⁴ The central role of legal pluralism was to control the political economy, establish colonial institutions to enforce colonial laws and to regulate access to property interests.⁵⁵⁵ At the point of British settlement Indigenous groups in Australia were socially and politically reconstructed as ‘non-inhabitants’ and in the early 1800s Indigenous peoples were redefined as ‘colonial legal subjects’,⁵⁵⁶ not as independent self-governing groups or nations.

Former Prime Minister Paul Keating addressed the reluctance of the parliament and the Australian courts to legally recognise traditional laws, customs and practices of Indigenous peoples. Mr Keating in his Second Reading speech on the Native Title Bill (1993) stated:

The Government has always recognised that despite its historic significance, the Mabo decision gives little more than a sense of justice to those Aboriginal communities whose native title has been extinguished or lost without consultation, negotiation or compensation. Their dispossession has been total, their loss has been complete.⁵⁵⁷

⁵⁵³ Ibid 29.

⁵⁵⁴ Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400 – 1900* (Cambridge University Press, 2002) 2.

⁵⁵⁵ Ibid 23.

⁵⁵⁶ Ibid 184.

⁵⁵⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating, Prime Minister of Australia)

Twenty-two years prior to *Mabo v Queensland* [No 2]⁵⁵⁸ Blackburn J in *Milirrpum v Nabalco*⁵⁵⁹ remarked upon the dissimilar nature of Aboriginal law and Australian law.

[t]here is so little resemblance between property, as our law, or what I know of any other law ... I must hold that these claims are not in the nature of proprietary interests.⁵⁶⁰

The non-legal recognition of Aboriginal land ownership was considered by Lionel Murphy:

[t]he aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land.⁵⁶¹

Brennan CJ in *Mabo v Queensland* [No 2],⁵⁶² considered the common law reasoning in relation to Aboriginal title in *Milirrpum v Nabalco*⁵⁶³ and stated:

[i]ndividual members of a community who enjoy only usufructuary rights that are not proprietary in nature are no impediment to the recognition of a proprietary community title.⁵⁶⁴

⁵⁵⁸ (1992) 175 CLR 1.

⁵⁵⁹ (1971) 17 FLR 141.

⁵⁶⁰ Paul Patton, 'The Translation of Indigenous Land into Property: The Mere Analogy of English Jurisprudence' (2000) 6(1) *Parallax* 33.

⁵⁶¹ Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Macleay Press, 2005) 15.

⁵⁶² (1992) 175 CLR 1.

⁵⁶³ (1971) 17 FLR 141.

⁵⁶⁴ Paul Patton, 'The Translation of Indigenous Land into Property: The Mere Analogy of English Jurisprudence' (2000) 6(1) *Parallax* 34-35.

In *Mabo v Queensland* [No 2]⁵⁶⁵ Brennan CJ acknowledged that the recognition of Aboriginal laws under native title is limited:

[t]he common law is not to be frozen in an age of discrimination [and] ... the Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.⁵⁶⁶

In *Mabo v Queensland* [No 2]⁵⁶⁷ the plaintiffs challenged the English concept of possession and property law as alien to Indigenous inhabitants.⁵⁶⁸ This judgment recognised that Australian law could accommodate Aboriginal rights to land and waters, and not ‘fracture the skeletal frame’⁵⁶⁹ of Australia’s legal system; Aboriginal laws must be recognisable and compatible with the common law. Generally, many Aboriginal communities in Australia welcomed the landmark judgment as an opportunity to reclaim the ownership of traditional land. Because of the ‘skeletal frame’, Aboriginal communities have had difficulty in reaching successful claims to water ownership because the recognition of ownership involves the recognition of property rights.

Michael McHugh, a High Court judge speaking extra-curially suggested that ‘judicial activism made substantive headway in Australian society by changing’ the status quo of the Australian legal system, resetting the colonial view of Indigenous laws, customs and practices.⁵⁷⁰

Perhaps the most frequently cited example of this in Australia is the decision of the High Court in *Mabo v Queensland*. It is now generally recognised that the

⁵⁶⁵ (1992) 175 CLR 1.

⁵⁶⁶ Geoffrey Robert Schiveley, ‘Negotiation and Native Title: Why Common Law Courts are not a Proper Fora for Determining Native Land Title Issues’ (2000) 33 *Vanderbilt Journal of Transnational Law* 464-465.

⁵⁶⁷ (1992) 175 CLR 1.

⁵⁶⁸ Ibid 128.

⁵⁶⁹ Ibid.

⁵⁷⁰ Michael McHugh, ‘Court Walks where Others Fear to Tread’ *Australian Financial Review* (Sydney) 23 July 2004, 62.

High Court's decision in *Mabo* forced the federal government to take legislative action in a field that it had largely avoided. In other words, the court could not sidestep the issue even where politicians had.⁵⁷¹

Kirby J in *Western Australia v Ward*⁵⁷² made the point that the 'inextricable linkage' of Aboriginal peoples to 'country' warranted legal protection.⁵⁷³

It has been accepted that the connection between Aboriginal Australians and 'country' is inherently spiritual and that the cultural knowledge belonging to Aboriginal people is, by indigenous accounts, inextricably linked with their land and waters, that is, with their 'country'. If this cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the *Native Title Act 1993* (Cth).⁵⁷⁴

Olney J in *Yarmirr v Northern Territory*⁵⁷⁵ did not recognise the Croker Islanders' exclusive possession of the marine seas, on grounds of a 'public right to fish as against the private right to land'.⁵⁷⁶ The Aboriginal claimants argued that their 'marine territories' were held under three principles: as territories in joint or common property ownership, an inherited right to exclude and exercise responsibilities over others and that the sea was handed down in law to them by ancestral figures under Aboriginal law.⁵⁷⁷

⁵⁷¹ Ibid.

⁵⁷² [2002] 191 ALR 1, 161-162.

⁵⁷³ Matthew Rimmer, 'Blame it on Rio: Biodiscovery, Native Title, and Traditional Knowledge' (2003) 7 *Southern Cross University Law Review* 30.

⁵⁷⁴ Ibid.

⁵⁷⁵ [1998] 156 ALR 370.

⁵⁷⁶ Nonie Sharp, 'Australian Native Title and Irish Marine Rights: An Inquiry on the West Coast of Ireland' (1998) 16(2) *Law in Context* 35. See *Lardil Peoples v Queensland* [2004] FCA 298 ('*The Wellesley Sea Case*').

⁵⁷⁷ Ibid 36.

The Aboriginal claimants in *Commonwealth v Yarmirr*⁵⁷⁸ claimed an exclusive right of possession, occupation, and use and enjoyment of their land and the sea. Olney J held:

There was nothing in the evidence to explain what the claimant group understood ‘the connection of ownership’ to encompass unless it be the aggregation of separate rights which are asserted in respect of the claimed area; and that the term ‘ownership’ was first used by counsel, and not by a witness.⁵⁷⁹

The court did not accept the claimants’ evidence in *Commonwealth v Yarmirr*⁵⁸⁰ and instead held fast to the ‘skeletal principle’ concept and protected non-Indigenous property rights:

A power to exclude members of the public as now claimed would, in our opinion, contradict these common law principles which, along with the right of innocent passage, are, we think, of sufficient importance to warrant their characterisation as ‘skeletal’ in the sense meant by Brennan J.⁵⁸¹

Australian decisions under native title law on the one hand have recognised a continuing relationship of Aboriginal peoples to the land and the waters, and on the other they show a strong reluctance to legally recognise Aboriginal rights and interests as that may ‘fracture the skeletal frame’ of common law. Legal concepts such as ‘the skeletal concept’ ensure narrow parameters in water ownership under native title.

Ethnographically speaking, the fact that much recent work on tenure has been carried out for sea closures and native title applications means there has been a pervasiveness of legal discourse in the ethnography of marine tenureship just as there has recently been for land tenure. This tends to alienate Aboriginal people

⁵⁷⁸ [1999] FCA 1668.

⁵⁷⁹ *Commonwealth v Yarmirr* [1999] FCA 1668 (Olney J) 576.

⁵⁸⁰ Ibid 58.

⁵⁸¹ Ibid.

from their own experience and practice at the same time as it makes those experiences and practices recognisable by the state.⁵⁸²

The significant cultural anthologies of the Yolngu peoples of the Northern Territory clearly outlined legal relationships to land and waters, as reported by anthropologists for the applicants in the *Milirrpum v Nabalco*⁵⁸³ case. Years later in *Mabo v Queensland [No 2]*⁵⁸⁴ the legal recognition of the Meriam people's laws and customs was determined by the majority to have continued irrespective of the laws of Queensland.

However, for many Aboriginal peoples, the determination of native title still remains inconsistent in providing certainty for Aboriginal claimant's rights and interests.⁵⁸⁵ Kirby J dissenting in *Western Australia v Ward* (2000)⁵⁸⁶ said:

When evaluating native title rights and interests, a court should start by accepting the pressures that existed in relation to Aboriginal laws and customs to adjust and change after British sovereignty was asserted over Australia. In my opinion, it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement.⁵⁸⁷

The courts have shown a reluctance to recognise the cultural significance of Aboriginal laws and practices and to acknowledge the existence of Aboriginal sovereignty.

Understanding the development of the law requires [an] understanding both of the contemporary Australian context in which potentially competing interests in land

⁵⁸² Nicolas Peterson and Bruce Rigsby (eds), 'Customary Marine Tenure in Australia' (1998) 48 *Oceania Monograph University of Sydney* 11.

⁵⁸³ Julie Fenwick, *Worrying about Our Land: Conceptualising Land Rights 1963-1971* (Monash Publications, 2001) 31.

⁵⁸⁴ (1992) 175 CLR 1.

⁵⁸⁵ *Ibid* 34.

⁵⁸⁶ P G McHugh, 'Aboriginal Title in New Zealand: A Retrospect and Prospect' (2004) 2 *New Zealand Journal of Public and International Law* 179. See *Western Australia v Ward* (2002) 191 ALR 1.

⁵⁸⁷ *Ibid*.

and resources occurs, and the unique Australian historical context which is largely about the denial of Indigenous land rights, including rights to self-government, land and resource management; which arise out of a proper conception of native title that views Aboriginal title as inherent, with an acknowledgement of prior Indigenous sovereignty.⁵⁸⁸

The majority in the High Court decision *Yorta Yorta v Victoria*⁵⁸⁹ held that native title rights were ‘frozen in time at the moment of the acquisition of Australian sovereignty which conceptualises native title into a relic of Australian law’.⁵⁹⁰

Rights associated with laws and customs came into being at the intersection of two normative systems. That intersection occurred when the common law entered Australia and recognized rights and interests derived from traditional laws and customs. The common law continues to recognize those rights and interests to the extent that they continue to exist ... the acquisition of sovereignty is simply a point of the transition of power.⁵⁹¹

The Native Title Report makes the point that Aboriginal peoples should be allowed to adapt their customary practices to Western concepts of tenure and use:

Traditional owner rights to land are limited to the same customary activities as those that were practiced centuries ago and recorded by the ‘first contact’ non-indigenous colonisers. The claimable land that exists under the native title regime includes unallocated Crown lands, some reserves and park lands, and some leases such as non-exclusive pastoral and agricultural leases, depending on the state or territory legislation under which they were issued.⁵⁹²

⁵⁸⁸ Gary D Meyers, ‘Native Title Rights in Natural Resources: A Comparative Perspective of Common Law Jurisprudence’ (2002) 19(4) *Environmental and Planning Law Journal* 257.

⁵⁸⁹ *Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.

⁵⁹⁰ Alex Reilly and Ann Genovese, ‘Claiming the Past: Historical Understanding in Australian Native Title Jurisprudence’ (2004) 3 *Indigenous Law Journal* 35.

⁵⁹¹ *Ibid* 29.

⁵⁹² Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2006’ (Human Rights and Equal Opportunity Commission, 2007) 43.

The High Court decision in *Wilson v Anderson*⁵⁹³ clearly indicates how unworkable the processes of proving native title are and the barriers to Aboriginal claimants, Kirby J observed:

The legal advance that commenced with *Mabo v Queensland* [No 2], or perhaps earlier, has now attracted such difficulties that the benefits intended for Australia's indigenous peoples in relation to native title to land and waters are being channelled into costs of administration and litigation that leave everyone dissatisfied and many disappointed.⁵⁹⁴

Dissenting in *Western Australia v Ward*,⁵⁹⁵ he had argued that the current evaluation of Aboriginal traditional rights required a 'human rights approach' to interpret the law. He remarked:

Because the statutory concepts of 'recognition' and 'extinguishment' are themselves ambiguous or informed by the approach of the common law, this Court should adopt, and consistently apply, several interpretative principles ... First...in any case of ambiguity, the interpretation of the statutory text should be preferred that upholds fundamental human rights rather than one that denies those rights and enforcement.⁵⁹⁶

However in *Western Australia v Ward*⁵⁹⁷ the High Court limited the legal recognition of economic and resource rights by characterising native title as a 'bundle of rights', and not as a 'title to land'.⁵⁹⁸ In other Western Australian native title determinations, Aboriginal

⁵⁹³ (2002) 213 CLR 401.

⁵⁹⁴ Ibid [126].

⁵⁹⁵ (2002) 213 CLR 1.

⁵⁹⁶ Ibid [567].

⁵⁹⁷ Ibid 213.

⁵⁹⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2006' (Human Rights and Equal Opportunity Commission, 2007) 49.

claimants have had varying success before the courts.⁵⁹⁹ A summary is given below of a number of native title decisions on water rights issues.

In *Ngalpil v Western Australia*⁶⁰⁰ the court held that the Tjurabalan peoples had exclusive possession ‘in relation to flowing and subterranean waters’.⁶⁰¹ The court in *Nangkiriny v Western Australia*⁶⁰² held that the Karajarri peoples had exclusive possession of ‘native title rights to use and enjoy the flowing and subterranean waters, including the right to hunt and gather’.⁶⁰³

In *Rubibi Community v Western Australia* (No 7)⁶⁰⁴ the court held that an exception to exclusive possession for flowing and subterranean waters was limited to a right to take water ‘for personal, domestic and non-commercial communal purposes’.⁶⁰⁵ By contrast, in *Sampi v Western Australia* (No 3)⁶⁰⁶ there was no recognition of ‘exclusive rights to water, either in flowing or by natural collection or to underground water’.⁶⁰⁷

In *Lardil Peoples v Queensland*⁶⁰⁸ the claimants, the Lardil, Yangkaal, Kaiadilt and Gangalidda peoples, described their Aboriginal water rights.

[i]n respect of the lands and waters below the high water mark in an area adjacent to the Wellesley Islands ... the right to exclusive and undisturbed occupation,

⁵⁹⁹ Email from David Collard to Virginia Falk, State Solicitor’s Office Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’ (12 December 2007) 5.

⁶⁰⁰ [2001] FCA 1140.

⁶⁰¹ Email from David Collard to Virginia Falk, State Solicitor’s Office Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’ (12 December 2007) 5.

⁶⁰² [2002] FCA 660.

⁶⁰³ Email from David Collard to Virginia Falk, State Solicitor’s Office Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’ (12 December 2007) 5.

⁶⁰⁴ [2006] FCA 459.

⁶⁰⁵ Email from David Collard to Virginia Falk, State Solicitor’s Office Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’ (12 December 2007) 6.

⁶⁰⁶ [2005] FCA 1716.

⁶⁰⁷ Email from David Collard to Virginia Falk, State Solicitor’s Office Western Australia, ‘National Water Initiative: Indigenous Access and Entitlement Rights’ (12 December 2007) 6.

⁶⁰⁸ Sean Huber, ‘The Wellesley Island Decision: Offshore Native Title Post *Yarmirr* and *Ward*’ (2004) 23 *University of Queensland Law Journal* 242. See *Lardil Peoples v Queensland* [2004] FCA 298.

possession, use and enjoyment of the land and waters, including the natural resources within the sea.⁶⁰⁹

The *Lardil* decision recognised the existence of ‘customary succession laws’ possessed by the Aboriginal claimants,

[u]nder traditional law and customs at the time of sovereignty ... where the Mingginda peoples, no longer alive due to European colonisation, had land adjoined to the claimant group ... the Gangalidda succession had occurred under the traditional law and customs.⁶¹⁰

In this decision⁶¹¹ Cooper J limited the Aboriginal claimants’ rights, asserting that the *Lardil Peoples*

[p]ossessed non-exclusive native title rights and interests over parts of the sea Albert River ... a continuing connection to the claim area ... as one of sustenance and religious and spiritual belonging.⁶¹²

He held that the Aboriginal claimants ‘possessed non-exclusive native title water rights limited to personal, domestic or non-commercial communal consumption’.⁶¹³

[t]he right to utilise fresh water from springs in the intertidal zone and the right to access the land and waters seaward of the high water mark, and the Albert River, for religious or spiritual purposes, and to access sites of spiritual or religious significance.⁶¹⁴

⁶⁰⁹ Ibid 242.

⁶¹⁰ Sean Huber, ‘The Wellesley Island Decision: Offshore Native Title Post *Yarmirr* and *Ward*’ (2004) 23 *University of Queensland Law Journal* 248.

⁶¹¹ [2004] FCA 298.

⁶¹² Sean Huber, ‘The Wellesley Island Decision: Offshore Native Title Post *Yarmirr* and *Ward*’ (2004) 23 *University of Queensland Law Journal* 244.

⁶¹³ Ibid 245.

⁶¹⁴ Ibid.

Cooper J held that the Lardil, Yangkaal, Gangalidda and Kaiadilt Peoples' claim to the land and waters below the high water mark in sea country survived 'the tide of colonisation'.⁶¹⁵ Cooper J concluded that the Lardil peoples owned their sea country under their own laws and customs, as customary exclusive rights.⁶¹⁶

These examples of various native title decisions on water rights indicate a range of outcomes that vary in the extent to which the courts recognise such rights. The courts, in determining the use of customary waters, can either deliver extinguishment or partial extinguishment or deliver exclusive or non-exclusive rights and interests. For Aboriginal communities who cannot prove native title in water there are limited opportunities to press for customary recognition by governments and other landholders.

Indigenous Land Use Agreements under the *Native Title Act 1993* (Cth) have provided an alternative to litigated native title determinations. For instance, in the Wet Tropics World Heritage Area situated in the Daintree and Bloomfield River water catchments in Queensland,⁶¹⁷ the Eastern Kuku Yalanji Peoples and the Queensland Government have entered into an Indigenous Land Use Agreement which transfers 64,000 hectares into Aboriginal freehold land under the *Aboriginal Land Act 1991* (Qld) and the Eastern Kuku Yalanji Peoples hold delegated powers to enforce the *Nature Conservation Act 1992* (Qld) regulations.⁶¹⁸

Under a native title consent determination, between the Djabugay peoples and the Queensland Government, 'native title was shown to exist in relation to water and land as a non-exclusive right, for personal, domestic, social, cultural, religious, spiritual,

⁶¹⁵ Ibid.

⁶¹⁶ Ibid.

⁶¹⁷ Working Group for Advancing Indigenous Reconciliation in Primary Industries and Natural Resource Management, 'Indigenous Reconciliation in Primary Industries and Natural Resource Management: Annual Report 2006-2007' ('Report', Natural Resource Management and Primary Industries Ministerial Councils, November, 2007) 23.

⁶¹⁸ Ibid 12.

ceremonial and non-commercial communal need'.⁶¹⁹ The claim area included the Baron Gorge National Park where the 'Storywaters' and *Bulurru*⁶²⁰ are ancestral creation areas. The types of water rights and interests negotiated under Indigenous Land Use Agreements under the *Native Title Act 1993* (Cth) do not provide compensation retrospectively for spent resources.

Aboriginal people are denied any right to compensation where native title may have existed over timber, water or minerals ... where native title may exist over these resources it will be extinguished ...⁶²¹

Pursuant to 'Part III of the *Rights in Water and Irrigation Act 1914* (WA), any native title rights to control the use and flow of waters were extinguished'.⁶²² The 'vesting of the beds of water courses, lakes and lagoons did not transfer legal estate to the Crown', only the control and management of water.⁶²³ For Aboriginal communities, the extinguishment of rights to water becomes not only a legal impediment but a barrier for future generations to exercise customary laws and practices on 'country'.

The Native Title Report (2006) addresses the statistics on native title determinations, pointing out that 'Indigenous s have varying rights and interests to just over 8.5 per cent of the Australian land mass as a consequence of native title determinations'.⁶²⁴ It also reports that 'just over 96 per cent of all Aboriginal land claims under native title are very remote locations'.⁶²⁵ Therefore the majority of Aboriginal peoples living in urban and rural locations will not be native title holders.

⁶¹⁹ *Djabagay People v Queensland* [2004] FCA 1652.

⁶²⁰ *Ibid.*

⁶²¹ NSW Aboriginal Land Council, 'NSW Native Title Bill: A Brief Critique by the NSW Aboriginal Land Council' ('Working Paper', 1993) 14.

⁶²² Lisa Strelein, 'A Comfortable Existence: Commercial Fishing and the Concept of Tradition in Native Title' (2002) 5 *Balay: Culture, Law and Colonialism* 119. Strelein (2002) cites *Western Australia v Ward* [2002] HCA 28 [241].

⁶²³ *Ibid.*

⁶²⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2006' (Human Rights and Equal Opportunity Commission, 2006) 43.

⁶²⁵ *Ibid.*

Lisa Strelein (2002) argues that ‘it is inconsistent to deny Indigenous peoples the right to develop their economic and cultural independence under native title’.⁶²⁶

The potential gap between the aspirations of Indigenous peoples and the capacity of common law native title to fulfil those expectations is enormous. The interpretation of the requirements of proof, and in particular the meaning attributed to the concept of ‘traditional’, form a significant part of that gulf.⁶²⁷

In *Commonwealth v Yarmirr* Olney J referred to the reasoning of Brennan and Toohey JJ in *Mabo v Queensland* [No 2] on the question of defining Indigenous ‘ownership’:⁶²⁸

Brennan J thought that it may be confusing to describe the title of the Meriam people as conferring ‘ownership’, a term which connotes an estate in fee simple or at least an estate in freehold. It would be equally confusing to ascribe the right of ownership to an area of sea and sea-bed. To understand ‘ownership’ in the present context it will be necessary to consider in detail what Toohey J described in *Mabo* [No 2] as ‘the abstract bundle of rights that are said to be enjoyed by reason of the connection of ownership’.⁶²⁹

There is a distinct gap between Western concepts in Australian law and Aboriginal definitions to exercise legal rights to water under traditional or customary laws. The court has conceptualised Aboriginal ownership in various legalistic concepts such as the ‘skeletal frame’ and the narrow definitions of native title laws determined by the courts. The use of the word ‘traditional’ implies a Western concept that frames native title with a ‘frozen in time’ approach to Aboriginal laws. These Western constructs fail to adequately express the nature of Aboriginal laws. The legal concept of native title as ‘a bundle of

⁶²⁶ Lisa Strelein, ‘A Comfortable Existence: Commercial Fishing and the Concept of Tradition in Native Title’ (2002) 5 *Balayi: Culture, Law and Colonialism* 123.

⁶²⁷ Ibid 100.

⁶²⁸ (1992) 175 CLR 1.

⁶²⁹ *Commonwealth v Yarmirr* [1999] FCA 1668. See *Mabo v Queensland* [No 2] (1992) 175 CLR 1 (Toohey J) 207.

rights', misunderstands the relationships of Aboriginal laws and traditional rights and interests of land, water and resources.

Native title is constructed on the doctrinal foundations of the Australian legal system and does not represent the complexity of ancient Aboriginal laws. The narrow interpretation of water rights under native title provides limited opportunities for Aboriginal peoples to exercise customary rights and interests. Aboriginal communities who do not hold native title under Australian law have negligible rights and interests in water. The High Court in determining native title in *Mabo v Queensland [No 2]*⁶³⁰ made a landmark decision that in some way acknowledged that the Yolngu peoples in the *Mirrilpum v Nabalco*⁶³¹ decision did possess a Yolngu legal system.

4.4 The Impact of Western Concepts on the Exercise of Aboriginal Water Ownership

The conceptual frameworks that represent Western ideological constructs lie within the disciplines of social science and Western philosophy. The impact of Western concepts on water rights and their respective property values are connected to how they are valued by their society. Both Aboriginal and non-Aboriginal values in water are based upon differing value systems and of themselves present a range of issues to address. As lawyers we are fully aware of the narrowing or broadening conveyed by the use of words in our opening or closing address to the court or where we seek to imply the statutory meaning of words in legislative instruments. The application of the word 'Western' in this thesis is to capture the meaning of words, concepts and perspectives which are derived from English, Australian or other European origins that are not concepts of Aboriginal peoples of Australia.

⁶³⁰ (1992) 175 CLR.

⁶³¹ (1971) 17 FLR 141.

Anthony Giddens (1993) proposes that the concept of ideology is useful for analysing relationships of power between different societies:

[t]he interrelations of conflict and consensus is that of *ideology* – values and beliefs which help secure the position of more powerful groups at the expense of less powerful ones. Power, ideology and conflict are always closely connected. Many conflicts are *about* power, because of the rewards it can bring. Those who hold most power may depend mainly on the influence of ideology to retain their dominance, but are usually able to use force if necessary.⁶³²

The thesis argues that Western ideology and Aboriginal ideology incorporate opposing values and beliefs and because of these opposing value systems there is a direct and indirect impact upon Aboriginal peoples claims to exercise their rights and interests in water. Any attempt to define Aboriginal water paradigms through Western ideology is unreasonable because customary Aboriginal law has evolved from a non-related set of beliefs, values and law systems.

Aboriginal water rights to ‘country’ are represented in the spiritual ancestral creation of the environmental landscape under Aboriginal laws, and familial totems and oral knowledge define the parameters of Aboriginal water use. As the introduction and the literature review demonstrate, Aboriginal laws have continued to be recognised by Aboriginal peoples.

Aboriginal peoples recognise kinship values and identity through such descriptors as ‘saltwater, freshwater and bitterwater’ which are especially relevant when travelling across traditional trade routes.⁶³³ Aboriginal kinship refers to ‘saltwater’ Aboriginal coastal communities, ‘freshwater’ from inland river areas and ‘bitterwater’ where

⁶³² Anthony Giddens, *Sociology* (Polity Press, revised ed, 1993) 722.

⁶³³ Virginia Falk, personal communication with D’harawal peoples, Frances Bodkin and Gavin Andrews, 2006.

saltwater meets the freshwater'.⁶³⁴ In Australia, Aboriginal peoples recognise a unique cultural identity within the water landscape through these familial connections.⁶³⁵

Marcia Langton (2005) argues that the construction of cultural identity in Cape York demonstrated commonalities with other Aboriginal communities:

[t]he distinction between freshwater and saltwater is critical in the cultural construction of places in the environment and environmental and economic knowledge of place. Freshwater and saltwater domains are distinct and separate, and rules that apply to the use of resources in each domain emphasize that distinctiveness in daily life.⁶³⁶

Aboriginal laws articulate the rights and interests of Aboriginal communities as they have always existed in the creation narrative. An ancestral creation story of the Ngarrindjeri explains the relationship of its peoples to the Creator:

The creation figure Ngarrindjeri pursued his two wives down the River Murray. They had eaten the bream fish, prohibited to women, and were escaping punishment. They travelled to the sea and ran over the land bridge to Kangaroo Island. Ngurunderi called the waters to rise. He flooded the land bridge and drowned his wives, whose bodies became the rocky islands known as The Pages, just off the eastern tip of the island.⁶³⁷

The principal characteristic of Aboriginal property rights or interests to water, either in birth or in death, is in the familial connection to 'place'. Connection can be represented

⁶³⁴ Virginia Falk, personal communication with Lionel Mongta, Traditional Owner of Gulaga Mountain in the South Coast of New South Wales 2006 during a fishing trip.

⁶³⁵ National Parks and Wildlife NSW 'D'harawal Brochure', NSW Department of Environment and Conservation, 2005. The information in the brochure was informed by several recognised D'harawal knowledge holders which explains the traditional boundaries and the recognition of bitterwater, freshwater and saltwater Aboriginal people within D'harawal communities.

⁶³⁶ Marcia Langton, *An Aboriginal Ontology of Being and Place: The Performance of Aboriginal Property Relations in the Princess Charlotte Bay Area of Eastern Cape York Peninsula*, Australia (D Phil Thesis, Macquarie University, 2005) 377.

⁶³⁷ Rebe Taylor, *Unearthed: The Aboriginal Tasmanians of Kangaroo Island* (Wakefield Press, 2002) 20.

by a river, an inter-tidal waterway, a waterhole or in the resources that rest on or beneath water. According to a Western perspective,

[t]he meaning of land (ontic commitments) and explanations of its origins (epistemic commitments) are reduced to a concern for quantification, in contrast to Indigenous relationships to land which are based on highly developed epistemic and ontic commitments.⁶³⁸

From an Aboriginal perspective, the importance of characterising water through contextual layers of creation stories remains paramount to understanding traditional law obligations – for example, in relation to particular meanings in Aboriginal water use or maintaining the quality of a ‘water-hole’. Aboriginal customary use is critical in Aboriginal trade along permanent water courses:

The Genaren Creek was part of a trade route and a source of permanent water and game. Wiradjuri people who commanded country that took in the headwaters and mid-reaches of what are now the Murrumbidgee, Lachlan and Bogan Rivers ... [in] the Murray-Darling Basin facilitated trade within and between clans and tribes ...⁶³⁹

The D’harawal-Bidjigal groups, referred to as ‘the D’harawal of the five rivers’, are the Traditional Owners of the Hawkesbury (Worondirri), the Parramatta, Georges (Kaimia), Woronora and Shoalhaven’ river regions.⁶⁴⁰ These rivers were surrounded by culturally significant swamps, from Sydney to the southern highlands, and the Goulburn region of New South Wales.⁶⁴¹ Paddy’s River provided food, ceremonial and initiation areas,

⁶³⁸ Alex Reilly, ‘Cartography, Property and the Aesthetics of Place: Mapping Native Title in Australia’ (2004) in Andrew Kenyon and Peter Rush (eds), *Aesthetics of Law and Culture: Texts, Images and Screens* 227- 228. Reilly cites Helen Verran’s (1998) ‘Re-imagining Land Ownership in Australia’ 1(2) *Postcolonial Studies* 237-254 which examines Indigenous relationships to land as highly developed epistemic and ontic relationships.

⁶³⁹ Chris Williams, *Old Land, New Landscapes: A Story of Farmers, Conservation and the Landcare Movement* (Melbourne University Press, 2004) 30.

⁶⁴⁰ Fran Bodkin and Lorraine Robertson, *D’harawal: Seasons and Climatic Cycles* (L Robertson and National Heritage Trust, 2008) 100.

⁶⁴¹ Ibid.

meeting places between groups, trade gatherings and medicine use for Aboriginal communities.⁶⁴²

For Aboriginal peoples, the ancestral creation-based values under Aboriginal laws restrict usage within a gendered environment of land, water and other things. Aboriginal sites represent a balance in animal and plant life because of a gendered environment.

The *Ngurru-nanggal Rom* is the First Creation Law of the Yolngu. Creation in Arnhem Land is cleft in twain: two halves called Dhuwa and Yirritja. This distinction is as fundamental as up and down, left and right, male and female, north and south.⁶⁴³

Aboriginal peoples' relationship to watercourses is tied to the spiritual creation of the lands and waters, and understood as a relationship to an animate object. Aboriginal customary property rights to land and water are bound by birthright, in a familial connection that includes the concept of ownership.

The Waanyi and Ganggalidda peoples hold primary interests in the Gregory River in the southern Gulf of Carpentaria.⁶⁴⁴ The Mingindda and Garawa peoples have secondary rights to this region of the river.⁶⁴⁵ Aboriginal rights and interests to these traditional areas illustrate why Aboriginal ownership to water is central to cultural identity.

Waanyi, and Ganggalidda people are closely related to each other through territorial association, ceremonial relationships ... there are close historical ties with the Lardil and Kaiadilt people of the Wellesley Islands. Rules of Kinship and social organisation undoubtedly determined access to land and water ... A

⁶⁴² Hawkesbury Nepean Catchment Management Authority, *World Wetlands Day: Paddys River* ('Brochure', 2 February 2009) 4.

⁶⁴³ John Cawte, *The Universe of the Warramirri: Art, Medicine and Religion in Arnhem Land* (New South Wales University Press, 1993) 12.

⁶⁴⁴ Ben Scambary, *Mining and Indigenous Values of Water: Gulf of Carpentaria Case Study* (North Australian Indigenous Land and Sea Management Alliance and Commonwealth Scientific and Industrial Research Organisation Darwin, 2007) 1-2.

⁶⁴⁵ Ibid.

consequence of close social and ceremonial ties with Northern Territory based language groups ... is also used to describe land interests.⁶⁴⁶

Both access to and use of traditional water landscapes was reliant on observing the seasonal changes in the environment. Aboriginal peoples had adapted to the natural ebb and flow of seasonal change and predicted change by traditional weather forecast methods.

In contrast to the construct of four European weather seasons, Aboriginal seasonal cycles would vary from six to ten cycles across Australia. The following examples of Aboriginal weather knowledge are provided below.

In Western Australia, the Nyoongar seasonal cycles are based upon an intimate relationship with the environment:

The sensitivity to the natural environment led Nyoongars to see the world in six seasons. All seasonal changes and patterns of life were part of a group's collected knowledge, and portrayed in ritual, mime and lore. Participation in special ceremonies ensured that the cycle of life continued.⁶⁴⁷

The Nyoongar seasons are indicated by

Bunuru for hot easterly and north winds from February to March, *Djeran* as becoming cooler with winds from the south-west in April to May, *Makuru* as cold and wet with westerly gales from June to July, *Djilba* in becoming warmer from August to September, *Kambarang* in rain decreasing from October to November and *Birak* in hot and dry with easterly winds during the day and south west sea breezes in the late afternoon from December to January.⁶⁴⁸

⁶⁴⁶ Ibid 6.

⁶⁴⁷ Ballardong Natural Resource Management Working Group, Avon Catchment Council, 'Ballardong Noongar Budjar: Healthy Country, Healthy People' ('Project Study', Australian Government 2006) 7.

⁶⁴⁸ Ibid 8.

Similarly, the climatic cycles for the D'harawal peoples in New South Wales identify

Talara as the time of ice, *Ganabi* as the time of fire, *Gadalung Burara* as the hot and dry, *Murayung Murrai* as getting cooler, *Tugara Murrai* as cold and wet, *Goray Murrai* as getting warmer and wet, *Gadalung Murrai* as hot and wet, *Murayung Burara* as getting cooler and drier, *Tugara Burara* as cold and dry and *Goray Burara* as getting warmer and drier, ending with the appearance of the Aurora Australis in the sky.⁶⁴⁹

Aboriginal laws regulate the Aboriginal environment, and the water rights and interests recognised in Aboriginal ownership express Aboriginal values and concepts, whereby Aboriginal spiritual beliefs embody both the tangible and intangible environment, and accepted in Aboriginal peoples narrative of relationships.

The relationship of Aboriginal peoples to land is particularised; each group is related to certain lands, bounded by physical features and meted [out] by religious ceremony and cultural heritage ... the land is not a lifeless, inanimate commodity to be used and disposed of, it is alive and has religious as well as economic value.⁶⁵⁰

European observations made in 1836 recognised the notion of Aboriginal ownership under Aboriginal laws:

The land appeared apportioned to different families ... beyond doubt an inheritable property among them, and they boast of having received it from their father's father to an unknown period way back.⁶⁵¹

⁶⁴⁹ Frances Bodkin, 'Experiencing a Cultural Landscape: The D'harawal Lands of the Yandelora and Wirrimbirra' ('Course Information', 1-2 May 2003). See the section on 'Climatic cycles'.

⁶⁵⁰ Gary D Meyers, 'Aboriginal Rights to the Profits of the Land: The Inclusion of Traditional Fishing and Hunting Rights in the Context of Native Title' in Richard H Bartlett and Gary D Meyers (eds), *Native Title Legislation in Australia* (1994) 213-219. See Meyer (1994) footnote 216 cites the work of R M Behrendt on 'Traditional Concepts of Aboriginal Land'.

⁶⁵¹ Sandy Toussaint, 'Western Australia' Ann McGrath (ed), in *Contested Ground: Australian Aborigines under the British Crown* (Allen and Unwin, 1995) 244.

The complexity of Aboriginal knowledge systems is far reaching on 'country'. For example, the familial obligation to care for water holes, rivers or other water resources encapsulates a unique cultural Aboriginal paradigm. Water resources are not effectively described through a Western value system or rights discourse. Western and Aboriginal concepts of water are distinct and antithetical to each other. Western cultures generally adopt economic methods to measure the value of the waters and the land in Australian society. Aboriginal spiritual philosophy does not.

The interpenetration of 'material' and 'spiritual' in Indigenous traditions confounds liberal philosophy's differentiation between religious and civil interests. Indigenous traditions are likely to see much less distinction between religious and other dimensions of existence. Ritual practice and spiritual traditions help to define and produce economic and social relations.⁶⁵²

An understanding of Aboriginal concepts of waterscapes and landscapes is derived from a cultural matrix of Aboriginal knowledge that is distinct from Western values of ownership. However commonalities exist with other Indigenous peoples:

First Nation peoples carry maps of their homelands in their heads. For most people, these mental images are embroidered with intricate detail and knowledge, based on the community's oral history and the individual's direct relationship to the traditional territory and its resources.⁶⁵³

Aboriginal customary laws to exclude or not exclude other Aboriginal groups were clearly taught from early childhood, as well as obligations and rights:

We had our own rules – we couldn't go anywhere and camp. Wilcannia mob when we came down for picking camped on 'The Hill' on the Fletchers Lake

⁶⁵² Marion Maddox, *Indigenous Religion in Secular Australia* ('Research Paper', No 11, Parliamentary Library, 1999-2000) 6.

⁶⁵³ Terry N Tobias, 'Chief Kerry's Moose: A Guide to Land Use and Occupancy Mapping, Research Design and Data Collection' ('Research Report', Union of British Columbia Indian Chiefs and Ecotrust Canada, 2000) 16.

Road – that was our camp, a bit away from old Victor Pottom’s hut. When we found a job and met up with some of our other relations we might find a place closer in. We couldn’t just go and camp, say where the Smiths were, but other Ngiyampaa people would go there.⁶⁵⁴

An Aboriginal Senior Lawman explains that Aboriginal laws, and the values and beliefs that attach to it remain unchanged:

Aboriginal law never change
Old people tell us ...
‘You gotta keep it’
It always stay.
Never change.⁶⁵⁵

Aboriginal law is central to the traditional, customary and contemporary access, control and management of ‘country’. The land and water cannot be separated from each other. Aboriginal ownership rights exist beyond death, in contrast to Western concepts.

Cultural heritage is the term used to refer to qualities and attributes possessed by places that have aesthetic, historic, scientific or social value for past, present and future generations ... There has been an artificial separation of indigenous and non-indigenous interests for a place ... the significance of indigenous places is defined by indigenous communities themselves ... For many Aboriginal people natural heritage is a meaningless distinction – they are interested in totality with the land ...⁶⁵⁶

⁶⁵⁴ Sarah Martin, ‘The Paakantji Claimants Wentworth Native Title Claim NC 95/10: Applicants Irene Mitchell and Ray Lawson Snr’ (‘Research Report’, NSW Aboriginal Land Council, December 1998) 92.

⁶⁵⁵ Big Bill Niedjie, Stephen Davis and Allan Fox, *Australia’s Kakadu Man Bill Niedjie* (Resource Managers, revised ed, 1986) 31.

⁶⁵⁶ Jane Lennon et al, ‘Conserving the Cultural Values of Natural Areas’ (‘Discussion Paper’, University of Canberra, August 1999) 4.

Aboriginal laws as they relate to water resources are a conundrum for Western legal frameworks. Determining Aboriginal water values and land as inseparable has far reaching implications for Western concepts in native title and water management in developing government policy and drafting laws. The core principle of Aboriginal property rights is Aboriginal peoples' ongoing obligation to the 'country' acquired by birthright.

In contemporary Australia, Aboriginal identity can be a synthesis of Aboriginal and Western social constructs. Aboriginal peoples may still seek to maintain Aboriginal customary practice – for example, in their spiritual attachment to water sources in exercising cultural obligations, recognising familial relationships to 'place', and pursuing economic rights to water while respecting cultural values.

To culturally identify as an Aboriginal person is important for the individual and the community, and resonates with a unique Aboriginal perspective in defining values, beliefs and practices.

Foremost I detest the imposition that anyone who is non-Aboriginal can define my Aboriginality for me and my race. Neither do I accept any definition of Aboriginality by non-Aborigines as it insults my intelligence, spirit and soul, and negates my heritage. The reincarnate anthropologists have made a stunning career out of a continuous 'Daisy Bates' serial. There are no books written by non-Aboriginals that can tell me what it is like to be Black as it is a fiction and an ethnocentric presumption to do so. I would never presume to know what it is to be white (except when I dine at the Hilton).⁶⁵⁷

Prominent Australian corporate chief Gerry Harvey expressed his view on defining Aboriginal identity:

⁶⁵⁷ Stephen Mueke, *Ancient and Modern: Time, Culture and Indigenous Philosophy* (University of New South Wales Press, revised ed, 2006) 104-105.

[H]ow do you solve the black problem? Australia's got nowhere with solving it. You've got all these righteous people over the years, politicians and do-gooders, all going to solve the black problem – and it gets worse every year. They don't solve it, they're getting nowhere. Then you've got the black fellow who stands up and wants all the land in Australia. And he's only half a black fellow, so is he a white fellow or is he a black fellow? In fact if he's got a tenth or an eighth of black fellow in him he says he's a black fellow. Bullshit! He's a white fellow. All right, so if he's half-black half-white, is he a black fellow or a white fellow? He's half each. He's no bloody different to you or me? Most Australians think like that.⁶⁵⁸

It has been suggested in Australia that Aboriginal culture has been weakened because of the import of Western values and beliefs:⁶⁵⁹

The Dreaming is a set of doctrines and values – the value of everything – which were determined once-for-all in the past. The things of the Market – money, prices, exchange values, saving, the maintenance and building of capital – which so sharply characterises our civilisation.⁶⁶⁰

Australian society has defended the right to progress and to capitalise on the development of the lands and waters, whilst available water resources held for millennia by Aboriginal groups were marginalised by the establishment of the Australian colonies and federation. Aboriginal peoples are generally expected to remain static in exercising traditional customs, law and practices, and when Aboriginal peoples adapt to Western influence and revitalize traditional laws, customs and practices they are generally excluded from exercising their inherent rights or interests.

⁶⁵⁸ Brett Kelly, *Collective Wisdom: Interviews with Prominent Australians* (Clown, 1998) 142.

⁶⁵⁹ Christopher Pearson, 'Stanner's Aboriginal Essays Show their Age', *The Australian* (Sydney), 21-22 March 2009, 24.

⁶⁶⁰ Ibid.

[A]boriginal rights are not frozen in time. Aboriginal culture is inherently dynamic and adaptive and should not be bound to archaic constructs of what practices encompassed traditional life in the pre-historic past. Although Aboriginal rights are identified in a western timeframe, they are not doomed to a static existence.⁶⁶¹

Blackstone's theory expounds the general principles of humankind's dominion over the natural environment through Western ideological values of law. He states:

The earth and all things therein were the general property of mankind from the immediate gift of the Creator. Not that the communion of goods seems ever to have been applicable, even in the earliest ages ... the substance of the thing; nor could be extended to the use of it. For, by the law of nature and reason, he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer ... the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part was the permanent property of any man in particular ... but the instance that he quitted the use or occupation of it, another might seize it without injustice.⁶⁶²

Australia's water rights were founded upon the English legal system of common law riparian water rights which were held by the owner of the land. Under this system the property in water running through the land was defined in these terms.

Property in water is naturally vested in the possession of the land, upon which, for the time being it lies. Whether falling as rain, or running from springs at the surface, or being drawn from the wells under the earth, the water belongs to the landowner, who has exclusive disposal of it, so long as it remains upon his land ...

⁶⁶¹ Graham R Statt, 'Tapping into Water Rights: An Exploration of Native Entitlement in the Treaty 8 Area of Northern Alberta' (2003) 18 *Canadian Journal of Law and Society* 1.

⁶⁶² Quoted in Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (John Murray, first published 1906, 1927 ed) 264-265.

The rain-water that falls on private land may be impounded and utilized in any way the proprietor may deem fit.⁶⁶³

The history of common law water rights, which preceded statutory law, commenced with the legal commentary of Bracton and with Roman jurisprudence, which influenced the development of modern water law.⁶⁶⁴ Bracton formulated the user-rights principles based upon the broader civilian concepts of property.⁶⁶⁵

Bracton's classification of property rights to water, which have been cited in judgements and treatises for over 600 years, recognised that user-rights over land held by the property owner were natural rights inherent in land ownership, which recognised running water as a common good.⁶⁶⁶ John Locke used the concept of water ownership to illustrate his theory on property rights.⁶⁶⁷ Because of Australia's British colonial settlement, these common law concepts of water 'ran with the land' where ownership of the land was held.

The nature of water was articulated by Blackstone: 'whatever moveables were found on or below the land or in the sea and unclaimed by any owner was said to be abandoned'.⁶⁶⁸ However, Blackstone states that 'the transient nature of water could not be owned in the same way as land but it could be occupied by a first use'.⁶⁶⁹ In contrast to definitions of English concepts of water, the framework of Aboriginal values in water rights and interests are based on a holistic creation based belief that water was created by ancestors, where waters have been formed and particular kinship obligations apply to maintain water quality; some water sources are also taboo because of the events in creation stories, as examined throughout the thesis chapters.

⁶⁶³ H H Dare, *Water Conservation in Australia* (University of Queensland and Simmons, September 1939) 15-16.

⁶⁶⁴ Joshua Getzler, *A History of Water Rights at Common Law* (Oxford University Press, 2006) 45.

⁶⁶⁵ Ibid 65.

⁶⁶⁶ Ibid 67.

⁶⁶⁷ Ibid 1. See J Locke, *Second Treatise of Government* ss. 29 and 33, in *Two Treatises of Government*,

⁶⁶⁸ Ibid 175.

⁶⁶⁹ Ibid.

Western property concepts value ownership and the right to exclude others. The ‘common good’ principle changed when water resources became significant for the development of the Industrial Revolution, raw material production, agricultural expansion and urbanisation.⁶⁷⁰

The truth is private property is central to political and economic freedom. We don’t talk about this much, partly because it’s such a basic premise of our civilisation and partly because it slips between economics and law.⁶⁷¹

Because of the Western ownership paradigm, Aboriginal values, practices and beliefs are in conflict with Western perspectives and values regarding property ownership. Aboriginal and Western conceptions of water rights and interests, as with land rights, are opposing ideologies, as this thesis will argue.

The High Court decision in *Mabo v Queensland* [No 2]⁶⁷² held that:

[E]nglish land law in 1879 and to the present, whereby an estate in fee simple on a person in possession of land enforceable against all the world was the basis for common law except where a person could prove a better claim.⁶⁷³

Ownership of the land or the waters is also highly valued because it enables the individual to increase personal wealth and status.

Private property is fundamental to a capitalist mode of production and, according to some, crucial to a nation’s wealth and standard of living.⁶⁷⁴

⁶⁷⁰ Ibid 37.

⁶⁷¹ Michael Duffy, ‘A Good Land Right is a Good Deed’, *The Sydney Morning Herald* (Sydney), 9 April 2005, 41.

⁶⁷² (1992) 175 CLR 1.

⁶⁷³ Ibid 127.

⁶⁷⁴ ACIL Tasman in association with Freehills, ‘An Effective System of Defining Water Property Titles’ (‘Research Report’, Australian Government, Department of Agriculture, Fisheries and Forestry and Land and Water Australia, Canberra, March 2004) 17.

Former Prime Minister of Australia, Gough Whitlam, remarking on the dispossession of Aboriginal peoples from their customary ownership of the land and waters, stated:

[i]n the 1990s, after *Mabo*, there was an attempt to argue that the squatters spearheaded the spread of our occupation did not really understand that they were dispossessing anybody in *terra nullius*. The truth is that they understood it very well. All the contemporary documents, official, press, and private, show abundantly that everybody understood that they were engaged in one of the largest land appropriations in history and that everybody understood the consequences of what we were doing.⁶⁷⁵

The historical ‘common thread of abuse’⁶⁷⁶ experienced by Aboriginal peoples in Australia has significantly impacted upon maintaining a cultural association to land and water. The Royal Commission Report into Aboriginal Deaths in Custody exposed the extent of policies and laws which underpins Aboriginal dispossession.

[A]boriginal people were dispossessed of their land without benefit of treaty, agreement or compensation is generally known ... little known is the amount of brutality and bloodshed that was involved in enforcing on the ground what was pronounced by the law. Aboriginal people were deprived of their land and if they showed resistance they were summarily dealt with. The loss of land meant the destruction of the Aboriginal economy which everywhere was based upon hunting and fishing ... the loss of the land threatened the Aboriginal culture which all over Australia was based upon land and relationship to the land. These were the most dramatic effects of European colonization supplemented by the decimating effects of introduced disease to which the Aboriginal people had no resistance.⁶⁷⁷

⁶⁷⁵ Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia*, (Macleay Press, 2005) 310.

⁶⁷⁶ Ibid 14-15.

⁶⁷⁷ Elliott Johnston, ‘National Report, Overview and Recommendations: Royal Commission into Aboriginal Deaths in Custody’ (Australian Government, 1991) 7.

*Milirrpum v Nabalco*⁶⁷⁸ highlights the courts' inability to recognise Aboriginal property rights under Australian law, however, the court clearly acknowledged the cultural relationships that bond Aboriginal peoples to land and water. Blackburn J attempted to interpret ancient Aboriginal laws through Western concepts of property law, stating in *Milirrpum v Nabalco*⁶⁷⁹ that,

[t]here is so little resemblance between property, as our law, or what I know of any other law ... I must hold these claims are not in the nature of proprietary interests.⁶⁸⁰

The concept of Aboriginal ownership was ignored because it did not bear any resemblance to British legal concepts of property.

Upon European settlement, Australian governments proceeded on the basis that the indigenous people had no settled law and therefore nobody owned the land with the result that it all vested in governments to use as they saw fit.⁶⁸¹

In *Mabo v Queensland* [No 2]⁶⁸² the Court held that Australia was acquired under radical title in an 'act of state doctrine', where settlement commenced under the doctrine of *terra nullius*, on the basis that 'indigenous people were without laws or a sovereign, and a primitive social organisation'.⁶⁸³ The majority in *Mabo v Queensland* [No 2]⁶⁸⁴ determined that the doctrine of native title formed part of Australia's laws, in relation to Australia's colonisation.⁶⁸⁵ The *Mabo v Queensland* [No 2]⁶⁸⁶ decision had moved well

⁶⁷⁸ (1971) 17 FLR 141.

⁶⁷⁹ Ibid.

⁶⁸⁰ Paul Patton, 'The Translation of Indigenous Land into Property: The Mere Analogy of English Jurisprudence' (2000) 6(1) *Parallax* 33.

⁶⁸¹ Paul Seaman, 'The Negotiation Stage' in Gary Meyers (ed), *In the Wake of Wik: Old dilemmas, New Directions in Native Title Law* (National Native Title Tribunal, May 1999) 382.

⁶⁸² (1992) 175 CLR 1.

⁶⁸³ Tony Simpson, 'Submissions Re: Domestic Dependant Nations' ('Unpublished Working Paper', 2004) 2.

⁶⁸⁴ (1992) 175 CLR 1.

⁶⁸⁵ Tony Simpson, 'Submissions Re: Domestic Dependant Nations' ('Unpublished Working Paper', 2004) 34-38.

⁶⁸⁶ (1992) 175 CLR 1.

beyond the reasoning in the *Mirrilmum v Nabalco*⁶⁸⁷ decision. However, Australian laws set rigid parameters on the legal recognition of Aboriginal laws, customs and practices.

Larissa Behrendt (2003) argues that ‘the method of Aboriginal use of the land was always incongruent with British and European values and concepts of Western property’.⁶⁸⁸

Behrendt does not make any distinction between British, European or Western value systems:

Despite claims that there were no Indigenous property rights, the British saw themselves from the earliest days of the colony as being in competition with Indigenous people for land.⁶⁸⁹

The treatment of Aboriginal peoples’ claim to exercising rights and interests is challenged by Western legal concepts because they challenge long held legal opinion. Olney J held in the *Yorta Yorta*⁶⁹⁰ decision that ‘the traditional connection of the Yorta Yorta no longer existed because of the information provided by the diary of squatter Edward Curr’.⁶⁹¹ Olney J stated:

The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs.⁶⁹²

In the Full Court *Yorta Yorta*⁶⁹³ decision, Black CJ dissented on what characterised Aboriginal ‘tradition’:⁶⁹⁴

⁶⁸⁷ (1971) FLR 141.

⁶⁸⁸ Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future* (Federation Press, 2003) 36.

⁶⁸⁹ Ibid.

⁶⁹⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] 4 ALIR 91.

⁶⁹¹ Ken Jagger and Helen Kurz, ‘Native title and the Tide of History: The *Yorta Yorta* Case’, (December 2002-January 2003) 17(6) *Australian Property Law Bulletin* 42.

⁶⁹² Ibid.

⁶⁹³ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2001] 180 ALR 655.

⁶⁹⁴ James Cockayne, ‘*Members of Yorta Yorta Aboriginal Community v Victoria: Indigenous and Colonial Traditions in Native Title*’ (2001) 25 *Melbourne University Law Review* 794. See the Macquarie Dictionary definition of ‘tradition’ in the ordinary meaning of the word quoted by Black CJ in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2001] 180 ALR 655.

[i]t can be readily appreciated how less physical or tangible manifestations of traditional laws and customs can be seen to be rooted in the past and to be traditional customs in the adapted form currently observed. Adaptations of this nature may manifest themselves in many ways including, to take one possible example, changed leadership structures within modern Aboriginal society.⁶⁹⁵

Lametti (2003) argued that ‘values’ hold a range of social meanings ‘in land and water’ that are not restricted to legal and economic values.⁶⁹⁶

Value is a critical concept; the way in which we assign value focuses on use and exchange of particular resources. The common method of valuation in Western market society is the exchange mechanism ...⁶⁹⁷

According to Lametti, the ‘social values that are central to a Western market society are one of economic and aesthetic utility’.⁶⁹⁸ As such the Aboriginal economy does not reflect these dominant Australian societal values. Former Prime Minister John Howard stated:

There’s no such thing as a nation without a dominant culture ... We have a dominant culture ... We have a dominant Anglo-Saxon culture. It’s our language, our literature, our institutions ... You can be a part of the mainstream culture and still have a place in your life and your heart for your home country.⁶⁹⁹

Aboriginal values, customary rights and interests are not part of Australia’s ‘mainstream culture’, even though Australia’s history commenced with an Indigenous culture and the dominant features of water and land are Indigenous. The difficulty in asserting an Australian ‘dominant cultural’ perspective under Australian law is that it fails to recognise Indigenous peoples have adapted to the impact of settlement and its expansion.

⁶⁹⁵ Ibid.

⁶⁹⁶ David Lametti, ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003) 53 *University of Toronto Law Journal* 11.

⁶⁹⁷ Ibid.

⁶⁹⁸ Ibid.

⁶⁹⁹ Tom Dusevic, ‘John Howard: The Making of a Populist’ *Time Magazine* (Sydney) 6 March 2006 (9) 22.

There is tension between the acceptance that the common law remedies are available to protect rights and interests in land held under traditional law, and the assertion that there is no room for a parallel system of Indigenous governance ... As the Court held in *Yorta Yorta*, native title can only continue to be recognised where the Indigenous people continue to acknowledge and observe traditional laws and customs.⁷⁰⁰

French CJ speaking extra-curially emphasised that native title claims are onerous for Aboriginal peoples under the ‘current burden of proof’ where they are required to prove claims to native title, where instead the Chief Justice asserts, Aboriginal claimants ‘should be presumed to have continuous existence and vitality from the assertion of British sovereignty’.⁷⁰¹

Secher (2004) argues that the *Mabo v Queensland* [No 2]⁷⁰² decision, in obiter, appears to have replaced the feudal fiction of original Crown ownership with a new legal fiction, namely the ‘no other proprietor fiction’.⁷⁰³ Secher comments on the Maori challenge to the notion of New Zealand as an ‘inhabited settled colony’.⁷⁰⁴

Since New Zealand is, contrary to the conventional view, relevant authority in the context of an inhabited settled colony, the Judicial Committee’s advice in *Nereaha Tamaki v Baker*⁷⁰⁵ should not be overlooked when examining the legal nature of the Crown’s title to land which is subject to pre-existing aboriginal title; statutory regimes declaring that all unappropriated and unalienated lands to be domain lands merely regulates the Crown’s disposition over all the land.⁷⁰⁶

⁷⁰⁰ John Basten, *Beyond Yorta Yorta*’ (October 2003) 2(24) Australian Institute of Aboriginal and Torres Strait Islander Studies 4, 5 <<http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip03v2n24.pdf>>.

⁷⁰¹ Selma Milovanovic, ‘Native Title Proof may be Reversed’, *The Age* (Melbourne), 10-11 April 2009, 3. (1992) CLR 175 1.

⁷⁰² Ulla Secher, ‘The Meaning of Radical Title: The Pre-Mabo Authorities Explained Part 2’ (2005) 11 *Australian Property Law Journal* 243.

⁷⁰³ Ibid 241

⁷⁰⁴ Ibid 227. Secher cites *Nereaha Tamaki v Baker* [1901] AC 561 (PC) and discusses the Privy Council in 1901 rejecting the New Zealand courts’ adoption of a line of reasoning that there was no customary Maori law.

⁷⁰⁵ Ibid 241.

Stephen Mueke (2006) argues that the doctrine of *terra nullius* in Australia's history resulted in a reluctance to legally recognise Aboriginal rights:

The British invented the designation of *terra nullius*, empty land, 'nowhere', to justify their occupation, effacing in the process the specific modes of emplacement of Aboriginal cultures, which is tantamount to effacing the people themselves: if they are nowhere, where are they dwelling?⁷⁰⁷

The native title amendments secured by the Federal Howard Government after the *Wik Peoples v Queensland*⁷⁰⁸ decision, and referred to as the 'Ten Point Plan', expunged the co-existence between Aboriginal and non-Aboriginal rights under certain pastoral leases; these amendments have narrowed Aboriginal rights and interests to land and water in Australia.⁷⁰⁹ For various reasons the native title system results in unsatisfactory outcomes for Aboriginal peoples, as the following decisions illustrate. The New South Wales Aboriginal Land Council stated:

[t]he *Wilson v Anderson* and *Yorta Yorta* decisions have further eroded the likelihood that native title will be recognised in NSW ... Due to the likelihood that native title will have restricted benefits for Aboriginal people in NSW, cultural heritage rights should form the basis upon which Aboriginal people are afforded benefits through NSW Water Reforms and the state-based Implementation of the National Water Initiative.⁷¹⁰

The Land Council submission, in relation to the treatment of Aboriginal land and water interests by the New South Wales Government, stated:

⁷⁰⁷ Stephen Mueke, *Ancient and Modern: Time, Culture and Indigenous Philosophy*, (University of New South Wales Press, revised ed, 2006) 14-15.

⁷⁰⁸ (1996) 187 CLR 1.

⁷⁰⁹ Katie Glaskin, 'Native title and the Bundle of Rights Model: Implications for the Recognition of Aboriginal Relations to Country' (2003) 13(1) *Anthropological Forum* 69-70.

⁷¹⁰ New South Wales Aboriginal Land Council, 'Submission to the Department of Natural Resources (NSW): Draft Implementation Plan for the National Water Initiative' (8 December 2005) 6.

It has been expected that Aboriginal rights and interests in water would be promoted through an approach similar to that contained in the *Aboriginal Land Rights Act 1983* (NSW). The *Act* recognises Aboriginal prior ownership of land, similar to the *Water Management Act 2000* (NSW) and the spiritual, social, cultural and economic values attached to land. The important distinction between the NSW Government approaches to the management of the Aboriginal claim on land as compared to the Aboriginal claim on natural resources is that the *Aboriginal Land Rights Act* provides mechanisms for compensation for loss whereas the *Water Management Act* and the Draft Implementation do not.⁷¹¹

Aboriginal communities' use of potable and cultural water rights, and their access to and use of water for other traditional or communal purposes, is considered by governments as an inferior water right among those of other stakeholders. Stakeholders, for example, in agriculture and mining development are highly valued within the Australian economy.

The two major parties are confronted, on the one hand, by their desire to see social justice for Aboriginal Australians and, on the other hand, their concern about the effect that native title claims will have on the pastoral and mining industries which are of major importance to the Australian economy. Both parties have an ongoing interest in setting a firm regime specifying the limits of native title.⁷¹²

Holzberger (2003) notes that 'Aboriginal rights to water under native title do not prevail over mining rights' due to the High Court decision in *Western Australia v Ward*.⁷¹³

The issuance of a water licence for mining purposes may impair native title rights. According to Denholder and Gishubl, grants of licences under water legislation

⁷¹¹ Ibid 1.

⁷¹² Frank G Nicholls, 'Aboriginal Hunting Rights and Fauna Protection Legislation: *Yanner v Eaton* [1999] in its Political Context' (2000) 30(3) *Environmental Policy and Law* 146.

⁷¹³ Melissa Kate Holzberger, 'Access to Water Resources for Mining Purposes in South Australia' (10 July 2006) *University of Dundee* <http://www.dundee.ac.uk/cepmlp/car.html/car7_article10.pdf>. See *Western Australia v Ward* [2002] 191 ALR 1.

are generally not considered to be grants, which are likely to be construed as inconsistent with native title rights as to bar co-existence. The grants are not exclusive.⁷¹⁴

The dialogues on water rights and property rights in water are similar to the issues surrounding native title and Aboriginal freehold land because Australia's hierarchy of rights and interests favours dominant Australian societal values.

[b]y labelling indigenous property rights as different from or non-analogous to common law interests in land ... the assertion of the cultural superiority of Western legal schemes over those of Aboriginal peoples ... the continuance of such stereotypes makes it easier to assume the inferiority of Aboriginal property rights⁷¹⁵

As Meyers (1994) explains, 'Indigenous Australians value the spiritual connection and relationship with the land and resources rather than Eurocentric notions of native title laws'.⁷¹⁶ The social and economic development of Australian society and the progress of Aboriginal policy are often at odds in the allocating of water rights and interests because of divergent cultural, social and economic values.

A key feature of the relationship between government and Indigenous peoples is its inequality. Instead of a government-to-government style of negotiation of needs, priorities and resources with Indigenous peoples. Australia has always had a top-down approach whereby the various Commonwealth, State and Territory government agencies ... decide the functional areas and guidelines for expenditure.⁷¹⁷

⁷¹⁴ Ibid 11-12. Holzberger quotes T Denholder and G Gishubl, 'First Decade of Mabo Part 2' (Paper presented at Australian Mining and Petroleum Law Association, Gold Coast, Queensland, 14-17 August 2002) 470.

⁷¹⁵ Gary D Meyers, 'Aboriginal Rights to the Profits of the Land: The Inclusion of Traditional Fishing and Hunting Rights in the Content of Native Title' in Richard H Bartlett and Gary D Meyers (eds), *Native Title Legislation in Australia* (University of Western Australia, 1994) 221-222.

⁷¹⁶ Ibid 217.

⁷¹⁷ Sean Brennan et al, *Treaty* (Federation Press, 2005) 32.

In relation to Aboriginal rights and interests to water, and identifying water use values, for example, as consumptive, non-consumptive and environmental, these definitions, like those in native title, are not well suited to Aboriginal concepts because Aboriginal laws and customs are difficult to define. Western water management concepts seek to separate and compartmentalise water resources, whereas under Aboriginal water and land concepts, water is valued holistically and are inseparable from one another. Klempton and Kleer (2003) say that ‘all Aboriginal rights are based upon inherency’ and are not dependent on ‘acts of government to prove Aboriginal rights’.⁷¹⁸

Inherent indigenous rights are derived from existence (being here) and custom (adaption of a way of life to perpetuate existence or survival as peoples). Custom (or customary law) is in turn derived from the relationship with the Creator and the understanding why and for what purposes the Creator put a people here (in their own place in the universe).⁷¹⁹

‘Culture’, in the ordinary meaning of the word, is

[t]he total of the inherited ideas, beliefs, values and knowledge, which constitute the shared bases of social action.⁷²⁰

The literal meaning of ‘culture’ is not adequate for interpreting an Aboriginal ‘world view’. The rigidity of Western property concepts is evident in Australia’s legal system when Aboriginal peoples exercise their claim to water rights and interests under native title and Aboriginal access and use of customary water resources. Legal parameters exist within native title definitions because of domestic and international boundaries of high and low water marks; Western water boundaries are unnatural and artificial for Aboriginal peoples.

⁷¹⁸ Kate Kempton and Olthuis Kleer Townshend, *Bridge over Troubled Waters: Canadian Law on Aboriginal and Treaty Water Rights and the Great Lakes Annex* (2003) 13
<<http://www.thewaterhole.ca/publications/aboriginal20%water%20rights%20and%20annex%20paper%20final.pdf>>.

⁷¹⁹ Ibid 13.

⁷²⁰ William Collins and Sons, *Collins Concise Dictionary of the English Language* Wilkes and Krebs (eds) (Collins, 2nd ed, 1988) 273.

The research on customary marine tenure conducted by Peterson and Rigsby (1998) points out that Aboriginal water relationships have ‘rich layers of law dimensions that dwarf the narrow descriptors of Australian water policy’.⁷²¹ Peterson and Rigsby argue that:

Indigenous interest in the sea encompasses a great deal more than subsistence, as the anthropological literature makes clear ... The social construction of the seascapes is ... complex and varied.⁷²²

In New Zealand the common law was modified by the legal recognition of Maori customary law. Elias CJ in *Ngata Apa* (‘*Marlborough Sounds Case*’)⁷²³ on appeal rejected the extinguishment argument in *Re Ninety-Mile Beach*⁷²⁴ regarding Maori rights to the foreshore and seabed, and stated:

[t]he common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English law. The common law of New Zealand is different.⁷²⁵

Advocating for Aboriginal water rights as ‘customary property’ has been an ongoing issue for Aboriginal communities, because unlike New Zealand, legal recognition under Australia’s legal system is reluctant to expand the definition to recognise Aboriginal water as ‘customary property’. Generally, Aboriginal land claims are centred upon contesting Western legal concepts of ownership to reclaim the land, water or resources which was ‘taken’.

⁷²¹ Nicolas Peterson and Bruce Rigsby (eds), ‘Customary Marine Tenure in Australia’ (1998) 48 *Oceania Monograph University of Sydney* 2.

⁷²² *Ibid* 10.

⁷²³ C Rebecca Brown and James I Reynolds, ‘Aboriginal Title to Sea Spaces: A Comparative Study’ (2004) 37(1) *University of British Columbia Law Review* 483-491. See *Attorney General v Ngati Apa* (2003) 3 NZLR 643 (‘*Ngati Apa Appeal*’) (‘*Marlborough Sounds Case*’).

⁷²⁴ *Ibid* 487-490. See *In Re Ninety-Mile Beach* (1963) NZLR 461 (CA).

⁷²⁵ *Ibid* 481-483.

The right to fish under traditional laws has not translated into commercial fishing rights; the native title right to take flora and fauna is not able to be used to sell bush foods or native wildlife as of right. The traditional use of minerals has not become a native title right to exploit minerals such as through mining enterprises ... Native title rights are limited in law to anachronistic, domestic, non-commercial rights.⁷²⁶

Aboriginal and non-Aboriginal societies have distinct legal systems based on differing values, societal governance and relationships with the environment. The distinct common thread between Aboriginal law and Australian law is that both legal systems seek to establish legal authority.

Aboriginal title is subject to the various judicially crafted constraints of inalienability, communality, and undefined restrictions to its use ... these restrictions will have commercial and economic implications, impairing the economic and commercial value of Aboriginal lands.⁷²⁷

The range of competing interests to property rights and how these relationships relate to the principles of environmentalism are examined in Arnold, 'The Reconstruction of Property' (2002), which seeks to define a 'new metaphor' that accommodates human relationships within the environment to define these legal interests in property as a 'web of interests'.⁷²⁸ The notion of a 'web of interests' allows a 'new metaphor' to describe the complex relationships of Aboriginal peoples and the impact of other interest groups post-contact upon Aboriginal communities.

Arnold's metaphor is useful when applied to the relationship of Aboriginal people to their lands and waters, where water rights and interests are recognised with a 'web' of relationships and 'interests' in property such as kinship obligations to maintain water

⁷²⁶ Tim Dick, 'Land Rights in Limbo', *The Sydney Morning Herald* (Sydney), 26-28 January 2007, 29.

⁷²⁷ Ibid 88.

⁷²⁸ Craig Anthony Tony Arnold, 'The Reconstruction of Property: Property as a Web of Interests' (2002) 26 *Harvard Environmental Law Review* 281.

holes and to monitor traditional boundaries and rights to access land and water areas. From an Aboriginal perspective, a complex system exists because an Aboriginal claim to water in the property rights paradigm requires the Western legal system to legally recognise and not merely 'accommodate' Aboriginal water values in Australian law and policy framework. Arnold (2002) explains in his research that,

a metaphor cannot answer all questions, but it can help us to know what they are and provide some mental scheme around organising the inquiry and analysis in accommodating human relationships in property rights.⁷²⁹

An argument put by Blumer (2000) analyses how to incorporate incompatible views on water interests, suggesting for example that an accommodation between environmental needs and an irrigator's allocation of water rights requires a distinction of the types of rights at issue.⁷³⁰

[n]ot by treating them as competitors of the same type for the same resource within the same system because the environment and the irrigation industry have fundamentally different needs.⁷³¹

The late Peter Cullen, a member of the Wentworth Group of Concerned Scientists, noted that the water reform policy of the Council of Australian Governments provides 'irrigators with a greater involvement than Indigenous interests'.⁷³² A lack of inclusion of the water rights and interests of Aboriginal peoples reduces the level of opportunity for incorporating Aboriginal concepts and values in water. For example, the nature of Aboriginal rights and interests in trading 'things' is limited by Western concepts and values in the way the characteristics of an economy are defined:

⁷²⁹ Ibid.

⁷³⁰ Mark Blumer, 'In Search of the Common Bunyip: A Commonsense Approach to Water Property Rights in New South Wales' (August 2000) 17(4) *Environmental and Planning Journal* 336.

⁷³¹ Ibid.

⁷³² Peter Cullen, 'Water: The Key to Sustainability in a Dry Land' in Jenny Goldie, Bob Douglas and Bryan Furnass (eds), *In Search of Sustainability* (Commonwealth Scientific and Industrial Research Organisation, 2005) 85.

The trade of goods such as ochre followed the dreaming tracks connecting the intermittent waters ... plentiful supplies of food allowed people to congregate at exchange centres at feast and trade ... trading events were associated with the migrations of bogong moths ... eels in Victoria, fish on the Darling River, and the ripening of bunya nuts in Queensland ... Maccassan seafarers made annual journeys to Australia's northern shores [trading] trepang and turtle shells, outrigger canoes, sails and tobacco.⁷³³

Aboriginal concepts in defining the boundaries of 'country' are difficult concepts to define through Western property tenure. Boundary marking trees which define territory or funeral areas, among lakes, along riverbanks and sand dunes, designate the use of the water landscape under Aboriginal laws and have highly sensitive cultural significance.⁷³⁴

A Nyoongar witness during the *Bennell*⁷³⁵ proceedings gave evidence that 'country' was distinguished by 'boundaries of trees amongst the landscape, and that these boundaries identified 'country' for Aboriginal peoples', and stated:

Boundaries are marked by landscape ... on the other side of Southern Cross they have different trees. They have Gimlett trees ... This is Gubran country. The trees in my country, Nyoongar country, are the white gum tree, the Yorgum trees and the jam gum trees. In Wongai country they have mallee trees. Boundaries are also marked by the hills and the names of hills. There might be a hill that you're not allowed to go past.⁷³⁶

⁷³³ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2007' (Human Rights and Equal Opportunity Commission, Sydney, 2008) 218.

⁷³⁴ Virginia Falk, (2008) personal communication between Aboriginal knowledge holders and the author during Aboriginal site consultation and Aboriginal artefact recovery.

⁷³⁵ *Bennell v Western Australia* [2006] 153 FCR 120.

⁷³⁶ Ibid 165. From witness evidence given by Dorothy Gartlett.

An Aboriginal water landscape is projected into topographic features dominated by ‘sea to mountain, and river to river’⁷³⁷ which are divided by ‘ridge lines’ to mark Aboriginal boundaries to country.⁷³⁸

Langton (2005) argues that the distinct cultural identity of Aboriginal peoples also lies within the definitions of fresh and coastal water:

[t]he distinction between freshwater and saltwater is critical in the cultural construction of places in the environment and environmental and economic knowledge of place.⁷³⁹

The use of certain types of water has inherent cultural value in the preparation of Aboriginal traditional medicines in Australia:

Salt water was used as an emetic, and various mixtures of earth and mud as a protective and haemastatic application to wounds. Bathing in mineral springs is also reported among Central Australians. Sand and mud baths were prescribed for feverish disorders in Western Australia.⁷⁴⁰

Jackson and Morrison (2007) argue that ‘the characteristics of Aboriginal water use warrant further consideration of the broad landscape perspectives in assessing impacts and engaging Indigenous communities’.⁷⁴¹ Aboriginal social, cultural, spiritual and economic water values are interwoven, as spiritually-linked concepts and values held within Aboriginal kinship, among all water resources.

⁷³⁷ Virginia Falk, personal communication with D’harawal people, Frances Bodkin and Gavin Andrews during my cultural mentoring, 2006-2007.

⁷³⁸ Ibid.

⁷³⁹ Marcia Langton, *An Aboriginal Ontology of Being and Place: The Performance of Aboriginal Property Relations in the Princess Charlotte Bay Area of Eastern Cape York Peninsula, Australia* (D Phil Thesis, Macquarie University, 2005) 377.

⁷⁴⁰ S Saggors and D Gray, *Aboriginal Health and Society: The Traditional and Contemporary Aboriginal Struggle for Better Health* (Allen and Unwin, 1991) 44.

⁷⁴¹ Sue Jackson and Joe Morrison, ‘Indigenous Perspectives in Water Management, Reforms and Implementation’ in Karen Hussey and Stephen Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges* (Commonwealth Scientific and Industrial Research Organisation, 2007) 11.

The Annual Report on Indigenous Reconciliation in Primary Industries and Natural Resource Management (2006-2007) identified the Australian Government's inaction in providing an equitable or cultural water use for Aboriginal peoples:

Water is a critical issue for Natural Resource Management and Primary Industries in Indigenous communities, as many communities have unreliable water source or lack of potable water. A reliable water supply is required for sustaining business ventures e.g. irrigated agriculture and aquaculture in remote and regional areas and may promote the economic independence of Indigenous communities.⁷⁴²

David Pannell suggests that 'there is often a mismatch between the complexity of policy problems and the simplicity of responses'.⁷⁴³ Pannell argues that the critical founding principles in politics and bureaucracies in Australian policy are underpinned by 'simplistic and bland agreements' which 'drive the lowest common denominator in policy proposals'.⁷⁴⁴ The impact of unresponsive and ill-conceived policy planning, as Pannell argues, in relation to Aboriginal policy has the potential to negatively affect Aboriginal policy development and the capacity to provide effective responses to the customary water values of Aboriginal peoples.

In Australia there is an inequitable allocation of water resources by government to the majority of Aboriginal communities, where Aboriginal communities are divided into native title holders and non-native title groups, as well as Aboriginal water interests and non-Aboriginal stakeholders in water. Governments may exercise their discretion to accommodate or legally enshrine Aboriginal cultural water rights and interests under Australian law. Without legal recognition of the range of Aboriginal water rights and interests, there is the potential to increase the level of social disadvantage experienced by

⁷⁴² Working Group for Advancing Indigenous Reconciliation in Primary Industries and Natural Resource Management, 'Indigenous Reconciliation in Primary Industries and Natural Resource Management: Annual Report 2006-2007' ('Report', Natural Resource Management and Primary Industries Ministerial Councils, November, 2007) 12.

⁷⁴³ David Pannell, University of Western Australia, 'Thinking like an Economist 20: Challenges for Policy Economists' <<http://www.pannelldiscussions.net/2005/05/52-thinking-like-an-economist-16-weaknesses-of-economists/>>.

⁷⁴⁴ Ibid.

Aboriginal groups who do not hold native title rights because of past government policies.

The Native Title Bill did not codify native title rights, but rather was arguably designed to give full play to the common law. It also sought to redress the effects of colonisation where native title could not be claimed ...⁷⁴⁵

Western values in property ownership underpin the control of the land and waters by non-Aboriginal interests and gives advantage to property owners in water. Exclusive ownership in water provides a legal expectation to fully participate in water policy development.

In the development of Australian capitalism other forms of ownership have become important, but the value accorded [to] land ownership has not diminished and, quintessentially represented in pastoral property, it continues to confer social and economic power.⁷⁴⁶

Robert Blowes has pointed to the conceptual differences in the control and ownership of national parks between government and Aboriginal peoples.⁷⁴⁷

[i]t was argued that Aborigines should not own or otherwise be in a position to influence the control of national parks. Ownership and control, it was said should be in the hands of government as the elected representative of all Australians. The assumption implicit in this argument is that an elected body dominated by persons of European and capitalist traditions would more likely be able and responsible in

⁷⁴⁵ Maureen Tehan, 'Report for the Attention of Members of the Committee on the Elimination of Racial Discrimination, A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' ('Report', Foundation for Aboriginal and Islander Research Action, February 2005) 14.

⁷⁴⁶ Gretchen Poiner, *The Good Rule: Gender and Other Power Relationships in a Rural Community* (Sydney University Press, 1990) 77.

⁷⁴⁷ Robert Blowes, 'From *terra nullius* to Every Person's Land: A Perspective from Legal History' Australian Institute of Aboriginal and Torres Strait Islander Studies Report Series, Jim Birkhead, Terry De Lacy and Laurajane Smith (eds), (Paper presented at Aboriginal Involvement in Parks and Protected Areas, Albury NSW, 22-24 July 1991) 149.

preserving the intrinsic values of country and its attendant cultural features than if Aborigines had any real and significant influence.⁷⁴⁸

The dominance of non-Aboriginal rights and interests in Australia has significantly impacted upon Aboriginal peoples ability to exercise their customary laws, and to restore Aboriginal ownership of water and continue customary practices. The ‘voices’ of Aboriginal peoples are often excluded in the national policy process because of the limited recognition of Aboriginal ownership.

The image of the ‘rural’ associated with agrarian ideals evokes [in] the Australian context, country mindedness. This emotional attachment to farming cannot be ignored by the policy process ... it is very evident in media discourse and political rhetoric during drought, and this in turn feeds into the political process.⁷⁴⁹

A Pitjantjatjara Traditional Owner explains the vast intellectual divide that exists between Aboriginal and non-Aboriginal law concepts:

There are two lines kuwari [now], two lines ngaranya [two sets of laws in place]. Anangu Tjukurrpa [Aboriginal law] and government rules. Government rules are like this thing here, written on paper.⁷⁵⁰

Our law is in the front.⁷⁵¹ Should open up and from Terra Nullius to every person’s land – A perspective from legal history give you freehold title. Not give you a tjitji one.⁷⁵²

⁷⁴⁸ Ibid.

⁷⁴⁹ Linda Courtenay Botterill, ‘Beyond Drought in Australia: The Way Forward’ in Linda Courtenay Botterill and Melanie Fisher (eds), *Beyond Drought: People, Policy and Perspectives* (Commonwealth Scientific and Industrial Research Organisation, 2003) 202.

⁷⁵⁰ Tony Tjamiwa, *Tjunguringkula waakaripai: Joint Management of Uluru National Park*, (1992) Australian Institute of Aboriginal and Torres Strait Islander Studies Report Series, Jim Birckhead, Terry De Lacy and Laurajane Smith (eds), (Paper presented at Aboriginal Involvement in Parks and Protected Areas, Albury NSW, 22-24 July 1991) 7.

⁷⁵¹ Ibid 8.

⁷⁵² Ibid 10. Citing the word tjitji to mean ‘kid’s stuff’ in Anangu.

Government law is on paper. Anaguku Law is held in our head and kurunpa [spirit]. You can't put Aboriginal Law on paper; it's the rules that our grandfathers and grandmothers and that fathers and mothers gave us to use, that we hold in our hearts and in our heads.⁷⁵³

Government might try and give you a flat tyre. Don't compromise your Law for a flat tyre.⁷⁵⁴

The Anaguku law narrative suggests that Australian law holds a weaker right than Aboriginal laws. The Traditional Owner explains that 'Aboriginal law is not written' but 'held in the heart as spiritual and cultural rules'. For Aboriginal peoples, Aboriginal ownership to water and land is held, from an Aboriginal perspective, by an indefeasible Aboriginal title that is passed on by kinship succession. The Western notion that Aboriginal law is unstructured and random is baseless, as the following chapters will argue. Aboriginal customary values and beliefs are regulated by rules under Aboriginal laws that have operated for thousands of years.

Aboriginal peoples in Australia have experienced economic competing rights for their lands and waters since the introduction of common law because of the concepts of English property law. These two distinct legal systems continue to cause dispute because of the increased demands on the use of and access to water, and demands for land and resources. Most notably, since the 1990s Aboriginal peoples have sought to assert their ownership of the land and the waters under the Australian legal system, and court decisions have not always met the expectations of Aboriginal communities.

The culture of the common law has imposed a conceptual grid over both space and time which divides, parcels, registers, and bounds people and places in a way

⁷⁵³ Ibid.

⁷⁵⁴ Ibid 11.

that is often inconsistent with Indigenous participation and environmental integrity.⁷⁵⁵

As this thesis will attempt to demonstrate, Aboriginal concepts and values to water are not simple generic concepts which represent all Aboriginal peoples. The development of a metaphor for Aboriginal relationships to water may be challenging because of the diversity which underpins community knowledge and community groups. Aboriginal communities are inherently connected to tangible and intangible Aboriginal values, and practices and customs that connect to Aboriginal identity, both as individuals and as communities. A holistic set of Aboriginal water values exists within all types of water because Aboriginal identity is characteristic of water kinship.

The complexity of Western values and legal concepts in water are both defended and defined by governments and other stakeholders. However, the inherent and indisputable rights of Aboriginal peoples have often had to conform to Western values and concepts in order to affirm recognition under Australian law.

4.5 The Ontological Context of Aboriginal Water Values

This part of the chapter examines the impact of constructing Aboriginal water values and their respective customary rights and interests in terms of legal language such as statutory legislation. Further, the chapter analyses the ontological structure of Aboriginal water values – for example, the complexity of cultural meaning which pertain to Aboriginal water use and the treatment of Aboriginal values and meanings by Australia's legal system.

This section will examine how Western construction of Aboriginal meanings of Aboriginal water concepts and laws can misinterpret the context of Aboriginal ontology.

⁷⁵⁵ John Burrows, 'Living between Water and Rocks: First Nations, Environmental Planning and Democracy' (1997) 47 *University of Toronto Law Journal* 4.

It will argue that the nuances of Aboriginal language require a new approach to articulating Aboriginal rights and interests that fully considers their ontological complexity.

Australian legislation generally refers to the environment as consisting of ‘water, land, trees, plants or wetlands’. A Western environment is constructed on a set of values that represent an aesthetic and scientific meaning. The inclusion of Aboriginal peoples water values into water policy and legislation requires a cultural acknowledgement of its unique characteristics.

In countries where customary water rights play a significant role, particularly in rural areas where they govern access and rights to water in basic human needs, for the watering of livestock and for subsistence agriculture, customary law and customary water rights are a factor to be reckoned with when preparing ‘modern’ legislation regulating the abstraction and use of water resources through government permits or licences. Failure to recognize the existence and resilience of customary practices, and to take them into account in ‘modern’ water resources legislation, is a recipe for social tension.⁷⁵⁶

Waubin Richard Aken, a Traditional Owner of Cape York in Queensland, has suggested that Western language negatively impacts upon Aboriginal peoples and also misrepresents their cultural perspective:⁷⁵⁷

[t]hese words can override Australian Indigenous perspectives and it becomes mainstream tools scientifically. The bureaucrats will use as their political games and innuendo’s for social order ... Cultural democracy is based on processes of Spiritual Sustainability Development Principles. It is a system based on the Cycle

⁷⁵⁶ Stefano Burchi, ‘The Interface between Customary and Statutory Water Rights: A Statutory Perspective’ (Paper presented at the African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa, South Africa, 26-28 January 2005) 32:1 <http://www.fao.org/fileadmin/user_upload/legal/docs/lpo45.pdf>. Burchi (2005) cites Nowlan (2004) on western and northern Canadian water rights.

⁷⁵⁷ Email from Virginia Falk on the Draft International Indigenous Water Declaration, 12 November 2008.

of Life. It clearly identifies who we are and where we are from. The mainstream society perspective is based on Materialisms ...⁷⁵⁸

Aristotle argued the position of numerous Greek philosophers on the relationship of human beings to the environment, as well as on property concepts in nature and resources.⁷⁵⁹

Property, in the sense of bare livelihood, seems to be given by nature herself to all ... Now if nature makes nothing incomplete, and nothing in vain, the inference must be that she has made all animals for the sake of men.⁷⁶⁰

Aristotle's view highlights an ontological perspective that 'nature' has made all things for human beings, bringing to the fore specific sets of values and beliefs in the European concept of property.⁷⁶¹

The Australian colonies were founded on common law doctrine and later by Imperial enactment that embedded characteristics of the common law doctrine and informed the rules of statutory construction and interpretation in Australia.⁷⁶²

The oral narrative of Aboriginal peoples has a basic similarity to the early development of common law because it was communicated orally.⁷⁶³ The oral common law tradition was handed down as 'lex non scripta' or unwritten law prior to the development of 'lex scripta' or statute law.⁷⁶⁴ The unwritten law of early England was later viewed as

⁷⁵⁸ Email from Waubin Richard Aken to Virginia Falk, 13 November 2008. In accordance with Australia's *Copyright Act 1968* (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

⁷⁵⁹ Eugene C Hargrove, *Foundations of Environmental Ethics* (Prentice Hall, 1989) 25.

⁷⁶⁰ *Ibid* 25.

⁷⁶¹ *Ibid*.

⁷⁶² *Ibid*.

⁷⁶³ Justice Robert Nicholson, 'Law and Language: The Case of Native Title' (30 June 2004) *Federal Court Intranet* <<http://intranet.fedcourt.gov.au/search97cgi.cgi?Action=View&VdkVgwkey=%20>>.

⁷⁶⁴ *Ibid*.

insufficient for adequately documenting the amendments or declarations of the law when doubts arose.⁷⁶⁵

However, the context of oral Aboriginal meanings and values differs significantly from the 'lex non-scripta' tradition because of the additional cultural meanings which are implied or expressed in Aboriginal value systems.

The whole idea of governing by fixed words inscribed on tablets is fascinating and strange. The words, which because of inadequacy of language and the infinite variety of circumstance, from the beginning never are better than approximate, are frozen in their imperfect state unless and until amended ... the inadequate words grow less and less apt. The temptation the court feels is to depart from the literal meaning in order to do justice or make sense. Yet this natural urge marks a failure in communication. Words are designed for no other purpose than to transmit a message. If what the words say is rejected in favour of a meaning reached by other means, the message has not got through.⁷⁶⁶

'Cultural ontology' refers to the 'metaphysics that deals with the nature of being'⁷⁶⁷ and pertains to 'the inherited ideas, beliefs, values and knowledge held by a particular people'.⁷⁶⁸ Cultural ontology, as a paradigm, can be used to explain the values and beliefs of Aboriginal creation and Aboriginal relationships to all things. Aboriginal ontology also interprets the rights and interests of Aboriginal peoples in their unique relationship with the tangible and intangible environment. However the value of recognising the importance of Aboriginal ontology was considered of minimal interest to the emerging Australian state.

The introduction of the Anglo-Australian legal system did not endorse the legal co-existence of Indigenous laws, customs and practices of Indigenous peoples. Therefore the

⁷⁶⁵ Ibid.

⁷⁶⁶ Ibid.

⁷⁶⁷ William Collins and Sons, *Collins Concise Dictionary of the English Language* Wilkes and Krebs (eds) (Collins, London, 2nd ed, 1988) 794.

⁷⁶⁸ Ibid 273.

notion of legal pluralism, that is, the colonial power allowing Aboriginal laws to operate, in whole or in part, was tolerated only where it would not impinge upon non-Aboriginal group or individual rights, nor restrict the colonial development of the Australian landscape. As Benton states:

Conflicts over cultural difference in the law were intertwined with disputes focussing on the control of property and its legal definition. Culture and economy were not separate entities ...⁷⁶⁹

The Boomanulla Report (2002) resulted from information provided by Aboriginal government employees who were tasked to ‘brainstorm’ and record the cultural values and the natural resource goals of Aboriginal communities in New South Wales, and included recommendations. The recommendations resulting from the Report identified the distinct conceptual differences between Aboriginal communities and Australian society:

The planning process springs from European thinking, which is linear and focussed on measuring data. This way of thinking does not rest easily with Aboriginal (holistic) ways of thinking about the environment and about the people who live in the environment.⁷⁷⁰

Russell Goldflam has argued that Edward Said’s critique of ‘Orientalism’ reflects the social position held by Aboriginal peoples in Western society:

Aboriginalism as a European power and knowledge constructs Aboriginal peoples and their Aboriginality isolating Aboriginal peoples in a conspiracy of silence

⁷⁶⁹ Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400 to 1900* (Cambridge University Press, 2002) 10.

⁷⁷⁰ NSW Aboriginal Land Council and the NSW Department of Land and Water Conservation, ‘Report on the Boomanulla Conference for Country’ (Paper presented at the Boomanulla Conference, Canberra, 5-6 March 2002) 6.

through the exclusive use of the English language in the legal system whereby Aboriginal people are effectively absent.⁷⁷¹

Western concepts, in view of this critique, have the power to influence the parameters of Aboriginal water rights and interests, as well as the meanings and values associated with Aboriginal water use. The Western concepts of what represents 'Aboriginality' have a flow on effect in how Australian policy and law constructs the values, customs and practices of Aboriginal communities.

Germaine Greer argued in 'Whitefella Jump Up: The Shortest Way to Nationhood' (2003) that the definition of Aboriginal peoples is based upon skewed Western concepts of Aboriginality.⁷⁷²

Defining the Aborigine as irrevocably Other has resulted in the creation of non-viable pockets of Aboriginality, human zoos or living museums, in which Aboriginals are considered to be living 'unchanged'. But Aboriginality is the elaboration of the art of survival and survival demands adaptability. To rethink Aboriginality as inclusive rather than exclusive would not involve the assumption of a phoney ethnicity or the appropriation of the history of any particular Aboriginal people. The owners of specific dreamings would continue to be so still, and would continue to pass them on according to their law as it applies to those concerned.⁷⁷³

Aboriginal ontology provides a context for evaluating whether Australian policy and legislative drafting is effective in portraying the values and meanings of Aboriginal water use because the emphasis is on Aboriginal peoples defining their own identity.

⁷⁷¹ Russell Goldflam, 'Silence in Court! Problems and Prospects in Aboriginal Legal Interpreting' in Diana Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia*, (University of New South Wales Press, 1995) 38.

⁷⁷² Germaine Greer, 'Whitefella Jump Up: The Shortest Way to Nationhood', (2003) 11 *Quarterly Essay*, 17.

⁷⁷³ Ibid.

The Western ideological construction of Aboriginal cultural values strips the inherent nature of its endemic culture, which in turn minimises Aboriginal consultation and engagement in the use of water. In the *Water Management Act*, the word ‘environment’ is defined as all living things to include human beings. From a customary Aboriginal perspective, the environment and culture are enmeshed.⁷⁷⁴

The objects of the *Water Management Act 2000* (NSW) is an example of ineffective legal drafting because the Act represents the values of Aboriginal peoples in terms of generic concepts such as ‘spiritual’ or ‘social’. The Western concept of ‘benefits’ which flow to Aboriginal peoples under section 3(c)(iv) implies

[b]enefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water.⁷⁷⁵

The legislative objectives in the *Water Management Act 2000* (NSW) fail to achieve an Aboriginal ontological expression of water values. In addition, the legislation omits to include how the ‘benefits’ will flow to Aboriginal peoples by the ‘spiritual, social, customary and economic use of the land and water’.⁷⁷⁶ Western legal concepts for interpreting Aboriginal ontological values and beliefs are inadequate for properly expressing Aboriginal water concepts.

The New South Wales Aboriginal Land Council, in their submission on the Draft New South Wales Implementation Plan for the National Water Initiative 2005, issued a complaint to the Department of Natural Resources:⁷⁷⁷

⁷⁷⁴ Neva Collins and Virginia Falk, ‘Water: Aboriginal Peoples in Australia and their Spiritual Relationship with Waterscapes’ in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 144.

⁷⁷⁵ *Water Management Act 2000* (NSW).

⁷⁷⁶ *Ibid.*

⁷⁷⁷ New South Wales Aboriginal Land Council, ‘Submission to the Department of Natural Resources NSW: Draft Implementation Plan for the National Water Initiative’ (8 December 2005) 3.

In the 102 pages, the Draft Implementation Plan is of a significant length; however the dedication of just 2 pages to addressing Aboriginal peoples rights and interests in water is disproportionate to the importance of these activities.⁷⁷⁸

The absence of Aboriginal water rights and interests in a significant state water policy plan highlights the power of governments to remove, at their absolute discretion, Aboriginal communities' participation in the use and access to water. Robert Nicholson, a judge, had suggested that Aboriginal law is not sufficiently valued in Australian society:

It is a further concern of historians that culturally different approaches between that of the law and Aboriginal custom may be insufficiently appreciated and certainly needs to be understood.⁷⁷⁹

Fragmenting Aboriginal water knowledge into generic Western legal concepts is inadequate to properly represent Aboriginal ontological concepts to water. To apply terms such as 'cultural water', 'traditional use', 'communal purposes' and 'spiritual activity' in order to interpret Aboriginal water values is equally problematic because it constructs restrictive definitions.

This example from a Senior Lawman (deceased), demonstrates that an English interpretation of Aboriginal ontology fails to represent the depth of Aboriginal meaning.

White European want to know ...
asking 'What this story ?
this not easy story.
No-one else can tell it...
Because this story for Aboriginal story.
I speak English for you,

⁷⁷⁸ Ibid 4.

⁷⁷⁹ Justice Robert Nicholson, 'The Use of History in Proving Native Title: A Judge's Perspective' (30 June 2004) *Federal Court Intranet*
<http://intranet.fedcourt.gov.au/search97cgi/s97_cgi?Action=View&VdkVgwKey=%20...>.

so you can listen ...
so you can know ...
you will understand.
If I put my words (language) in same place,
You won't understand.⁷⁸⁰

Aboriginal water landscapes retain their purpose and meaning through Aboriginal language. The following examples demonstrate that complex layers of knowledge are based in customary law.

The men's place, Pirlpirr is really important. Another name for it is Minnie Creek. Only wati, initiated men, know the story for that place that only wati can look after it.⁷⁸¹

A Senior Lawman described what it means to care for the Aboriginal use of water-holes near Uluru:

The family got their water from Ininti waterhole. They walked out to Kata Tjuta to hunt for meat and gather food (mai) and obtained water from the waterholes in the area, including Yulara Purlka. They were 'walking around this area being taught by my father' about all the waterholes, and stories about when he used to live in the area. They were also taught how to dig out waterholes and clean them by taking out the dead animals.⁷⁸²

At the Garma Indigenous Water Conference in 2008, Aboriginal water experts and Traditional Owners from various common law countries agreed in consensus that

⁷⁸⁰ Big Bill Neidjie, Stephen Davis and Allan Fox, *Australia's Kakadu Man* Bill Neidjie (Resource Managers, revised ed, 1986) 47.

⁷⁸¹ Transcript of Proceedings, *Harrington-Smith on behalf of the Wongatha People v Western Australia* (Federal Court, No 9, Lindgren J, July 2002) (Hudson Westlake during witness evidence for 'Autobiographical and Claims to Country') 14. Note, Mr Murray is a 'wati', initiated man and that his father was also a 'wati', 14; Waitku is men's law, 15.

⁷⁸² Transcript of Proceedings, *Jango v Northern Territory* [2004] FCA 1539 (Federal Court, Weiner J), (Reggie Uluru examination-in-chief of Reggie Uluru by D Parsons SC *in situ* in November 2003) 39.

‘Indigenous peoples throughout the globe hold common themes in the value and use of water as sacred’.⁷⁸³ These common values are not inherent in Western frameworks.

Aboriginal water rights are not easily conceptualised or valued under the common law and statutory interpretation because Aboriginal concepts of law are recognised within an Aboriginal property rights paradigm. There is reluctance by the courts to define Aboriginal ‘ownership’ as freehold. Australian legal definitions are unable to capture concepts of Aboriginal ownership and invariably diminish Aboriginal ownership rights. This chapter has argued that the Australian legal system has added to the complexity of understanding Aboriginal peoples relationship to land and waters because it has been reluctant to use Aboriginal legal concepts of ‘ownership’ to express the concept of Aboriginal title.

⁷⁸³ The author was invited to the Garma Conference as an Indigenous Water Expert where this statement was declared by Aboriginal delegates.

Chapter 5: Aboriginal Values – The Murray-Darling Basin and the Commonwealth Water Act

The first part of this chapter examines how water scarcity and competing interests in the Murray-Darling Basin impact upon Aboriginal water rights and interests and whether the customary, cultural, social, economic and spiritual water needs of Aboriginal communities are effectively represented in water allocation. This part of the chapter will be limited to examining the broad experience of Aboriginal communities within the Murray-Darling Basin, and the affect of the proposed water reforms by the Murray-Darling Basin Authority for the Basin regions.

The second part of the chapter examines the overall impact of the *Water Act 2007* (Cth) (*‘the Water Act’*) and the *Water Amendment Act 2008* (Cth) (*‘the Water Amendment Act’*), and further amending legislation, on Aboriginal communities’ water rights and interests, in the provisions that directly affect Aboriginal communities and their water requirements. The chapter will not examine the particular water needs of other water users and will not examine the specific impact of the legislative changes on individual Aboriginal communities. Nor is this chapter intended to provide an in depth examination of the constitutional issues in water because it is beyond the scope of this thesis.

5.1 An Over-Allocated Basin Catchment: The Effect on Aboriginal Water Rights

The Basin comprises over one million square kilometres of south-eastern Australia and covers three-quarters of New South Wales, nearly half of Victoria, and a large portion of Queensland and South Australia.⁷⁸⁴ The Murray-Darling Basin is comprised of 23 river valleys within the 19 regions and it is the most iconic river system in Australia.⁷⁸⁵ The Basin region represents around 40 per cent of Australian farms, where agriculture is the

⁷⁸⁴ Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Volume 2 Part 1* (Australian Government, 2010) 10.

⁷⁸⁵ Ibid.

dominant water user, its share accounting for 83 per cent of the consumptive water use,⁷⁸⁶ calculated on the use of surface and ground water.⁷⁸⁷

The Murray-Darling project established in the Basin was critical in the late 1800s to advance agricultural research and enterprise potential in irrigation planning.

An irrigation system designed in the late 19th century by the Chaffey brothers, who were lured from Canada to Australia by Alfred Deakin on the promise of 250,000 acres (101,000ha), had not been able to withstand foolish allocations of rival state governments and their absurdly optimistic advisers.⁷⁸⁸

The development of the Murray-Darling Basin project was a significant experiment combining settlement and irrigation.

During the 1890s the Mildura settlement in Victoria was an irrigation experiment where the Government, on the fulfilment of conditions, 'freely' gave away hundreds of thousands of acreage and a large portion of the Murray River waters which 'cared for' the rights and interests of settlers.⁷⁸⁹

According to the results of the National Land and Water Resource Audit, the historic impact of the over-allocation of water resources has been underestimated.⁷⁹⁰

[f]rom 1985 to 1996/97, total water-use in Australia increased by 65 per cent. Use for irrigation grew by 76 per cent ... over commitment and over extraction of water resources has led to riverine ecosystem degradation.⁷⁹¹

⁷⁸⁶ Ibid 16.

⁷⁸⁷ Ibid 21.

⁷⁸⁸ Stuart Rintoul, 'Dog Eat Dog in the Fight for Water', *The Australian* (Sydney), 12-13 July 2008, 8.

⁷⁸⁹ Manning Clark (ed), *Selected Documents in Australian History 1851-1900 Volume 2* (Angus and Robertson, revised ed, 1979) 164-165.

⁷⁹⁰ Stewart Smith, *Water Reforms in NSW: An Up-date: Briefing Paper* (6 November 2006) NSW Parliament <<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/435D6C31A6EA...>>.

⁷⁹¹ Ibid.

The Murray-Darling Basin Agreement of 1992 was ratified by the parliaments of the Commonwealth, New South Wales, Victoria and South Australia; and then by Queensland in 1996 and the ACT in 1998 under a Memorandum of Understanding.⁷⁹² The Murray-Darling Basin Agreement replaced the River Murray Waters Agreements of 1915 and 1987.⁷⁹³ In 1994 the Council of Australian Governments agreed to reform the national water industry by improving the efficiency of water use and address the environmental problems created by the over-allocation of water.⁷⁹⁴

The significant reform to water management sought by the Council of Australian Governments' decision – namely, institutional reform – was to deliver environmental flows, recognise a market value in water that relates to its cost, separate water entitlements from land title, and expand the right to trade water.⁷⁹⁵

In 2004 the Murray-Darling Basin Ministerial Council identified six factors which posed a risk to the competing water interests within the Basin, factors which included the impact of climate change, a rise in the number of farm dams and increased groundwater extraction.⁷⁹⁶ The Murray-Darling Basin Commission, the executive arm of the Ministerial Council, was responsible for developing, supporting and evaluating natural resource management policies across the Basin's catchments.⁷⁹⁷

The introduction of the *Water Act* provided for the management of water resources in the Murray-Darling Basin and established the Murray-Darling Basin Authority as an independent statutory body to integrate a water management plan for the Basin.⁷⁹⁸ The Murray-Darling Basin Authority absorbed the functions of the Murray-Darling Basin Commission, engaging with non-government stakeholders such as the Indigenous Water

⁷⁹² Ibid 8.

⁷⁹³ Ibid 10.

⁷⁹⁴ Productivity Commission, *Water Rights Arrangements in Australia and Overseas: Annex A, Murray-Darling Basin* ('Research Paper', 2003) 4.

⁷⁹⁵ Kathy Ridge, 'Water Supply' in David Farrier and Paul Stein (eds), *Environmental Law Handbook* (Redfern Legal Centre, 4th ed, 2006) 517.

⁷⁹⁶ Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Volume 2 Part 1*, 75.

⁷⁹⁷ Productivity Commission, *Water Rights Arrangements in Australia and Overseas: Annex A, Murray-Darling Basin* ('Research Paper', 2003) 11-12.

⁷⁹⁸ Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Overview Volume 1*, 4-5.

Subcommittee.⁷⁹⁹ Under their mandate from the *Water Act 2007* (Cth) the Basin Authority compiles information on water resources, including issues that affect the Basin's environment and socio-economic framework.⁸⁰⁰

The Basin Authority, under the *Water Act*, has been mandated to develop water planning and water management that promotes economic return that does not compromise environmentally sustainable levels of extraction or the ecological values of the Basin.⁸⁰¹

Amendments have been made to the *Water Act* and additional legislative functions under the *Water Amendment Act 2008* (Cth). Included in the 2008 Act is a referral of certain state powers to the Commonwealth;⁸⁰² under various subsections of s 18B of this Act, the Commonwealth coordinates arrangements between governments for the Basin.⁸⁰³

The Council of Australian Governments' Reconciliation Framework in 2000⁸⁰⁴ led to an initiative in 2002 by the Murray-Darling Basin Commission to develop an 'Indigenous Action Plan' with Indigenous Murray-Darling Basin communities.⁸⁰⁵ The Australian Government commenced negotiation with 44 autonomous Aboriginal groups in the Murray-Darling Basin to inform the planning process of Indigenous water interests.⁸⁰⁶

The Aboriginal population in the Murray-Darling Basin comprises over three per cent of the general population and is increasing.⁸⁰⁷ In the Basin there is Aboriginal representation

⁷⁹⁹ The *Water Amendment Act 2008* (Cth) sch 4 had two amendments to ss 10 and 11 of the 2007 Act; s 202(3)(b) to insert at subsection (c) 'an Indigenous water Subcommittee, to guide the consideration of Indigenous matters relevant to the Basin's water resources' and s 202(5) to add at subsection (c) 'an individual with expertise in Indigenous matters relevant to the Basin's water resources'.

⁸⁰⁰ Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Overview Volume 1*, 5-6.

⁸⁰¹ Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Volume 2 Part 1*, 67.

⁸⁰² The referral of powers from the States to the Commonwealth is for specific matters dealing with the Basin States, and does not interfere with the operation of ss 99 and 100 of the *Australian Constitution*. See also the reading down provision s 11 of the *Water Act 2007* (Cth).

⁸⁰³ Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Overview Volume 1*, 4-5.

⁸⁰⁴ Murray-Darling Basin Commission, 'Final Draft: The Murray-Darling Basin Indigenous Action Plan' (29 July 2005) Murray-Darling Basin Commission, Canberra, <www.mdbc.gov.au>.

⁸⁰⁵ Ibid.

⁸⁰⁶ Ibid.

⁸⁰⁷ Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Volume 2 Part 1*, 27.

from the Northern Murray-Darling Basin Aboriginal Nations⁸⁰⁸ and the Murray Lower Darling River Indigenous Nations.⁸⁰⁹ Both groups advocate for Aboriginal water rights and interests in the Basin.⁸¹⁰

The historic over-allocation of water resources in the Basin catchments limits Aboriginal peoples' access to and use of water in the Murray-Darling Basin.

[t]he mouth of the Murray River is silting-up as decreased water flows in the river are unable to carry sediments out into the sea. This environmental catastrophe is attributed to the over-consumption of river waters by irrigators, and to massive land clearing in the Murray-Darling Basin over the past century ... loss of biodiversity threatens the identity and the way of life of the Ngarrindjeri people, their culture, stories and spirituality and their entire cosmology.⁸¹¹

The Indigenous Action Plan recommended principles to acknowledge the cultural diversity of Aboriginal communities within the Murray-Darling Basin, including the recognition of customary laws and Aboriginal cultural obligations to water and to establish an equitable share in the benefits from natural resources.⁸¹²

The Murray Lower Darling Rivers Indigenous Nation makes the point that

Water entitlements that are legally and beneficially owned by the Aboriginal nations and are of sufficient and adequate quality and quantity to improve the

⁸⁰⁸ Ibid 25. Represented by the following Aboriginal groups, Barkindji, Barunggam, Bidjara, Bigambul, Budjiti, Euahlayi, Gamilaroi, Githabul, Gunggari, Gwamu (Kooma), Jarowair, Kunja, Kwiambul, Malangapa, Mandandanji, Mardigan, Murrawarri, Ngemba, Ngayampaa, Wailwan and Wakka Wakka.

⁸⁰⁹ Ibid 25. Represented by the following Aboriginal groups, Barapa, Latji Latji, Mutti Mutti, Ngarrindjeri, Taungurung, Wadi Wadi, Wamba Wamba, Wergaia Wiradjuri and Yorta Yorta.

⁸¹⁰ Ibid.

⁸¹¹ Aboriginal and Torres Strait Islander Commission and the Lingjari Foundation, *Indigenous Rights to Water Report and Recommendations* (15 November 2004) Aboriginal and Torres Strait Islander Commission <http://astic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp>.

⁸¹² Murray-Darling Basin Commission, *The Murray-Darling Basin Indigenous Action Plan* (29 July 2005) Murray-Darling Indigenous Action Plan <www.mdbc.gov.au>.

spiritual, cultural, environmental, social and economic conditions of those Aboriginal nations, is our inherent right.⁸¹³

The Indigenous Action Plan has been signed by only 40 representative Aboriginal groups in the Basin. The Plan is designed to engage Aboriginal participation in the management of natural resources and environmental governance, and to reduce Aboriginal communities' socio-economic disadvantage under a revised protocol framework.⁸¹⁴

The potential benefits of the Indigenous Action Plan have remained purely symbolic and tangible outcomes for Aboriginal water rights and interests have not eventuated. The Plan for the Murray-Darling Basin was made as a non-binding agreement that has failed to deliver economic and cultural outcomes for water.⁸¹⁵

In 2008, at the Australian Indigenous Water Focus Group meeting in Adelaide, the progress on native title interests was presented by Murray Radcliffe, Manager of Programs for the National Water Commission, who stated:

[t]he Biennial assessment under the National Water Initiative in relation to Indigenous Water Planning does not talk about cultural flows and economic interests ... the 2007 review of Indigenous engagement was 'patchy at best'.⁸¹⁶

The 2011 National Water Commission's third Biennial Assessment of the National Water Initiative⁸¹⁷ reported that Indigenous stakeholders' progress was deficient across all water

⁸¹³ Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Volume 2 Part 1*, 26.

⁸¹⁴ Murray-Darling Basin Commission, 'Final Draft: The Murray-Darling Basin Indigenous Action Plan' (29 July 2005) Murray-Darling Basin Commission, Canberra, iii-20 <www.mdbc.gov.au>.

⁸¹⁵ *Ibid.*

⁸¹⁶ Murray Radcliffe, 'National Water Commission Introduction and Engagement' (Speech delivered at the Australian Indigenous Water Focus Group, National Water Commission, South Australia, 18 November 2008). I attended the meeting as an Indigenous delegate with the Indigenous Water Focus Group.

⁸¹⁷ National Water Commission, Australian Government, 'The National Water Initiative: Securing Australia's Water Future' ('Report', Australian Government, 2011) iii. The Biennial Assessment of the National Water Initiative is regulated under s 7 of the *National Water Commission Act 2004* (Cth).

management areas.⁸¹⁸ The Commission's findings are relevant because they highlight the performance of the government signatories under the Murray-Darling Basin Agreement.

The National Water Commission's findings from the 2011 Biennial Assessment indicates the performance by the States and Territories for incorporating Indigenous water interests under the Commission's benchmark for 'Water Access Entitlements and Planning Framework' under clauses 25(ix) and 52 to 54 of the National Water Initiative.⁸¹⁹ The findings of the 2011 Biennial Assessment are summarised below.

New South Wales consulted with Indigenous communities across various networks to identify Indigenous water values in the water planning process and undertook consultation with Indigenous groups on water-dependent cultural assets.⁸²⁰ The *Water Management Act 2000* (NSW) recognised native title rights as basic landholder rights and the New South Wales Government undertook discussions on defining water volume for determinations in native title.⁸²¹ In addition, Water Sharing Plans outside the Murray-Darling Basin would allow for an Aboriginal cultural water licence at no cost, where water was not fully allocated.⁸²²

The Australian Capital Territory under its statutory requirement to report responded that native title is extinguished in the Territory.⁸²³ No outcomes were recorded for water planning to address Indigenous outcomes under the National Water Initiative.⁸²⁴

The Biennial findings for Queensland and the *Water Act 2000* (Qld) identified some public consultation and the formation of a community reference panel to identify Indigenous water issues in the water planning process.⁸²⁵ The Queensland Government

⁸¹⁸ Ibid. Commencing from 200 in app B the report has a summary on the progress of National Water Initiative Actions under the jurisdictions.

⁸¹⁹ Ibid 44.

⁸²⁰ Ibid 222.

⁸²¹ Ibid.

⁸²² Ibid.

⁸²³ Ibid 211.

⁸²⁴ Ibid.

⁸²⁵ Ibid 251.

considered that Indigenous cultural values were already inherent in the regional water plans.⁸²⁶

South Australia had addressed Indigenous water issues in water planning through consultation and responded that the taking of, or use of, water for cultural purposes must not bring to a halt or interfere with the state's water flows.⁸²⁷

Victoria, under the *Water Act 1989* (Vic), has statutory requirements to address Indigenous water issues. However, no cultural flows were allocated under the Victorian Sustainable Water Strategies.⁸²⁸ The government included Indigenous groups in the public consultation.⁸²⁹

The Barmah and Nyah-Vinifera National Parks in the Murray-Darling Basin, now co-managed by the 'Yorta Yorta and Wadi Wadi'⁸³⁰ with the Victorian Government under the *Traditional Owner Settlement Act 2010* (Vic) made progress relating to Indigenous water management issues.⁸³¹ The Victorian Government amended s 8 of the *Water Act 1989* (Vic) to include native title rights to water and water for ceremonial and spiritual purposes.⁸³²

Finally, the 2011 Biennial Assessment reported that the interests of Indigenous peoples under clauses 25(ix) and 52 to 54 of the National Water Initiative Agreement should 'more explicitly account for Indigenous water values and requirements in water planning and build the capacity of Indigenous peoples to increase Indigenous participation in water planning and management'.⁸³³ Referring back to actions proposed by the 2009 Biennial Assessment of the National Water Initiative, it was acknowledged that 'Indigenous

⁸²⁶ Ibid.

⁸²⁷ Ibid 265.

⁸²⁸ Ibid 294.

⁸²⁹ Ibid.

⁸³⁰ Friends of the Earth, *Melbourne* (16 March 2012)

<http://www.melbourne.foe.org.au/?q=bmc/indigenous_justice>.

⁸³¹ National Water Commission, Australian Government, 'The National Water Initiative: Securing Australia's Water Future' ('Report', Australian Government, 2011) 294.

⁸³² Ibid.

⁸³³ Ibid 44.

peoples were rarely included in water plans and rarely included in the objectives to meet Indigenous social, spiritual and customary water needs'.⁸³⁴ The findings of the 2011 Biennial Assessment indicate that there has been inconsistent progress across all jurisdictions to meet the objectives of the Indigenous actions under the National Water Initiative.

The First Peoples' Water Engagement Council, established in 2011 by the National Water Commission, acknowledged that 'Aboriginal peoples face significant impediments to access water for economic, environmental and cultural purposes and the impediments vary across jurisdictions and the regions'.⁸³⁵ The First Peoples' Water Engagement Council recommended, among other things, that the establishment of an Aboriginal water fund or trust which could fund, coordinate and facilitate the acquisition and management of Aboriginal economic water allocations.⁸³⁶ The National Water Commission responded to the recommendation by acknowledging that a trust or water fund would make a legitimate contribution to the Australian Government's Indigenous policy, '*Closing the Gap*'.⁸³⁷

Water resources have featured as the central focus for facilitating economic wealth production for non-Indigenous interests since the commencement of the Murray-Darling project in the late 1800s. The project accelerated the disenfranchisement of Aboriginal communities from Aboriginal economic opportunities and the continued use of water for customary purposes.

Australians use more than 14,600 million cubic metres of water a year – the equivalent of 30 times the capacity of Sydney Harbour ... [It] is the basis of one of our largest industries; it accounts for \$90 billion worth of infrastructure

⁸³⁴ Ibid.

⁸³⁵ Ibid 45.

⁸³⁶ Ibid 46.

⁸³⁷ Ibid.

investment; it contributes about \$6 billion to annual revenues through irrigated agricultural production in New South Wales.⁸³⁸

The overriding emphasis on economic wealth creation for the pastoral and agricultural industries in Australia is most apparent in the Murray-Darling Basin region. The expansion of agricultural operations and other industries has resulted in the over-allocation of water in the Basin.

On the basis of his doctoral research on the Murray-Darling Basin, Daniel Connell (2007) comments on the ‘ambiguous nexus between water commodification and water management’:

It is hard to avoid concluding that if the National Water Initiative system as described is needed for water trading to be environmentally beneficial then this is, in effect, a statement that water trading under achievable standards will be bad for the environment in many instances. These uneasy compromises suggest unresolved tensions between the desire to promote economic activity by strengthening or creating property rights, and the legal responsibility of Australian governments to manage water resources for the benefit of society as a whole.⁸³⁹

In a discussion paper on ‘Indigenous Rights to Water in the Murray-Darling Basin’ (2004), Morgan, Strelein and Weir examine Aboriginal peoples relationship to the land and water. They comment:

Indigenous rights to onshore waters are part of a holistic system of land and water management. This holistic system has been fractionalised and encroached upon by

⁸³⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 2000, 9855 (George Souris).

⁸³⁹ Daniel Connell, *Water Politics in the Murray-Darling Basin* (Federation Press, 2007) 205.

European systems of land and water management, and by accompanying environmental impact.⁸⁴⁰

Aboriginal traditional groups in the Murray-Darling Basin assert that cultural rights to water are important to their survival.

Water is central to the survival of Indigenous peoples in Australia. Indigenous peoples' survival depended upon knowledge of the both episodic and seasonal behaviour of the creeks and rivers, reliable water holes, and the availability of swamps, springs and soaks.⁸⁴¹

The Boomanulla Report (2002) described water rights as a platform of social justice for Aboriginal communities:

Access to water should be seen as a matter of social justice allowing Aboriginal communities priority access to the water market (that is through provision of allocation of water licences to Aboriginal people through an appropriate management structure such as a Trust).⁸⁴²

The historical marginalisation of Aboriginal communities has occurred as a result of the development of the Australian economy, and the creation of a water market provides considerable gains for government, industry and agricultural development. Australian Government policy and the lack of generational wealth has been a strong contributing vehicle in the continuation of Aboriginal poverty.

[t]he worth of rural land lies not only in its market value. It also offers some assurance of an economic future and grants the autonomy of self-employment

⁸⁴⁰ Monica Morgan, Lisa Strelein and Jessica Weir, 'Indigenous Rights to Water in the Murray-Darling Basin' ('Research Discussion Paper' No 14, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2004) 7.

⁸⁴¹ Gretchen Poiner, *The Good Rule: Gender and Other Power Relationships in a Rural Community* (Sydney University Press, 1990) 35.

⁸⁴² New South Wales Aboriginal Land Council and the Department of Land and Water (NSW) (Paper presented at the Boomanulla Conference for Country, Canberra, 5-6 March 2002) 11.

which is part of the bourgeois occupational ideal ... In the country land is the basis for the most privileged class relationships, which can only improve in character and potential with improved quality and quantity of the property. Moreover, land ownership has symbolic value: it attests a person's worth and standing in the community.⁸⁴³

The commercialisation of water in Australia has obscured the inherent water rights and interests of Aboriginal peoples and undermined progress on Indigenous water policy.

Many Australian cultural attitudes, as well as government policies, remain the ones that have caused damage in the past and is still continuing to cause it ... among political obstacles to a reform of water policies are obstacles arising from a market of water licences. The purchasers of those licences understandably feel that they actually own the water ...⁸⁴⁴

The significant impact of drought conditions and in seasons of severe flooding across the Basin's region has greatly affected the water rights and interests of stakeholders.

[t]he basin's rivers and groundwater is shared between all these interests ... the relentless expansion of irrigation, dam building and takes from groundwater. Along with the projected impact of climate change, all this put the Murray-Darling on 'a knife edge'.⁸⁴⁵

In 2011 the Murray-Darling Basin Authority, pursuant to section 43(4) and (5) of the *Water Act 2007* (Cth), called for public submissions to revise the Basin Plan.⁸⁴⁶ The latest

⁸⁴³ Gretchen Poiner, *The Good Rule: Gender and Other Power Relationships in a Rural Community* (Sydney University Press, 1990) 124.

⁸⁴⁴ Jared Diamond, *Collapse: How Societies Choose to Fail or Survive* (Penguin, revised ed, 2007) 409.

⁸⁴⁵ Daniel Lewis and Marian Wilkinson, 'Licence to Spill is a Big Water Fight', *The Sydney Morning Herald* (Sydney), 30 June-1 July 2007, 30.

⁸⁴⁶ Murray-Darling Basin Authority, *Plain English Summary of the Proposed Basin Plan* (Australian Government, 2011) iv.

revised Draft Basin Plan seeks to find a balance of competing water interests between the environment, the economy and Basin communities.⁸⁴⁷

The inquiry into the Impact of the Murray-Darling Basin Plan in regional Australia, ‘Of Drought and Flooding Rains’ (2011) (‘the Windsor Inquiry’)⁸⁴⁸ was the result of a hostile response to the release of the 2010 ‘Guide to the Draft Proposed Basin Plan’.⁸⁴⁹

Concerned Basin communities held that the original Plan was too complex, and that it erred ‘in stripping irrigators’ water rights away and in lacking broad public consultation’.⁸⁵⁰

The key feature for achieving the proposed major water reforms in the Murray-Darling Basin was the proposed implementation of ‘Sustainable Diversion Limits’ (SDLs), to regulate environmental water requirements within the Basin catchments.⁸⁵¹ The poor state of the Basin’s environmental health had resulted from bad management and unsustainable water use, as the Basin Rivers were over-extracted and facing serious risk of biodiversity decline.⁸⁵²

The Commonwealth Environmental Water Holder, established under the *Water Act 2007* (Cth), has the responsibility of managing the Commonwealth’s water entitlements, in accordance with the Environmental Watering Plan.⁸⁵³

The Windsor Inquiry highlighted the need for a greater involvement of Aboriginal peoples in the Basin region with respect to, the water planning process, the development and implementation of the Environmental Watering Plan and finding innovative ways to

⁸⁴⁷ Murray-Darling Basin Authority, Australian Government, ‘Delivering a Healthy Working Basin: About the Draft Basin Plan’ (‘Discussion Paper’, November 2011) foreword.

⁸⁴⁸ Tony Windsor MP, Chair of the inquiry in the House of Representatives.

⁸⁴⁹ House Standing Committee on Regional Australia, House of Representatives, *Inquiry into the Impact of the Murray-Darling Basin Plan in Regional Australia* (2011) 1.18-1.19.

⁸⁵⁰ Ibid.

⁸⁵¹ House Standing Committee on Regional Australia, House of Representatives, *Inquiry into the Impact of the Murray-Darling Basin Plan in Regional Australia* (2011) 2.58.

⁸⁵² Ibid 2.74, 2.76.

⁸⁵³ Ibid 2.59.

provide for self-managed cultural water use.⁸⁵⁴ The Chair of the Northern Basin of Aboriginal Nations, in a submission to the Windsor Inquiry, argued that ‘cultural flows are distinct from environmental flows’; cultural flows provide water needs for Aboriginal people and environmental flows relate to biodiversity.⁸⁵⁵ The Inquiry report did not outline solutions to address the lack of Aboriginal water rights and interests or how to increase Aboriginal water holdings.

The purpose of the Murray-Darling Basin Plan, under the *Water Act*, is to provide for the integrated management of the Basin’s water resources and to give effect to relevant international agreements, to the extent that agreements are relevant to the use and management of water resources.⁸⁵⁶ The *Ramsar Convention on Wetlands* (1971) is recognised in the literature on the conservation of the declared wetlands in the Murray-Darling Basin as setting a benchmark for international standards. However, the significance of the *United Nations Declaration on the Rights of Indigenous Peoples 2007* is no less relevant to the purposes of the proposed Basin Plan for promoting the sustainable use of water resources.

Under s 21(4)(c)(v) of the *Water Act*, a Basin Plan must give attention to ‘social, cultural, Indigenous and other public benefits’.⁸⁵⁷ The unpopular 2010 Basin Plan and the newly revised 2011 Draft Plan are equally deficient in providing for Aboriginal water rights and interests. Neither plans identified tangible benefits that should flow to Aboriginal communities. There was also no proposition in the 2011 Draft Plan to establish perpetual, reserved water rights for Indigenous communities outside the consumptive pool.

The ‘*Draft Basin Plan: Catchment by Catchment*’ (2011), issued for public comment, provides an overview of the key elements of the Basin Plan in each catchment, including changes to water use which will result in social and economic benefits or costs to

⁸⁵⁴ Ibid 4.24.

⁸⁵⁵ Ibid 4.19.

⁸⁵⁶ Ibid. *Water Act 2007* (Cth) app D and s 21(1).

⁸⁵⁷ Ibid. See app D.

communities.⁸⁵⁸ The 2011 Draft Plan sets out features that categorise water use into social, cultural, economic and environmental profiles in the Murray-Darling Basin – for example, the contribution to agricultural or industrial production, the environmental biodiversity of the catchments, and the cultural profile of Indigenous groups.⁸⁵⁹

Under the revised 2011 Draft Plan there is no significant inclusion of Indigenous communities other than in identifying the names of the Indigenous groups. The unique relationship of Indigenous peoples to the Basin is not discussed and neither is the Indigenous use of the environment, such as the use of rivers in providing for cultural, spiritual, social, customary and economic values.

The *Plain English Summary of the Proposed Basin Plan* (2011) aims to assess the environmentally sustainable level of take in water resources to ensure sufficient water to improve the rivers, Basin biodiversity and water availability.⁸⁶⁰ In Part 14 of the 2011 Draft Plan, titled ‘Indigenous values and uses’, is to identify cultural flows in the water resource plans.⁸⁶¹ The 2011 Draft Plan does not sufficiently examine native title rights and interests, Indigenous consultation and strategies to meet social, cultural, spiritual and customary objectives.⁸⁶²

In Australia over the last decade, new concepts in environmental policy and law have evolved through ‘Environmentally Sustainable Development’ (ESD), and principles which ‘apply to water resources to maintain ecological values of ecosystems’.⁸⁶³ These principles of sustainability seek to achieve economic development without increasing the over-exploitation of natural resources.⁸⁶⁴ The application of environmental concepts in

⁸⁵⁸ Murray-Darling Basin Authority, *The Draft Basin Plan: Catchment by Catchment*, (Australian Government, 2011) 3.

⁸⁵⁹ Ibid.

⁸⁶⁰ Murray-Darling Basin Authority, ‘Plain English Summary of the Proposed Basin Plan: Including Explanatory Notes’ (Australian Government, November 2011) Explanatory Note.

⁸⁶¹ Ibid 52-53.

⁸⁶² Ibid.

⁸⁶³ Poh-Ling Tan, ‘Water Law Reform in NSW – 1995 to 1999’ (2003) 20 *Environmental Planning Law Journal* 175.

⁸⁶⁴ Sharon Beder, *Environmental Principles and Policies: An Interdisciplinary Approach* (University of New South Wales Press, 2006) 19.

relation to traditional ecological management requires the inclusion of Aboriginal people's water use as an 'environmentally sustainable' measure.

The introduction to the 2011 Draft Plan comments as follows on the relevance of water to Indigenous communities:

The Murray-Darling Basin Authority acknowledges and pays respects to the Traditional Owners and their Nations of the Murray-Darling Basin ... The Murray-Darling Basin Authority recognises and acknowledges that the Traditional Owners and their Nations in the Murray-Darling Basin have a deep cultural, social, environmental, spiritual and economic connection to their lands and waters.⁸⁶⁵

The 2011 Draft Plan fails to incorporate Indigenous water management and Indigenous water values. Nor does it include any provision for the economic use of water by Indigenous communities in the Basin catchments and there is no discussion of guaranteed rights and interests for Indigenous peoples.

This 2011 Draft Plan merely acknowledges the cultural or spiritual relationship of Indigenous communities to water resources but stops short of identifying any strategies to progress any type of generational water rights for Indigenous communities. In addition, there is no mention of linking the Australian Government's *Closing the Gap* policy to the proposed water reforms for the Murray-Darling Basin, to improve Aboriginal living standards.

The First People's Water Engagement Council, appointed by the National Water Commission, has limited potential to improve Indigenous water requirements.

⁸⁶⁵ Murray-Darling Basin Authority, *Plain English Summary of the Proposed Basin Plan* (Australian Government, 2011) iii.

The national water policy position for the allocation of water to Aboriginal communities proposed by the Federal Government is represented by a handful of public servants and advocates that have imposed a national water rights agenda to freshwater Aboriginal interests.⁸⁶⁶

The New South Wales Aboriginal Land Council, in an address to the United Nations Permanent Forum on Indigenous Issues in 2011, advocated for Indigenous peoples' water interests in the Murray-Darling Basin:

[i]t must also be appreciated that the mere recognition of our rights and entitlements alone, is not enough. We also need to see Governments addressing the barriers our peoples face in accessing our rights and entitlements to water ... Rights and entitlements that are given without practical support for accessing those entitlements amount to mere symbolic gestures.⁸⁶⁷

In raising its concerns, the Land Council indicated that the recognition of Indigenous water rights and interests is not an effective process if there is no guarantee to implement those rights and interests. The First Peoples' Water Engagement Council is not independent and not representative of the Indigenous community as a whole as representatives are not elected by the Indigenous community. In order to evaluate Indigenous water rights and interests in Australia there is an urgent requirement to consult widely among Indigenous communities.

The Murray-Darling Basin Authority has to date had no meaningful involvement with Aboriginal peoples in the management of the Basin's water resources.⁸⁶⁸ Its failure to

⁸⁶⁶ David Collard, personal communication to Virginia Falk, February 2009. The appointment of representatives at the Indigenous Focus Group Conference, Adelaide, South Australia on 17-19 February 2009 was confirmed during the conference.

⁸⁶⁷ New South Wales Aboriginal Land Council, *Tenth Session, Agenda Item 6: The Right to Water and Indigenous Peoples* (20 March 2012) United Nations Permanent Forum on Indigenous Issues, Tenth Session, 16-27 May 2011, New York
<http://www.hreoc.gov.au/social_justice/international_docs/2011/7_Right_to_Water_NSWALC_FINAL.pdf>.

⁸⁶⁸ Ibid.

legally recognise the needs of Aboriginal communities marginalises the spiritual, cultural, environmental, social and economic water requirements of Aboriginal communities.⁸⁶⁹

The right to self-determination in the Aboriginal management of water resources should be recognised as a legal and beneficial right in the Basin catchments.⁸⁷⁰ In spite of the recognition of Indigenous peoples' traditional knowledge of natural resources under international instruments such as the *United Nations Convention on Biological Diversity* (1993), the proposed Murray-Darling Basin Plan is non-committal on policy strategies to 'respect, preserve and maintain traditional knowledge and practices'.⁸⁷¹

A review of the initiative conducted by the Australian and New Zealand Environment and Conservation Council concluded that the objective to recognise and ensure the continuity of the contribution of the ethnobiological knowledge of Australia's indigenous peoples to the conservation of Australia's biodiversity has not been achieved.⁸⁷²

The national dialogue on water reform in Australia has regularly reported on the poor condition of the Murray-Darling Basin, one of Australia's most significant river systems. However, national reforms have generally ignored developing Aboriginal water policy and legislation. International agreements such as the *Kyoto Protocol*, ratified by Australia in 1992,⁸⁷³ have not encouraged the Australian Government to combine environmental policy and sustainable resource use with the adoption of Aboriginal protocols and measurable solutions.⁸⁷⁴

⁸⁶⁹ Ibid.

⁸⁷⁰ Ibid.

⁸⁷¹ Secretariat of the Convention on Biological Diversity, *Sustaining Life on Earth* (20 March 2012) Convention of Biological Diversity <www.cbd.int/convention/guide/?id=web>.

⁸⁷² Angie Shuter, 'A Review of the Experience of Other States in the Development of *sui generis* Mechanisms for Protecting Traditional Knowledge' ('Scoping Paper', Te Puni Kokori, February 2002) 25.

⁸⁷³ Carbon Planet Consultancy, 'Australia as a Kyoto Nation' (Carbon Planet, 2007) 8.

⁸⁷⁴ Ibid 9.

Tan (2000) argues that the ‘non-fettered discretion’⁸⁷⁵ of government bureaucracy has over-allocated water licences to appease farmers and industry for political gain and that this approach has contributed to the water and environmental concerns affecting the Australian landscape.⁸⁷⁶ The endemic problems in the Murray-Darling Basin catchments are attributable to former government water policy and the expansion of irrigation use.

The Murray-Darling Environmental Resources Study (1987) identified the significant changes to the Basin’s river systems:

Development of the river systems has involved extensive modification of the rivers through the construction of dams and weirs, river ‘improvement’ operations, levees, and water allocation and management practices designed essentially to supply water for domestic and industrial consumption, irrigation and livestock ... the changed flow from river regulation and the physical barriers of dams are two significant factors affecting the aquatic resources...⁸⁷⁷

The hostility of the Murray-Darling Basin communities in 2010 towards the proposed policy changes to water use in the Basin led to parliament initiating the Windsor Inquiry. The inquiry highlighted the communities’ confusion regarding the proposed re-distribution of the region’s water rights and interests. The Australian Government and the Murray-Darling Basin Authority attracted constant media attention because of this, which also highlighted the lack of community and stakeholder consultation. Adding to the communities’ frustration was the fact that the highly technical reports by the Murray-Darling Basin Authority about the 2010 water reforms were too complex for communities to understand. This led to the launch of a Plain English summary of the 2011 Draft Plan.

In the Murray-Darling Basin catchments the focus on water scarcity and the length of the drought in Australia has intensified social and political debate on water issues. To

⁸⁷⁵ Poh-Ling Tan, ‘Conflict over Water Resources in Queensland: All Eyes on the Lower Balonne’ (2000) 17(6) *Environmental and Planning Law Journal* 545.

⁸⁷⁶ Ibid.

⁸⁷⁷ Murray-Darling Basin Ministerial Council, ‘Murray-Darling Basin Environmental Resources Study’ (‘Research Report’, Murray-Darling Basin Ministerial Council, July 1987) 145.

improve government coordination in the management of water resources, state and territory governments responsible for the Basin catchments agreed to the referral of certain powers to the Commonwealth.

However, amidst this dialogue on water reforms and proposals for the Basin region, the water rights and interests of Aboriginal peoples have stalled. It is clear from the 2011 Draft Plan that all governments have failed to meaningfully address Aboriginal community water requirements. A new independent inquiry should examine and make recommendations on Aboriginal communities' legal and beneficial right to use the Basin's water resources.

The Commonwealth's *Water Act 2007* and *Water Amendment Act 2008* are reviewed below to examine the gaps in the legislation and to consider ways of redressing the water rights and interests of Aboriginal peoples.

5.2 The Impact of the Commonwealth's Water Legislation on Aboriginal Water Rights and Interests

The *Water Act 2007* (Cth) implemented key reforms for water management in Australia and the key features of the Act vested the Murray-Darling Basin Authority with the functions and powers to ensure that Basin water resources are managed sustainably.⁸⁷⁸ The *Water Act* requires that a Basin Plan is devised for strategically managing water resources and establishes a Commonwealth Environmental Water Holder to manage the Commonwealth's environmental water within the Basin region as well as external to other areas where the Commonwealth owns water.⁸⁷⁹

In addition, the *Water Act* provides the Australian Competition and Consumer Commission with a key role in developing and enforcing water charges and water market

⁸⁷⁸ Australian Government, *Water Legislation* (10 February 2012) Department of Sustainability, Environment, Water, Population and Communities <<http://www.environment.gov.au/water/australia/water-act/index.html#amendment-2008>>.

⁸⁷⁹ Ibid.

rules under the National Water Initiative. The *Water Act* also provides the Bureau of Meteorology with water information functions, together with the *Meteorology Act 1955* (Cth) which the Bureau operates under.⁸⁸⁰

The *Water Amendment Act 2008* (Cth) amended the *Water Act 2007*. A key feature of the *Water Amendment Act* is that it was intended to transfer the Murray-Darling Basin Commission into the Murray-Darling Basin Authority to form a single body responsible for water resource planning in the Murray-Darling Basin.⁸⁸¹ The *Water Amendment Act* allowed the Basin Plan to provide arrangements for meeting critical human water needs and increased the powers of the Australian Competition and Consumer Commission to ensure that water charge rules and water market rules apply to all water service providers and transactions, and to determine or accredit determination arrangements for all regulated non-urban water charges.⁸⁸²

The *Water Amendment Act* is based on a combination of Commonwealth constitutional powers and the referral of certain powers under s 51 (xxxvii) from the Basin States to the Commonwealth – in particular Queensland, New South Wales, Victoria and South Australia.⁸⁸³ In schedule 1 of the *Water Amendment Act* the purpose and functions of the Murray-Darling Basin Agreement and the powers of the Murray-Darling Basin Authority are set out, including state entitlements to water,⁸⁸⁴ water accounting,⁸⁸⁵ water sharing,⁸⁸⁶ reporting, audit and review processes⁸⁸⁷ and the inter-state transfer of water entitlements.⁸⁸⁸

The management of Australia's rivers has become one of the most urgent public policy problems for each tier of government in Australia, due to the length of severe drought

⁸⁸⁰ Ibid.

⁸⁸¹ Australian Government, *Water Legislation* (10 February 2012) Department of Sustainability, Environment, Water, Population and Communities <<http://www.environment.gov.au/water/australia/water-act/index.html#amendment-2008>>.

⁸⁸² Ibid.

⁸⁸³ Ibid.

⁸⁸⁴ *Water Amendment Act 2008* (Cth). See sub-div B.

⁸⁸⁵ Ibid. See sub-divs D, E and F.

⁸⁸⁶ Ibid. See div 4c135.

⁸⁸⁷ Ibid. See sch B pt VII.

⁸⁸⁸ Ibid. See sch D app 2.

cycles and floods.⁸⁸⁹ The *Australian Constitution* determines the framework for water resource management and to what extent the state or the Commonwealth may exercise their respective powers.⁸⁹⁰ Since the foundation of federation, the primary heads of the Commonwealth's legislative powers in relation to water resources has expanded most notably, the powers in relation to corporations, external affairs, trade and commerce and acquiring property on just terms.⁸⁹¹

In the 'Official Record of the Debates of the Australasian Federal Convention' in 1891, Mr John Forrest, representing the interests of Western Australia, highlighted the 'haphazard boundaries' relating to the Murray River in the Australian colonies⁸⁹² and stated:

[t]he boundary between Victoria and New South Wales is the river Murray a most unsuitable division. No line of division is so unsuitable as a river. The people living on each side of it marry, and become virtually the same people but they are divided by artificial boundaries ...⁸⁹³

During the constitutional debates the colonial governments did not concern themselves with the interests or rights of Indigenous peoples as constituting part of the federation framework. The modern recognition of native title rights or the significant influence of international law upon Australia's law-making was not contemplated in the creation of federation.

Unlike Canada, the United States of America and New Zealand, there were no federal treaties signed by the Crown with Aboriginal peoples. Subsequently there has been no constitutional recognition of Aboriginal property, Aboriginal customary laws and practices, Aboriginal rights to water resources or ownership rights to mineral resources.

⁸⁸⁹ Paul Kildea and George Williams, 'The Constitution and the Management of Water in Australia's Rivers' (2010) 32 *Sydney Law Review* 595.

⁸⁹⁰ Ibid 596.

⁸⁹¹ Ibid 605.

⁸⁹² New South Wales, *Official Report of the National Australasian Convention Debates*, Sydney 2 March-9 April 1891, 220 (Mr John Forrest).

⁸⁹³ Ibid.

As this thesis has argued, Indigenous peoples in Australia were not legally recognised as ‘self-governing nations’, retaining their own laws and sovereignty in the claim to possession by a foreign government.⁸⁹⁴ But, from an Aboriginal perspective, Aboriginal sovereignty has not been relinquished.

Both ‘sovereignty’ and ‘ownership’ are terms that denote ideas of relative authority, and the incidents and recognisable interests that will be protected under those rubrics.⁸⁹⁵

The boundaries to the ownership and control of water and other resources inherent to Indigenous peoples have been defined by the Crown. The Commonwealth water legislation has clearly defined the parameters of the rights and interests of Indigenous peoples water resources. The exercise of water rights in Australia by Aboriginal communities historically turns on ‘government political will’ to include Aboriginal peoples in policy and legislative development.

The Commissioner for the Royal Commission into Aboriginal Deaths in Custody acknowledged the historic circumstances of Aboriginal Australians:

I say very frankly that when I started upon my work in the Commission I had some knowledge of the way in which broad policy had evolved to the detriment of Aboriginal people and some ideas of the consequences. But, until I examined the files of the people who died and the other material which has come before the Commission and listened to Aboriginal people speaking, I had no conception of the degree of pin-pricking domination, abuse of personal power, utter paternalism,

⁸⁹⁴ Ani Mikaere, Nin Thomas and Kerensa Johnston, Treaty of Waitangi and Maori Land Law’ (2003) *New Zealand Land Review* 480. See also James D K Morris and Jacinta Ruru, ‘Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples’ Relationships to Water?’ (2010) 14(2) *Australian Indigenous Law Review* 49-59. Morris and Ruru (2010) examine a ‘new legal framework that would recognise the legal personality of a river whereby a river would have *locus standi* to protect its river system from harm and recognise Maori tribes in relationship with the river as beneficiaries. In October 2012 I attended the World Indigenous Lawyers Conference at University of Waikato, New Zealand, where it was announced that a legal agreement had recognised the Whanganui river with legal standing and personhood.

⁸⁹⁵ Ibid.

open contempt and total indifference with which so many Aboriginal people were visited on a day to day basis.⁸⁹⁶

Noel Pearson (2002) expresses the impact of Australia's national exploitation of Aboriginal communities:

During the frontier phase Aboriginal people were dragged into the colonial economy for purposes of exploitation, which was only partially ameliorated during the protection phase when the State, in collaboration with the Christian churches, created the isolated institutions of the Aboriginal Reserves, and a modern form of subsistence economy was developed in these institutions.⁸⁹⁷

Collins and Falk (2008) argue that Aboriginal peoples' ability to exercise any future demand for Aboriginal water rights and interests is measured against the interests of the national economy:⁸⁹⁸

The far-reaching implications of the Commonwealth's National Water Initiative reforms through the Intergovernmental Agreement between the Commonwealth, States and the Territories mean for Aboriginal and non-Aboriginal Australians things remain clear in terms of the commodification of water: Australia will buy and sell water as the market price determines its private and public value.⁸⁹⁹

In spite of the national water reforms and the National Water Initiative, the Australian Government clearly prioritises commercial water rights in the hierarchy of stakeholders, even at the risk to environmental flows. The ability of Aboriginal communities to exercise their full enjoyment of water rights and interests is undervalued in the national agenda.

⁸⁹⁶ Education and Health Standing Committee, Western Australian Legislative Assembly, *A Successful Initiative: Family Income Management* ('Report', 2007) [5].

⁸⁹⁷ Noel Pearson, *Our Right to Take Responsibility* (Noel Pearson, 2000) 27.

⁸⁹⁸ Neva Collins and Virginia Falk, 'Water: Aboriginal Peoples in Australia and their Spiritual Relationship with Waterscapes' in Elliott Johnston and Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 132.

⁸⁹⁹ *Ibid* 139.

Within Australia as a whole, Indigenous peoples hold a special status as the first peoples of this land. Their status as first sovereigns necessitates that they be distinguished from other minorities by virtue of their distinct histories as political entities. At its heart, the call for recognition of the right to self-determination concerns the nature of engagement between Indigenous peoples and government.⁹⁰⁰

The participation of Aboriginal peoples in the water economy is essential to stimulate the intergenerational growth of wealth in Aboriginal communities and is further examined in Chapter 7. The national reforms are weak in delivering water rights and interests for Aboriginal communities.

There is an apparent disjuncture between the significant attention given to Indigenous economic rights in the academic literature and the content of resource management discourse which rarely addressed property rights issues, or economic opportunities arising from Indigenous access to water rights.⁹⁰¹

The inadequate provision of legally recognised cultural water rights in the national water reforms equates to a loss of Aboriginal identity because water is inherent to kinship.

As Jackson and Morrison (2006) argue, ‘there is negligible empirical evidence of the impact of various water reforms and a range of knowledge gaps in Aboriginal water management which exist under the National Water Initiative’.⁹⁰² Jackson and Morrison raise considerable doubt about the benefits that can flow from the water reforms to Aboriginal interests unless further research is undertaken.⁹⁰³ Because the Indigenous

⁹⁰⁰ Monica Morgan, Lisa Strelein and Jessica Weir, ‘Indigenous Rights to Water in the Murray-Darling Basin’ (‘Research Discussion Paper’ No 14, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2004) 6.

⁹⁰¹ Sue Jackson and Joe Morrison, ‘Indigenous Perspectives in Water Management, Reforms and Implementation’ in Karen Hussey and Stephen Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges* (Commonwealth Scientific and Industrial Research Organisation, 2007) 23-41.

⁹⁰² Ibid.

⁹⁰³ Ibid.

actions under the National Water Initiative are unenforceable, there is an increased possibility of inconsistent water reform outcomes.⁹⁰⁴

The *Water Act 2007* (Cth) states in s 21(4)(c)(v) that ‘the National Water Initiative has regard to social, cultural, Indigenous and other public benefit issues’ in the Basin Plan. For Indigenous water rights to be accorded a value balanced with other water rights it is necessary for Indigenous water rights and interests to be incorporated into legislative instruments. The drafting of the provisions in the *Water Act* to provided ‘social, cultural or other public benefit issues’ is too narrow. This does not properly represent the range of Indigenous water rights and interests within the Basin region.

Spigelman CJ has expressed the view that the interpretation of legislation has moved to a ‘contextual interpretation’,⁹⁰⁵ stating:

Over the last two or three decades the fashion in interpretation has changed from textualism to contextualism. Literal interpretation – a focus on the ordinary meaning of particular words – is no longer in vogue. Purposive interpretation is what we do now ...⁹⁰⁶

This contextual approach to legal interpretation would help to redress the gaps in Aboriginal water knowledge and rights and interests in Australia’s water legislation. The national water reforms must incorporate human rights benchmarks in order for Indigenous water rights and interests to be recognised according to the basic standards for human rights.

It is imperative that Indigenous water rights and interests are articulated in such a way as to capture Aboriginal ontological meanings and values, and relate to Indigenous environmental paradigms. Indigenous water relationships are distinct from Western

⁹⁰⁴ Ibid.

⁹⁰⁵ Pearce, Dennis and Robert Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 7th ed, 2011) 30-31. Authors cite Spigelman CJ.

⁹⁰⁶ Ibid.

environmental values and ecological definitions in water. The Commonwealth's water legislation should be amended to provide for Indigenous water rights and interests that reflect the unique status of water for Indigenous communities.

Jackson (2006) argues that the 'creation of a distinct category associated with Aboriginal values is glossed over as cultural values':⁹⁰⁷

[t]he implicit dichotomy between the material (e.g. environmental, economic) and a separate symbolic sphere of meaning (belief and value), otherwise understood as cultural, relegated Aboriginal interests to a realm of negligible significance to the political economy of regional agricultural development and marginalised them within environmental research and action.⁹⁰⁸

It is difficult to capture what the meaning of water is without according Aboriginal words their appropriate context. Hundreds of words in Aboriginal dialects and languages exist for describing water in the context of its relationship with Aboriginal peoples. For example, the type of water requires a description of water quality or water use. The water knowledge held by Aboriginal communities should influence the context and meanings of water which are used to identify the range of rights and interests of Aboriginal communities. The Commonwealth's *Water Act 2007* and regulations would better reflect Aboriginal people's rights and interests to water and the communities water requirements if this approach was adopted.

The *Water Act* in s 20(b) states that the purpose of the Basin Plan is 'the establishment and enforcement of environmental sustainable limits to the taking of surface and groundwater and also protect the land and the waters valued by Aboriginal people'. This

⁹⁰⁷ Sue Jackson, 'Compartmentalising Culture: The Articulation and Consideration of Indigenous Values in Water Resource Management' (2006) 35 *Australian Geographer* 28-29.

⁹⁰⁸ Ibid.

impacts the available water resources for cultural water activities and cultural water licences.⁹⁰⁹

As I have emphasised, the nurturing of Aboriginal water and landscapes for Aboriginal peoples is bound to the inseparability of land and water. Section 20(b) of the Act refers to ‘cultural water activities’ that are conditional upon an Aboriginal right to take and use water. Aboriginal laws of themselves limit the taking of water in such a way as to maintain a holistic relationship with the environment, because surface and groundwater are not severable components of the water and the land.

Although s 86A of the *Water Act* states that the Basin Plan ‘must have regard to critical human water needs’, the provision does not specifically include Indigenous water requirements as ‘critical needs’, or basic human rights.

Western concepts of water use are represented in government water policy, planning and the development of water allocations. The Commonwealth water legislation has decoupled Aboriginal ontological water concepts from the provisions that identify Aboriginal water interests. The definition of environmental water under the *Water Act 2008* (Cth) does not represent an Aboriginal understanding of the environment. Both access and use of surface and ground water are governed through Aboriginal laws.

Within the objects of the *Water Act*, in s 3, the management of Australia’s water resources and how these resources should be dealt with and monitored is articulated. Furthermore, the objects of the *Water Act* in subsections 3(a) enable the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources in the national interest. Section 3(b) gives effect to relevant international agreements ‘for special measures’ and s 3(c) gives effect to ‘relevant international agreements’, in order to

⁹⁰⁹ New South Wales Government, Department of Water (NSW) *Our Water Our Country: An Information Manual for Aboriginal People and Communities about the Water Reform Process* (NSW Government, Sydney, 2012) 2:4.

‘promote the use and management of the Basin water resources to optimise economic, social and environmental outcomes’.⁹¹⁰

In the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1) it is stated that,

so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.⁹¹¹

Similarly, Australia’s water legislation should incorporate the provision that the legislation is ‘interpreted in a way that is compatible with human rights’, and with international law.⁹¹² This would ensure the recognition of Indigenous water rights ‘adopting the words of international agreements, instruments and treaties’.⁹¹³ The context of Indigenous water rights and interests is interpreted through the lens of human rights because there is limited protection under Australia’s water legislation.

International standards are articulated in the relevant conventions in water and other international legal instruments such as the *United Nations Convention on Civil and Political Rights*, the *Ramsar Convention*, the *Convention on Biological Diversity* and the *Declaration on the Rights of Indigenous Peoples*. These international standards establish a collective recognition of rights specific to Indigenous values, laws and the revitalisation of traditional practices, which be examined in Chapter 9.

The *Ramsar Convention on Wetlands* and the *Convention on Biological Diversity* ‘establishes a framework for environmental objectives that have primacy and the implementation of these objectives allow for the consideration of social and economic

⁹¹⁰ Ibid.

⁹¹¹ Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 7th ed, 2011) 43.

⁹¹² Ibid.

⁹¹³ Ibid.

factors'.⁹¹⁴ However, these environmental measures are not identified in the *Water Act*. In order to incorporate Indigenous peoples relationship and customary knowledge of the Basin's water resources, s 3 of the *Water Act 2007* (Cth) should be amended to include Indigenous co-management.

The *Water Act* provides in s 3 for water management implemented 'in the national interest' and to 'optimise' economic, social and environmental outcomes'. The provisions in the *Water Act* should include reference to 'Indigenous water rights and interests' as a separate subsection, and also include under s 3(c) words to the effect, 'to recognise and promote the use and management of the Basin water resources for the benefit of Indigenous peoples'.

Definitions which refer to 'social, economic and environmental outcomes' in s 3(c) of the *Water Act* currently fail to include recognition of Indigenous water rights and interests as a stakeholder group in its own right and also fails to identify that the rights of Indigenous communities are not fully represented in 'consumptive' nor 'non-consumptive' use. Indigenous water rights and interests should be defined as collective rights because in the timeline of Australia's water use these are the 'first water rights'.

An economic perspective has a limited capacity to respond to many moral and ethical issues even though substantial political threats can come from groups driven by such considerations.⁹¹⁵

A significant role in co-managing the Murray-Darling Basin's water resources requires the recognition of the water rights and interests of Aboriginal peoples, as a prioritised 'first right' in the hierarchy of water users. The Commonwealth water legislation has failed to meet the water needs of Aboriginal communities in the Basin region.

⁹¹⁴ Sue Jackson, 'Compartmentalising Culture: The Articulation and Consideration of Indigenous Values in Water Resource Management' (2006) 35 *Australian Geographer* 28-29.

⁹¹⁵ Daniel Connell, *Water Politics in the Murray-Darling Basin* (Federation Press, 2007) 44-45.

In Australia, Aboriginal cultural values are generally regarded as subservient to the economic progress of the nation. Where any public purpose or planning requirement is proposed, the value of Aboriginal sites is doomed ... Natural waterways continue to succumb to the urgency of improving and expanding the 'frontier'.⁹¹⁶

In 1995 the Council of Australian Governments' Task Force on Water Reform, 'Water Allocations and Entitlements: A National Framework for the Implementation of Property Rights in Water', omitted Indigenous water rights:

[t]his national policy position paper made no reference to native title, or any other form of Indigenous entitlement that might require recognition and accommodation when developing national principles designed ... to turn water entitlements ... into full property rights which will form the basis for inter-jurisdictional trade ...⁹¹⁷

The blueprint for the National Water Initiative Agreement did not include Aboriginal water rights and interests. The Federal Government included discretionary provisions in the National Water Initiative for Indigenous peoples, without community consultation to identify whether these national Indigenous Actions met the water needs of communities.

A scoping study by Jon Altman and William Arthur (2009)⁹¹⁸ offers an estimate of commercial water licences and allocations for Indigenous people across all States and Territories in Australia.⁹¹⁹ The number of water licences held by Indigenous individuals or organisations are given as follows: 122 in New South Wales, 23 in Queensland, 4 in

⁹¹⁶ Neva Collins and Virginia Falk, 'Water: Aboriginal peoples in Australia and their Spiritual Relationship with Waterscapes' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd edition, 2008) 141.

⁹¹⁷ Aboriginal and Torres Strait Islander Commission and the Lingiari Foundation, *Indigenous Rights to Water Report and Recommendations* (15 November 2004) Aboriginal and Torres Strait Islander Commission <http://astic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp>.

⁹¹⁸ Jon Altman and William Arthur, 'Commercial Water and Indigenous Australians: A Scoping Study of Licence Allocations', ('Working Paper' No 57, Centre for Aboriginal Policy Research, Australian National University, 2009).

⁹¹⁹ *Ibid* 3, 9.

South Australia, 5 in Victoria, 3 in Western Australia, 1 in Tasmania and 4 in the Northern Territory.⁹²⁰

Altman and Arthur argue the need for comprehensive research to calculate the exact number of Aboriginal commercial licence holders in Australia and the establishment of a national Indigenous water register for Indigenous customary water allocations and water licences.⁹²¹ They conclude that the policy objectives for Indigenous peoples may improve when these issues are addressed.⁹²² This research would identify the commercial and customary water requirements of Indigenous communities, and determine the water requirements of Indigenous communities in the Murray-Darling Basin Plan.

The NSW Government in 2009 held workshops across the state to identify the unique water issues for Aboriginal communities and to consult on the impact of water reform. During these government workshops Aboriginal community participants responded that ‘they were unaware of their status in the water sharing process or the allocation of the introduction of the Aboriginal cultural water access licence’.⁹²³ Other issues raised by Aboriginal participants were the need to develop cultural and economic opportunities in water and to recognise the Aboriginal Water Trust as an important body to represent the interests and community objectives of Aboriginal communities’.⁹²⁴

The *Water Act* fails to include any substantial water rights and interests for the Indigenous communities of the Murray-Darling Basin. There has been a lack of recognition and inclusion of Indigenous peoples in water management reform since the 1990s, there still appears no genuine policy shift towards establishing Indigenous water rights and interests in the national water management legislation. Section 13 of the *Water Act* states that ‘nothing in the Act affects the operation of the *Native Title Act 1993*

⁹²⁰ Ibid. In NSW the water licences were identified as 13,341 megalitres for General Security Licences; 3,030 megalitres for High Security Licences and 7,366 megalitres for Irrigation Licences.

⁹²¹ Ibid 8.

⁹²² Ibid.

⁹²³ New South Wales Government, Department of Water (NSW) *Our Water Our Country: An Information Manual for Aboriginal People and Communities about the Water Reform Process* (NSW Government, Sydney, 2012) 1:7.

⁹²⁴ Ibid.

(Cth)'. The development of case law in relation to the operation of the *Water Act* is still emerging.

Tim Fisher of the Australian Conservation Foundation has expressed concerns in the direction of national water reforms, saying,

The Council of Australian Governments' Water Resources Policy also included water property rights. Classification of rights is required to free-up markets, enabling irrigators to cash-in on unwanted entitlements and speeding up transition to the use of water for higher-value products ...⁹²⁵

Section 3d(i) of the *Water Act* ensures the return of environmentally sustainable levels of extraction for water resources that are over-allocated or overused. Section 3d(ii) is intended 'to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems and biodiversity'.

Establishing environmental flows is necessary for improving the Murray-Darling Basin's ecosystem. However, the provisions fail to recognise that Indigenous people's knowledge and relationship with these ecosystems has existed for hundreds of generations. Although Aboriginal cultural flows are congruous with Aboriginal water values for nurturing the river systems, Aboriginal water management is inadequately acknowledged in the Murray-Darling Basin policy and legislation.

In spite of the environmental objectives of the 'Living Murray Initiative'⁹²⁶ and the objectives of the proposed Murray-Darling Basin Plan, these policies do not adequately recognise a major role for Aboriginal communities in managing water resources. The *Water Amendment Act* only includes Indigenous water rights and interests as part of other

⁹²⁵ Letter from Tim Fisher to Andrew Chalk, 8 March 1996.

⁹²⁶ *Water Amendment Act 2008* (Cth) s 18H.

stakeholder interests. For example, s 21(4)(c)(v)⁹²⁷ reads: ‘to have regard to social, cultural, Indigenous or other public benefits in water’. The words ‘to have regard to’ are not strong enough to require governments to commit to providing water resources for Aboriginal communities.

As I have pointed out, the land, waters and resources have ‘interconnectivity’ to the spiritual and cultural meaning of ‘country’ that is connected to Aboriginal kinship. Water management legislation must recognise Aboriginal water rights and interests in such a way as to reflect the context of Aboriginal relationships with the environmental landscape. The right to water is integral to Aboriginal peoples as a human right and their relationship to water lies at the centre of their community identity.

The significance of water being everywhere culturalized as sacred in Aboriginal societies, the settler society was and remains in conflict with Aboriginal constructions of the landscape in ever more complicated ways.⁹²⁸

Part 14 of the *Water Act* sets out requirements to address ‘Indigenous Values and Uses’; including requirements for a Water Resource Plan.⁹²⁹ A Water Resource Plan, in light of this provision, must identify a range of issues which meet ‘the objectives and outcomes for Indigenous people’.⁹³⁰ It is to also include ‘consultation with relevant Indigenous organisations in the management of water resources’ and ‘to have regard to the social, spiritual and cultural values of Indigenous people’ relating to the Water Resource Plan area’.⁹³¹ The preparation of a Water Resource Plan is ‘to have regard to the desirability in minimising any risks to the Indigenous values and Indigenous use of water’, as well as

⁹²⁷ Ibid. S 21(4) of the Act confirms the relevance of social and economic factors the Minister must, in exercising their powers and performing their functions under this division includes under (v) social, cultural, Indigenous and other public benefit issues.

⁹²⁸ Marcia Langton, *Freshwater* (15 November 2004) Lingiari Report to the Aboriginal and Torres Strait Islander Commission
<http://www.atsic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp>.

⁹²⁹ Murray-Darling Basin Authority, ‘Proposed Basin Plan: A Draft for Consultation’ (Australian Government, November 2011) 83.

⁹³⁰ Ibid.

⁹³¹ Ibid.

having discretionary scope to ‘identify opportunities to strengthen the protection of Indigenous values and uses’.⁹³²

In Schedule 1 of the 2011 Draft Basin Plan, an Indigenous use of the Murray-Darling is expressed in terms of ‘Indigenous values’ in water as ‘inextricably connected to the land and the rivers and integral to the river system’.⁹³³ Schedule 1 also states that ‘the concept of cultural flows helps to translate the complex relationship of Indigenous peoples to the language of water planning and management’.⁹³⁴ An acknowledgement of commercial water interests for Indigenous Basin communities and organisations is mentioned, including native title interests.⁹³⁵

The 2011 Draft Basin Plan fails on many levels to deliver significant water rights for Indigenous communities because Aboriginal water rights and interests have to compete with other stakeholders for water. Under the Commonwealth water management legislation, Indigenous water use sits within a consumptive and non-consumptive use of water. For example, Aboriginal cultural flows and native title water rights compete with the allocation of environmental flows, and Aboriginal commercial water licences and Aboriginal cultural water licences are made to compete with stakeholders within the consumptive pool.

According to a Commonwealth Scientific and Industrial Research Organisation report, ‘Effect of water availability on Indigenous people in the Murray-Darling Basin’ (2010), the current legislative framework for water management in the Murray-Darling Basin makes minimal provision for the water rights and interests of Indigenous communities.⁹³⁶

⁹³² Ibid.

⁹³³ Ibid 134.

⁹³⁴ Ibid.

⁹³⁵ Ibid.

⁹³⁶ Sue Jackson, Brad Moggridge and Cathy Robinson, *Effects of Changes in Water Availability on Indigenous People of the Murray-Darling Basin: A Scoping Study and Report to the Murray-Darling Basin Authority* (16 April 2012) Commonwealth Scientific and Industrial Research Organisation <<http://www.csiro.au/Organisation-Structure/Flagships/Water-for-a-Healthy-Country-Flagship/Sustainable-Yields-Projects/MDBSY/MDBSY-indigenous-water-report.aspx>>.

The Basin's water resources are now so tightly constrained that Indigenous people find it extremely difficult to compete with those accessing water for either consumptive or non consumptive uses. Indigenous water requirements have not been ascertained in any systematic or comprehensive manner at a catchment scale

⁹³⁷
...

In addition, this Report considers that Indigenous communities within the Basin region should have shared control of water management if tangible benefits to Indigenous peoples are to be delivered.⁹³⁸ The Report also recommends government financial investment in the capacity building of Indigenous Basin communities, to provide opportunities for the contribution of Indigenous water knowledge in managing environmental water allocations.⁹³⁹

According to Jackson, Moggridge and Robinson (2010), the Murray-Darling Basin Plan presents a significant opportunity to address the longstanding neglect of Indigenous water interests and to implement further research, as well as to monitor any benefits from the national water reforms for Indigenous communities.⁹⁴⁰

5.3 Murray-Darling Basin Research, Reports and Government Documents

Most of the earlier written resources on the Murray-Darling Basin region have focused upon the economic values and opportunities that can be produced from farming and agriculture. Contemporary documents on the Basin region also identify the range of opportunities for maximising wealth production in the commercial use of water resources. The national water reforms promote the provision of water resources for the environmental requirements of the Basin region and the reforms also acknowledge limited Aboriginal water rights and interests.

⁹³⁷ Ibid.

⁹³⁸ Ibid.

⁹³⁹ Ibid.

⁹⁴⁰ Ibid.

The various government and agency reports offer insight into how government agencies respond to Aboriginal water interests and Aboriginal peoples' relationship with the land and the waters. Aboriginal narratives orated by Aboriginal peoples about their relationships in the Murray-Darling Basin are instructive.

An Aboriginal world view is often expressed through Western frameworks of ecology and biodiversity:

The maintenance of biological diversity on lands and waters over which Aboriginal and Torres Strait Islander peoples have title or in which they have an interest is a cornerstone of the wellbeing, identity, cultural heritage and economy of Aboriginal and Torres Strait Islander communities.⁹⁴¹

The 'Murray-Darling Basin Environmental Resources Study' (1987) for the Murray-Darling Basin Ministerial Council, recalls a Ngurunderi creation story of the Lower River Murray, describing it as a 'myth' and retelling it through an anthropological gaze.⁹⁴² The section of the 'Study' dealing with the 'cultural heritage' of Aboriginal peoples in the Basin identifies 10,000 significant Aboriginal sites that have been recorded as generally found along the rivers, and the word 'mythological' is used to indicate the significance of all sites such as middens, burials and quarries.⁹⁴³ Approximately 20 rivers drain into the Basin system; and along with the Great Artesian, is significant for the environment.⁹⁴⁴ Two of the oldest Aboriginal areas in the Murray-Darling Basin have been identified as

⁹⁴¹ Dan Gillespie, Peter Cooke and John Taylor, 'Improving the Capacity of Indigenous People to Contribute to the Conservation of Biodiversity in Australia' ('Research Report', Environment Australia and the Biological Diversity Advisory Council, 2001) 57. See also Department of Sustainability, Environment, Water, Population and Communities, *Australia's Biological Diversity Conservation Strategy* (14 November 2011) <<http://www.environment.gov.au/biodiversity/publications/strategy-2010-30/pubs/biodiversity-strategy-2010.pdf>>.

⁹⁴² Murray-Darling Basin Ministerial Council, 'Murray-Darling Basin Environmental Resources Study' ('Research Report', Murray-Darling Basin Ministerial Council, July 1987) preface. The report includes in the preface the creation story for the 'Ngurunderi' recounted by an initiated man, and cited R M and C H Berndt, *The World of the First Australians* (Rigby, Adelaide, 1985).

⁹⁴³ Ibid xxiv.

⁹⁴⁴ Ibid 3.

Lake Mungo and Kow Swamp, where features in the landscape are said to have been created by ancestral beings.⁹⁴⁵

According to Strawbridge in a Western Australian Aboriginal site report (1988),⁹⁴⁶ water courses hold archaeological objects near water where ‘they are likely to be located within 350m of a potential water source, including swamps, creeks, rivers, lakes, surface water, springs and soaks.’⁹⁴⁷ This acknowledges the importance of water sites for Aboriginal peoples in their daily lives.

Australian settlement and development of the Murray-Darling Basin led to considerable negative impact at the hands of explorers (since 1813), squatters (pastoralists), farmers and gold-mining, as well as introducing irrigation in Renmark and Mildura around the 1880s.⁹⁴⁸ In looking ahead to the contemporary use of the Basin, the ‘Murray-Darling Basin Environmental Resources Study’ clearly indicates that the present problems in the Murray-Darling Basin have resulted from over-development and unsustainable water use, and that significant environmental problems such as rising salinity in the groundwater systems should address the cause, which was recognised by submissions to the government in 1985.⁹⁴⁹

Chapter 3 of the ‘Murray-Darling Basin Environmental Resources Study’ examines water resources in the Murray-Darling Basin, including the result of degradation to the water landscape from irrigated landholdings, agriculture run-off from fertilizers into the water system, erosion of the landscape from the increased demands of industries such as forestry, land clearing for agricultural production and salinisation from extensive

⁹⁴⁵ Ibid 17, 18.

⁹⁴⁶ Edward McDonald, Bryn Coldrick and Linda Villiers, ‘Study of Groundwater-related Aboriginal Cultural Values on the Gngangara Mound, Western Australia’ (‘Research Report’, Department of Environment Western Australia, October 2005) 37.

⁹⁴⁷ Ibid. As quoted by Edward McDonald et al in ‘Study of Groundwater-related Aboriginal Cultural Values on the Gngangara Mound, Western Australia’ and citing L Strawbridge, ‘Aboriginal Sites in the Perth Metropolitan Area: A Management Scheme’, Report to the Department of Aboriginal Affairs, Western Australian Museum, 1988).

⁹⁴⁸ Murray-Darling Basin Ministerial Council, ‘Murray-Darling Basin Environmental Resources Study’ (‘Research Report’, Murray-Darling Basin Ministerial Council, July 1987) 18-19.

⁹⁴⁹ Ibid 21-22.

irrigation.⁹⁵⁰ There is no inclusion of Aboriginal interests in water resources within the Basin and no discussion of the effect of these significant environmental problems upon Aboriginal communities.

In Chapter 8 of the ‘Murray-Darling Basin Environmental Resources Study’, the only focus on Aboriginal peoples in the Murray-Darling Basin, is concentrated on ‘cultural heritage’ through an anthropological framework; which includes information on Aboriginal sites, the Aboriginal Site Register, the distribution and type of Aboriginal sites, and attributes the negative impact on Aboriginal sites to such activities as recreation, tourism, rural development and rising non-flood river levels.⁹⁵¹

Tan (2001) concludes that ‘flood plain water resources, the recognition of environmental values in water and flood plain capture have historically been disregarded in Australia by the common law, State water managers and politicians’.⁹⁵²

Here, once again, there is no information on the relationships of Aboriginal peoples within the Murray-Darling Basin, or reference to the complex connection of water resources within Aboriginal culture, and no attempt to make recommendations to the Murray-Darling Basin Ministerial Council to protect the rights and interests of Aboriginal communities in their traditional lands and waters.

The ‘Murray-Darling Basin Environmental Resources Study’ identifies several main issues. It points out that, the contemporary problems that plague the Murray-Darling Basin have resulted from the impact of inappropriate development; and the failure to include Aboriginal relationships inherent to the lands and the waters of the Murray-Darling Basin has undermined the Aboriginal claim to water rights and interests. Applying a largely anthropological framework, and concentrating only on ‘cultural

⁹⁵⁰ Ibid 73-101.

⁹⁵¹ Ibid 353-375.

⁹⁵² Poh-Ling Tan, ‘Conflict over Water Resources in Queensland: All Eyes on the Lower Balonne’ (2000) 17(6) *Environmental and Planning Law Journal* 567.

heritage', fractures the inherent relationships of Aboriginal communities in the Murray-Darling Basin and disregards their historic connections.

In contrast, the paper by Monica Morgan, Lisa Strelein and Jessica Weir, 'Indigenous Rights to Water in the Murray-Darling Basin' (2004), examines the rights and interests of Indigenous peoples to water, not as a mere stakeholder in water, but as the Indigenous Nations of 'First Peoples', and underpinned by the inherent Indigenous sovereignty to the Basin's water resources.⁹⁵³ The right to water for Indigenous peoples is facilitated through the *Racial Discrimination Act 1975* (Cth) whereby governments have an obligation to exercise non-discrimination principles in relation to Indigenous rights.⁹⁵⁴

The recommendations put forward by Morgan, Strelein and Weir for conceptualising Indigenous water rights in the Murray-Darling Basin are: an application of the precautionary principle to ensure that water flows returned to the environment are linked to Indigenous interests, an Indigenous priority in water allocation accorded to Indigenous cultural flows before economic allocations, economic water rights allocated for Indigenous peoples such as water trading, and the implementation of a co-management model between Indigenous Nations within the Basin to protect water systems.⁹⁵⁵ In addition to the recognition of Indigenous water rights and interests identified by Morgan, Strelein and Weir's paper, there is a call for acknowledging Indigenous diversity, procedural rights in decision-making, principles of self-determination and Indigenous governance to regulate property rights in water.⁹⁵⁶

The paper by Morgan, Strelein and Weir does not include all Indigenous Nation Groups within the Murray-Darling Basin, effectively excluding consultation with other

⁹⁵³ 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' ('Research Discussion Paper', No 14, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004) 3.

⁹⁵⁴ Ibid.

⁹⁵⁵ Ibid 5. See also Rudi Maxwell, '21 Aboriginal Nations Join Water Battle', *Koori Mail* (Lismore), 2 May 2012, 35. This article highlights the claim for 100 per cent of the environmental flows by the Northern Murray-Darling Basin Aboriginal Nations in the Northern Murray-Darling Basin; in the article I am quoted in 'calling for an inquiry into Indigenous water entitlements in the Murray-Darling Basin'.

⁹⁵⁶ Ibid 5-6.

Indigenous groups regarding water rights and interests. The authors fail to identify the nexus in the diverse cultural, economic and environmental water requirements of Indigenous peoples. The recommendations in this paper should have included proposals for legislative changes to Australian water law that would address all Indigenous water needs and not just those of groups. The legal recognition of water rights and interests requires meaningful engagement with all Indigenous peoples within the Murray-Darling Basin region.

The most recent policy development for the Murray-Darling Basin is the revised version of the proposed Draft Basin Plan by the Murray-Darling Basin Authority, developed under the *Water Act*.⁹⁵⁷ The Draft Basin Plan includes a 'Plain English Summary of the Plan', a 'Catchment by Catchment' Plan for the proposed changes, and 'A Healthy Working Basin' discussion paper for sustainable integration of water use for public consultation.

Aboriginal communities gain little, if anything, from the Proposed Basin Plan. The opportunities to exercise water rights and interests are limited to the participation of Aboriginal communities in processes to identify 'Indigenous values and uses in water management' in the development of a water resource plan.⁹⁵⁸ A water resource plan should provide the same level of protection as a transitional or interim water resource plan,⁹⁵⁹ and 'must have regard to cultural flows' in view of Indigenous community objectives.⁹⁶⁰

Although the documents to inform the Proposed Basin Plan are focussed on providing community information, without technical jargon, the Proposed Basin Plan does not in

⁹⁵⁷ Murray-Darling Basin Authority, 'Delivering a Healthy Working Basin: About the Draft Basin Plan' ('Discussion Paper', Australian Government, November 2011) 5. See also Murray-Darling Basin Authority, 'Guide to the Proposed Basin Plan: Overview Volume 1' ('Public Consultation Guide', Australian Government, 2010) and Murray-Darling Basin Authority, 'Guide to the Proposed Basin Plan: Technical Background Volume 2, Part 1 of 3' ('Public Consultation Guide', Australian Government, 2010).

⁹⁵⁸ See Part 14 titled 'Indigenous Values and Uses' in the Murray-Darling Basin Authority, 'Proposed Basin Plan: A Draft for Consultation,' (Australian Government, November 2011) 83.

⁹⁵⁹ Ibid 84. See clause 9.59 in the 'Proposed Basin Plan: A Draft for Consultation,' (November 2011).

⁹⁶⁰ Ibid. See clause 9.58 in the 'Proposed Basin Plan: A Draft for Consultation,' (November 2011).

any way address the water rights, interests and requirements of Aboriginal peoples living in the Murray-Darling Basin and there is no discussion in the Plan of restoring water rights and interests to Aboriginal communities.

As part of a panel discussion on Aboriginal sovereignty at the University of Wollongong I argued for an inquiry into Aboriginal water rights and interests in Australia:

The Australian Government should, as a priority, hold an inquiry to examine the status of Indigenous water rights and interests in Australia, for example, in the cultural, spiritual, social, and legal rights of all Indigenous peoples and if the Commonwealth, State and Territory water legislation meets the water requirements of Indigenous peoples. The inquiry should include in its terms of reference the issue of Aboriginal sovereignty, constitutional amendments and the incorporation of international law into Australia's legal system.⁹⁶¹

The constitutional entrenchment of Aboriginal peoples' rights and interests has not been attempted in the Australian Constitution. There is no Aboriginal right inherent in the Australian Constitution to recognise, for example, a 'right to own, conserve and manage natural resources', as exists in s 35(1) of the Canadian Charter of Rights,⁹⁶² where Canadian Aboriginal title is a 'constitutionally protected property right'.⁹⁶³ There is a national dialogue on recommendations for amending the Australian Constitution to recognise a substantial improvement for Indigenous representation, however a national referendum on such changes will require significant support from all Australians.

⁹⁶¹ Virginia Marshall, Symposium, 'Aboriginal Water Rights and Interests: Constitutional Recognition' (23 May 2012) Legal Intersections Research Centre, Faculty of Law, University of Wollongong. See Virginia Falk, 'Beyond Native Title: The Rights Response to Social Justice and the Conceptual Problems of Resource Development' Development (2010) Native Title Conference <http://www.aiatsis.gov.au/ntru/documents/Virgina_FalkBeyondNativeTitleAbstract.pdf>. See Virginia Marshall, 'Indigenous Water rights and Governance' (Paper presented at the Trade, Intellectual Property and the Knowledge of Indigenous Peoples: The Developmental Frontier Conference, University of Victoria, New Zealand, 7-10 December 2010). See also Virginia Falk, 'Aboriginal Water Rights and Interests: An Emerging Issue in Australian Water Law' (Paper submitted to Lawlab 2010 Water Law Award, Sydney, 17 February 2010); Virginia Marshall quoted in R. Maxwell, '21 Aboriginal nations join water battle', Koori Mail, 2 May 2012, 35.

⁹⁶² Kent McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42(2) *Osgoode Hall Law Journal* 289.

⁹⁶³ *Ibid* 294.

The National Water Commission's 'Biennial Assessment 2009' and 'Biennial Assessment 2011' reported on the National Water Initiative outcomes progressed by the States and Territories in Australia and where the jurisdictions demonstrate how they have met the national water management objectives.⁹⁶⁴ What is clear from both the 2009 and the 2011 Biennial Assessments is that the States and Territories have in the majority of cases failed to implement many of the Indigenous objectives under the National Water Initiative. According to the 'Biennial Assessment 2011' the summary of findings identified that 'most jurisdictions have failed to incorporate effective strategies for Indigenous social, spiritual and customary objectives in water plan'.⁹⁶⁵

The 'Biennial Assessment 2009' noted in the findings that 'it was rare for Indigenous water requirements to be explicitly addressed in the water plans of any jurisdiction'.⁹⁶⁶

The National Water Commission's 'Biennial Assessment' findings on Indigenous water requirements are useful in tracking the progress of the jurisdictions across Australia under the benchmark of the National Water Initiative and the Intergovernmental Agreement.

The States and Territories are not penalised for failing to comply with meeting the water needs of Indigenous communities as set out in the Indigenous participation clauses 25(ix) and 52 to 54 of the National Water Initiative.⁹⁶⁷ There is no satisfactory method in place for compliance checking on the jurisdictions' commitment to implementing the National Water Initiatives; 'under the Intergovernmental Agreement at clause 27 the jurisdictions agreed to modify their existing legislation and administrative regimes'.⁹⁶⁸ The States and

⁹⁶⁴ National Water Commission, 'The National Water Initiative: Securing Australia's Water Future' ('Report', Australian Government, 2011 Assessment). See also National Water Commission, 'Australian Water Reform: Second Biennial Assessment of Progress in Implementation of the National Water Initiative' ('Report', Australian Government, 2009).

⁹⁶⁵ National Water Commission, 'The National Water Initiative: Securing Australia's Water Future' ('Report', Australian Government, 2011 Assessment) 57.

⁹⁶⁶ National Water Commission, 'Australian Water Reform: Second Biennial Assessment of Progress in Implementation of the National Water Initiative' ('Report', Australian Government, 2009) 27.

⁹⁶⁷ National Water Commission, 'The National Water Initiative: Securing Australia's Water Future' ('Report', Australian Government, 2011) 44.

⁹⁶⁸ National Water Commission, Intergovernmental Agreement on a National Water Initiative between the Jurisdictions (2004) <http://nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>.

Territories were ‘reluctant’ to expressly identify over-allocated and overused water systems for progressing sustainable water extractions.⁹⁶⁹

It was noted in the ‘Biennial Assessment 2009’ that ‘a deeper assessment of Indigenous water values and needs in the water plan has not been undertaken’.⁹⁷⁰ The ‘Biennial Assessment 2011’ reports that the progress of initiatives to implement Indigenous water requirements in the jurisdictions is tardy and that ‘where the Indigenous water values have been identified in the water plans it has not produced any additional water allocation’.⁹⁷¹ The outcomes for Indigenous water rights and interests have not improved under the National Water Initiative because, as the Biennial Assessments in 2009 and 2011 indicate, ‘Aboriginal people face significant impediments in accessing water for economic, environmental and cultural needs’.⁹⁷²

In spite of the formation of a ‘First Peoples’ Water Engagement Council’ by the National Water Commission as a policy support group on Indigenous engagement, the jurisdictions are free to reject any of the Council’s recommendations. The Biennial Assessment reports by the National Water Commission are essential for identifying the level of commitment and progress in meeting Indigenous water requirements within the jurisdictions, even though the outcomes to date remain highly unsatisfactory.

The Parliamentary ‘Inquiry into the Impact of the Murray-Darling Basin Plan in Regional Australia’ (Murray-Darling Basin Plan Inquiry 2011) tabled in June 2011 was undertaken because of the ‘hostile public reaction’⁹⁷³ to the lack of consultation by the Murray-Darling Basin Authority with the community and stakeholders on the release of the ‘Guide to the Proposed Basin Plan’ in 2010 and given effect by the *Water Act*.⁹⁷⁴ The

⁹⁶⁹ National Water Commission, ‘The National Water Initiative: Securing Australia’s Water Future’ (‘Report’, Australian Government, 2011) 104.

⁹⁷⁰ National Water Commission, ‘Australian Water Reform: Second Biennial Assessment of Progress in Implementation of the National Water Initiative’ (‘Report’, Australian Government, 2009) 27.

⁹⁷¹ National Water Commission, ‘The National Water Initiative: Securing Australia’s Water Future’ (‘Report’, Australian Government, 2011) 45.

⁹⁷² Ibid.

⁹⁷³ Ibid 161.

⁹⁷⁴ House Standing Committee on Regional Australia, Parliament of Australia, *Inquiry into the Impact of the Murray-Darling Basin Plan in Regional Australia* (2 June 2011) 1, 23. See Rural and Regional Affairs

inquiry received over 700 submissions, held public hearings across the Basin region and heard evidence from 274 witnesses⁹⁷⁵ in order to identify the basis for recommendations in an integrated response to Basin community needs.⁹⁷⁶

The Murray-Darling Basin Plan Inquiry 2011 reported that ‘Aboriginal people in the Basin argued ‘they had not been consulted, lacked recognition of their cultural association with the Basin and the level of disadvantage experienced by Aboriginal communities was significant’.⁹⁷⁷ Further, the inquiry noted that although Aboriginal cultural values are ‘considered’ under the *Water Act*, these values have not ‘provided for’ cultural flows within the Basin Plan, irrespective of the overlap with environmental and cultural flows.⁹⁷⁸ The report highlights the large Aboriginal population living in the Basin, and the high levels of unemployment among Aboriginal people is a negative impact, in addition to the under representation of Aboriginal communities in water planning.⁹⁷⁹

The Murray-Darling Basin Plan Inquiry 2011 made recommendations which specifically identify Aboriginal interests. Recommendation 4 states that in developing the Murray-Darling Basin Plan the Murray-Darling Basin Authority must ‘recognise the social and cultural needs of Aboriginal people’.⁹⁸⁰ Recommendation 5 states that ‘the Commonwealth Government should develop separate community basin planning for the recognition of the specific needs and economic circumstances of Aboriginal communities’.⁹⁸¹

The Murray-Darling Basin Plan Inquiry 2011 did not recommend any substantive strategies to address Aboriginal peoples’ loss of control of the river systems, nor did it address research and development opportunities, nor promote dialogue on the review of

and Transport References Committee, Parliament of Australia, Darwin, *Rural Water Usage in Australia* (18 November 2003), 448-453 (Sue Jackson). See New South Wales, *Parliamentary Debates: Water Management Bill*, Legislative Assembly, 9393 21-22 June 2000 (Second Reading).

⁹⁷⁵ Ibid 5.

⁹⁷⁶ Ibid 9.

⁹⁷⁷ Ibid 77.

⁹⁷⁸ Ibid 78.

⁹⁷⁹ Ibid 81.

⁹⁸⁰ Ibid 89.

⁹⁸¹ Ibid 93.

the legal and policy processes to enhance the equitable sharing of water rights and interests for the Basin's Aboriginal communities in cultural flows, nor economic opportunities in the water market and native title interests.

Perhaps the limited response to the Murray-Darling Basin Plan Inquiry 2011 was predictable, given that powerful economic interest sectors such as irrigators have greater political clout and command greater attention than Aboriginal groups. The revised and the Proposed Murray-Darling Basin Plan 2011 did not advance the recognition of water interests and rights for Aboriginal people and did not engage in water reforms to equip Aboriginal communities in the Basin with any tangible benefits from the Basin's water resources.

This chapter has attempted to demonstrate that since the 1990s research into Indigenous water rights and interests has not been a high priority of Australian governments. Nearly a decade later, the national water reforms concentrated on achieving regulated water allocations to ensure the smooth transition of water trading and pricing, and a new property right in water. The 'Biennial Assessment (2011)' by the National Water Commission reviewed the progress of national water reform strategies and raised the question of whether the benchmarks for the States and Territories had improved.⁹⁸² The Biennial Assessment identified the poor performance of the jurisdictions in meeting water sharing planning and other water requirements for Indigenous peoples.⁹⁸³

In hindsight, the vesting of water management in the States and the administration of water resources by the Commonwealth has undermined the inherent rights of Indigenous peoples to self-manage the Basin's water resources. Further academic research on the Murray-Darling Basin should address Indigenous peoples' inherent customary rights in water in future national policy reform. In addition, the National Water Commission should establish Indigenous water rights that are legally recognised and protected under

⁹⁸² National Water Commission, 'The National Water Initiative: Securing Australia's Water Future' ('Report', Australian Government, 2011).

⁹⁸³ Ibid.

water management legislation as a separate category for Indigenous peoples under the Murray-Darling Basin Plan.

The under-allocation of water resources to Indigenous communities in the Murray-Darling Basin Plan has serious consequences for future generations of Indigenous peoples. The historic over-allocation of water resources to non-Indigenous stakeholders has left Indigenous communities with limited opportunities to participate in water management and economic development in water trading. The Murray-Darling Basin Authority should consider Indigenous water rights and interests as a critical issue in restoring water rights and delivering water policy strategies to improve the living standards and health of Indigenous peoples under Australia's '*Closing the Gap*' initiatives.

Chapter 6: The Implications for Aboriginal Health of Self-Determination and Water Rights

This chapter examines how the opportunities and barriers relating to Aboriginal peoples' access to water affect Aboriginal health. It will also address how their exercise of self-determination through the customary use and economic development of water rights and interests impacts upon Aboriginal health. The chapter analyses whether there are ways to improve the state of Aboriginal health by providing cultural and economic certainty in establishing reserved Aboriginal allocations of water. Finally, the chapter examines the consequences that may follow for Aboriginal communities if water benefits, rights and allocations are not self-managed by the community. It identifies some common themes in Indigenous policy that acknowledge the social and cultural values of Aboriginal self-determination, Aboriginal sovereignty and self-governance which are directly linked to Aboriginal ontological concepts of water.

6.1 Perspectives on Aboriginal Self-Determination

Aboriginal health is integral to any national dialogue on Aboriginal water rights and interests, just as unemployment and low incomes have been linked to poor health outcomes for all Australians. Numerous government and non-government reports, as well as media and academic research publications, recognise the dire living standards of the majority of Aboriginal communities.

The principles of 'self-determination' progressed in Australia under the 'guiding principles of Aboriginal Affairs policy development' were established by the federal government in 1973.⁹⁸⁴ After decades of protectionist and assimilation policies, the

⁹⁸⁴ Senate Select Committee on the Administration of Indigenous Affairs, Parliament of Australia, *After ATSIC: Life in the Mainstream?* (March 2005) [2.23].

‘management of Aboriginal policy was controlled by Aboriginal peoples who sought to improve community outcomes’ through Aboriginal governance.⁹⁸⁵

During the ‘National Inquiry into the Stolen Generations’ the principles of self-determination were discussed in relation to the forced separation of Aboriginal children from their families. A definition of ‘self-determination’ was expressed as follows:

Self-determination is a collective right of peoples to determine and control their own destiny. It is a right to exercise autonomy about their affairs and a right to make their own decisions.⁹⁸⁶

Mick Dodson, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, acknowledged the importance of ‘self-determination’, stating that

[e]very issue concerning the historical and present status, entitlements, treatment and aspirations of Aboriginal and Torres Strait Islander peoples is implicated in the concept of self determination.⁹⁸⁷

The interrelationship of natural resources, such as water and land, and the enjoyment of good health among Aboriginal communities are directly connected to the range of benefits derived from water rights and interests if allocated to Aboriginal communities. The concept of self-determination is rarely discussed as a national water policy issue in terms of Aboriginal water rights, or in relation to improving Aboriginal health by the reserve of water rights in Australian legislation that is, allocating Aboriginal water rights and interests before other water allocations.

Chapter 4.5 explained the significance and importance of recognising Aboriginal ontological concepts as the basis of defining and interpreting Aboriginal water rights and

⁹⁸⁵ Ibid.

⁹⁸⁶ Human Rights and Equal Opportunity Commission, ‘Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families’ (‘Report’, Human Rights and Equal Opportunity Commission, April 1997) 319.

⁹⁸⁷ Ibid.

interests in Australia. If we use the ‘web of interests’ concept to explore Aboriginal values and beliefs it is easier to understand Aboriginal relationships and interests in water. Because of community diversity it is not feasible to use a generic ‘web of interests’ concept to represent the intimate knowledge and law system of each community group. Aboriginal peoples’ rights and interests can exist anywhere within the web and not in chronological or linear formation. The web is also the blueprint for visualising how other non-Aboriginal interests interact with Aboriginal interests. Aboriginal ontology is the dominant feature of this ‘web of interests’ because the creation of Australia, from an Aboriginal perspective, has its origins in ancestral story. The nexus with all things within the Aboriginal environment, Australia, is innately joined together as a ‘web of relationships’.

The Australian Government report ‘The Engagement of Indigenous Australians in Natural Resource Management’ (2007) identified the ‘nexus between land, water and human health of Indigenous peoples’:⁹⁸⁸

Land, water and human health are intimately integrated in Indigenous Australia and research is now trying to understand and even quantify the nexus.⁹⁸⁹

Recommendations put forward by the Working Group for Advancing Indigenous Reconciliation in Primary Industries and Natural Resource Management also identified the nexus between health and other policy frameworks:⁹⁹⁰

Employment is one of a number of key elements that need to be addressed ... improved health and housing, a safe family environment, law and order, and education. These major issues cannot be addressed effectively in isolation, as to

⁹⁸⁸ Alice Roughley and Susie Williams, ‘The Engagement of Indigenous Australians in Natural Resource Management: Key Findings and Outcomes from Land and Water Australia and the Broader Literature’ (‘Research Report’, Land and Water Australia, November 2007) 18, 23 <www.aiatsis.gov.au/research/publications/Land&Water/pn21610.pdf>.

⁹⁸⁹ Ibid 23.

⁹⁹⁰ Working Group for Advancing Indigenous Reconciliation in Primary Industries and Natural Resource Management, ‘Key Issues: Indigenous Employment and Engagement in Natural Resource Management and Primary Industries’ (‘Draft Report’, 2008) 1.

do so will not provide the holistic framework for policy, service and project implementation that is required to reduce Indigenous disadvantage ...⁹⁹¹

Mark Bennett (2004) reasons that the innate cultural and political difference between non-Aboriginal and Aboriginal communities lies within the notion of autonomy.⁹⁹²

Indigenous autonomy is different from general ethnic autonomy. Ethnic autonomy argues for exceptions to equal citizenship; indigenous autonomy appeals to the equality of nations ... indigenous autonomy is not merely about the distribution of resources and rights among citizens within the state, but is rooted in the question of how indigenous peoples, as polities, political groups, or 'nations', were incorporated into the wider state.⁹⁹³

Mason Durie, a Maori academic, has articulated the idea that the autonomy sought by Maori communities incorporates various meanings for Maori governance:⁹⁹⁴

Maori aspiration for greater control over their destinies and resources is variously described as a search for sovereignty, autonomy, independence, self-governance, self-determination, tino rangatiratanga, and mana motuhake.⁹⁹⁵

The notion of Aboriginal autonomy appears to represent some common themes with Indigenous peoples in other parts of the world. Shin Imai (2003) has argued that 'the Canadian Courts' position to seek a balance on negotiating Aboriginal rights in relation to the rights of others' is 'problematic for Aboriginal sovereignty'.⁹⁹⁶ This seems to be the case in Australia, where Governments to date have not sought to recognise the existence

⁹⁹¹ Ibid.

⁹⁹² Mark Bennett, 'Indigenous Autonomy and Justice in North America' (2004) 2 *New Zealand Journal of Public and International Law* 207.

⁹⁹³ Ibid.

⁹⁹⁴ Kirsty Gover and Natalie Baird, 'Identifying the Maori Treaty Partner' (2002) *University of Toronto Law Journal* 2.

⁹⁹⁵ Ibid.

⁹⁹⁶ Shin Imai, 'Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources' (2003) 41 *Osgoode Hall Law Journal* 7.

of Aboriginal sovereignty in law and the superior courts' interpretation of Aboriginal sovereignty is limited to commentary on these issues, preserving the notion of a 'skeletal frame' within Australia's legal system, examined in the previous chapters. Imai (2003) commenting on Canada's treatment of Aboriginal sovereignty, states:

The Court has approached this problem by attempting to balance recognition of Aboriginal and treaty rights required by the constitution against the unknown consequences of too broad an articulation of those rights.⁹⁹⁷

Identifying the 'parameters' for Indigenous legal rights within the Western legal system are, as Imai (2003) suggests, not straightforward. McLachlin CJ of Canada emphasised the importance of 'reconciling Aboriginal rights with the Western legal system' in order to 'repudiate prior injustices':⁹⁹⁸

Canadian jurisprudence on Aboriginal rights has emphasized the twin tasks of recognition and reconciliation. The goal of reconciliation requires us to abandon an all-or-nothing perspective, and to seek principled compromises based on a shared will to live together in a modern, multicultural society.⁹⁹⁹

Wilcox J in *Bennell v Western Australia*¹⁰⁰⁰ ('*Single Noongar Case*') argued for a similar jurisprudential perspective on Aboriginal rights in Australia, in seeking to reconcile the impact of Australia's settlement with the rule of law. Wilcox J was of the view that

[t]he impact of European settlement has resulted in modifications to traditional law which must be accepted by the courts because these modifications are within the parameters of acceptable change and adaptation.¹⁰⁰¹

⁹⁹⁷ Ibid.

⁹⁹⁸ McLachlin, Beverley CJ, 'Reconciling Sovereignty: Canada and Australia's Dialogue on Aboriginal Rights' (2003) High Court Centenary Conference, Canberra, 3
<http://unicorn.fedcourt.gov.au/uhtbin/cgisirsi/0000/000/38/10/x?user_id=SYD_WEBBpassword=SYD_WEB>.

⁹⁹⁹ Ibid.

¹⁰⁰⁰ (2006) 230 ALR 603 [791].

Kirby J in *Western Australia v Ward*¹⁰⁰² critiqued the reasoning by von Doussa J where the latter states that ‘the legal recognition of Aboriginal property rights would fracture the skeletal principles of the common law’.¹⁰⁰³ Kirby J responds that

Skeletal principles are not immutable. When they offend values of justice and human rights, they can no longer command unquestioning adherence. A balancing exercise must be undertaken to determine whether, if the rule were overturned, the disturbance would be disproportionate to the benefit flowing from the overturning.¹⁰⁰⁴

Geoffrey Robertson, a human rights barrister, argues that ‘the common law has been found to be defective’, therefore ‘the application of human rights principles to balance judicial reasoning’ is justified.¹⁰⁰⁵

The Commonwealth Government report ‘Engagement of Indigenous Australians’ (2007) found that Aboriginal autonomy is generally restricted by Western frameworks.

Indigenous governance and self-determination is dominated by the complexities of both internal and external accountability and capacity building relates to the devolution of power among Indigenous communities.¹⁰⁰⁶

The state of Aboriginal health is linked to the average income of Aboriginal peoples. The Department of Aboriginal Affairs ‘Two Ways Together Report’ (2005) found that the

¹⁰⁰¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2007’ (Human Rights and Equal Opportunity Commission, 2008) 148.

¹⁰⁰² (2002) 191 ALR 1.

¹⁰⁰³ Matthew Rimmer, ‘Blame it on Rio: Biodiscovery, Native Title, and Traditional Knowledge’ (2003) 7 *Southern Cross University Law Review* 28.

¹⁰⁰⁴ *Ibid.*

¹⁰⁰⁵ Margaret Throsby, Interview with Geoffrey Robertson (Radio Interview 95.70 FM, 1 April 2009).

¹⁰⁰⁶ Alice Roughley and Susie Williams, ‘The Engagement of Indigenous Australians in Natural Resource Management: Key Findings and Outcomes from Land and Water Australia and the Broader Literature’ (‘Research Report’, Land and Water Australia, November 2007) 28

<www.aiatsis.gov.au/research/publications/Land&Water/pn21610.pdf>. See also T Rowse (2002) ‘Indigenous Futures: Choice and Development for Aboriginal and Torres Strait Islander Australia’ University of New South Wales Press, Sydney.

average earnings for Aboriginal males were between \$120 and \$190 per week, and for Aboriginal females it was between \$200 and \$399 per week.¹⁰⁰⁷ For non-Indigenous households the average weekly income was between \$1500 and \$1999.¹⁰⁰⁸

According to various reports, the health status of Aboriginal peoples is linked to the level of poverty experienced in communities.

Mortality statistics released last week by the Australian Bureau of Statistics said the median age of death for Aboriginal men in Western Australia has dropped from 52.8 years in 2005 to 47.9 years ...¹⁰⁰⁹

The life expectancy of Aboriginal peoples is approximately 20 years less than that of other Australians and the earning capacity of Aboriginal peoples are significantly lower. The potential for asset accumulation in Aboriginal communities is very low. This chapter argues that because of these statistics Aboriginal communities require legal certainty with respect to water allocations. Establishing Aboriginal water ownership and tradeable water licences would ensure economic certainty in the water market for Aboriginal communities.

The poor earning capacity of Aboriginal peoples suggests that the poor socio-economic status of Aboriginal peoples is a significant barrier for Aboriginal communities. In order to realise economic self-determination and achieve the health standards of other Australians, a national reform in government water policy for Aboriginal peoples is required.

In Australia, the degree of wealth inequality across households is much larger than the inequality in income alone ... Lack of policy attention to the economic implications of Indigenous premature mortality and to the savings implications of

¹⁰⁰⁷ Department Aboriginal Affairs NSW, 'Two Ways Together Report on Indicators: The NSW Aboriginal Affairs Plan 2003-2012' ('Report', June 2005) 7.

¹⁰⁰⁸ Ibid.

¹⁰⁰⁹ Elizabeth Murray, 'Welfare to Work Legislation Criticised' *Koori Mail* (NSW) 21 November 2007, 13.

Indigenous employment conditions is symptomatic ... a key structural difference between the Indigenous and non-Indigenous populations [is that] ... most Indigenous people barely reach retirement age.¹⁰¹⁰

Manning Clark, an eminent Australian historian, argues that the Australian land use policy adopted between 1788 and the 1850s was based upon a land monopoly, almost exclusively for the benefit of the pastoral industry.¹⁰¹¹

The origin and basis of our colonial prosperity has been pastoral occupation of the waste lands ... it answered excellently its purpose of creating a valuable export, and spreading civilisation over the interior.¹⁰¹²

In 1982 the New South Wales Department of Aboriginal Affairs raised their concerns on the unfettered Western exploitation of land and resources.

The major concerns centred on the lack of provision of ownership and control of Aboriginal sites or for ownership of the entire subsurface (rights to gold, silver, coal and petroleum were excluded) ... It gave Aboriginal people no real protection and no real control.¹⁰¹³

The Ministerial Councils for Natural Resource Management and Primary Industries acknowledged the significance of land ownership by building the capacity of Aboriginal communities.

¹⁰¹⁰ John Taylor, 'Tracking Change in the Relative Economics Status of Indigenous People in New South Wales' ('Discussion Paper', No 277, Australian National University, 2005) 30.

¹⁰¹¹ Manning Clark, (ed) *Select Documents in Australian History 1851-1900 Volume 2* (Angus and Robertson, revised ed, 1979) 98.

¹⁰¹² Ibid 113.

¹⁰¹³ Gaynor Macdonald, 'Self-Determination or Control: Aborigines and Land Rights Legislation in New South Wales' (1988) 24 *Social Analysis* 37.

Hand-back of land, whether co-managed or freehold, makes a significant contribution to investing in Indigenous community initiatives.¹⁰¹⁴

The lack of tangible benefits flowing to Aboriginal communities from the exploitation of land and resources remains unsatisfactory.

Despite living on the doorstep of this enormous development, there exists a stark disparity between the vast development and wealth being generated and the significant level of disadvantage in which Aboriginal people in these regions are living.¹⁰¹⁵

Senator Aden Ridgeway, delivering the 'Mabo Lecture' for 2005, highlighted that a comparison of the Council of Australian Governments' 'National Framework Principles for Government Service Delivery to Indigenous Australians' (2004) and the Council of Australian Governments' 'National Commitment Principles' (1992) shows policy inconsistencies exist.¹⁰¹⁶ He further added that the 'National Commitment Principles' of self-determination, self-management, economic independence and equity-based Aboriginal social and cultural values were not included in the national policy outcomes that were delivered.¹⁰¹⁷

The 'Indigenous Engagement Report' (2007) noted that governments considered that Indigenous governance mechanisms were preferable to Indigenous self-determination.¹⁰¹⁸ However, the omission of self-determination principles in Indigenous policy impacts

¹⁰¹⁴ Email from Primary Industries Ministerial Council and the Natural Resource Management Ministerial Council to Virginia Falk, April 2006. In accordance with Australia's *Copyright Act* 1968 (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹⁰¹⁵ Yamatji Marlpa Barna Maaja Aboriginal Corporation, 'Annual Report 2007' ('Report', 15 October 2007) 22.

¹⁰¹⁶ Aden Ridgeway, 'Addressing the Economic Exclusion of Indigenous Australians through Native Title' (The Mabo Lecture, Coffs Harbour, 3 June 2005) 8
<<http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2005/papers/RidgewayA.pdf>>.

¹⁰¹⁷ Ibid 5.

¹⁰¹⁸ Alice Roughley and Susie Williams, 'The Engagement of Indigenous Australians in Natural Resource Management: Key Findings and Outcomes from Land and Water Australia and the Broader Literature' ('Research Report', Land and Water Australia, November 2007) 29
<www.aiatsis.gov.au/research/publications/Land&Water/pn21610.pdf>.

upon securing certainty over resource rights and interests. Aboriginal communities lack the economic influence of other water stakeholders in industry and agriculture. The incorporation of self-determination principles in Indigenous policy would enable Aboriginal communities to exercise economic and cultural rights, which are lacking in various examples from Western models of governance.

The use of surrogate governance is a predominant model for engaging with Aboriginal communities and needs to be reviewed. The critical question is whether the use of surrogate models negates the need to engage with communities and therefore undermines the opportunity for Aboriginal peoples to play an active role in their own governance.¹⁰¹⁹

In contrast to Australia, the USA has validated the recognition of Native American sovereignty, a sovereignty which exists through the exercise of tribal government authority.¹⁰²⁰ Jill Byrnes (1990) comments on the absence of a treaty process for Indigenous Australians:

No treaties have been signed in Australia, but in Canada treaties were signed with many of the First Nations. The First Nations did not initiate the treaty process, or exert much influence over the terms or even understand them clearly. They were coerced to agree with them, usually under the constraint of starvation and with the promise of food and other necessities, and in the obvious imminent, or actual, settlement on their land by Europeans.¹⁰²¹

The Boomanulla Report (2002) recognised the general powerlessness of Aboriginal communities to secure their rights and interests in Australia:

¹⁰¹⁹ Email from David Collard to Virginia Falk, the Minister for Indigenous Affairs to the Cabinet Standing Committee on Social Policy (WA), 2004.

¹⁰²⁰ Ed Goodman, 'Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right' (2000) 30 *Environmental Law* 284.

¹⁰²¹ Jill Byrnes, 'Aboriginal Economic Independence: A Report on some Canadian Initiatives' ('Research Report', Rural Development Centre, University of New England, 1990) 6.

Aboriginal people have received few real benefits from the use (and often misuse) of the land and rivers.¹⁰²²

In New South Wales no commercial water licences for Aboriginal peoples were granted; the Aboriginal licences were deemed non-tradeable and Aboriginal communities have strongly criticised the government's approach.¹⁰²³ Both water access and water infrastructure are integral to a successful economic enterprise in Aboriginal communities. The Commonwealth land acquisitions by the Indigenous Land Corporation, on behalf of Aboriginal communities, did not include investment in capital infrastructure or the purchase of water rights for Aboriginal leaseholders. Because of this policy omission, Aboriginal farm enterprises invariably failed.¹⁰²⁴

The Commonwealth Senate Committee heard evidence on 'Rural Water Usage in Australia' (2003) for Australian farmers and the highlighted economic values in water ownership. The Deputy Chair stated:

Twelve months ago a lot of key politicians from both sides of the political spectrum thought Australia was going to have some sort of nationally traded water right, which was dreaming, and there is no question that the banks and investment vehicles in Australia are lobbying heavily to be able to capture the river of gold, which was the capital base of the value of water, where they should not allow the transfer of the wealth of water, where they will have a regime, as they see it, to have a farmer as the tenant to the water. I say that we should not allow the transfer of wealth of water from the farm to the bank vault ... when you go to borrow the money at the bank you have to have equity.¹⁰²⁵

¹⁰²² Bruce Callaghan, NSW Aboriginal Land Council and the Department of Land and NSW Water Conservation, *Report on the Boomanulla Conference for Country 5-6 March 2002 Canberra* (2002) 4.

¹⁰²³ Email from David Collard to Virginia Falk on Virginia Simpson, 13 November 2007.

¹⁰²⁴ Virginia Falk, personal communication with John Gillespie Project Advisor for the Commonwealth Indigenous Land Corporation (2 July 2006, Cowra NSW). See also email from John Gillespie to Virginia Falk, 17 July 2007.

¹⁰²⁵ Evidence to Senate Rural and Regional Affairs and Transport Reference Committee, Parliament of Australia, Canberra, 18 November 2003, 389 (Bill Heffernan, Deputy Chair).

The 'Two Ways Together Report' (NSW) produced by the Department of Aboriginal Affairs (NSW) identified the total amount of Aboriginal owned or controlled land in New South Wales as 0.45 per cent.¹⁰²⁶ The report 'An Effective System of Defining Water Property Titles' (2004) also argues that the ownership of resources is fundamental for control:

One can have property rights over a resource without being the owner of the resource, such as in a leasehold arrangement to real estate ... property rights in an asset or resource can be viewed as a spectrum from a minimal interest through to private ownership ... The distinction between ownership and rights is relevant to water because the bundle of rights that have been allocated do not collectively amount to a legal ownership of the underlying resource, in the pure property sense of the word.¹⁰²⁷

The Aboriginal and Torres Strait Islander Commission was established under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) to advocate on behalf of Indigenous Australians and to promote Indigenous self-determination.¹⁰²⁸ However, Indigenous economic, social and cultural development remained far from being realised during the Commission's operation.¹⁰²⁹

The notion that the existence of the Commission rested on 'special laws', which would only benefit Aboriginal peoples is erroneous, and this has been well documented. The enactment of 'special laws' does not implement Aboriginal governance. It should also be noted that such laws are far removed from grass-roots Aboriginal processes and decision-making.¹⁰³⁰

¹⁰²⁶ Department of Aboriginal Affairs NSW 'Two Ways Together, Partnerships: A New Way of Doing Business with Aboriginal People, NSW Aboriginal Affairs Plan 2003-2012' (2003) 7.

¹⁰²⁷ ACIL Tasman in association with Freehills, 'An Effective System of Defining Water Property Titles' ('Research Report', Australian Government, Department of Agriculture, Fisheries and Forestry and Land and Water Australia, March 2004) 13.

¹⁰²⁸ Senate Select Committee on the Administration of Indigenous Affairs, Parliament of Australia, *After ATSIC: Life in the Mainstream?* (2005) [2.2].

¹⁰²⁹ Ibid.

¹⁰³⁰ Virginia Falk, 'The Rise and Fall of ATSIC: A Personal Opinion' (2004) 8(4) *Australian Indigenous Law Reporter* 17.

After the dismantlement of the Aboriginal and Torres Strait Islander Commission in 2005, the Howard Government established the National Indigenous Council to provide advice on Indigenous policy.¹⁰³¹ The National Indigenous Council was not elected by Aboriginal communities, and anecdotal evidence from communities deemed the National Indigenous Council to be ineffective and powerless.¹⁰³² The Rudd Federal Government disbanded the National Indigenous Council during its term of government and the subsequent Gillard Federal Government did not reinstate the Aboriginal and Torres Strait Islander Commission model.

In summary, the strategies directed at the generation of wealth in Australia, since the Crown asserted possession of the land, have resulted in creating the conditions for extreme Aboriginal disadvantage and an unsatisfactory level of poverty among Aboriginal communities. At the point of British settlement in Australia and over the various stages of colonising the land and the water, Aboriginal peoples were disenfranchised from their traditional rights and interests and from the ability to create an economic base to sustain their communities. The national water reforms have been focused upon industry, pastoralists, farmers and irrigators, which continue to disenfranchise Aboriginal communities from property rights in water and embeds Aboriginal disadvantage. If governments choose to ignore Aboriginal water rights and interests within their respective legislative instruments and water policy strategies, the dire conditions of Aboriginal communities will remain unchanged.

6.2 The Nexus in Aboriginal Water Rights, Health and Self-Determination

This chapter will argue that there is a connection between the health status of Aboriginal peoples and economic and cultural certainty in the allocation of water rights and interests.

¹⁰³¹ Ibid.

¹⁰³² Ibid.

In relation to Aboriginal water rights and interests in Australia, an economic analysis of the qualitative and quantitative impact of water rights on the Aboriginal water economy has been generally ignored in research. The introduction of native title and other laws, including government policy reform, has been implemented instead of responding to how the level of poverty in Aboriginal communities has occurred.

It is the great Australian paradox, that the recognised traditional owners of the land are the poorest people living on it.¹⁰³³

When Aboriginal self-determination is rejected in government policy there is a lack of power to manage Aboriginal water resources. Aboriginal peoples' right to control and manage customary water underpins social, cultural and economic certainty.

Chapter 3 demonstrated the methodological approach of this thesis using an Aboriginal narrative to articulate Aboriginal ontological water rights and interests, because from an Aboriginal perspective, land and water are inseparable and Aboriginal ownership exists in water resources. Aboriginal peoples should determine their community water requirements, in the type of allocations they require, to decide the management of customary water resources, and how they wish to exercise these rights such as commercial or economic water rights. The level of poverty would decrease if Aboriginal communities were able to determine their water needs.

Self-determination is considered by many Indigenous peoples to be the cornerstone of providing community capacity. Nicolas Peterson (1985) argues that land rights were implemented as a 'welfare measure'.¹⁰³⁴

[t]he fact that in essence land rights are a welfare measure and not the act of compensatory justice they appear to be. In Australia, an interventionist welfare state has had little problem creating long term, distinctive rights, since it

¹⁰³³ Ruth Williams, 'Mining Rites', *The Age* (Melbourne), 17 May 2008, 5.

¹⁰³⁴ Nicolas Peterson, 'Capitalism, Culture and Land Rights: Aborigines and the State in the Northern Territory' 18 (December 1985) *Social Analysis* 97.

recognises it is a long term problem and it would presumably feel obliged to intervene should gross inequities result in the future.¹⁰³⁵

In *Commonwealth v Yarmirr*¹⁰³⁶ the Aboriginal claimants expressed that ‘no essential difference between land and sea country’ exists under cultural belief.¹⁰³⁷ Aboriginal stories ‘often begin out at sea’ then proceed towards the land.¹⁰³⁸ Former High Court judge Mary Gaudron has indicated the immense difficulty in unpacking the customary rights of Aboriginal peoples under the Western legal system.

[t]o embark on an analysis of native title law is to begin with the strange and unfamiliar ... with the notion of rights which owe their existence, not to our laws which are strange enough, but to customs and traditions in respect of which we have contrived ... to describe that framework as ‘exceedingly complex’ ... is, perhaps, a masterful understatement.¹⁰³⁹

The following narrative of a Senior Law Knowledge Holder of the Bunitj¹⁰⁴⁰ instructs on the importance of maintaining Aboriginal law.

Law never change ...
always stay same.
Maybe it hard,
but proper one for all people.
Not like white European law ...
always changing.

If you don’t like it, you can change.

¹⁰³⁵ Ibid.

¹⁰³⁶ [2001] 208 CLR 1.

¹⁰³⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2007’ (Human Rights and Equal Opportunity Commission, 2008) 217.

¹⁰³⁸ Ibid.

¹⁰³⁹ Ibid 11.

¹⁰⁴⁰ Big Bill Neidjie, Stephen Davis and Allan Fox, *Australia’s Kakadu Man Bill Neidjie* (Resource Managers, revised ed, 1986) 24.

Aboriginal law never change.

Old people tell us,

‘You got to keep it’.

It always stays.¹⁰⁴¹

Water is your blood.

Water ... you can’t go without water.

No matter no food for 2 days, 3 day, 4 day if you got water.

If no water ... little bit weak ... getting hard.

Water important.¹⁰⁴²

The Human Rights and Equal Opportunity Commission’s ‘Review of the 1994 Water Report’ (2001) noted the nexus between ‘the right to water and the right to health’.¹⁰⁴³

[a]s satisfactory health is a precondition of the full enjoyment of almost all human rights and fundamental freedoms, water is crucial in a chain of factors affecting the fulfilment of other human rights, and the right to water is implied throughout many of the more wide ranging provisions of the various instruments.¹⁰⁴⁴

The Review raised concerns from the Australian Health and Water Research Consortium, that ‘water development in Aboriginal communities lacked a coherent strategy and service levels lacked clear priorities’.¹⁰⁴⁵ Water requirements need to be directed by the communities themselves in determining the economic strategies to deliver and service water supplies.

The *Water Resources Act 1989* (Qld) avoids any substantive recognition of Aboriginal water requirements; the rights of the Crown prevail.

¹⁰⁴¹ Ibid 39.

¹⁰⁴² Ibid 54.

¹⁰⁴³ William Jonas, ‘Review of the 1994 Water Report’ (‘Research Report’, Human Rights and Equal Opportunity Commission, 2001) 2 Human Rights and Equal Opportunity Commission
<http://www.hreoc.gov.au/racial_discrimination/water_report/index.html>.

¹⁰⁴⁴ Ibid.

¹⁰⁴⁵ Ibid.

The perpetual water rights provision was superseded by the *Water Resources Act 1989* (Qld) which concentrated upon the powers of the Crown to water resources, the development and consumptive use of water ... avoiding the relevance of ecosystems and the environmental aspects of water management.¹⁰⁴⁶

The *Irrigation Act 1922* (Qld) held that perpetual water rights for irrigators were ‘attached to the land’ and water availability was defined.¹⁰⁴⁷

A water right was circuitously defined as a right in respect of irrigable land to a quantity of water annually out of the water available for irrigation in an irrigation area.¹⁰⁴⁸

In contrast water availability is defined by restricting water trading and economic development. The Cape York Peninsula Heritage Bill 2007 was the singular provision for water in Aboriginal communities, where river extraction is capped at 1 per cent of the mean annual flow.¹⁰⁴⁹ Fifty per cent is to be allocated as non-tradeable Aboriginal water licences.¹⁰⁵⁰ Further, the Queensland Government ‘bundles Aboriginal peoples cultural water into environmental water flows’.¹⁰⁵¹

The Northern Territory legislation does not recognise Aboriginal water rights and interests at all. Under section 9 of the *Water Act 1992* (NT), the Crown owns all water.¹⁰⁵²

The Northern Territory Water Act refers to recreational, social and cultural uses of water, but no reference is made to Aboriginal rights and interests in water.¹⁰⁵³

¹⁰⁴⁶ Poh-Ling Tan, ‘Conflict over Water Resources in Queensland: All Eyes on the Lower Balonne’ (2000) 17(6) *Environmental and Planning Law Journal* 549-550.

¹⁰⁴⁷ *Ibid* 546.

¹⁰⁴⁸ *Ibid*.

¹⁰⁴⁹ Email from David Collard to Virginia Falk on Virginia Simpson, 13 November 2007.

¹⁰⁵⁰ *Ibid*.

¹⁰⁵¹ *Ibid*.

¹⁰⁵² Jon Altman assisted by V Branchut, ‘Fresh Water in the Maningrida Region’s Hybrid Economy: Intercultural Contestation over Values and Property Rights’ (‘Working Paper’ No 46, Australian National University, 2008) 30.

¹⁰⁵³ *Ibid* 31.

The *Aboriginal Land Rights Act 1976* (NT) does not allow for the transfer of Crown-owned water to Aboriginal ownership.¹⁰⁵⁴ Research on the water rights of Aboriginal peoples in the Maningrida region highlights the impact of the Northern Territory National Emergency Response legislation in 2007.¹⁰⁵⁵ The legislation initiated a compulsory lease of the Maningrida Township and took compulsory acquisition of Aboriginal assets, including water, bore fields and sacred water sites.¹⁰⁵⁶ The government's compulsory acquisition of Aboriginal property disenfranchised the Maningrida community from exercising their customary water rights and interests and management of their country.

The Report on Aboriginal Community Water Supply and Sewerage Systems in New South Wales observed that 'the nature of water and sewerage provision was poor in discrete communities'.¹⁰⁵⁷ The Report highlighted the 'limited scope for community contribution to water and sewerage service costs due to the low socio-economic status of Aboriginal communities'.¹⁰⁵⁸

The Department of Aboriginal Affairs (NSW) has statutory responsibility for the Aboriginal Communities Development Program, whereby the department addresses water and sewerage provision to Aboriginal communities across New South Wales.¹⁰⁵⁹ The 'NSW Aboriginal Community Water and Sewerage Working Group Report' (2006) highlighted the lack of financial and technical capacity within Aboriginal communities to

¹⁰⁵⁴ Ibid 12.

¹⁰⁵⁵ Ibid 13.

¹⁰⁵⁶ Ibid. See *Wurridjal v Commonwealth* (2009) 237 CLR 309, which is a determination on the compulsory acquisition of Aboriginal owned lands in Maningrida by the Commonwealth to implement policies under the Northern Territory Emergency Response legislation.

¹⁰⁵⁷ New South Wales Aboriginal Community Water and Sewerage Working Group, 'Aboriginal Community Water Supply and Sewerage Systems' ('Draft Report', Department of Commerce NSW Sustainable Water Solutions, 2006) 4.

¹⁰⁵⁸ Ibid 5.

¹⁰⁵⁹ NSW Aboriginal Community Water and Sewerage Working Group, 'Aboriginal Community Water Supply and Sewerage' ('Final Draft Report', Department of Commerce (NSW) Sustainable Water Solutions, 2007) 57. See also Department of Aboriginal Affairs (NSW), 'Two Ways Together Report on Indicators: The NSW Aboriginal Affairs Plan 2003-2012' ('Report', June 2005).

effectively manage water servicing and operational maintenance;¹⁰⁶⁰ a lack which extends to Aboriginal Land Councils in rural, discrete and remote areas.¹⁰⁶¹

This Working Group Report makes the assumption that providing land and water ownership, of itself, enhances the opportunities for Aboriginal peoples, however this is not the case. It is essential for Aboriginal communities to be afforded the economic and social capacity to protect, develop and sustain continued ownership and management of their land, waters and resources. The development of their technical and operational capacities should be consistent with their perspectives in Aboriginal ontological concepts of land and water management.

A significant number of our land councils are non-compliant largely because of lack of capacity in the towns. About 50 per cent would probably fall into the unfunded category because of non-compliance ... we inherited also the lack of facilities: water, power and sewerage.¹⁰⁶²

While Local Aboriginal Land Councils are responsible for the infrastructure on their land, they often lack the resources or/and skills to maintain these systems over the long-term. Many of these communities have small populations and cannot generate sufficient income to sustain essential water and sewerage systems.¹⁰⁶³

‘Guidelines for Assessing the Impacts of Water Sharing Plans on Aboriginal Peoples’ (2001) recognise that inclusion of Aboriginal values is important:

[d]omestic, town, and environmental [water] may overlap and parallel the interests of Aboriginal peoples. However, it is important that Aboriginal interests

¹⁰⁶⁰ Ibid 8. The author represented the Department of Natural Resources (NSW) on the Aboriginal Working Group in my capacity as Executive Officer of the NSW Aboriginal Water Trust.

¹⁰⁶¹ Ibid 10.

¹⁰⁶² Darren Coyne, ‘Now or Never: NSW Inquiry Action Tackling Indigenous Disadvantage’, *Koori Mail* (NSW), 26 March 2008, 10.

¹⁰⁶³ Ibid 4.

and values are not subsumed under these other interests. Aboriginal interests and values need to be recognised independently.¹⁰⁶⁴

The 'New South Wales Water Sharing Guidelines' (2001) highlight government's lack of social inclusion during the consultation process with Aboriginal peoples:

Historically, Aboriginal communities have been excluded from decision-making that affects communities and 'country' and have often suffered significant negative impacts as a result of natural resource management decisions.¹⁰⁶⁵

The Human Rights and Equal Opportunity Commission noted that social justice policy underpins appropriate living standards and is linked to health outcomes:

Social justice is grounded in the practical, day-to-day realities of life. It's about waking up in a house with running water and proper sanitation; offering one's children an education that helps them develop their potential and respect their culture. It is the prospect of satisfying employment and good health.¹⁰⁶⁶

The Environmental Health Needs Survey (2004) analysed water use among discrete Aboriginal communities in Western Australia.¹⁰⁶⁷ The Survey data indicated that of the 274 Aboriginal communities surveyed; only 42 were connected to town water, 200 communities relied on bore water and 4300 Aboriginal peoples lived with unsatisfactory water quality and supply.¹⁰⁶⁸

¹⁰⁶⁴ Department of Land and Water Conservation (NSW), 'Guidelines for Assessing the Impacts of Water Sharing Plans on Aboriginal Peoples' (Economic and Social Policy Branch, Department of Land and Water Conservation, August 2001) 18.

¹⁰⁶⁵ Ibid 8.

¹⁰⁶⁶ New South Wales Aboriginal Community Water and Sewerage Working Group, 'Aboriginal Community Water Supply and Sewerage Systems' ('Draft Report', Department of Commerce (NSW) Sustainable Water Solutions, 2006) 10.

¹⁰⁶⁷ Department of Water (WA), Government of Western Australia, 'Draft Policy for Consultation with Aboriginal People' (2008) 31.

¹⁰⁶⁸ Ibid.

Further, the Environmental Health Needs Survey (2004) found that one in every five Aboriginal persons living in discrete communities did not benefit from adequate sewerage treatment or have the use of a disposal system.¹⁰⁶⁹ In view of the national water reforms, the Western Australian Government has failed to take into account basic human rights in delivering water requirements for Aboriginal communities.

The Western Australian Government report 'Water Services in Discrete Indigenous Communities' (2006) argued that improving government standards of water service delivery and water supply is integral to improving the health status of Aboriginal peoples.¹⁰⁷⁰ Further, the report noted that the discontinuation of the programs run by the Aboriginal and Torres Strait Islander Commission resulted in an acute reduction in the state's contribution to Aboriginal water supply and service delivery.¹⁰⁷¹

There is currently a lack of consistency between jurisdictions with regard to policy and practices around Indigenous cultural access to Country and natural resources ... There is currently a skill shortage in water resource management in Indigenous communities, which can contribute to the lack of potable water.¹⁰⁷²

The Western Australian Government report 'Implementation Plan for the National Water Initiative' (2006)¹⁰⁷³ indicated that the government would 'provide a framework for future reductions in the availability of water for consumptive use',¹⁰⁷⁴ and that 'no process is in place to resume sustainable limits'.¹⁰⁷⁵ The report also expresses concern for the future health of Aboriginal communities, however, the government intends to limit water availability in the consumptive pool and reclaim any unallocated water.¹⁰⁷⁶

¹⁰⁶⁹ Ibid 36.

¹⁰⁷⁰ Department of Water, Government of Western Australia, 'Report for the Minister for Water Resources on Water Services in Discrete Indigenous Communities' (December 2006) 5.

¹⁰⁷¹ Ibid 6.

¹⁰⁷² Email from David Collard to Virginia Falk on Primary Industries Ministerial Council and the Natural Resource Management Ministerial Council to Virginia Falk, April 2006.

¹⁰⁷³ Department of Water, 'Western Australia's Implementation Plan for the National Water Initiative' ('Report', Government of Western Australia, April 2007).

¹⁰⁷⁴ Ibid 25.

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ Ibid.

The significant health and economic issues facing Aboriginal communities in Western Australia were recognised in a set of recommendations to the Minister of Water Resources (2006):¹⁰⁷⁷

[t]he affordability of water to people on low incomes and appropriate methods of cost recovery and whether these are consistent with international conventions and declarations on human rights and non-legally binding resolutions, such as Principle 4 of the Dublin Statement ... it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.¹⁰⁷⁸

The lack of Aboriginal economic empowerment has a nexus to poverty and the endemic health problems experienced by Aboriginal communities. Both land and water ownership constitutes potential assets for building community capacity and determining their future needs. The vesting of Aboriginal ownership rights in water would ensure that Aboriginal communities enjoyed a higher standard of human rights in Australian society because they would have the economic base to participate in water economies.

Senator Aden Ridgeway argued that Aboriginal freehold title would provide economic capacity:¹⁰⁷⁹

[t]he findings of the 1998 Reeves Review of the Northern Territory Aboriginal Land Rights Act concluded that the most appropriate form of title for Aboriginal land was inalienable title ... the inalienability of Aboriginal freehold does not significantly restrict the capacity of Aboriginal Territorians to raise capital for

¹⁰⁷⁷ Department of Water, Government of Western Australia, 'Report for the Minister for Water Resources on Water Services in Discrete Indigenous Communities' (December 2006).

¹⁰⁷⁸ Ibid 49, 78.

¹⁰⁷⁹ Aden Ridgeway, 'Addressing the Economic Exclusion of Indigenous Australians through Native Title' (the Mabo Lecture, Coffs Harbour, 3 June 2005) 8
<<http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2005/papers/RidgewayA.pdf>>.

business ventures ... Aboriginal title is most likely to protect the interests of Aboriginal people.¹⁰⁸⁰

Jon Altman, Australian National Director of the Centre for Aboriginal Economic Policy Research, stated during the '2020 Summit' in Canberra:¹⁰⁸¹

[o]ne mechanism to close the gap of indigenous life expectancy in Australia should consider amending the law to provide Aboriginal land owners with legal property rights over resources, which occurs in the United States of America and most Canadian provinces ... we need to start thinking about bestowing some commercially valuable resources and rights on indigenous groups.¹⁰⁸²

The nationally recognised low income among Aboriginal communities eliminates the potential for Aboriginal communities to own water resources under the current water legislation, either as water licences or water trading, under national, state and territory legislation. The negligible degree of Aboriginal ownership in native title water access indicates a serious threat to Aboriginal living standards and health conditions because no economic development in water is permitted.

In Western Australia, Nyoongar peoples raised their concerns about the South West Water Plan during a conference organised by the Department of Water.¹⁰⁸³ Nyoongar participants emphasised the link between health, self-determination and Aboriginal water rights and interests:

Nyoongar people maintain that the ecological health of these systems is pivotal in maintaining Nyoongar culture. Without a healthy environment, Nyoongar people cannot maintain their use of the waterways as a place to collect food and recreate

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Patricia Karvelas, 'Push for Aboriginal Rights over Resources', *The Australian* (Sydney), 11 April 2008, 6.

¹⁰⁸² Ibid.

¹⁰⁸³ Brad Goode, Colin Irvine and Melinda Cockman, 'Report on Conferences held with the Nyungar Community for the South West Water Plan ('Research Report', Department of Water, Western Australia, June 2007).

and as a place to maintain their spiritual and cultural connection with the land and particularly as places with which to transmit their values and knowledge to the coming generations.¹⁰⁸⁴

Further, the Nyoongar community suggested that the government neglected opportunities for any meaningful engagement with their community. Nyoongar participants cited

[t]he lack of Aboriginal consultation of Nyoongar water management, the uncertain legal rights to water under native title policy, the barrier for Nyoongar peoples access to waterways and water sites under legislation, the lack of engagement of Nyoongar people prior and during planning projects and not post-planning and the payment of royalties for use of waterways that are held by Native Title Claimants.¹⁰⁸⁵

Under the national water reforms, higher water prices present significant problems for Aboriginal communities, especially where government cost recovery methods are implemented in water servicing. The poverty experienced by Aboriginal communities strongly indicates that Australia has failed to meet its obligations under various human rights instruments.

Under the *Water Act 1989* (Vic), the Act promotes a ‘water reserve’ for environmental values,¹⁰⁸⁶ but does not address a ‘water reserve’ for Aboriginal cultural values. If a reserved water right was allocated for Aboriginal water use then Aboriginal health standards would improve. In Victoria there is no provision for allocating water for traditional purposes under native title.¹⁰⁸⁷

¹⁰⁸⁴ Ibid 32.

¹⁰⁸⁵ Ibid 1-48.

¹⁰⁸⁶ Department of Sustainability and Environment Victoria, *Securing Our Water Future Together* (7 June 2007) Victorian Government <www.dse.vic.gov.au>.

¹⁰⁸⁷ Sue Jackson, ‘Indigenous Interests and the National Water Initiative: Water Management, Reform and Implementation’ in Karen Hussey and Stephen Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges* (Commonwealth Scientific and Industrial Research Organisation, 2007) 107.

A consent determination in the Federal Court recognised that the Guditjmarra peoples in Victoria held non-exclusive native title rights and interests over 133,000 hectares of vacant Crown land, national parks, reserves, rivers, creeks and sea north-west of Warnambool.¹⁰⁸⁸ The Guditjmarra peoples have traditionally farmed eels and fish in a highly organised construction of channels and stone holding areas for thousands of years.¹⁰⁸⁹ The *Water Act 1989* (Vic) does not include permanent access and use of water for native title holders.

The allocation of ‘reserved water rights’ for Aboriginal peoples should be allocated prior to the allocation of other stakeholder interests, to provide legal certainty for Aboriginal communities. In my submission in 2008 to the Department of Water in Western Australia, I advocated for water to be set aside, as ‘reserved water’ to restore Aboriginal water rights.

The concept of a ‘reserved right’ came from my overview from the government’s previous allocation of water in Western Australia. I submitted, where Aboriginal peoples are forced to compete for water rights within the consumptive pool it means they must compete with a range of economically powerful stakeholders. Therefore ‘reserved water rights’ for Aboriginal peoples would provide water allocation, as well as water perpetual entitlements, uncapped native title rights to water and other cultural water requirements. My report addressed the government’s policy focus on other stakeholders, whilst ignoring Aboriginal water rights and interests within the state.

The recognition of an Aboriginal ‘reserved water right’ across Australia would provide economic security and legal recognition that would revolutionise Aboriginal water management and improve living standards. The national water reform in Australia fails to set aside a permanent water allocation such as ‘reserved rights’ for Aboriginal peoples outside the consumptive pool. As Chapter 5 demonstrates, the Murray-Darling Basin Plan

¹⁰⁸⁸ Aboriginal and Torres Strait Islander Commissioner, ‘Draft Native Title Report 2008’ (Human Rights and Equal Opportunity Commission, 2007) 26.

¹⁰⁸⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2007’ (Human Rights and Equal Opportunity Commission, 2008) 225.

has failed to address Aboriginal water requirements because government's have deemed these discretionary water interests and any available water left in the consumptive pool has been over-allocated to other groups.

Australian governments should, as a matter of urgency, recognise the nexus between the ownership of water rights in relation to improving the dire conditions in Aboriginal health. The national water reforms in Australia have failed to implement critical changes in view of the Australian governments '*Closing the Gap*' strategies. National policy frameworks fail to factor in strengthening Aboriginal autonomy, and fail to focus on Aboriginal water rights ownership as a means for wealth generation. The health, well-being and economic prosperity of Aboriginal peoples should be viewed within the 'web of interests' and 'web of relationships' that connect Aboriginal water values to Aboriginal ontological concepts of water.

Chapter 7: Achieving Intergenerational Wealth Development in Water Rights

This chapter examines the potential for wealth creation through ownership of water rights, for example in the allocation of reserved water rights as discussed in Chapter 6. This would ensure water resource availability for Aboriginal communities; to self-determine their water rights and interests before other water users in the consumptive pool. There are other national policy changes which are needed to stimulate wealth development, including statutory Aboriginal ownership of water. The chapter will demonstrate that the government's failure to respond to the water rights and interests of Aboriginal peoples has impacted the future wealth creation within Aboriginal communities.

Because neither a water right determined under native title legislation nor an Aboriginal cultural water licence provide opportunities to develop economic benefits, barriers exist for the economic development of water in Aboriginal communities. While the advancement of national water reforms has secured economic benefits for other stakeholders, through the separation of water from the land to convert water into a type of property right, governments should turn their minds to securing economic certainty for Aboriginal communities.

The purpose of this chapter is to identify how to increase commercial opportunities for Aboriginal communities in water ownership, to identify areas of government water policy that require review and reform, and to address the failure of the Commonwealth and State and Territory governments to provide for economic benefits from the water market to Aboriginal communities.

7.1 Empowering Aboriginal Peoples: Economic Development Issues in Water

Chapter 6 has attempted to demonstrate that poor outcomes in health, wealth and well being of Aboriginal peoples in Australia result from the significant failure in Indigenous policy implemented by successive Commonwealth, State and Territory governments. Since Australia's settlement by the British, the historical inequities experienced by Aboriginal communities have produced a challenging environment for government policy planning. Ineffective government policy has led to the entrenched social, economic and cultural dysfunction experienced by majority of Aboriginal peoples in Australia.

The 'father' of the New South Wales Constitution, William Wentworth, wrote in 1819 of the potential worth of rivers for the exploitation of Australia's resources to develop Australia's economy:

[i]n promoting the progress in this fifth continent, will be prodigious, and in all probability before the expiration of many years, give an entirely new impulse to the tide of population: and here it may not be altogether irrelevant, to enter into a short disquisition on the natural superiority possessed by those countries which are most abundantly intersected with navigable rivers. That such are most favourable for all the purposes of civilized man, the history of the world affords the most satisfactory proof. There is not, in fact, a single instance on record of any remarkable degree of wealth and power having been attained by any nation which has not possessed facilities for commerce, either in the number and size of its rivers, or in the spaciousness of its harbours, and the general contiguity of its provinces to the sea.¹⁰⁹⁰

¹⁰⁹⁰ William Charles Wentworth, *Statistical, Historical, and Political Description of The Colony of New South Wales and its Dependent Settlements in Van Diemen's Land: A Particular Enumeration of the Advantages which these Colonies Offer for Emigration, and their Superiority in many Respects over those Possessed by the United States of America* (Griffen Press, first published 1819, 1978 ed) 78.

However, Wentworth's vision for creating wealth for Australia was to advance the economic development of non-Indigenous groups and interests. The acquisition of land by the Crown dispossessed Aboriginal peoples but allowed the Crown to make free land grants to individuals on the basis of a nominal 'rent'.¹⁰⁹¹ Most of Australia's land holdings were privately owned, either by the purchase of freehold land or in leases by the Crown; leasehold estates were for a term of years or in perpetuity, where in the case of the latter a reversion to the Crown occurred for non-payment of fees or other breaches.¹⁰⁹² Crown grants of land were able to be passed on to the heirs and successors of the land owner.¹⁰⁹³

The Crown's legal powers to withhold or confer the ownership of land directly impacted upon Aboriginal water use because water ran with the land, as discussed in earlier chapters. With few exceptions, Aboriginal peoples were disenfranchised from their customary connection to the Aboriginal environment, by the Crown's powers to grant land and to set aside land for Crown purposes, individuals or other entities. These past practices have directly resulted in the paucity of Aboriginal owned land and water resources.

It is estimated that Commonwealth and State pastoral leases in Australia exist under a combination of freehold, Crown leasehold and Crown reserves, which amounts to 42 per cent for the Commonwealth and between 70 and 80 per cent for the States.¹⁰⁹⁴ Queensland has the largest area held by Crown tenants under non-perpetual Crown leasehold tenure.¹⁰⁹⁵ The water interests held by Aboriginal communities under these pastoral leases have generally been extinguished as a result of the 1998 amendments to the *Native Title Act 1993* (Cth).¹⁰⁹⁶

¹⁰⁹¹ John Baalman, *Outline of Law in Australia* (Law Book, 2nd ed, 1955) 112-114.

¹⁰⁹² *Ibid.*

¹⁰⁹³ *Ibid.*

¹⁰⁹⁴ *Wik Peoples v Queensland* (1996) 141 ALR 129, 190.

¹⁰⁹⁵ *Ibid.*

¹⁰⁹⁶ Richard Bartlett, *Native Title in Australia* (Lexis Nexis Butterworths, Australia, 2nd ed, 2004) 378.

Note, the 1998 amendments were also referred to as the 'Ten Point Plan', whereby the Federal Government reaction was to diminish the Traditional Owners native title rights determined in *Wik Peoples v Queensland* (1996) 187 CLR 1.

In 1964 Donald Horne, a social critic and academic, analysed the government's Indigenous policy and its effect upon Indigenous communities.¹⁰⁹⁷

Economically they are still exploited, often being paid lower minimum wages than people of European descent ... most of them are second-class citizens (although they now have the Federal vote), and the necessary accompaniment of paternalism, lavish expenditure on welfare and imaginative planning was not present ... a lack of a policy is itself a policy.¹⁰⁹⁸

In 2006 Peter Shergold, Secretary of the Department of Prime Minister and Cabinet, acknowledged the failure in government policy across all areas of Aboriginal life.¹⁰⁹⁹ Shergold outlined a bleak assessment of the 'lost years' and the plethora of Aboriginal programs and schemes that had failed.¹¹⁰⁰ According to a 2007 Oxfam study, the 'lack of progress' in Aboriginal living standards is 'undeniable'.¹¹⁰¹

Most notably, the removal of Aboriginal peoples control over customary ownership of the land, waters and resources, and the impact of British sovereignty, along with the staggered establishment of the colonies have resulted in the disenfranchisement of customary Aboriginal economies. For generations, customary practices on 'country' sustained the health of Aboriginal communities. These included customary trade practices, cultural sharing practices and access to water sources during seasonal cycles. In contemporary water practice, Aboriginal water rights still remain central to the cultural and economic development of Aboriginal peoples.

¹⁰⁹⁷ Donald Horne, *The Lucky Country: Australia Today* (Penguin, 1964) 117.

¹⁰⁹⁸ Ibid 117-118.

¹⁰⁹⁹ Russell Skelton, 'One Country, Two Standards' *The Sydney Morning Herald* (Sydney), 19-20 May 2007, 26.

¹¹⁰⁰ Ibid.

¹¹⁰¹ Ibid.

Edith Weiss has remarked that ‘intergenerational equity is to prevent the squander of natural and cultural resources and to underpin the wellbeing of earth’s future generations’.¹¹⁰²

We, as a species, hold the natural and cultural environment of our planet in common, both with other members of the present generation and with other generations, past and future. At any given time, each generation is both a custodian and trustee of the planet for future generations and a beneficiary of its fruits.¹¹⁰³

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, addressed the role of governments on Aboriginal communities:

Governments need to be aware of the legacy of previous government policies and make sure that their actions empower rather than disempower. Governments must work with our communities as enablers and facilitators. They can also work to remove existing structural and systemic impediments to healthy relationships within our communities.¹¹⁰⁴

Sharon Beder (2006) considers the concept of intergenerational equity in global terms under the definition provided by the World Commission on Environment and Development:

The Brundtland Commission’s definition of sustainable development is based on intergenerational equity, development that meets the needs of the present without compromising the ability of future generations to meet their own needs.¹¹⁰⁵

¹¹⁰² Paul Barresi, ‘Beyond Fairness to Future Generations: An Intragenerational Alternative, Intergenerational Equity in the International Environmental Arena’ (1997) 11(1) *Tulane Environmental Law Journal* 60.

¹¹⁰³ Ibid.

¹¹⁰⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Social Justice Report 2011’ (Australian Human Rights Commission, 2011) 76.

¹¹⁰⁵ Sharon Beder, *Environmental Principles and Policies: An Interdisciplinary Approach* (University of New South Wales Press, 2006) 71.

The concept of intergenerational equity is articulated through environmental philosophy. To establish an economically sustainable future for Aboriginal water rights and interests, the Australian legal system should recognise Aboriginal ownership rights. The practical benefits derived from intergenerational equity through Aboriginal water rights would enable Aboriginal communities to plan for future water needs and establish economic growth.

The ‘acquisition of native sovereign territory’ in the United States of America is held under the legal doctrine of ‘domestic dependant nations’.¹¹⁰⁶ ‘Nation’ is understood to mean ‘a people distinct from others’.¹¹⁰⁷ Native peoples in the United States are recognised as ‘domestic dependant nations’ because some native tribes retained their powers as autonomous sovereign states and thus manage their internal affairs.¹¹⁰⁸ The sovereign powers of native peoples are ‘lost only if surrendered by specific treaty provisions or expressed in legislation as terminated by the Federal Government’.¹¹⁰⁹

Kent McNeil (2004) suggests that Aboriginal self-governance under the doctrine of domestic dependant nations relates to

[t]he form of government it chooses, citizenship rules, laws relating to natural resources and land use within territory, family law matters, education, social services, and so on.¹¹¹⁰

In the High Court decision of *Coe (‘Wiradjuri Tribe’) v Commonwealth*,¹¹¹¹ the Court considered whether the Wiradjuri peoples were a ‘domestic dependant nation, and if so,

¹¹⁰⁶ Tony Simpson, ‘Submissions Re: Domestic Dependant Nations’ (‘Unpublished Working Paper’, Sydney, 2004) 1. See *Cherokee Nation v State of Georgia* (1831) 30 US 515, 181.

¹¹⁰⁷ Ibid. See *Worcester v State of Georgia* (1831) US 178, 559; *Worcester v State of Georgia* 6 Peter 515 (USSC 1832)

¹¹⁰⁸ Ibid. See *United States v Wheeler* (1978) 435 US 313, 323.

¹¹⁰⁹ Ibid. See *Oliphant v Schlie* (1976) 544 F.2d 1007, 1009.

¹¹¹⁰ Kent McNeil, ‘The Inherent Right of Self-Government: Emerging Directions for Legal Research’ (‘Research Report’, First Nations Governance Centre, November 2004) 22.

¹¹¹¹ [1993] 68 ALJR 110.

entitled to self government and full rights over their traditional lands'.¹¹¹² The High Court dismissed the claim by the Wiradjuri because a reasonable cause of action was not disclosed.¹¹¹³ Aboriginal peoples in Australia are not recognized under Australian law as 'domestic dependant nations'.

The inherent customary rights and obligations which underpin Aboriginal laws have become constrained under the common law as a *sui generis* or usufructuary right to take and use water for domestic purposes. Within the common law framework the concept of *sui generis* presents limited opportunities for economic outcomes and reduces Aboriginal rights as a 'right to take' only. The national water reforms implemented by Australian governments also work against the concept of intergenerational equity because national laws and policies are focussed upon exploiting resources for national wealth creation.

The Australian Reform Commission in its inquiry into 'The Recognition of Aboriginal Customary Laws' (1986) commented that Aboriginal communities should be allowed to adapt their customs and practices to the changing environment:

[c]hanges or adaptations in traditional rules or customs, to cope with the drastic difficulties European settlement has posed for Aborigines, may produce something which could be described as synthetic. It is hardly surprising that Aborigines have attempted to synthesise these new elements along with their own beliefs, traditions and world view. All legal and cultural systems with a long history are likely to be synthetic in this sense. But that does not mean that they are less real or important to those whom they affect.¹¹¹⁴

The guarantee of economic benefits from water, under statutory water legislation, has provided a higher level of commercial certainty for non-Aboriginal stakeholders to water, as well as perpetual water entitlements and water trading. In Australia the capitalist

¹¹¹² Simon Blackshield, 'Is the United States Doctrine of Indigenous Rights of Self-Regulation Applicable to Australia's Common Law' ('Working Paper', no date) 3.

¹¹¹³ Ibid.

¹¹¹⁴ Australian Law Reform Commission, 'Aboriginal Customary Law: A General Regime for Recognition, Aboriginal Customary Research Papers' ('Research Paper' No 8, 1982) 23.

nature of the economy has cultivated self-interest among water users.¹¹¹⁵ The nexus linking water to the land has underpinned Australia's agricultural development for over a hundred years.¹¹¹⁶

The marginalisation of the Aboriginal economy seems inevitable, given the introduction of capitalist market forces and economic utilitarianism. Australian legal frameworks have subsequently undermined Aboriginal customary trade and community values in water. This market approach does not provide a framework of economic and cultural certainty for Aboriginal communities or increase Aboriginal participation in the water market under the existing regimes *if* Aboriginal communities are not participating in the water market.

The Federal Government's 'Indigenous Business Australia' has replaced a number of business operations previously implemented by the Aboriginal and Torres Strait Islander Commission.¹¹¹⁷ The Indigenous Business Australia Annual Report (2005) states that

Indigenous Business Australia sees a direct correlation between Indigenous communities owning businesses and the future improvement in employment opportunities.¹¹¹⁸

The Victorian Government's Indigenous Business Development Strategy (2005-2007) under its main objectives for Aboriginal economic development identified 'self-determination' as incorporating 'symbolic and practical measures to address the dispossession of land and culture'.¹¹¹⁹ Restoring Aboriginal ownership rights to water is a practical measure to build capacity in an Aboriginal market economy.

¹¹¹⁵ Australian Academy of Technological Sciences and Engineering, *Academy Symposium: Perception of Water in Australian Law Re-Examining Rights and Responsibilities* (24 September 2004) 1 <<http://www.atse.org.au/index.php?sectionid=629>>.

¹¹¹⁶ *Ibid* 2.

¹¹¹⁷ Australian Government, 'Indigenous Business Australia: Annual Report 2004-2005', (Indigenous Business Australia, 2005) 9.

¹¹¹⁸ *Ibid* 40.

¹¹¹⁹ Victorian Government, 'Building the Economic Base: The Victorian Government's Indigenous Business Development Strategy 2005-2007' (Koori Business Network, Department of Innovation, Industry and Regional, 2007) 5.

There is no mention of Aboriginal water rights in Victoria's government business strategies; increased Aboriginal participation in the Australian water market and the ownership of water property assets could create a 'practical measure'.¹¹²⁰ As a general rule, Aboriginal economic policies should be based on the principles of self-determination because Indigenous economic strategies and policy planning should be 'driven' by Aboriginal communities. Water market policies do not incorporate Aboriginal water values and concepts. The participation of Aboriginal communities in the water market and the Aboriginal customary economy is vital for community development and creating genuine pathways to intergenerational equity.

Australia has one of the highest home ownership rates among Organisation for Economic Co-operation and Development (OECD) countries. At the 2001 Census, 70 per cent of all households in New South Wales lived in a dwelling that was either fully owned or mortgaged ... only 16 per cent of Indigenous households in New South Wales lived in a fully owned dwelling ... [the difference between] Indigenous and non-Indigenous rented accommodation [reported that] Indigenous households [were] far more reliant on State and community housing.¹¹²¹

Aboriginal communities should be free to exercise their native title water rights and cultural interests through unfettered ownership to undertake economic development, to facilitate Aboriginal water enterprise. The narrow interpretation of native title imposes limitations on realising community autonomy and wealth creation to achieve Aboriginal water strategies as Chapters 6 and 7 demonstrate.

Achieving self-determination is difficult because of the dichotomy of a government that has a focus on the pursuit of individual wealth creation and Aboriginal and Torres Strait Islander peoples who may pursue self-determination

¹¹²⁰ Ibid.

¹¹²¹ John Taylor, 'Tracking Change in the Relative Economic Status of Indigenous People in New South Wales' ('Discussion Paper' No 277, Australian National University, 2005) 18.

as individuals or groups within a cultural context that focuses more broadly on social, cultural and environmental as well as economic benefits.¹¹²²

The lack of economic leverage in Aboriginal communities is not conducive to the concept of intergenerational equity and hinders the economic participation of Aboriginal communities. Aboriginal water rights require legal recognition as property rights to allow Aboriginal communities to utilise communal and private water rights and interests. Without the incorporation of Aboriginal water ownership strategies, the National Water Initiative will not deliver economic or cultural benefits to Aboriginal communities.

Western property rights in water are highly valued because ownership can provide exclusivity. Exclusive ownership rights in water enable the individual or entity to exercise a temporary or permanent right to transfer, trade or sell their water rights.¹¹²³ The non-tradeable status of Aboriginal water licences fails to provide economic benefits. In New South Wales Aboriginal peoples may apply for a 'Specific Purpose Water Access licence' that is non-tradeable or an 'Aboriginal cultural water access licence' that is for a specific activity over a period of time, subject to the available water determination.¹¹²⁴ However, this narrow policy approach encompasses a static approach to Aboriginal water requirements because it fails to provide allocation certainty for Aboriginal licence holders as use is subject to the available water. A non-tradeable water licence has no commercial value.

The status of Aboriginal peoples in Australia, since the introduction of the common law, has directly impeded the autonomy and self-governance of Aboriginal communities. The inferior status of native title in comparison to other Australian laws hinders cultural survival. To improve the living standards of Aboriginal peoples, the focus should therefore be on providing Aboriginal communities with legal certainty in all aspects of

¹¹²² Aboriginal and Torres Strait Islander Commissioner, 'Native Title Report 2011' (Australian Human Rights Commission, 2011) 126.

¹¹²³ National Water Commission, 'Australian Water Reform 2009: Second Biennial Assessment of Progress in Implementation of the National Water Initiative' ('Report', Australian Government, 2009) x.

¹¹²⁴ Office of Water (NSW), 'Our Water Our Country: An Information Manual for Aboriginal People and Communities about the Water Reform Process' (Department of Primary Industries NSW, 2nd ed, February 2012) 6.3-6.4.

water use and the autonomy to manage water resources. The Aboriginal concepts of water are not undermined by private property rights; they ensure the capacity to self-manage economic development in water and the ability for the community not government to determine their needs.

The Productivity Commission Report 'Overcoming Indigenous Disadvantage: Key Indicators' (2011) recognised that the economic participation of Indigenous peoples directly influences the living standards of Aboriginal peoples, including health and wealth development.¹¹²⁵ The Report points out that Aboriginal health improves significantly when Indigenous peoples hold Indigenous owned or controlled land and business.¹¹²⁶ In view of the Commission's findings, it should be incumbent on the Australian Government to incorporate Indigenous economic rights to water within the framework of national water management policy and water legislation.

The Productivity Commission Report also states that 'land ownership and the control of land provides a range of benefits to Indigenous peoples and enables autonomy and economic independence within Indigenous communities'.¹¹²⁷ The primary measures identified in the Report recognise other economic participation indicators such as the recognition of native title, the size and number of Indigenous Land Use Agreements, the economic benefits of Indigenous rights to land and the opportunities for self-employment and Indigenous business.¹¹²⁸

According to the Report, although an Indigenous customary economy such as fishing and 'hunting and gathering' is highly valued and important to communities, the potential for commercial exploitation in these economies is negligible.¹¹²⁹

¹¹²⁵ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (1 January 2012) Steering Committee for the Review of Government Service Provision
<http://www.pc.gov.au/__data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf>.

¹¹²⁶ Ibid 8.1.

¹¹²⁷ Ibid 8.8-8.9.

¹¹²⁸ Ibid.

¹¹²⁹ John Taylor, 'Tracking Change in the Relative Economic Status of Indigenous People in New South Wales' ('Discussion Paper' No 277, Australian National University, 2005) 8.19. See Altman 2001; McDermott et al 1998; Rowley et al 2008.

Native title is not a form of tenure and so has no market value ... although Indigenous groups have an extensive land base; there are limited opportunities to use them as security for economic developments.¹¹³⁰

The economic utilisation of natural resources by Indigenous peoples provides opportunities for the development of a vital economy and enables Indigenous peoples to maintain Aboriginal laws, customs and practices on Indigenous owned and controlled land and waters.¹¹³¹ The national water management regime could incorporate economic participation of Aboriginal peoples in the water market by creating a reserved Aboriginal water right external to the consumptive pool. The improvement of Aboriginal health and living standards requires these significant reforms to benefit future generations and to provide the necessary framework for self-determination for Aboriginal communities.

7.2 Competing Water Rights and the Impact on Aboriginal Development

Aboriginal water rights in Australia do not have the legal protection recognised in other common law countries such as Canada, the United States and New Zealand. Apart from native title determinations and areas of Aboriginal freehold land, the allocation of water rights and interests for Aboriginal peoples under the National Water Initiative is framed within discretionary jurisdictional actions under 'Indigenous Access' in clauses 52, 53 and 54 of the National Water Initiative.¹¹³² The National Water Initiative policy underpins

¹¹³⁰ Graeme Neate, 'The Tidal Wave of Justice and the Tide of History: Ebbs and Flows in Indigenous Land Rights in Australia' (Paper presented at the 5th World Summit of Noble Peace Laureates, Italy, 10 November 2004) 26.

¹¹³¹ Productivity Commission, *Steering Committee for the Review of Government Service Provision 2011, Overcoming Indigenous Disadvantage: Key Indicators 2011* (1 January 2012) <http://www.pc.gov.au/__data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf> 8.22. See also Altman and Cochrane 2003; Bawinanga Aboriginal Corporation 2007; Fordham, Fogarty and Fordham 2010.

¹¹³² National Water Commission, 'Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory' (2004) National Water Commission <http://nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>.

a broad agenda of 'water reform in water allocation, water trading, environmental considerations, public participation in water management principles and established a market-based and regulatory regime that also requires state and territories to compete for water use'.¹¹³³

The recognition of native title rights is limited to Aboriginal communities who are unable to meet the complex standard of proof required under statutory native title legislation and the common law. For this reason alone there is a compelling case to incorporate a reserved water right for Aboriginal peoples in the Australian Government's 'National Water Initiative' to ensure a perpetual water right.

In South Australia the government has failed to provide for the economic development of Aboriginal water rights and interests.¹¹³⁴ Equally, other states or territories have also failed to implement a policy pathway to incorporate Aboriginal economic benefits in water.¹¹³⁵ Virginia Simpson's report (2007) strongly argued that 'governments should allow Aboriginal people to extract water for economic development through water licences and by other means'.¹¹³⁶

According to the 'Review of the 1994 Water Report' (2001), the Australian Government water reforms have also failed to recognise the intrinsic economic and cultural values which exist in Aboriginal water use.¹¹³⁷ For example, I submitted in my report to the Western Australian Government that the concept of water royalties I proposed be included in the policy framework on Aboriginal water rights. My comparison is drawn from the provision of mining royalties derived from mining on Aboriginal owned land; like mining royalties, water royalties could provide economic benefits. Further a 'water

¹¹³³ Australian Academy of Technological Sciences and Engineering, *Academy Symposium: Perception of Water in Australian Law Re-examining Rights and Responsibilities* (24 September 2004) <<http://www.atse.org.au/index.php?sectionid=629>>.

¹¹³⁴ Virginia Simpson, 'Aboriginal Access to Water Across Australia' ('Draft Report', South Australian Government, Department of Water, Land and Biodiversity Conservation, 2007) 23-24.

¹¹³⁵ Ibid.

¹¹³⁶ Ibid 27.

¹¹³⁷ William Jonas, 'Review of the 1994 Water Report' ('Research Report', Human Rights and Equal Opportunity Commission, 2001) 2 Human Rights and Equal Opportunity Commission <http://www.hreoc.gov.au/racial_discrimination/water_report/index.html>.

royalty’ would ensure certainty in economic planning in Aboriginal communities; where third parties seek to access and use water on Aboriginal owned lands.

The Federal Government’s policy ‘*Closing the Gap*’ was implemented to improve opportunities and living standards for Aboriginal communities. However, the Productivity Commission Report (2011) states: ‘any improvement from this federal policy is minimal’.¹¹³⁸ The ‘*Closing the Gap*’ policy is summarised as follows:

Our challenge for the future is to embrace a new partnership between Indigenous and non-Indigenous Australians. The core of this partnership for the future is closing the gap between Indigenous and non-Indigenous Australians on life expectancy, educational achievement and employment opportunities. This new partnership on closing the gap will set concrete targets for the future.¹¹³⁹

The mining boom in Western Australia has secured national economic wealth for Australia, and ‘mineral exploration across Australia continues to expand at a rapid rate’, but the living standards among Aboriginal communities still remain poor.¹¹⁴⁰ Mining exploration and development in coal, uranium ore and other precious metals require high levels of fresh water.¹¹⁴¹ If Aboriginal communities owned the water resources, under native title or other water rights, communities could commercially exploit these resources and develop economic viability.

Australia is a major world producer of iron, aluminium, lead, zinc and uranium. It is the world’s largest exporter of bauxite (aluminium ore) and alumina. It is the

¹¹³⁸ Productivity Commission, Steering Committee for the Review of Government Service Provision 2011, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (1 January 2012) <http://www.pc.gov.au/__data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf>.

¹¹³⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Building a Sustainable National Indigenous Representative Body: Issues for Consideration’ (‘Issues Paper’, Australian Human Rights Commission, 2008) 8.

¹¹⁴⁰ Sandy Toussaint, ‘Western Australia’ Ann McGrath (ed), in *Contested Ground: Australian Aborigines under the British Crown* (Allen and Unwin, 1995) 240.

¹¹⁴¹ National Water Commission, ‘The National Water Initiative, Securing Australia’s Water Future: 2011 Assessment’ (‘Report’, Australian Government, 2011) 41.

world's largest exporter of lead and the second largest exporter of zinc. It is the world's largest producer of both nickel and gold.¹¹⁴²

The ongoing national competition for water resources between governments, industry and native title holders has not placed Aboriginal communities in a favourable position. The wealth creation from spring water extraction has been primarily developed by private companies. The current commercial requirements for spring water supplies can impose a direct threat to many Aboriginal cultural water sites and in sustaining levels of available spring water in aquifers.

Maintaining water flows is fundamental to ensuring the vitality and existence of Indigenous heritage and spirituality.¹¹⁴³

In the village of Bundanoon in New South Wales the community's residents held a meeting to ban bottled water, and instead provide several drinking fountains to reduce the use of harmful plastics.¹¹⁴⁴ The bottled water ban, believed to be a world-first, was aimed at highlighting the excessive production of plastic bottles and the impact upon the environment.¹¹⁴⁵

As the only Aboriginal presenter during the community meeting, my focus was on the implications of the proposed spring water extraction from Bundanoon. However, the event organisers were not interested in Indigenous water issues or in the impact upon Bundanoon's aquifer. My observations on the meeting were as follows:

Through the evening the presentation emphasised the pollution factor to plastic bottles, not the entire still and sparkling water business practice that should

¹¹⁴² Paul Kauffman, *Wik, Mining and Aborigines* (Allen and Unwin, 1998) 3.

¹¹⁴³ Northern Australian Indigenous Land and Sea Management Alliance, *A Policy Statement on North Australian Indigenous Water Rights* (November 2009) Northern Australian Indigenous Land and Sea Management Alliance <<http://nailsma.org.au/sites/default/files/Water-Policy-Statement-web-view.pdf>>.

¹¹⁴⁴ 'Bundanoon in World-First Ban on Bottled Water', *The Australian* (26 September 2009) <<http://www.theaustralian.com.au/news/nation/bundanoon-in-world-first-ban-on-bottled-water/story-e6frg6nf-1225779878437>>.

¹¹⁴⁵ Ibid.

expose Australia's well-documented over-extraction of groundwater and the significance of water holes, springs and the existence of Indigenous heritage sites to these water systems. In recent water research, I was commissioned by government to develop an Indigenous water policy in Western Australia. The request for a reserved water allocation met with political stone-walling.¹¹⁴⁶

Spring water has been exploited around the globe irrespective of Aboriginal water values. The extraction and commodification of spring water is dominated by the global company, Coca-Cola Amatil, a world leader in the bottled water market.

Mount Franklin dominates the \$544 million bottled water market and is an expert in marketing campaigns that tap into community issues ...¹¹⁴⁷

The human consumption and demand for bottled water throughout Australia has increased the establishment of other spring water companies entering the market and the ramifications for Aboriginal communities are numerous. Aboriginal cultural values in spring water have not been fully considered in allocating water extraction permits. The incorporation of Aboriginal business opportunities have not been developed in this market. In addition, the policy paradigm for culturally appropriate and sustainable Aboriginal water enterprise has been virtually ignored by all Australian jurisdictions.

Hawken, Lovins and Lovins (1999) argue that the exploitation for wealth production requires compromise for the benefit of the environment and people.¹¹⁴⁸

Industry ingests energy, metals and minerals, water, and forest, fisheries, and farm products. It excretes liquids and solid waste – variously degradable or persistent toxic pollutants – and exhales gases, which are a form of molecular garbage ...

¹¹⁴⁶ Virginia Falk, 'Much ado about Bundy on Tap' on Denis Wilson Peonyden (29 July 2009) <peonyden.blogspot.com/2009_07_01_archive.htm>.

¹¹⁴⁷ Julian Lee, 'Message on a Bottle Labelled as Greenwash', *The Sydney Morning Herald* (Sydney), 23-24 February 2008, 11.

¹¹⁴⁸ Paul Hawken, Amory B Lovins and L Hunter Lovins, *Natural Capitalism: The Next Industrial Revolution* (Earthscan, 1999) 48.

The molecular waste goes into the atmosphere, oceans, rivers, streams, groundwater, soil, plants, and the flesh of wildlife and people.¹¹⁴⁹

The exploitation of land and resources has always been part of the settlement history of Australia. In the establishment of New South Wales no land would be sold for fewer than five shillings an acre, where sales were generally for lots of 640 acres.¹¹⁵⁰ The Crown reserved the right to build on the land for public purposes and ‘reserved for itself indigenous timber, stone and all minerals of precious metals and coals’.¹¹⁵¹

According to the Metropolitan Water Plan, Sydney’s population is expected to increase by one million people over the next 25 years, which represents an average increase of 110 people and 40 dwellings every day.¹¹⁵² If water consumption remains at its current levels the government will need to find an extra 200 billion litres of water each year.¹¹⁵³ This increased demand in water use will directly impact upon meeting the water requirements for Aboriginal communities in the future.

The contemporary sustainability of the Aboriginal environment and the protection of Aboriginal water resources have not been meaningfully considered under national water planning reforms. The amount of water used by the mining sector and other industries is prioritised above the needs of Aboriginal peoples and their water use. The water requirements for both consumptive and non-consumptive purposes under the National Water Initiative framework do not take into account the fresh water needs of Aboriginal communities and Aboriginal ontological concepts of water are not taken into consideration in drafting national water policy.

The minerals sector invests its risk capital in investigating and developing water sources and infrastructure and provides significant data to Government on these

¹¹⁴⁹ Ibid.

¹¹⁵⁰ James Raymond, *The New South Wales Calendar and General Post Office Directory 1832* (The Trustees of the Public Library of New South Wales, first published 1832, 1966 ed) 155-156.

¹¹⁵¹ Ibid 156.

¹¹⁵² Waste Streams, *Trading in the Future of Water* (27 September 2006) <http://wastestreams.com.au/ws/white_papers/paper_032006b.asp>.

¹¹⁵³ Ibid.

water resources ... the bulk of water used by mining is from underground aquifers, in the more remote regions and non-potable.¹¹⁵⁴

In the Pilbara region of Western Australia, water contamination from mining operations has posed significant threats to Aboriginal water use.

The Weeli Wolli Spring in Western Australia ... has been central to local language groups' lifestyle and spiritual beliefs for about 18,000 years, will take at least 20 years to restore after mining ... the drinking water has been polluted by the mining process ... we want to make them the mining companies and the Government accountable ...¹¹⁵⁵

A Senior traditional Witjira Elder and Ranger observes that 'Aboriginal health is interconnected to a holistic purpose for water and its Aboriginal values'.¹¹⁵⁶

[w]e have a holistic approach to water. For this is a source of healing when we are sick ... it is our life blood which we need to survive. It allows us to continue our ceremonies which incorporate our rich and unique culture ... it is these sources of water that provide an adequate and valuable food source rich in fish and other foods for my people.¹¹⁵⁷

In 2006 the Leichhardt River near Mt Isa was reported to have excessive lead toxicity from smelting and mining operations, which dispersed dust contamination from the mines heavy metal production.¹¹⁵⁸ At the Pacific Basin Consortium for Environmental and

¹¹⁵⁴ Beckwith Environmental Planning, 'Draft Water Resources Management Bill: Recommended Legislative Framework' (Water Reform Implementation Committee, Department of Water, Western Australia, May 2007) 52.

¹¹⁵⁵ Elizabeth Murray, 'Pilbara Anger over Drowned Spring', *Koori Mail* (NSW), 6 June 2007, 17.

¹¹⁵⁶ Barty McFarlane, 'The National Water Initiative and Acknowledging Indigenous Interests in Planning' (Paper presented at the National Water Conference, Sydney, 29 November 2004) 14 <<http://www.nntt.gov.au/news-and-communications/speeches-and-papers/documents/2004/speeches%20national%20water%20initiative%20mcfarlane%20november%202004.pdf>>.

¹¹⁵⁷ Ibid.

¹¹⁵⁸ Leigh Dayton, 'Research Raises a Toxic Dust', *The Australian* (Sydney), 21-22 November 2009, 12.

Health Conference, research was presented on ‘the health effects of lead in Mt Isa and identified that children were at risk from intellectual deficits and fatal health outcomes as a result of lead poisoning from mining residue’.¹¹⁵⁹

Children are exposed to dust laden with lead ... Youngsters ingest dust when crawling on contaminated floors, playing in contaminated yards, swimming in contaminated water or engaging in hand-to-mouth behaviour.¹¹⁶⁰

The contamination of water resources is an additional threat to Aboriginal water use. Equally, the over-allocation of freshwater for industry and mining directly impacts on Aboriginal communities. The competing interests within the water market are not accounted for by the Federal Government and other peak bodies, according to the ‘Statement of Intent to Close the Gap on Indigenous Health Equality’ (2008). The ‘Statement of Intent’ expresses

[a] commitment to work collectively to systematically address the social determinants that impact on achieving health equality for Aboriginal and Torres Strait Islander peoples.¹¹⁶¹

The correlation between poor Aboriginal health, the lack of Aboriginal wealth creation and the over-allocation and contamination of water resources has been seriously overlooked as a national issue. Aboriginal communities represent a highly diverse demographic, and this also has not been taken into account within the national dialogue on water and water reform policy.¹¹⁶²

¹¹⁵⁹ Ibid.

¹¹⁶⁰ Ibid.

¹¹⁶¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Social Justice Report 2008’ (Human Rights Commission, 2009) 24.

¹¹⁶² The author undertook regularly internet searches on ‘Google’ to ascertain any water conference in Australia which represents Aboriginal water use and the representation of Aboriginal people and such references to date are uncommon. Key words used on ‘Google’ were water conference+ Aboriginal; water conference + Aboriginal 2008; water conference + Aboriginal Australia. For example: the 2008 Water Summit in Sydney did not include Aboriginal presenters, Aboriginal communities, Aboriginal organisations or Aboriginal experts.

The Department of Water (WA) has stated in its proposed Water Resources Bill that ‘native title rights for Aboriginal peoples are to be recognised on the same basis as stock and domestic or riparian water interests’.¹¹⁶³ The department did not propose any economic use of water for Aboriginal peoples under the government’s water policy.¹¹⁶⁴

A further example of excluding Aboriginal economic development is in the Ord River Irrigation Area in Western Australia, which was originally designed to develop wealth for northern Australia and increase the settlement of Anglo-Australians.¹¹⁶⁵ The Ord consists of tens of thousands of hectares in irrigated horticultural crops,¹¹⁶⁶ and the gross value in production is around \$60 million annually.¹¹⁶⁷

The Miriuwong-Gajerrong peoples, Traditional Owners of this area, were not consulted in the preliminary discussions on the redevelopment of their lands¹¹⁶⁸ and did not directly benefit from the early development of the irrigation area.

There is no indication in available records that Aboriginal people were consulted about the Ord River Irrigation Area development, nor were they given advance notice of the flooding of their traditional lands ... As the waters rose the traditional landowners were moved to short term leasehold areas and communities with no means of employment except day labouring ... The land and the wealth created through their long involvement in the pastoral industry were in the hands of the pastoralists, and so Aboriginal peoples had no capital or assets to invest in the project.¹¹⁶⁹

In Western Australia a ‘Study of Groundwater-related Aboriginal cultural values of the Gngangara Mound’ (2005) identified major groundwater sources of freshwater in the

¹¹⁶³ Email from David Collard to Virginia Falk, 17 February 2009.

¹¹⁶⁴ Ibid.

¹¹⁶⁵ Department of Water, Government of Western Australia and Miriuwong-Gajerrong Aboriginal Corporation, ‘Interim Management Plan for Reserve 31165’ (August 2006) 14.

¹¹⁶⁶ Ibid.

¹¹⁶⁷ Ibid.

¹¹⁶⁸ Ibid.

¹¹⁶⁹ Ibid.

Mound (which extends from north Fremantle, to Moore River and Gingin Brook and east to Ellen Brook and the Swan River in the South) to determine the ‘Social Water Requirements’ of the Nyungar communities.¹¹⁷⁰

The ‘Gnangara Mound Report’ articulated the traditional creation story of the ‘Emu cave’ of Nyungar peoples, in which the modern Emu¹¹⁷¹ and the serpent ‘Waugal’¹¹⁷² are associated with ‘certain freshwater springs’.¹¹⁷³ Nyungar peoples, as with other Aboriginal communities, have traditionally used ‘swamps’ or ‘wetlands’ as a source of water.¹¹⁷⁴ Due to increasing industry and housing developments, the Nyungar peoples have lost staple foods such as ‘typha reed’ (*yandiji*)¹¹⁷⁵ and their customary access to water.

The increased development of coastal and inland areas of Western Australia has implications for the ‘public and private alteration of the natural flow of surface and ground water’.¹¹⁷⁶ The Gnangara Mound, a significant Aboriginal water site for Nyungar peoples, has been significantly affected by the ‘use of private water bores, by the increase of housing estates, the operation of market gardens and turf farms’.¹¹⁷⁷

Giblett (2005) suggests that the quintessence of Aboriginal water values requires the inclusion of Aboriginal water rights:

By excluding water rights from native title John Howard was not only dealing a cruel and savage blow to reconciliation. He was also demonstrating his ignorance that water and land cannot really be separated out in this way for both Anglo and

¹¹⁷⁰ Edward McDonald, Bryn Coldrick and Linda Villiers, ‘Study of Groundwater-Related Aboriginal Cultural Values on the Gnangara Mound, Western Australia’ (‘Research Report’, Department of Environment Western Australia, October 2005) 79.

¹¹⁷¹ Ibid 59.

¹¹⁷² Ibid.

¹¹⁷³ Ibid 58.

¹¹⁷⁴ Ibid 70.

¹¹⁷⁵ Ibid.

¹¹⁷⁶ Ibid 74.

¹¹⁷⁷ Ibid.

Indigenous Australian cultures. Water is the life-blood of land, and land is people.¹¹⁷⁸

The foundation of Aboriginal economic development and intergenerational wealth creation cannot be realised without implementing the reservation of water rights for Aboriginal peoples outside the consumptive pool because of competing interests and demands from other water stakeholders. The intense competition between stakeholders and governments reduces the possibility of ensuring water rights, water entitlements and allocations to Aboriginal peoples. The ‘special association to water’ which Aboriginal peoples continue to hold must be recognised as a first right before other water rights. Australian law should recognise inherent Indigenous rights within national water policy that enshrine both economic and cultural water use; a cultural use should be examined through the Aboriginal ontological concepts of water, its values, laws as a ‘web of relationships and interests’.

This chapter has attempted to demonstrate that Aboriginal values in water and the customary purposes inherent in water under Aboriginal laws and practices should not preclude Aboriginal peoples from adapting these customary practices and beliefs for economic development. It is not viable for Aboriginal communities to compete with other stakeholders in the water market with an inferior legal right because there is an obvious power imbalance between Aboriginal communities and other water stakeholders such as irrigators, farmers and water traders.

Australian water policy has not engaged Aboriginal peoples in a meaningful dialogue on water rights. Under the National Water Initiative Intergovernmental Agreement, the ‘Indigenous Access’ clauses are merely discretionary allocations and are devoid of any Aboriginal concept of water. The National Water Initiative should include perpetual and reserved water rights for Aboriginal communities in all jurisdictions to ensure legal and economic certainty in water rights and interests.

¹¹⁷⁸ Rod Giblett, ‘Black and White: Cross-Cultural Colour-Coding of the Life-Blood of the Earth Body’ (14 February 2007) *University of South Australia* 64
<http://www.unisa.edu.au/waterpolicylaw/documents/water_justice_papers.pdf>.

Australian water policy has narrowed the 'window of opportunity' for Aboriginal economic use of water and the few Indigenous provisions included in the National Water Initiative is evidence of an unresponsive government policy. Aboriginal communities require legal certainty: first, a guaranteed access to, and use of water resources that will enable intergenerational equity for future generations of Aboriginal peoples; second, governments should widely consult with Aboriginal communities with a specific view to incorporating a robust Aboriginal water policy; third, to identify and allocate permanent water rights to Aboriginal communities in both under-allocated and over-allocated water resources in all jurisdictions; and lastly, all governments should agree not to cap any water resources held by native title claimants or fetter the use of native title in water where Aboriginal communities seek to develop Aboriginal economic benefits.

Chapter 8: Aboriginal Water Rights & Interests: Legislative and Policy Development

This chapter examines the treatment of Aboriginal water rights and interests in legislative instruments and policy development and to what extent Aboriginal cultural customs and practices are considered in the management of water resources under Australian law. The chapter analyses the position of Aboriginal water rights and interests within the hierarchy of other water interests, and whether Aboriginal cultural, customary practices and economic needs in water are sufficiently considered in water policy development and effectively incorporated into Australian law.

The chapter examines a case study from Western Australia of the Water Resources Bill and how Aboriginal water rights and interests were dealt with by government in the drafting process. The case study provides an analysis of the government's approach to conceptualising and constructing Aboriginal water values into water policy and legislative framework, and analyses whether government water policy took into account the particular requirements of water rights and interests of Aboriginal communities across the state.

8.1 Incorporating Aboriginal Water Values into Australian Policy and Law

The literature review in Chapter 2, the section on the nature of water rights in Chapter 4.3, and Chapter 5 on the legislative and policy issues in the Murray-Darling Basin, have examined the framework of Australian policy and law in water rights and interests; and demonstrated the particular failings of the national water reform framework on Aboriginal water rights and interests. In Australia the allocation of water resources has become one of the most politicised and contentious issues among national and state water departments and their agencies. The reason for this may be expressed, in the words of

early explorer and barrister Charles Wentworth, as resulting from ‘the competing interests of commerce in the access and use of water to attain power and wealth’.¹¹⁷⁹ The Australian Constitution has determined the extent of state and Commonwealth powers in water management.¹¹⁸⁰ Because of the ‘artificial political borders’ which lie over Australia’s river system this ‘fragments’ the governance of water.¹¹⁸¹ In recent times there have been very few cases in the High Court examining Australia’s water issues.¹¹⁸² Section 100 of the *Australian Constitution* places limits upon Commonwealth intervention in the States’ control of water resources:

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.¹¹⁸³

Water is vested in the Crown for the purposes of management and conservation, although access rights to use water are granted by the respective States.¹¹⁸⁴ Indigenous peoples’ water rights and interests were not included in the Australian Constitution or in the constitutions of any state.

The management of water sources in the early days of British settlement was treated in an ad hoc fashion where common law riparian water rights were used at the discretion of the land owner; water ran with the land and had no separate property rights attached to it. The Australian colonies did not implement a management regime to regulate the use of water until the late 1800s. From Federation the Australian states and territories sought to ‘softly’ regulate water used by irrigators; however, the water policy framework continued

¹¹⁷⁹ William Charles Wentworth, *Statistical, Historical, and Political Description of The Colony of New South Wales and its Dependent Settlements in Van Diemen’s Land: A Particular Enumeration of the Advantages which these Colonies Offer for Emigration, and their Superiority in many Respects over those Possessed by the United States of America*, (Griffen Press, first published 1819, 1978 ed) 78.

¹¹⁸⁰ Paul Kildea and George Williams, ‘The Constitution and the Management of Water in Australia’s rivers’ (2010) 32(4) *Sydney Law Review* 596-597.

¹¹⁸¹ *Ibid* 597.

¹¹⁸² *Ibid*.

¹¹⁸³ Commonwealth of Australia, *Australia’s Constitution* (Government Printers, 2nd ed, 1998) 39.

¹¹⁸⁴ John Marsden, ‘Water Entitlements and Property Rights: An Economic Perspective’ (2002) in *Property: Rights and Responsibilities, Current Australian Thinking* (Land and Water Australia, 2002) 43.

to focus on water users such as pastoralists, farmers, squatters and irrigators. For example, in the early stages of establishing South Australia, Aboriginal peoples were permitted to co-exist upon some pastoral stations to access water and ceremonial areas and to traverse to neighbouring 'country'. Until case law development in Australian native title, as examined in Chapter 4, the notion of Indigenous water rights received minor attention.

I would argue that the Howard Government's national review of water management unequivocally altered Australian water policy and the legislative framework for water management by separating water from the land and creating a type of new property right; these rights could be temporarily or permanently transferred or traded to other parties or entities, and could be mortgaged to secure economic benefits.

However, Aboriginal water rights and interests were not included in national water reforms until 2004, resulting from the persistent advocacy of Aboriginal peak bodies. The National Water Initiative has barely progressed these rights and interests to anything more than inadequate provisions such as 'accounting for native title water' and 'where possible, to acknowledge these water interests exist'. This chapter demonstrates that the primary focus of water use and water management in Australia is the economic prosperity of a small group of stakeholders and government.

Tan (2002) argues that early government water policy did not take into account the impact from the inadequate regulation of Australian water resources.¹¹⁸⁵

Public debate over policy and law reform has challenged expectations about water use. It must be acknowledged that the economic prosperity of inland irrigation has been bought at considerable environmental cost. River systems have suffered much degradation in the two centuries since colonial occupation ... Water resources have become fully committed, wetlands have been drained, natural

¹¹⁸⁵ Poh-Ling Tan, 'Legal Issues Relating to Water Use' (2002) *Property: Rights and Responsibilities, Current Australian Thinking* (Land and Water Australia, 2002) 35.

habitats destroyed, and native species have dwindled under the burden of highly modified flow regimes and spreading exotic species.¹¹⁸⁶

In Australia, water management legislation was first introduced in the 1880s to regulate a consumptive use of water, generally for irrigated agriculture, where water was regulated through an administrative system rather than a riparian doctrine of the common law.¹¹⁸⁷ The doctrine was ‘shaped’ upon the legal concept that ‘flowing water is in a constant state of change’ and ‘cannot be possessed or appropriated’ by water users.¹¹⁸⁸ This approach became less than ideal for Australian conditions because Australian watercourses differed vastly from English watercourses, as did the climatic conditions.¹¹⁸⁹ Water resources in Australia were administered in a manner that was inconsistent with how Aboriginal water use was understood by Aboriginal peoples.

Aboriginal water use knowledge was not highly valued during the early development of Australian water policy. The priority in allocating water resources was instead focused upon ensuring the social and economic benefits flowing to the nation and the states, and also to pastoralists, irrigators and farmers.

Jackson, Storrs and Morrison’s research paper (2005) on the recognition of Aboriginal rights, interests and values in rivers analyses the Western legal system in relation to the allocation of land and water rights:

[w]estern and customary legal systems allocate rights and responsibilities to land and resources ... the greater significance of land over water in the western environmental consciousness explains why Indigenous relationships to land, rather than water, have tended to be more readily recognised and documented.

Western law has treated water as a fluid element and, as a consequence, rights to

¹¹⁸⁶ Ibid.

¹¹⁸⁷ Ibid.

¹¹⁸⁸ Joshua Getzler, *A History of Water Rights at Common Law* (Oxford University Press, revised ed, 2006) 43.

¹¹⁸⁹ Poh-Ling Tan, ‘Legal Issues Relating to Water Use’, (2002) *Property: Rights and Responsibilities, Current Australian Thinking* (Land and Water Australia, 2002) 35.

water have been poorly defined ... land is more or less fixed, is more readily traded and valued.¹¹⁹⁰

Collins (2002) suggests that a nexus exists in water rights and a broad range of human rights entitlements among Indigenous communities.¹¹⁹¹

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 practice their cultural traditions affiliated with water includes other indivisible rights for sustenance of the community as a whole.¹¹⁹²

A significant recognition of those rights and entitlements was gained through the native title recognition of Indigenous property rights. Kirby J explains that the law-makers in Australia had not anticipated the future changes to the law resulting from the *Mabo v Queensland [No 2]*¹¹⁹³ and the *Wik v Queensland*¹¹⁹⁴ decisions:¹¹⁹⁵

[as] *Mabo [No 2]* and *Wik Peoples v Queensland* demonstrate ... Australian law at this time is in the process of a measure of readjustment, arising out of the appreciation, both by parliaments and the courts of this country, of injustices which statute and common law earlier occasioned to Australia's indigenous peoples.¹¹⁹⁶

¹¹⁹⁰ Sue Jackson, Michael Storrs and Joe Morrison, 'Recognition of Aboriginal Rights, Interests and Values in River Research and Management: Perspectives from Northern Australia' (2005) 6(2) *Ecological Management and Restoration* 106.

¹¹⁹¹ Neva Collins, *Water Rights and International Law: Background Briefing Papers Lingiari Report Indigenous Rights to Water Report and Recommendations* (15 November 2004) Aboriginal and Torres Strait Islander Commission

<http://atsic.gov.au/issues/Indigenous_Rights/Indigenous_Rights_Waters/Default.asp>.

¹¹⁹² Ibid.

¹¹⁹³ [1993] 175 CLR 1.

¹¹⁹⁴ (1996) 187 CLR 1.

¹¹⁹⁵ Evidence to Senate Legal and Constitutional Committees, Parliament of Australia, Canberra, July-December (1997) vol 3, 34 (Justice Michael Kirby).

¹¹⁹⁶ Ibid. See *Thorpe v Commonwealth* (No 3) (1997) 144 ALR 677, 687.

Jason Behrendt and Peter Thompson (2004) argue that there has always been a lack of recognition of and protection for Aboriginal rights and interests in the state management of New South Wales river systems.¹¹⁹⁷ Behrendt and Thompson analyse the plight of Aboriginal peoples regarding access to and use of water resources and the impact from the commodification of water and the allocation of water extraction licences to other water users.¹¹⁹⁸ The authors conclude that water reforms implemented without Aboriginal consultation have had negative consequences for Aboriginal communities, including inadequate provision for cultural, spiritual, social and economic water use.¹¹⁹⁹

Tim Fisher, former executive of the Australian Conservation Foundation, presented a briefing in 1996 on the direction of water property rights:

The Council of Australian Government's Water Resources Policy also included water property rights. Classification of rights is required to free-up markets, enabling irrigators to cash-in on unwanted entitlements and speeding up transition to the use of water for higher-value products ... Irrigator groups, such as the NSW Irrigators Council, have raised the issue formally with state departments. They want freehold title to water with guaranteed security. ARMCANZ ... recommends that water entitlements should wherever possible be perpetual.¹²⁰⁰

Murray Radcliffe, the Manager of Water Planning for the Australian Government's National Water Commission, confirmed the poor recognition of Indigenous water rights in addressing the Indigenous Water Focus Group (2008) in Adelaide:

[t]he National Water Commission and the Commonwealth government may amend the National Water Initiative in relation to Indigenous Water Planning ... Indigenous spiritual and social water requirements are currently neither included

¹¹⁹⁷ Jason Behrendt and Peter Thompson, 'The Recognition and Protection of Aboriginal Interests in NSW Rivers' (2004) 3 *Journal of Indigenous Policy* 37.

¹¹⁹⁸ Ibid.

¹¹⁹⁹ Ibid 124-125.

¹²⁰⁰ Letter from Tim Fisher to Andrew Chalk, 8 March 1996. In accordance with Australia's *Copyright Act* 1968 (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

by Indigenous cultural flows or economic interests. The Biennial Assessment of the National Water Initiative in 2007 showed Indigenous engagement was patchy at best.¹²⁰¹

Radcliffe also stated to the Indigenous Focus Group meeting that

[f]rom the Indigenous actions under the National Water Initiative only 10 Indigenous groups were represented nationally ... with nil incorporation of Indigenous cultural inclusion, or Indigenous consultation, native title rights allocation, or where water was to be taken into account among water sharing plans.¹²⁰²

The national focus on the development of water policy reform is not concerned with improving the water rights and interests of Aboriginal communities. The Howard Federal Government had instead prioritised national issues such as the development of Northern Australia for new and expanded agricultural lands and increased financial investment.¹²⁰³ However, to achieve this sizeable development, the government would have had to acquire Aboriginal land and water rights.¹²⁰⁴ The government's policy position to acquire Aboriginal land would compromise the land and the water rights and interests of Aboriginal communities for the sake of achieving national wealth.

In New South Wales the Indigenous principles in the *Water Management Act 2000* (NSW) provide protection to Indigenous areas of significance under sections 5(2)(e) referring to the 'geographical and other features of indigenous significance' and s 5(2)(f) referring to the 'geographical and other features of major cultural, heritage or spiritual significance'. There is no indication in the legislation whether these water sites in 'areas of Indigenous significance' are protected water resources under this legislation.

¹²⁰¹ Murray Radcliffe, 'The National Water Commission Introduction and Engagement' (Speech delivered at the Australian Indigenous Water Focus Group, National Water Commission, Adelaide, South Australia, 18 November 2008). The author was invited to participate as an Indigenous delegate for the Indigenous Water Focus Group in Adelaide.

¹²⁰² Ibid.

¹²⁰³ David Collard, personal communication with Virginia Falk (Marshall), February 2009.

¹²⁰⁴ Ibid.

The purpose of the *Water Act 1912* (NSW) was to consolidate legislation relating to water rights, water drainage, drainage promotion and artesian wells. In contrast, the *Water Management Act 2000* (NSW) provides for the protection, conservation and ecologically sustainable development of State water. Under s 55 of the *Water Management Act 2000* (NSW), native title appears to be the only legal right identified for Aboriginal ownership. Aboriginal water licences are limited because the licence system is based on a ‘non-tradeable licence’ system.

In New South Wales, the Macro Water Sharing Project Control Group recommended that the New South Wales Minister for Water should restrict the economic interests of Aboriginal peoples in the proposed policy for Aboriginal commercial water licence:¹²⁰⁵

[t]hese licences are not fully commercial. While they may be temporarily traded, they cannot be subject to permanent trade as such [they] will remain in the community for the life of the licence. Aboriginal communities, enterprises and individuals are encouraged to seek financial assistance from funding bodies to purchase fully commercial licences.¹²⁰⁶

The Department of Natural Resources (NSW) established a conditional Aboriginal cultural water licence, a non-tradeable commercial water licence scheme, in consultation with the Macro Water Plans Project Committee within the department. The State water policy was incorporated into the Macro Water Sharing Plans under the *Water Management Act 2000* (NSW).¹²⁰⁷ However, the government had not engaged in

¹²⁰⁵ Dave Miller, personal communication with Virginia Falk (Marshall), December 2006. The author, as the then Executive Officer of the NSW Aboriginal Water Trust, delivered a paper at the Aboriginal Consultation Water Sharing Workshop for Department of Environment and Climate Change (NSW) at Murra Mittagar Penrith, 26 May 2006.

¹²⁰⁶ Department of Natural Resources (NSW) ‘Workshop to Discuss Developing Culturally Appropriate Aboriginal Consultation for Macro Water Sharing Plans’, held by the Department of Natural Resources (NSW) (26 May 2006). See also email from Dave Miller to Virginia Falk (Marshall), December 2006.

¹²⁰⁷ Email from Dave Miller to Virginia Falk (Marshall), 25 May 2006. In accordance with Australia’s *Copyright Act 1968* (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

consultation with Aboriginal communities in New South Wales, and the State's water policy reforms were instead driven by internal policy advice.¹²⁰⁸

The proposed introduction of Aboriginal non-tradeable commercial water licences was aimed at unregulated coastal water systems where low impact and high flows are a condition for granting an Aboriginal licence.¹²⁰⁹ This government policy stipulated that no licences would be issued for inland regulated rivers and that potential licences in unassigned groundwater systems are all subject to environmental assessment.¹²¹⁰

The water entitlement licences in New South Wales are generally for 'domestic and stock access licences and local water utility access licences'; aquifer licences in not fully allocated groundwater sources and the introduction of Aboriginal cultural 'specific purpose' access licences', which are restrictive and conditional.¹²¹¹ The commercial licence model for Aboriginal applicants was designed as non-tradeable, non-perpetual water licences that cease when the commercial activity has finished.¹²¹²

Craig (2005) highlights the cultural needs for Aboriginal peoples for cultural purposes:

Cultural flows should be an essential component of river management. A cultural flow can be set and monitored as sufficient flow in a suitable pattern to ensure the maintenance of Aboriginal cultural practices and connections with the rivers. In circumstances where rights to water are being turned into a commodity and schemes for tradeable water rights being expanded, it becomes increasingly important to ensure that Aboriginal cultural flows are secured in legislation as a non-tradeable interest. Aboriginal people do not have the means to purchase those water flows on the open market.¹²¹³

¹²⁰⁸ Ibid.

¹²⁰⁹ Ibid.

¹²¹⁰ Ibid.

¹²¹¹ Ibid.

¹²¹² Ibid.

¹²¹³ Donna Craig, 'Indigenous Property Rights to Water: Environmental Flows, Cultural Values and Tradeable Property Rights' (2005) *Macquarie University* ('Unpublished essay') 14, quoting Jason Behrendt

The New South Wales ‘Two Ways Together 2003-2012’ policy, developed by the Department of Aboriginal Affairs (NSW), committed to developing and delivering government partnerships with Aboriginal communities. Culture and heritage was one of its key priorities identified to improve Aboriginal policy outcomes through ‘social, economic and cultural’ policy objectives.¹²¹⁴ However, this policy was mute on outcomes in water rights and interests for Aboriginal peoples.

8.2 A State Approach to Aboriginal Water Enterprise

In my capacity as the Executive Officer of the NSW Aboriginal Water Trust, and leader of a state water project, I was responsible for generating, assembling and disseminating a range of working papers, discussion papers, briefing papers, reports and correspondence that relate to Indigenous rights and interests in water resources. The significance of these documents lays in their relevance to the emerging Aboriginal water rights dialogue and in the response elicited from state and federal government agencies and other stakeholders. These documents provide an important insight into the development of Aboriginal water policy and a rich source of reference material for this thesis.¹²¹⁵

The New South Wales Aboriginal Land Council submission on the Draft National Water Initiative Implementation Plan outlined to the Department of Natural Resources (NSW) that the Draft Plan had failed to adequately promote Aboriginal water rights and interests in the state.¹²¹⁶ The Aboriginal Land Council letter to the Deputy Director General of the department highlighted various issues that did not promote water rights for Aboriginal

and Peter Thompson, ‘The Recognition and Protection of Aboriginal Interests in NSW Rivers (‘Occasional Paper’, No 1008, Healthy Rivers Commission NSW, November 2003) 59-60.

¹²¹⁴ Department of Aboriginal Affairs (NSW) ‘Two Ways Together, Partnerships: A New Way of Doing Business with Aboriginal People, NSW Aboriginal Affairs Plan 2003-2012’ (2003) 4.

¹²¹⁵ See also Department of Land and Water Conservation (NSW), ‘Guidelines for Assessing the Impacts of Water Sharing Plans for Aboriginal Peoples’ (Economic and Social Policy Branch, Department of Land and Water Conservation, August 2001) 13. The guidelines state that ‘literature reviews can be used to generate and review information that exists about Aboriginal peoples, in respect to water use and values in local and regional contexts’.

¹²¹⁶ Email from Peter Sutherland to Virginia Falk, 8 December 2005. In accordance with Australia’s *Copyright Act* 1968 (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

communities such as the omission of a mandate for Indigenous representation in water planning and implementation of the Indigenous objectives under the Plan, the need to guarantee Aboriginal peoples access to, and use of water, to allow Aboriginal peoples to participate in the decision-making processes and to recognise the need for compensation for the loss of Aboriginal water rights and interests.¹²¹⁷

Further, the New South Wales Aboriginal Land Council emphasised that, irrespective of a determination in native title, Aboriginal peoples are the rightful custodians of their cultural heritage and the prior owners of the lands, the waters and natural resources in their ‘country’.¹²¹⁸ Following a meeting between me, as the Executive Officer of the NSW Aboriginal Water Trust, and the Indigenous Land Corporation, the Corporation supported a partnership with the Water Trust to ‘enhance the benefits for Aboriginal peoples through combining water and land ownership’.¹²¹⁹

Water licences on the ‘open market’ are highly inflated in price and are held primarily by non-Aboriginal persons or legal entities.¹²²⁰ The Department of Natural Resources (NSW) stated that ‘a reliance on native title rights to provide benefits to Aboriginal peoples in the state was unlikely to occur’.¹²²¹ Furthermore, the Department recognised that ‘all water sharing plans should provide for Aboriginal cultural access licences and Aboriginal commercial access licences, in conjunction with the NSW Aboriginal Water Trust’.¹²²² To address the limited opportunities for Aboriginal peoples to access the water market and to participate in ‘benefit-sharing’, the Aboriginal Water Trust was established in New South Wales as a ‘protected state project’.¹²²³

¹²¹⁷ Ibid.

¹²¹⁸ Ibid.

¹²¹⁹ Email from John Gillespie to Virginia Falk, 17 July 2007, 1. In accordance with Australia’s *Copyright Act* 1968 (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹²²⁰ Jon Altman and William Arthur, ‘Commercial Water and Indigenous Australians: A Scoping Study of Licence Allocations’ (‘Working Paper’ No 57, Centre for Aboriginal Policy Research, Australian National University, 2009) 7.

¹²²¹ Ibid 5.

¹²²² Ibid.

¹²²³ Virginia Falk, Executive Officer of the NSW Aboriginal Water Trust.

The Aboriginal Water Trust (NSW) was established to facilitate the delivery of potential benefits to Aboriginal communities in New South Wales through funding Aboriginal water enterprise under objectives of the *Water Management Act 2000* (NSW).¹²²⁴ The New South Wales Cabinet directed that the Aboriginal Water Trust would be incorporated into the State corporate water management plan with a key performance indicator to estimate the volume of water purchased for Aboriginal peoples within the State.¹²²⁵

The State Government established an administrative and grant funding budget of \$5 million, for the life of the project, which provided insufficient funding to realise significant economic benefits for Aboriginal peoples.¹²²⁶ The increase in water pricing through water trading and the increased value in commercial water licences significantly impeded the capacity of the Aboriginal Water Trust to purchase Aboriginal water licences because of their modest funding.¹²²⁷ The allocation of funds by the State Government for purchasing water licences had not included the calculation of the higher cost to purchase water licences as a result of the national water reforms for water trading.¹²²⁸ The maximum grant of funds to an Aboriginal owned organisation was approximately three hundred thousand dollars to assist with the modernisation of commercial water infrastructure.¹²²⁹

The Department of Natural Resources (NSW), under the department's 'Macro Water Plans Project', advised 'that the introduction of Aboriginal Commercial Water Licences in the states water plans addresses Aboriginal disadvantage'.¹²³⁰ The granting of Aboriginal commercial water licences is subject to lenient access provisions because of

¹²²⁴ Ibid.

¹²²⁵ Email from Kim Wagstaff to Virginia Falk, 4 September 2006. The email was in relation to advice provided by Virginia Falk (Marshall) on a key performance indicator for the Department of Natural Resources (NSW) as to the 'volume of water purchased through the Aboriginal Water Trust'. In accordance with Australia's *Copyright Act 1968* (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹²²⁶ The author held the position of Executive Officer of the NSW Aboriginal Water Trust.

¹²²⁷ Ibid.

¹²²⁸ Virginia Falk, personal communication with Department of Natural Resources (NSW), 2007.

¹²²⁹ Ibid.

¹²³⁰ Email from Dave Miller to Virginia Falk, 25 May 2006, 3.

their availability in low risk groundwater.¹²³¹ The assessment of groundwater systems in New South Wales is flawed, as the Department of Natural Resources (NSW) identified:

The primary tool currently available for managing groundwater in highly connected alluvial systems is the 40m rule, where groundwater extractions within 40m of a river are managed to the daily access rules of the adjoining river ... it falls short of the National Water Initiative requirement, as there are literally thousands of alluvial aquifers ... which are highly connected to their parent streams ... they extend well beyond the 40m zone.¹²³²

The Project Control Group under the Department of Natural Resources (NSW) agreed to allow Aboriginal Commercial Water Licences to be tradeable and to allow licence holders to convert the licence to an unregulated river licence and trade or sell their share to other Aboriginal organisations or individuals and sell their allocations to other licence holders.¹²³³ A recommendation by the Project Control Group was to create an additional category 'Aboriginal Community Development', under the Water Management Regulations, to progress Aboriginal commercial licences, including unregulated river and aquifer licences.¹²³⁴

The Aboriginal Community Development Water Access Licence was introduced by the NSW Government and was included within the water sharing plans. However, these licences have highly restrictive conditions. They are not made available to Aboriginal individuals, are only for coastal water and some aquifer systems, and are not available where cap limits apply such as in the Murray-Darling Basin region.¹²³⁵

Prior to the establishment of the Aboriginal Water Trust, during negotiations between the New South Wales Government and the New South Wales Native Title Services, the latter

¹²³¹ Ibid 4.

¹²³² Email from Dave Miller to Virginia Falk, December 2006.

¹²³³ Ibid.

¹²³⁴ Ibid.

¹²³⁵ Office of Water (NSW), 'Our Water Our Country: An Information Manual for Aboriginal People and Communities about the Water Reform Process' (Department of Primary Industries (NSW), 2nd ed, February 2012) 6.4.

requested \$250 million to compensate native title holders for their share of the estimated \$5 billion value in water trading rights resulting from the introduction of national water reforms impacting on the New South Wales water legislation.¹²³⁶ The compensation was sought to establish the Aboriginal Water Trust with the financial capacity to purchase water.¹²³⁷ Instead, the New South Wales Aboriginal Water Trust received five million dollars for the establishment, administration and funding of community activities.¹²³⁸

After two and a half years of operating the Aboriginal Water Trust, the New South Wales Government suspended further grant funding and withheld the accumulated interest owed to the Aboriginal Water Trust on the remaining funds.¹²³⁹ Following a review of the Aboriginal Water Trust by Andrew Refshauge, a former New South Wales Minister and consultant to the review, the government then dissolved the Aboriginal Water Trust and returned remaining funds to consolidated revenue.¹²⁴⁰ The Water Trust has not been replicated anywhere in Australia.

The Draft New South Wales 'Water Management Business Plan' (2006-2007) involves Aboriginal communities only through its heading, 'Indigenous Engagement', which covers the development, construction and implementation of State water projects that are overseen within the corporate structure.¹²⁴¹ There is no inclusion of Aboriginal self-determination and how Aboriginal communities are to be involved in the state water management plan.

[from] the State 'Water Sharing Workshops' for Aboriginal community groups in New South Wales, the range of Aboriginal participant comments highlighted the lack of government communication and consultation with Aboriginal

¹²³⁶ Debra Jopson, 'Aborigines Demand \$250 million over Water Rights System', *The Sydney Morning Herald* (Sydney), 3 June 2002, 1.

¹²³⁷ Ibid.

¹²³⁸ Ibid.

¹²³⁹ Gavin Andrews, personal communication with Virginia Falk, 29 March 2009. Discussion at Tharawal Aboriginal Land Council for a Land Council community meeting.

¹²⁴⁰ Cliff Daylight, personal communication with Virginia Falk, 2008. Cliff Daylight held the Acting Executive Officer of the Aboriginal Water Trust (NSW) after my resignation.

¹²⁴¹ Department of Natural Resources (NSW), 'Water Management Division Business Plan 2006-2007' (21 August 2006) 11.

communities, in conjunction with the State Water Sharing Plans and the post-policy process that was rushed through to suit government timeframes.¹²⁴²

The Water Management Principles in the *Water Management Act 2000* (NSW) address Aboriginal cultural values; the legislation refers to the protection of ‘geographical and other features of major cultural, heritage or spiritual significance’.¹²⁴³ However, the legislation is silent on how these benefits of equitable sharing are to be delivered to Aboriginal peoples.

The Objects of the *Water Management Act 2000* (NSW)¹²⁴⁴ provide for ‘equitable sharing of water resources’.¹²⁴⁵ Further, the objects of the Act are to ‘ensure’ the flow-on in ‘benefits to Aboriginal people in relation to their spiritual, social, customary and economic use of land and water’ through the State’s provision of ‘sustainable and integrated management of water resources’.¹²⁴⁶

A paper on ‘The Recognition and Protection of Aboriginal Interests in NSW Rivers’ by Jason Behrendt and Peter Thomson (2003) focussed on identifying the lack of protection and lack of recognition of Aboriginal rights and interests to river systems in New South Wales, and included a number of recommendations.¹²⁴⁷ Although this paper appeared nearly a decade ago, the issues it discusses remain relevant because the recognition of Aboriginal water rights and interests is still emerging as an academic jurisprudence in Australia, especially for Indigenous researchers and Indigenous academics.

¹²⁴² Virginia Falk, ‘Workshop to Discuss Developing Culturally Appropriate Aboriginal Consultation for Macro Water Sharing Plans’, held by the Department of Natural Resources (NSW) (26 May 2006). The author was invited to present on the involvement of the Aboriginal Water Trust and Indigenous Community Engagement.NSW

¹²⁴³ Ibid. See *Water Management Act 2000* (NSW) pt 1 div 1.

¹²⁴⁴ *Water Management Act 2000* (NSW) s 3.

¹²⁴⁵ Ibid.

¹²⁴⁶ Ibid.

¹²⁴⁷ Jason Behrendt and Peter Thompson, ‘The Recognition and Protection of Aboriginal Interests in NSW Rivers’ (‘Occasional Paper’, No 1008, Healthy Rivers Commission of NSW, November 2003) 5. See also Behrendt and Thompson, ‘The Recognition and Protection of Aboriginal Interests in NSW Rivers’ (2004) 3 *Journal of Indigenous Policy* 37.

Behrendt and Thompson's concluding remarks recognise that a 'just and equitable sharing of water resources epitomises an act in reconciliation'¹²⁴⁸ and the 'implementation of international human rights standards to secure the water rights of Aboriginal people'.¹²⁴⁹ In light of the failure to address the development of Indigenous water rights and interests under the Australian Government's 'National Water Initiatives' and the inconsistent performance of the States and Territories, it would appear that mandating Aboriginal water rights and interests needs serious consideration. It is argued in this thesis that a mandated allocation will provide a more realistic approach to guaranteeing Aboriginal rights than a reconciliation approach.

In the submissions made to the Australian Government on the Draft National Water Initiative Implementation Plan in 2005, the complaints raised in the submissions included 'a lack of federal funding to State and Territory jurisdictions to implement the national plan and funding water reform implementation from their resources'.¹²⁵⁰ There was no funding set aside for the National Water Initiative by the Australian Government to assist the States and Territories implement water reforms under the plan.¹²⁵¹

The only funding available for specific National Water Initiative related projects is the \$1.6 billion Water Smart Australia program under the Australian Water Fund. The Water Smart Australia program is designed to support the National Water Initiative by funding projects that improve river flows, desalinate water, recycle storm water, re-use grey water, better manage sewerage, store water more efficiently, and design more efficient houses.¹²⁵²

Daniel Connell in 'Water Politics in the Murray-Darling Basin' (2007) suggests that 'solutions must be culturally acceptable'.¹²⁵³

¹²⁴⁸ Ibid 86.

¹²⁴⁹ Ibid.

¹²⁵⁰ Email from Meera Rajagopalan to Virginia Falk, 10 March 2006, 2. In accordance with Australia's *Copyright Act 1968* (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹²⁵¹ Ibid.

¹²⁵² Ibid.

¹²⁵³ Daniel Connell, *Water Politics in the Murray-Darling Basin* (Federation Press, 2007) 44.

An economic perspective also has limited capacity to respond to many moral and ethical issues even though substantial political threats can come from groups driven by such considerations. Those involved often lack market power but that does not mean that they lack political power. Examples in Australia include the Green and Indigenous land and water rights movement. Consequently, medium term security and predictability for management programs and water-based economic activities cannot be provided without a policy and management framework that is able to integrate many different interests, not just those that can exert market pressure, in ways that are acceptable to the wider community.¹²⁵⁴

The Productivity Commission Report (2011) states that, ‘in order for Indigenous peoples to participate in the economy the policy must address strategic areas for any significant and lasting effect in Aboriginal health reform’.¹²⁵⁵ Further, the Productivity Commission identified the ‘correlation between improved incomes, economic participation and socio-economic development.’¹²⁵⁶

The Draft Annual Report by the Working Group for Advancing Reconciliation (2006) to the Primary Industries Ministerial Council and the Natural Resource Management Ministerial Council addressed where the states and territories met the priority areas identified by the Council of Australian Governments.¹²⁵⁷ The Draft Annual Report indicates a desire for reconciliation within the National Action Plan in natural resource management and primary industries, and includes a key theme of water and land.¹²⁵⁸ New South Wales in terms of national achievement was the only jurisdiction to meet the key priorities identified by the Council of Australian Governments to improve the lives of Indigenous peoples, which included the creation of the NSW Aboriginal Water Trust and

¹²⁵⁴ Ibid 44-45.

¹²⁵⁵ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (1 January 2012) Productivity Commission <http://www.pc.gov.au/__data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf>.

¹²⁵⁶ Ibid.

¹²⁵⁷ Email from the Department of Natural Resources (NSW) to Virginia Falk, April 2006. In accordance with Australia’s *Copyright Act* 1968 (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹²⁵⁸ Ibid.

the appointment of an Aboriginal Executive Officer to establish and administer the state program.¹²⁵⁹

The Water Management Division Business Plan (2006-2007) for the Department of Natural Resources (NSW) requires that Indigenous engagement must be undertaken in the development, construction and implementation of State water programs, and water management plans for iconic sites.¹²⁶⁰ According to the Virginia Simpson Report (2007), commissioned by the South Australian Government, the implementation of water management in 'partnership' with Aboriginal peoples remains unsatisfactory.¹²⁶¹ Aboriginal engagement in national water reform is under resourced in funding for capacity building of Aboriginal water enterprise; and the level of genuine engagement by governments with Aboriginal communities has been described as dysfunctional.¹²⁶²

Marcia Langton states:

The rhetoric of reconciliation is a powerful drawcard, like a bearded woman at the old sideshow. It is a seductive, pornographic idea, designed for punters accustomed to viewing Aborigines as freaks. It almost allows 'the native' some agency and a future. I say almost because in the end, 'the native' is not allowed out of the show, forever condemned to perform to attract crowds.¹²⁶³

It is important to acknowledge the symbolic context of reconciliation as a process of education on Aboriginal history in Australia. However, as a substantive policy response by government, the formal reconciliation process has not assisted Aboriginal peoples to exercise their rights to water as First Peoples. The recognition of Aboriginal customary rights and interests has only advanced because of *Mabo v Queensland* [No 2]¹²⁶⁴ and

¹²⁵⁹ Ibid.

¹²⁶⁰ Ibid.

¹²⁶¹ Email from David Collard to Virginia Falk on Virginia Simpson, 13 November 2007. In accordance with Australia's *Copyright Act* 1968 (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹²⁶² Ibid.

¹²⁶³ Marcia Langton, 'Real Change for Real People' *The Australian* (Sydney), 26-27 January 2008, 31.

¹²⁶⁴ (1991) 175 CLR 1.

through the recognition of international conventions, not through national reconciliation activities.

Australian governments do not appear to have addressed any level of certainty for Aboriginal communities' cultural and economic use of water. In recent times governments have had the opportunity to formally recognise and incorporate Aboriginal water requirements into water management legislation. However, governments instead have marginalised Aboriginal water rights and interests as an inferior right and interest. The participation of Aboriginal peoples in the water market was initially encouraged through the New South Wales Aboriginal Water Trust but the level of government funding was inadequate to achieve its policy and legislative objectives.

This part of the chapter has demonstrated that Aboriginal communities have not been accorded a substantial entitlement to water rights and interests where competing rights exist. Although the New South Wales water management legislation has provisions to protect and recognise Aboriginal water requirements, government policy and legislation has not delivered actual long term benefits, apart from a short period of success during the operation of the Aboriginal Water Trust.

It is argued that the commercial values of using and exploiting water resources through water trading and water licences is based upon a very different concept of rights and interests for Aboriginal peoples, and certainly not on Aboriginal ontological concepts of water. The two tier system of tradeable water licences for non-Aboriginal licence holders and non-tradeable water licences for Aboriginal communities reflects the inadequate level of government support for the economic development of Aboriginal communities. The lack of national and state commitment to guaranteed reserved Aboriginal water rights and interests in water policy and water management legislation limits the opportunities for Aboriginal communities to exercise their customary and economic rights.

8.3 Policy Approaches to Allocating Aboriginal Water Rights

This part of the chapter examines the participation and representation of Aboriginal peoples in the allocation of water rights and interests by governments administering Australian water policy. In addition, this part analyses whether the legislative regime provides adequately for the inclusion of Aboriginal water rights and interests and allows for the unique Aboriginal values attached to water.

It also examines how Australian governments have responded to Aboriginal water rights and interests as regards sharing water allocations and whether policy development takes into account the customary and cultural requirements of Aboriginal communities. A case study from Western Australia is examined to outline the government's response to Indigenous water issues in water policy development.

In an ideal world, 'good governance principles in water management such as transparency, accountability, decentralisation and participation should be widely incorporated in government policies to advocate for the better management of natural resources'.¹²⁶⁵ From an Aboriginal perspective, Australian governments have largely ignored the cultural and economic values inherent in Aboriginal knowledge systems and Aboriginal ontological water concepts in policy development. Their incorporation into water policy requires the participation of Aboriginal communities in water management in order to guide 'good governance principles for Indigenous outcomes'.

Water management in Australia has moved to address serious concerns in water use and issues of sustainability because of the significant increases in water consumption for consumptive and non-consumptive use. The expansion of irrigated agriculture and advocacy from sectoral interest groups pressuring the Australian Government to expand the northern region of Australia for irrigated broad acre farming directly affects Aboriginal communities because there are significant areas of Aboriginal owned land.

¹²⁶⁵ Bryan Bruns, 'Water Tenure Reform: Developing an Extended Ladder of Participation' (2003) *University of South Australia* 2 <http://unisa.edu.au/waterpolicylaw/documents/water_justice_papers.pdf>.

Jackson, Storrs and Morrison (2005) examine the level of Aboriginal participation in water and catchment management within the Northern Territory region:

Aboriginal people have managed their water bodies and riparian areas for millennia. They rely heavily on these nationally and internationally significant wetlands for food, for cultural values, and, increasingly, for economic independence. The need for external advice or assistance has arisen chiefly from relatively recent changes driven by European settlement and other land management practices.¹²⁶⁶

In Australian water policy the Western characterisation and use of water is compartmentalised into water policy categories such as ‘environmental and cultural flows’ and ‘consumptive and non-consumptive use of water’. In the previous chapters I have argued that water values in Aboriginal customary laws have been simplified into wholly deficient cultural definitions of water values.

The testimony of Aboriginal people is a difficult basis on which to develop policy, particularly in land management ... Culturally specific issues of ‘health’, ‘well-being’, ‘place’ and ‘identity’ are culturally complex ...¹²⁶⁷

The legal implications for ‘water’ as a new type of property right has been problematic for Aboriginal peoples because it characterises water as having economic value, as distinct from social and cultural values. Because water is separated from the land there is an increasing tendency by policy makers to prioritise economic values in the context of water rights and interests above other value systems.

¹²⁶⁶ Sue Jackson, Michael Storrs and Joe Morrison, ‘Recognition of Aboriginal Rights, Interests and Values in River Research and Management: Perspectives from Northern Australia’ (2005) 6(2) *Ecological Management and Restoration* 107.

¹²⁶⁷ Stephen and Bev Sithole ‘Sustainable Northern Landscapes and the Nexus with Indigenous Health: Healthy Country Healthy People’ (‘Research Report’, NTU07, Land and Water Australia, 2007) 35.

The 1994 Council of Australian Governments (COAG) report ‘informed water users that the price of water would regulate future water use thus water efficiency would follow’:

[t]he concept of tradeable water rights or entitlements, given that it would operate within a market framework, is generally considered the maximum benefit from the use of the resource.¹²⁶⁸

Syme and Hatfield-Dodds (2007) argue that the Council of Australian Governments ‘ignored the social implications in water use during water reform development to favour the triple bottom line’:¹²⁶⁹

The social bottom line was given little emphasis in the early period of reform, the main emphasis being on the delivering within ‘social constraints’. These constraints were not explicitly defined, although there was to be emphasis on consultation and public education ... culture as an input to water resource policy has been given little or no substantive attention.¹²⁷⁰

Further, Syme and Hatfield-Dodds (2007) argue that ‘the issue of resolving contested value systems is complex’:¹²⁷¹

It is evident that growth in population, irrigation water demands, the expanding metropolitan footprint and climate change have placed strains on institutional structures ... Contested values present both well-known challenges and less recognised opportunities. Recognition of multiple currencies of value allows a

¹²⁶⁸ Poh-Ling Tan, ‘Water Law Reform in NSW – 1995 to 1999’ (2003) 20 *Environmental Planning Law Journal* 166.

¹²⁶⁹ Geoffrey J Syme and Steve Hatfield-Dodds, ‘The Role of Communication and Attitudes Research in the Evolution of Effective Resource Management Arrangements’ in Karen Hussey and Stephen Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges* (Commonwealth Scientific and Industrial Research Organisation, 2007) 11-18.

¹²⁷⁰ Ibid.

¹²⁷¹ Ibid 11-12.

more nuanced approach ... rather than framing the entire process in terms of trade-offs between opposing values ...¹²⁷²

The tension between Aboriginal communities and other water stakeholders is growing because of the strong lobbying by industry, farmers, pastoral entities and irrigators to maintain or increase their water allocations. The emphasis on economic values in water has impacted significantly upon Aboriginal water rights and interests for customary and Aboriginal economic development.

The Howard federal government in 2007 funded the water rights of irrigators across Australia, in contrast to the limited support for Aboriginal water interests.

The Howard Government's hastily conceived \$10 billion national water plan ... Nearly \$6 billion of the plan was dedicated to assisting irrigators to improve the efficiency of existing irrigation infrastructure.¹²⁷³

Marcia Langton (2005) argues that the national policy change introduced by the Australian Government indicates that 'water is treated as a fluid element', and under these changes 'Indigenous water rights are poorly defined'.¹²⁷⁴

Crommelin (1984) explains the Western 'economic concept of property' in resource use:

The discipline of economics is concerned with scarcity. In the face of scarcity of resources, there is the need to allocate resources within society among competing ends.¹²⁷⁵

¹²⁷² Ibid.

¹²⁷³ Matthew Warren, 'Rain Changes Debate', *The Australian* (Sydney), 23-24 February 2008, 1.

¹²⁷⁴ Sue Jackson, Michael Storrs and Joe Morrison, 'Recognition of Aboriginal Rights, Interests and Values in River Research and Management: Perspectives from Northern Australia' (2005) 6(2) *Ecological Management and Restoration* 106.

¹²⁷⁵ Michael Crommelin, 'Economic Analysis of Property' in D J Galligan (ed) *Essays in Legal Theory* (1984) 74-78.

In contrast, for generations Aboriginal peoples have developed significant water knowledge for resource use. Aboriginal water knowledge, traditional sharing practices, climate and seasonal weather knowledge underpin water use knowledge. Aboriginal customary water use cannot be decoupled from the relationship with the environment and water resources because Aboriginal water concepts are central to the ‘web of kinship relationships’. Unlike Western water concepts, water cannot be separated from the land because the creation stories have laid the foundations for Aboriginal water values and its use.

Matthew Rigney, Ngarrindjeri and Chair of the Ngarrindjeri Native Title Management Committee, expressed to the National Water Commission that the ‘separation of land and water should be considered a genocidal activity because Aboriginal peoples belong to the water’.¹²⁷⁶

Water policy reform in Australia has generally marginalised the rights and interests of Aboriginal peoples in the policy development of the states and territories. Jackson and Morrison (2007) comments that

Indigenous interests were not formally considered in water policy documents prepared during the 1990s ... and were not addressed in water resource law until 2000.¹²⁷⁷

The National Water Initiative, established in 1994 with Australian Intergovernmental Agreements between the Commonwealth and the States and Territories, was the policy driver for national water reforms. For example, the National Water Initiative identifies methods for future water management, in regulating water through price structure,

¹²⁷⁶ Matthew Rigney, ‘Broad Principles on Indigenous Engagement on Water Issues’ (Speech delivered at the Australian Indigenous Water Focus Group, National Water Commission, National Water Commission, Adelaide South Australia, 18 November 2008).

¹²⁷⁷ Sue Jackson and Joe Morrison, ‘Indigenous Perspectives in Water Management, Reforms and Implementation’ in Karen Hussey and Stephen Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges* (Commonwealth Scientific and Industrial Research Organisation, 2007) 25.

statutory protection for environmental water allocations and national water sharing plans.¹²⁷⁸

Under the National Water Initiative, a framework and set of characteristics was implemented to provide a nationally compatible water entitlement system.¹²⁷⁹ Water access entitlements, under this framework, were intended to create effective water management and certainty for business and industry, as well as commercial opportunities for investment in water trading.¹²⁸⁰ In clauses 28 to 31 of the National Water Initiative Agreement, the consumptive use of water enables water access entitlements as separate from land, consistent with water sharing plans.¹²⁸¹

In a review of the national water reform policy, Tan (2001) argues that private rights such as ‘domestic and stock use, water licences and the right to use surface flows’ remain a high priority for governments.¹²⁸² Tan notes that the ‘primary concern for governments in water policy was to protect the interests of irrigators’.¹²⁸³

Water law reform was to define and simplify private rights to water, reduce potential for dispute between neighbours over drainage and water, and to make sure that disputes are resolved in ways to protect the wider interests of the community.¹²⁸⁴

The National Water Initiative reforms have provided governments with discretionary powers to accommodate Indigenous rights and interests, and any implementation of the

¹²⁷⁸ Barty McFarlane, ‘The National Water Initiative and Acknowledging Indigenous Interests in Planning’ (2004) <<http://www.nntt.gov.au/news-and-communications/speeches-and-papers/documents/2004/speeches%20national%20water%20initiative%20mcfarlane%20november%202004.pdf>>. Paper presented at the National Water Conference, Sydney.

¹²⁷⁹ National Water Commission, ‘Australian Water Reform 2009: Second Biennial Assessment of Progress in Implementation of the National Water Initiative’ (‘Report’, Australian Government, 2010) 104.

¹²⁸⁰ Ibid.

¹²⁸¹ Ibid 108.

¹²⁸² Poh-Ling Tan, ‘Irrigators Come First: Conversion of Existing Allocations to Bulk Entitlements in the Goulburn and Murray Catchments, Victoria’ (2001) 18(2) *Environmental and Planning Law Journal* 164.

¹²⁸³ Ibid 187.

¹²⁸⁴ Ibid 182.

reforms will rest with each jurisdiction.¹²⁸⁵ The Indigenous Actions in the National Water Initiative Agreement recognise Indigenous water interests under the following clauses.

Clause 52(i) and (ii) state that ‘the planning process ensures the inclusion of Indigenous representation in water planning wherever possible and will incorporate social, spiritual and customary objectives and strategies wherever they can be developed’.¹²⁸⁶

Clause 53 of the National Water Initiative Agreement ‘will take into account in the water planning processes of the possible existence of native title rights to water in the catchment or aquifer area, following the recognition of native title rights, to allocate water to the native title holders’.¹²⁸⁷

Clause 54 of the Agreement refers to ‘water allocated to native title holders for traditional cultural purposes and that it will be accounted for’.¹²⁸⁸ The Indigenous objectives under these clauses are clearly inadequate because they do not seek a mandatory commitment from governments to include Indigenous water rights and interests, except for those rights and interests that are native title.

In clause 53 of the Agreement, the use of the words ‘where possible’ makes government action discretionary. There is no enforceable power to include Indigenous water use, or water resources plans. There is a lack of certainty about Indigenous water rights and interests implied in the phrase ‘wherever they can be developed’ and because words like ‘cultural’ and ‘spiritual’ fail to take into account the complex layers of customary laws.¹²⁸⁹

¹²⁸⁵ Bardy McFarlane, ‘The National Water Initiative and Acknowledging Indigenous Interests in Planning’ (2004) <<http://www.nntt.gov.au/news-and-communications/speeches-and-papers/documents/2004/speeches%20national%20water%20initiative%20mcfarlane%20november%202004.pdf>>. Paper presented at the National Water Conference, Sydney.

¹²⁸⁶ National Water Commission, ‘Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory’ (2004) National Water Commission <http://nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>.

¹²⁸⁷ Ibid.

¹²⁸⁸ Ibid.

¹²⁸⁹ Bardy McFarlane, ‘The National Water Initiative and Acknowledging Indigenous Interests in Planning’ (2004) <<http://www.nntt.gov.au/news-and-communications/speeches-and->

The clauses do not provide any meaningful recognition of the water requirements of Aboriginal communities and of Aboriginal values. In this way, ‘customary objectives’ receive a generic treatment and reflect little more than a baseline of Aboriginal values. As an analogy, the complex layering of Aboriginal laws are as central to Aboriginal water rights as the rule of law is central to underpinning the stability of the Australian legal system. For example, ‘The upholding of the rule of law under English law was affirmed in representing the dominant values of its society, embodying the concept of English law, and acting as the ideological cornerstone of English society’.¹²⁹⁰

Similarly, Aboriginal laws underpin the social, cultural and familial order of relationships and the obligations expected by the individual and the collective group and Aboriginal laws are held as the ‘cornerstone’ of Aboriginal society. As the previous chapters have shown, Aboriginal values and concepts, and the use of water resources among Aboriginal communities requires a nuanced approach to incorporating Aboriginal water requirements into statutory framework.

Aboriginal water management practice incorporates more than utility notions about the use of water.¹²⁹¹

Cultural practices relating to water ... include talking to country, ‘watering’ strangers and others, restrictions on behaviour and activities, protecting others from harm and management and protection of sites. These practices are a consequence of more recent remembered and unremembered ancestors, or ‘old people’, returned to their countries as spirits. The animating spirits that become children are also believed to enter their mothers from water ... rivers and creeks, and their associated features, including gorges, waterfalls, plunge pools,

papers/documents/2004/speeches%20national%20water%20initiative%20mcfarlane%20november%202004.pdf>. Paper presented at the National Water Conference, Sydney.

¹²⁹⁰ Emilio Santoro, ‘The Rule of Law and the Liberties of the English: The Interpretation of Albert Venn Dicey’ in Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer, The Netherlands, 2007) 155-156.

¹²⁹¹ Bryan Bruns, ‘Water Tenure Reform: Developing an Extended Ladder of Participation’ (2003) *University of South Australia 2* <<http://www.bryanbruns.com/bruns-ladder.pdf>>.

waterholes, billabongs and springs ... groundwater-base flows ... seasonally inundated swampy areas.¹²⁹²

A Western Australian State Government Committee pointed out that ‘the utilisation of Traditional Ecological Knowledge (TEK) was emerging as a valid mainstream management tool,’¹²⁹³ and that Western knowledge should ‘recognise diversity in and between Indigenous communities in the process of applying Indigenous knowledge and traditions’.¹²⁹⁴

Australian water policy fails to incorporate the breadth of Aboriginal water knowledge and the context of this knowledge, such as seasonal foods sourced from the knowledge of Aboriginal weather cycles, water connectivity across the landscape, customary fishing and eel trapping or fire farming practices. For example, Aboriginal communities’ use of spring water in preparing numerous Aboriginal medicines requires that no other type of water may be used.¹²⁹⁵ The central conflict in water policy for Aboriginal water use results from the fact that Aboriginal rights or interests are categorised into economic or non-economic interests.

Jakeman, Letcher and Chen (2007) argue that the use of an ‘integrated assessment of the interconnected issues surrounding water allocation with the integration of stakeholder water demands may resolve allocation issues’.¹²⁹⁶ The authors considered the

¹²⁹² David Cooper and Sue Jackson, ‘Preliminary Study on Indigenous Water Values and Interests in the Katherine Region of the Northern Territory’ (‘Research Report’, Commonwealth Scientific and Industrial Research Organisation, Sustainable Ecosystems, March 2008) 4.

¹²⁹³ Working Group for Advancing Indigenous Reconciliation in Primary Industries and Natural Resource Management, ‘Key Issues: Indigenous Employment and Engagement in Natural Resources Management and Primary Industries’ (‘Draft Report’, 2008) 4.

¹²⁹⁴ Ibid 14.

¹²⁹⁵ Virginia Falk personal communication with Frances Bodkin, 2006. During cultural education about the preparation of Aboriginal medicines of the D’harawal peoples.

¹²⁹⁶ Tony Jakeman, Rebecca Letcher and Serena Chen, ‘Integrated Assessment of Impacts and Water Allocation Changes across Social, Economic and Environmental Dimensions’ in Karen Hussey and Stephen Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges* (Commonwealth Scientific and Industrial Research Organisation, 2007) 97-98.

[i]ntegration of knowledge from different disciplines with the goal to contribute to understanding and solving complex societal problems, that arise from the interaction between humans and the environment, and to contribute in this way to establishing the foundation for sustainable development.¹²⁹⁷

The Indigenous Actions under the National Water Initiative should be subject to the scrutiny of human rights standards to examine whether the complex needs of Aboriginal communities are met. Because water rights and interests of Aboriginal communities are not consistently implemented across the states and territories, a benchmark of human rights standards is required. The access to and use of water by Indigenous peoples is recognised as an international human right, as chapter 9 will examine.

The Aboriginal and Torres Strait Islander Commission raised their dissatisfaction with the lack of engagement with Aboriginal rights and interests in water reform:

The impending implementation of these water management plans, as they stand, will have significant impact on Aboriginal rights and interests in the waters of those catchments. Aboriginal communities throughout New South Wales are requesting more time to allow for effective discussion and feedback on the Catchment Blueprint Documents. I am advised by my constituents that this situation in New South Wales is a consequence of the failure of the Water Reform Agenda nationally, to take Indigenous interests into consideration from an early stage.¹²⁹⁸

The legislated Water Sharing Plans in New South Wales were not afforded any level of Aboriginal consultation because community consultation was considered ‘time-

¹²⁹⁷ Ibid.

¹²⁹⁸ Letter from Geoff Clark to Bob Carr, 2 April 2004. A letter from the Aboriginal and Torres Strait Islander Commission, Canberra.

consuming' in the view of the New South Wales Cabinet.¹²⁹⁹ Instead the New South Wales Government expedited the draft water legislation through the parliament.¹³⁰⁰

During New South Wales Water Sharing Planning workshops, Aboriginal participants agreed that the government was not prepared to listen to Aboriginal community views on the planning process for Aboriginal water allocation.¹³⁰¹ The community participants argued that the government prioritised legislative protection for other interest groups above that of Aboriginal peoples, prioritising agricultural, industrial and town use.¹³⁰² The economic rights to water were not clarified at the Planning workshop.

The issue whether Indigenous rights to inland waters includes commercial rights is still undetermined, but there are clear precedents overseas that it should include such rights.¹³⁰³

Jackson (2008) argues that 'in spite of national water reforms in Australia the process had not provided Aboriginal peoples with consultation or information on water sharing plans'.¹³⁰⁴ According to the Commonwealth Scientific and Industrial Research Organisation, 'not one Aboriginal person knew about the water reforms in rural and remote communities'.¹³⁰⁵

Murray Radcliffe, a member of the National Water Commission, noted that 'the Indigenous actions in the National Water Initiative Agreement cannot be changed',

¹²⁹⁹ Virginia Falk personal communication with Jennifer Whitmore, Senior Officer, Cabinet Taskforce, Water Reform Policy, NSW Government, 2006. Communication took place at the Department of Natural Resources (NSW) Parramatta.

¹³⁰⁰ Ibid.

¹³⁰¹ Virginia Falk, participation in the State Water Sharing Workshops, Department of Natural Resources (NSW), 2006-2007. The author attended the state workshops as the Executive Officer of the NSW Aboriginal Water Trust.

¹³⁰² Ibid.

¹³⁰³ Jill Windle and John Rolfe, 'Natural Resource Management and the Protection of Aboriginal Cultural Heritage' ('Occasional Paper', No 5, Institute for Sustainable Regional Development, Queensland Government, 2002) 6.

¹³⁰⁴ Sue Jackson, 'Panel Discussion' (Speech delivered at the Garma Indigenous Water Knowledge, Indigenous Water Interests Conference, Gove Northern Territory, 7 August 2008).

¹³⁰⁵ Ibid.

however, ‘they can be added to later’.¹³⁰⁶ The National Water Commission has not indicated when any future amendment may occur.

According to Jackson and Morrison (2007) the current ‘gap’ in Aboriginal water allocation is the absence of a methodology:

We have no current overview of the various methods and means of identifying and incorporating Indigenous objectives within Australian water planning ...¹³⁰⁷

Australian water management has become more complex because the competition over water use between irrigators, farmers, and the mining industry and water corporations is centred upon water trading. Aboriginal rights and interests are not considered a major stakeholder in Australian water policy and this is unacceptable. There is no legal certainty with the allocation of Aboriginal water rights except where native title is determined. The cultural water rights of Aboriginal peoples are treated less favourably than the rights of other water users.

Tan (2002) suggests that governments may incur future legal action from stakeholders because of inadequate policy and legislation:

[w]ater agencies and their political masters were extremely vulnerable to litigation. They were prepared to make decisions that would affect availability of resources in the long term, not to mention adverse environmental impacts, for short term political gain.¹³⁰⁸

¹³⁰⁶ Murray Radcliffe, ‘Strategic Development for Future Indigenous Dialogue and Engagement at the National Level’ (Speech delivered at the Australian Indigenous Water Forum Focus Group, National Water Commission, Adelaide South Australia, 18 November 2008).

¹³⁰⁷ Sue Jackson and Joe Morrison, ‘Indigenous Perspectives in Water Management, Reforms and Implementation’ in Karen Hussey and Stephen Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges* (Commonwealth Scientific and Industrial Research Organisation, 2007) 7.

¹³⁰⁸ Poh-Ling Tan, ‘An Historical Introduction to Water Reform in NSW – 1975 to 1994’ (2002) 19 *Environmental and Planning Law Journal* 451.

Donna Craig (2005) suggests that Aboriginal cultural rights in water share common characteristics among Aboriginal communities:

[t]he broad characteristics of the law relating to water sites described here are common throughout Australia.¹³⁰⁹

According to Jackson and Morrison (2007), various issues need to be addressed in establishing Indigenous water interests under the National Water Initiative Agreement because there is a significant ‘knowledge gap’ among governments on how to meet Indigenous water rights and interests. Issues identified are

[l]imited knowledge of the means of addressing Indigenous water requirements; the degree of technical difficulty; the lack of capacity in the Indigenous community; the impediments posed by uncertainty; and contestation and lags in native title claims processes.¹³¹⁰

The most significant failing of the National Water Initiative is that Indigenous Actions are discretionary for all jurisdictions.¹³¹¹ The discretionary nature of these ‘actions’ narrows the outcomes for Indigenous water policy and creates uncertainty regarding Aboriginal water rights and interests in Australia.

The significance of the ‘social processes to protect, maintain and enhance relationships with the river system’ has been ignored.¹³¹² The understanding of Aboriginal peoples’ relationships with water should be analysed from an Aboriginal ontological position and not from an Australian concept of water policy. Jackson identifies that Aboriginal water values are more than a ‘cultural value’ or an ‘environmental value’:

¹³⁰⁹ Donna Craig, ‘Indigenous Property Rights to Water: Environmental Flows, Cultural Values and Tradeable Property Rights’ (2005) *Macquarie University* (‘Unpublished essay’) 14.

¹³¹⁰ Sue Jackson and Joe Morrison, ‘Indigenous Perspectives in Water Management, Reforms and Implementation’ in Karen Hussey and Stephen Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges* (Commonwealth Scientific and Industrial Research Organisation, 2007) 3.

¹³¹¹ *Ibid* 2.

¹³¹² Sue Jackson, ‘Compartmentalising Culture: The Articulation and Consideration of Indigenous Values in Water Resources Management’ (2006) 37(1) *Australian Geographer* 29.

[t]he implicit dichotomy between the material (e.g. environmental, economic) and a separate symbolic sphere of meaning (belief and value), otherwise understood as cultural, relegated Aboriginal interests to a realm of negligible significance to the political economy of regional agricultural development and marginalised them with environmental research and action ... it should be analysed as a socio-cultural process¹³¹³

Jackson (2006) identifies in her research on 'Indigenous values for water resource management' in the Northern Territory, that the Territory's water legislation defines environmental values as comprising seven categories, including generic social and 'cultural values'.¹³¹⁴

In the *Water Act 2004* (NT) there is a definition of a generic cultural value, expressed as 'water to meet aesthetic, recreational and cultural needs'. The water legislation does not include Aboriginal cultural values in any of the seven definitions under the environmental and cultural values of water.

Jackson explains that Aboriginal water management in the Northern Territory represents more than is included in these Western definitions:

Every aspect of water as a phenomena and physical resource as well as the hydro morphological features it creates is represented and expressed in the languages of local Aboriginal cultures: mist, clouds, rain, hail, seasonal patterns of precipitation, floods and floodwater, river flows, rivers, creeks, waterholes, billabongs, springs, soaks, groundwater and aquifers, and the oceans (saltwater).¹³¹⁵

¹³¹³ Ibid.

¹³¹⁴ Ibid 21.

¹³¹⁵ David Cooper and Sue Jackson, 'Preliminary Study on Indigenous Water Values and Interests in the Katherine Region of the Northern Territory' ('Research Report', Commonwealth Scientific and Industrial Research Organisation, Sustainable Ecosystems, March 2008) 26.

The broad reference to ‘cultural needs’ under the *Water Act 2004* (NT) is a further example of the lack of recognition of Aboriginal water values and use. The concept of Aboriginal water use is included as a generic cultural value under the legislation.

The Northern Territory Government has also been slow to address domestic water access and use, as well as business or economic development in water and the development of Water Allocation Plans.¹³¹⁶ The National Water Initiative has significant policy gaps regarding Aboriginal water rights and interests because of the discretionary nature of the Indigenous clauses.¹³¹⁷

An essay by Ronald Berndt (1998), an eminent anthropologist, recognises the consequence of dismissing the significance of Aboriginal cultural values:

Land, and what it means in socio-personal terms, continues to remain significant. When land is alienated, its natural resources depleted, its physiographic features destroyed, this irrevocably harms not only the trappings of belief but, without doubt, traditional religion as such ... Whilst ownership was thrown into doubt from the earliest European settlement, there was no doubt among the Aborigines themselves.¹³¹⁸

The National Water Initiative Agreement does not represent the profound context of Aboriginal laws and the beliefs or values expressed because these laws are founded on the conviction that water cannot be separated from land:

¹³¹⁶ Email David Collard to Virginia Falk on Virginia Simpson, 13 November 2007.

¹³¹⁷ Ibid.

¹³¹⁸ Ronald M Berndt, ‘A Profile of Good and Bad in Australian Aboriginal Religion’ in *Religious Business: Essays on Australian Aboriginal Spirituality*, Max Charlesworth (ed), (Cambridge University Press, 1998) 42-43.

Land tenure is not a neutral ingredient: it is pervasive and the question is whether it encourages a positive or a negative expression of the human relationship with place.¹³¹⁹

Jackson, Storrs and Morrison (2005) argue that industry and government planning have significantly altered the Aboriginal landscape and the water systems, undervaluing the millennia of Aboriginal laws and kinship.¹³²⁰ The inclusion of Aboriginal water interests in Australian water policy is inconsistent among the states and territories because the Commonwealth Bilateral Agreements only require governments to ‘account for’ Aboriginal water requirements.¹³²¹

The National Water Initiative does not deal with Aboriginal ownership in water, apart from ‘taking into account water for native title use’. The national water policy and legislation remains a barrier for Aboriginal peoples if they seek to pursue Aboriginal economic or cultural rights in water use. Water has become a new property interest and the commercial benefits in water trading and water licences appear to exclude certainty for Aboriginal communities. Instead, profitable water assets such as water trading have developed new property rights for industry, farmers, pastoralists and water companies.

From the commencement of national water reform policy in the 1990s, Aboriginal water rights and interests were not included in the policy framework. Nearly a decade later, Aboriginal water rights and interests emerged as a footnote to the national water plan. The lack of formal and meaningful consultation by governments with Aboriginal communities has resulted in a significant policy gap for Aboriginal water values and community water needs.

¹³¹⁹ Peter Knight, *Land Tenure and Relationship to Place: An Essay Uniting Spatial, Political, and Spiritual Themes in the Formulation of a PhD Topic* (28 June 2008) Department of Surveying, University of Otago <http://www.business.otago.ac.nz/SIRCO5/conferences/2000/14_knight.pdf>.

¹³²⁰ Sue Jackson, Michael Storrs and Joe Morrison, ‘Recognition of Aboriginal Rights, Interests and Values in River Research and Management: Perspectives from Northern Australia’ (2005) 6(2) *Ecological Management and Restoration* 106-107.

¹³²¹ Working Group for Advancing Indigenous Reconciliation in Primary Industries and Natural Resource Management, ‘Key Issues: Indigenous Employment and Engagement in Natural Resource Management and Primary Industries’ (‘Draft Report’, 2008) 2.

In relation to allocating future water resources, it is unlikely that Aboriginal ownership or perpetual water rights for Aboriginal communities will be included in the same way as legal certainty has been provided to other stakeholders. On this basis, it is clear that Aboriginal organisations and communities will be unable to participate and enjoy the benefits of these water reforms because of non-tradeable Aboriginal water licences and the over-allocation of water resources to other stakeholders.

Gleeson CJ has argued that ‘the next legal battleground for Australia will be water’.¹³²²

If someone asked me to predict – and said it was income tax 30 years ago, and it is immigration cases now – I would say in 30 years from now it will be water ... When there is an important topic of public policy and the likelihood of government regulation, then lawyers are likely to get involved, too.¹³²³

The prediction of Gleeson CJ may indicate the potential for litigation in the future where the development of public policy and legislation has not adequately addressed water issues. The following case study from Western Australia is examined to highlight the Aboriginal issues which arise under the National Water Initiative and how the Australian Government’s water policy framework has been dealt with by Western Australia.

8.4 A Case Study: Aboriginal Water Rights in the Consumptive Pool

The Draft Water Resources Management Bill (WA) (‘Draft Water Bill’) is modelled on the *Water Management Act 2000* (NSW).¹³²⁴ Section 55 of the *Water Management Act 2000* (NSW) was adapted for the Western Australian Draft Water Bill, under instructions by the Department of Water ‘to limit water use’.¹³²⁵

¹³²² Jonathon Pearlman, ‘Water Will be the Next Big Battleground, says Chief Justice’, *The Sydney Morning Herald*, (Sydney), 11 February 2008.

¹³²³ Ibid.

¹³²⁴ Virginia Falk, personal communication with the Department of Water (WA), November 2007.

¹³²⁵ Email from David Collard to Virginia Falk, State Solicitor’s Office (WA), ‘Water Resources Management Bill and Water Entitlements and their Administration’, 18 April 2008, 16.

The Draft Water Bill provides a broad definition of water resources:

[a]ll waterways, wetlands, aquifers and groundwater, and all surface or overland flow; adding spring water flowing to the surface on private land, water in privately owned wetlands, and all floodplain and overland flow.¹³²⁶

The Draft Water Bill does not account for Aboriginal cultural and spiritual rights and interests in the proposed legislation and there is no inclusion of any economic water value for Aboriginal peoples under the proposed statutory provisions.

The Bill recognises that native title holders are defined for the purposes of the *Native Title Act 1993* (Cth) as follows:¹³²⁷

[n]ative title means a non-exclusive right to take and use water for personal, domestic and non-commercial communal purposes (including the purposes of drinking, food preparation, washing, manufacturing traditional artefacts, watering domestic gardens, hunting, fishing and gathering and recreation, cultural and ceremonial purposes).¹³²⁸

In drafting the new legislation, the Western Australian Government was reluctant to include native title rights at all:

A question has arisen should the rights under the proposed Water Resources Management Bill be extended to the registration of Native title interests? If rights are to be extended, the Legislation Reform Branch will require a written policy position on this issue that outlines the justification for this position.¹³²⁹

¹³²⁶ Ibid 9.

¹³²⁷ Ibid 16.

¹³²⁸ Ibid.

¹³²⁹ Email from David Collard to Virginia Falk on Vic Fazakerley, David Collard and Paul Rosair, 26 August 2008. In accordance with Australia's *Copyright Act 1968* (Cth) under the Act's 'fair dealing' provisions for research and study, this research thesis in its entirety does not infringe copyright.

The legal instruction for the Draft Water Bill was centred upon non-Aboriginal rights and interests, with ‘a default policy position to maintain the status quo for the consumptive pool regime’.¹³³⁰ The consumptive pool incorporates all water users in a competitive market-place where pricing is driven by the economic utility values of ‘supply and demand’.¹³³¹

The primary policy position of the Northern Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, which represents Aboriginal water interests in northern Australia states:

It is imperative that Indigenous people are allocated rights to the consumptive pool, to ensure that we are not further marginalised.¹³³²

The consumptive pool includes all water stakeholders with an interest in water. The legal advice for the Draft Water Bill, sought to minimise the legal rights of Aboriginal communities:

[t]he Minister may restrict native title rights to take water or to protect a water resource and its dependent ecosystems.¹³³³

Further, advice on the Draft Water Bill identified a process to quantify water use under native title rights:

[i]t would be unusual for a determination of native title to specify the maximum amount of water that could be taken or used by native title holders, for instance under section 211(2)(a) of the *Native Title Act*.¹³³⁴

¹³³⁰ Email from David Collard to Virginia Falk, State Solicitor’s Office (WA), ‘Water Resources Management Bill and Water Entitlement and their Administration’, 18 April 2008, 1.

¹³³¹ Ibid.

¹³³² Northern Australian Indigenous Land and Sea Management Alliance, ‘Indigenous Water Policy Group to take an Indigenous Position on Water to the 2020 Summit’ (Media Release, 18 April 2008) 1.

¹³³³ Email from David Collard to Virginia Falk, State Solicitor’s Office (WA), ‘Water Resources Management Bill and Water Entitlements’, 18 April 2008, 16.

The Western Australian State Solicitor considered that ‘the recognition of common law rights and interests in inland waters¹³³⁵ was settled after the High Court decision in *Western Australia v Ward*’ where ‘the Court determined that the state held exclusive possession’.¹³³⁶

[t]he vesting of the right to the use, control and management of inland waters in the Crown under the *Rights in Water and Irrigation Act 1914* (WA) have put to rest any possibility of exclusive rights ...¹³³⁷

Under the *Rights in Water Irrigation Act 1914* (WA) vesting rights in the State were recognised as follows:¹³³⁸

[t]he right to the use and flow, and to the control, of the water [in various natural water resources] vests in the Crown except where specified in other legislation.¹³³⁹

The Department of Water proposed that the draft water legislation identify the provision for native title holders:

Subject to there being sufficient unallocated capacity in the system, a maximum of 5% of the water resources identified in the water resource allocation plan as being available for consumption on land subject to native title is to be reserved for use.¹³⁴⁰

¹³³⁴ Email from David Collard to Virginia Falk, State Solicitor’s Office (WA), ‘National Water Initiative: Indigenous Access and Entitlement Rights’ 12 December 2007, 9.

¹³³⁵ Ibid 8.

¹³³⁶ *Western Australia v Ward* [2002] 213 CLR 1, 263 (Gleeson CJ, Gaudron, Gummow and Hayne JJ)

¹³³⁷ Email from David Collard to Virginia Falk, State Solicitor’s Office (WA), ‘National Water Initiative: Indigenous Access and Entitlement Rights’, 12 December 2007, 8.

¹³³⁸ Email from David Collard to Virginia Falk, State Solicitor’s Office (WA), ‘Water Resources Management Bill and Water Entitlements’, 18 April 2008, 16.

¹³³⁹ Ibid 9-16.

¹³⁴⁰ Email from David Collard to Virginia Falk, 7 January 2009. In accordance with Australia’s *Copyright Act* 1968 (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

Under the Draft Water Bill, where native title holders seek to exercise a water right under the *Native Title Act 1993* (Cth), the draft proposes that, if the taking of water exceeds the volume specified, a penalty is likely to be incurred by the native title holder.¹³⁴¹

The legal definitions in the Draft Water Bill are ambiguous, notably where it is stated that ‘allocation’ means the ‘bucket of water’ attached to a water licence or a water access entitlement.¹³⁴² The draft legislation also defines a ‘water access entitlement’ under the Water Sharing Plans to mean ‘where a consumptive pool may exist or a consumptive pool that cannot be defined’.¹³⁴³

The legal advice provided to the Western Australian Government also raised the potential issue that ‘if the amount of water in the native title determination was quantified and statutory legislation or regulations prescribed a cap on taking, then *prima facie* the native title holder may require a licence to exercise a right beyond the prescribed amount’.¹³⁴⁴

Aboriginal communities in Western Australia were not consulted on the Draft Water Bill and this omission raises issues in how the state will recognise and implement Aboriginal water use.¹³⁴⁵ The government has sought to marginalise native title water requirements, and failed to include a methodology for Aboriginal consumptive water use and to address sharing water allocations within a geographically diverse state.¹³⁴⁶

Western Australia’s Department of Water developed proposals for statutory water plans without specific consultation with Aboriginal communities, hence without ascertaining the nature of Aboriginal water use and cultural ontological values.¹³⁴⁷ Aboriginal interests in water were not a government priority in Western Australia’s water policy reform.

¹³⁴¹ Ibid.

¹³⁴² Email from David Collard to Virginia Falk, State Solicitor’s Office (WA), ‘Water Resources Management Bill and Water Entitlements’, 18 April 2008, 38.

¹³⁴³ Ibid 29.

¹³⁴⁴ Ibid 9.

¹³⁴⁵ David Collard, personal communication with Virginia Falk, December 2008.

¹³⁴⁶ Ibid.

¹³⁴⁷ Memorandum from David Collard to Virginia Falk, 5 June 2008. The communication was in relation to a briefing by Virginia Falk (Marshall) to Department of Water (WA) on Indigenous interests in the water reform process with respect to the Water Resources Management Bill.

Further, the Department of Water (WA) considered that allocating water rights to Aboriginal peoples was ‘discriminatory’ to other water stakeholders,¹³⁴⁸ claiming that

[a] reserve of water rights for Aboriginal peoples would be discriminatory for other stakeholders and would create a precedent. The National Water Initiative is to drive water entitlements not a reserved allocation. The Water Trust model initiated in New South Wales is considered a welfare model. The allocation of water via water licences to Aboriginal peoples would be seen as discriminatory to other stakeholders. Allowing Aboriginal cultural values in water *in situ* means where water allocation is currently held by other stakeholders and not a transfer for Aboriginal peoples.¹³⁴⁹

David Collard, the then Indigenous Affairs Co-ordinator with the Department of Water of Western Australia, highlighted the lack of government engagement in allocating water for Aboriginal peoples:

The Western Australian government have watered down Aboriginal rights and interests ... COAG Reconciliation Committee didn’t address water or resources for Aboriginal peoples ... Government will look at how much it will cost them and not Aboriginal peoples ... There is no budget for Aboriginal consultation for Aboriginal engagement.¹³⁵⁰

The Western Australian Government had commissioned me to conduct a State water policy review for identifying Indigenous water requirements. The report I submitted, ‘Indigenous Access to Water in Australia’ (2008), made recommendations to the Department of Water (WA): it recommended the reserve of water allocations for

¹³⁴⁸ Email from David Collard to Virginia Falk, 17 February 2009. The email was in relation to a briefing by Virginia Falk (Marshall) to Department of Water (WA) on Indigenous interests in the water reform process with respect to the Water Resources Management Bill.

¹³⁴⁹ Ibid. The expression ‘in situ’ was confirmed by David Collard with the Department of Water (WA). The email was in relation to a briefing by Virginia Falk (Marshall) to Department of Water (WA) on Indigenous interests in the water reform process with respect to the Water Resources Management Bill.

¹³⁵⁰ David Collard, ‘Panel Discussion’ (Speech delivered at the Australian Indigenous Water Focus Group, National Water Commission, Adelaide South Australia, 18 November 2008).

Aboriginal water use outside the consumptive pool.¹³⁵¹ The terms of reference of the report were to take into account the range of water rights and interests of Aboriginal communities and to identify how to incorporate Aboriginal water rights and interests into the State water policy for the proposed Draft Water Bill.¹³⁵² However, the Western Australian Government has deferred further action on Indigenous water allocations or entitlements and the Water Bill remains in limbo.¹³⁵³

The Draft Water Bill recognises the legal definition of ‘first rights’ water use for non-Aboriginal water licence holders, stating that where a person explores for water, their licence ‘takes priority over a person applying for a licence to take water’.¹³⁵⁴ A water exploration licence holder is afforded greater certainty than Aboriginal water users.

The proposed ‘first rights’ provision under the Bill was drafted

[t]o protect people who conduct their own investigations for water resources to allow them the first rights to water they have spent time and money in exploring for, over another person who has not done the work for determining the nature of a water resource.¹³⁵⁵

An inconsistency in the Draft Water Bill is that certainty is provided for the exploration of water in ‘first rights’, a non-exclusive right and based upon the financial investment expended by the licence holder. Under the Water Bill a native title holder may hold an exclusive or non-exclusive right to water under the *Native Title Act 1993* (Cth), but the Bill seeks to narrow the exercise of those rights.

The Virginia Simpson Report (2007) argues that Aboriginal participation, in view of the national water reforms, is minimal under the Draft Water Bill, and points out that the

¹³⁵¹ David Collard, personal communication with Virginia Falk, 17 February 2009.

¹³⁵² Ibid.

¹³⁵³ Ibid.

¹³⁵⁴ Email from David Collard to Virginia Falk, State Solicitor’s Office (WA), ‘Department of Water, Western Australia, Water Resources Management Bill and Water Entitlements’, 18 April 2008, 32.

¹³⁵⁵ Ibid.

economic water use for Aboriginal communities was not included in the draft legislation.¹³⁵⁶ Further, the report identifies a lack of progress in the delivery of water services to discrete Aboriginal communities, and points out that the dormancy of Aboriginal participation in Water Sharing Plans was exacerbated by the legislative delay of the Draft Water Bill.¹³⁵⁷

According to the Simpson Report, ‘the consideration of water use for economic purposes in Aboriginal communities is considered a competing threat by governments and non-Aboriginal stakeholders.’¹³⁵⁸ The Western Australian Government was provided with commissioned policy advice in the ‘Indigenous Access to Water in Australia’ Report (2008) to set aside a reserved water right for Aboriginal peoples, in order that Aboriginal communities are not exposed to unfair competition in the consumptive pool.¹³⁵⁹ The state government has not considered incorporating a reserved water allocation for Aboriginal communities outside the consumptive pool.

The approach taken by the Western Australian Government to account for Aboriginal water rights and interests illustrates the weakness of provisions of the National Water Initiative Agreement. The discretionary nature of the National Water Initiatives does not provide certainty for Indigenous access to and use of water resources. The legal instructions provided to the government on Aboriginal rights and interests regarding water seek to minimise the legal rights of native title holders and to narrow the cultural interests of Aboriginal communities. As at May 2014 the Draft Water Resources Management Bill has still not progressed in parliament and the absence of state legislation directly impacts on the ability of Aboriginal communities to access and use consumptive and non-consumptive water.

In drafting the water legislation, the Western Australian Government did not consult with Aboriginal communities within the state and does not take into account the range of

¹³⁵⁶ Email from David Collard to Virginia Falk on Virginia Simpson, 13 November 2007.

¹³⁵⁷ Ibid.

¹³⁵⁸ Virginia Simpson, ‘Aboriginal Access to Water in Australia’ (‘Draft Report’, 2007).

¹³⁵⁹ Virginia Falk, ‘Indigenous Access to Water in Australia’ (‘Report’, Department of Water, Western Australia, 2008).

Aboriginal water use exercised by Aboriginal communities, so as to include, for instance, the cultural context of water, the complex nature of the water landscape within Western Australia and the range of water requirements required by native title holders. This case study demonstrates the inconsistent implementation of the national water reforms and the gaps in the national legislation that allow the marginalisation of Aboriginal water rights and interests.

Chapter 9: Securing Aboriginal Water Rights through Human Rights

This chapter examines the relevance of human rights instruments for securing water rights for Aboriginal peoples in Australia and whether Aboriginal water rights and interests are adequately protected under these instruments under Australian water law and policy. The chapter is an integrated analysis of domestic and international human rights and reflects on how these standards and principles strengthen the thesis argument for Aboriginal water rights and interests to be recognised in Australian policy framework and water legislation and instruments as essential to reforming water management. It is the purpose of this chapter to examine human rights within an Aboriginal water discourse in an integrated analysis of domestic and international regimes and not as a chronological process.

The chapter also examines whether human rights regimes can effectively influence the domestic recognition and protection of basic guarantees of international human rights instruments, which assert the inherent right of Indigenous peoples to water resources.

9.1 The Framework of Aboriginal Water Rights as Human Rights

The preceding chapters have examined the limited recognition of Aboriginal peoples' rights and interests in water within various jurisdictions across Australia. The framework of water rights and interests for Aboriginal communities under the 'Indigenous Access' clauses of the National Water Initiative does not include the provision of human rights protection in the national reform framework.

Australian water legislation does not formally recognise the inherent nature of Indigenous water rights as platforms for cultural and economic development. In the absence of human rights principles for Indigenous peoples in the national water reform process, there

is a legal impediment to Indigenous peoples claiming water rights and asserting ownership of water resources on Aboriginal owned lands and Aboriginal interests in water.

Michael O'Donnell, in his report 'Indigenous Water Rights in Northern Australia' (2011), notes that 'Indigenous rights to water are seen as an incident of the principle of self-determination and not part of domestic Australian policy'.¹³⁶⁰ O'Donnell suggests that 'in terms of government water policy under the National Water Initiative and State and Territory water management legislation that there was a long way to go in meeting international standards for Indigenous participation'.¹³⁶¹

The right of Indigenous peoples to self-determination is affirmed under the United Nations Charter and other treaties, where many jurists consider it to be a customary norm, if not *jus cogens*.¹³⁶² While many disagree about what the terms 'peoples' and 'self-determination' mean, there is an international consensus that Indigenous claims should be recognised according to the principles of self-determination.¹³⁶³

International law before 1945 was not generally concerned with how Nation States treated individuals within their domestic sovereign borders; some exceptions were limited in scope.¹³⁶⁴ The process in reaching the ratification of international instruments is said to consist of 'slow processes and lengthy, complex drafting that is debated within ideological and political battlefields'.¹³⁶⁵ Although traditional international law existed

¹³⁶⁰ Michael O'Donnell, *NAILSMA TRaCK Project 6.2: Indigenous Rights in Water in Northern Australia* (11 August 2011) NAILSMA Tropical Rivers and Coastal Knowledge and Australian Government <<http://www.nailsma.org.au/nailsma/projects/downloads/TRaCK-6-2-Indigenous-Rights-in-Water-in-Northern-Australia-Final-Report-2.pdf>>.

¹³⁶¹ Ibid.

¹³⁶² See also Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2nd ed, 2000) 77. The authors discuss the rule of *jus cogens*, an early principle of international law, where a treaty could not override natural law. The modern revival of *jus cogens* means that states are not allowed to contract out of the 'peremptory norms of general international law'.

¹³⁶³ Anon, 'International Law as an Interpretive Force in Federal Indian Law' (2003) 116/1751 *Harvard Law Review*.

¹³⁶⁴ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995) 6-7.

¹³⁶⁵ Ibid 352.

before the adoption of the Charter of the United Nations (1945), the Charter's extensive body of international and regional human rights law expanded human rights doctrine.¹³⁶⁶ John Rawls' 'A Theory of Justice' (1971) was significant to inform the modern development of human rights, as Rawls's theory is said to have introduced 'principles of justice to define the rights and duties of universal citizenship'.¹³⁶⁷ In understanding the broader role of justice in defining water rights and interests of Indigenous peoples in Australia, the national framework of water policy and law would provide a more contextual analysis of Indigenous human rights. In relation to international human rights principles the enjoyment of substantive human rights for Indigenous peoples in Australia is explained by Erica-Irene A Daes, 'society and governments have to align in the right political and social climate to support a shared autonomy'.¹³⁶⁸

Not all human rights instruments articulate every facet of 'right or interest', for example, in the *International Covenant on Civil and Political Rights 1976* (ICCPR) 'the economic, social and cultural rights do not include the rights to property'.¹³⁶⁹ The literature review in Chapter 2 examines the failure of the Australian Government to engage in Aboriginal water rights and interests on any 'principle of justice, shared autonomy or in the creation of substantive rights' to access and use water based upon Aboriginal ontological water concepts.

The *United Nations Declaration on the Rights of Indigenous Peoples 2007* (UNDRIP) in Article 26 expresses an Indigenous entitlement to resources:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas,

¹³⁶⁶ Thomas Buergenthal, 'International Human Rights in an Historical Perspective' in Janusz Symonides (ed), *Human Rights: Concepts and Standards*, (UNESCO, 2000) 3-5, 31.

¹³⁶⁷ Ibid 46-52. In the book's chapter by Jerome Shestack at pp 31-61 Shestack examines Rawls's two principles of justice. The first principle on the position of 'rights and liberties', and the second principle on the conception of 'distributive justice'.

¹³⁶⁸ Erica Irene A Daes, 'Protection of the World's Indigenous Peoples and Human Rights' in Janusz Symonides (ed), *Human Rights: Concept and Standards*, (UNESCO, 2000) 301-308.

¹³⁶⁹ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995) 25.

sea-ice flora, fauna and other resources which they have traditionally owned and 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 upon these rights.¹³⁷⁰

In addition, Article 29 of UNDRIP¹³⁷¹ states:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property and have the right to special measures to control, develop and protect their science, technologies and cultural manifestations, including ... seeds, medicines, knowledge of the properties of fauna and flora, oral traditions ...¹³⁷²

The Rudd Federal Government endorsed UNDRIP¹³⁷³ and its influence on ‘*Closing the Gap*’ in response to the endemic disadvantage burdening many Aboriginal communities in Australia.¹³⁷⁴ Incorporation of these articles in developing water policy and legislation would duly recognise a legal right to water and extend beyond mere dialogue on Aboriginal values in water.

The most significant property value in Western land tenure is based upon ‘individual property ownership and the commercialization of Indigenous resources’ by non-

¹³⁷⁰ Douglas J R Moodie, *Aboriginal Maritime Title in Nova Scotia: An Extravagant and Absurd Idea?* (2003) 37(1) *University of British Columbia Law Review* 495, 497.

¹³⁷¹ *United Nations Declaration on the Rights of Indigenous Peoples 2007* (1 July 2011) <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

¹³⁷² Angie Shuter, ‘Scoping Paper for Te Puni Kokori: A Review of the Experiences Other States in the Development of *sui generis* Mechanisms for Protecting Traditional Knowledge’ (‘Scoping Paper’, Te Puni Kokori, February 2002) 15.

¹³⁷³ *United Nations Declaration on the Rights of Indigenous Peoples 2007* (1 July 2011) <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

¹³⁷⁴ Murray Radcliffe, ‘International Perspective’ (Speech delivered at the Australian Indigenous Water Focus Group, National Water Commission, Adelaide, South Australia, 18 November 2008).

Indigenous interests.¹³⁷⁵ The intrinsic nature of Western property values is based upon individual rights whereas Aboriginal rights and interests are collective rights which attach to Aboriginal ontological water concepts and relationships.

The cultural properties of indigenous peoples have been under ever increasing danger of theft, appropriation and exploitation... The right to collective ownership is for many indigenous nations an essential element of culture yet it is a right with little significance and standing in international and states' government laws.¹³⁷⁶

In the *United Nations Declaration on the Rights of Indigenous Peoples* (2007), Articles 25, 26 and 27 deal with the recognition and protection of water rights. For example, Article 25 states:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.¹³⁷⁷

In Article 25 it is made clear that the principles of intergenerational equity should be recognised and that Indigenous rights require protection so as to enable Indigenous peoples to 'develop and control' their water resources. This includes Aboriginal owned land and other tenure or Aboriginal occupation that is recognised under land rights legislation and native title, or under lease.

Further, Article 26 states:

¹³⁷⁵ Centre for World Indigenous Studies, *A Treaty between Indigenous Nations on the Protection of Cultural Property and Traditional Resource Rights: Asserting Indigenous Nation Sovereignty* (28 May 2004) Centre for World Indigenous Studies <<http://www.cwis.org/260fge/260tcptr.html>>.

¹³⁷⁶ Ibid.

¹³⁷⁷ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (1 July 2011) United Nations <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.¹³⁷⁸

Article 26(2)¹³⁷⁹ recognises that Aboriginal peoples have the right to control their resources, including water. In terms of Article 26(3) these resources are to be afforded legal recognition and protection by the nation-state, and Aboriginal peoples are to ‘exercise these rights as they see fit’.¹³⁸⁰ Article 27 states:

The States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources.¹³⁸¹

James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples, has reported upon ‘the status of human rights and fundamental freedoms of Indigenous peoples in Australia’, and observes that the recognition and application of these

¹³⁷⁸ Ibid.

¹³⁷⁹ Ibid.

¹³⁸⁰ Ibid.

¹³⁸¹ Ibid.

international law standards under the *United Nations Declaration on the Rights of Indigenous Peoples*¹³⁸² have not been followed by the Australian Government in reforming water management:

The strengthening of legislative and administrative protections for indigenous peoples' rights over lands and natural resources should involve aligning those protections with applicable international standards, in particular those articulated in the Declaration on the Rights of Indigenous Peoples ... the Declaration effectively rejects a strict requirement of continuous occupation or cultural connection from the time of European contact in order for indigenous peoples to maintain interests in lands, affirming simply that rights exist by virtue of traditional ownership or other traditional occupation or use.¹³⁸³

Anaya observes that the high threshold of evidential proof required under the Australian native title system is not a requirement for recognition under international legal standards. Within the context of this observation, the Special Rapporteur instructs that Australia's water legislation should recognise and protect Aboriginal rights to natural resources and that domestic legislation should be articulated using international human rights standards.

The Western commercial value of Aboriginal knowledge systems – for example, Aboriginal water knowledge, Aboriginal foods and the use of medicinal plants – has attracted significant interest from institutions because of the 'commercial research value' of Aboriginal knowledge. Since 2010 I have worked on a pro bono basis for Traditional Owners in the Kimberley region of Western Australia in negotiating and developing various stages of an Aboriginal medicine plant project and to ensure its unique Aboriginal knowledge use and world-wide patent rights are defended. Like Aboriginal plant and medicine knowledge, Aboriginal water knowledge can be vulnerable to unfettered exploitation by others if such knowledge has weak legal protection. The collation of

¹³⁸² *United Nations Declaration on the Rights of Indigenous Peoples* (1 July 2011) United Nations <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>. Article 25 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

¹³⁸³ James Anaya, Special Rapporteur, GA Agenda Item 3, 15th sess, UN Doc A/HRC/15/37Add.4 (1 March 2012) <<http://daccess-dds-ny.un.org/UNDOC/GEN/G10/138/87/PDF/G1013887.pdf?OpenElement>>.

Aboriginal water knowledge has the potential for commercialisation and exploitation by non-Indigenous entities and parties, for instance in the way Aboriginal knowledge in Aboriginal bush foods and Aboriginal art have been exploited.

According to the Northern Australian Land and Sea Management Alliance, ‘to maintain and strengthen Aboriginal peoples’ spiritual relationship with their traditional owned territories and water’ requires incorporating the *United Nations Declaration on the Rights of Indigenous Peoples* into Australia’s water management regime.¹³⁸⁴ Article 32.2 of the *Declaration*¹³⁸⁵ recognises the rights of Indigenous peoples to the commercial use and development of water on traditional territories, through the principles of self-determination of Indigenous rights.¹³⁸⁶ Article 32.2 of the *UN Declaration on the Rights of Indigenous Peoples* requires ‘free, prior and informed consent of Indigenous peoples such as for lands, water and resources. This right implies the right to recognise Aboriginal water knowledge and to determine the incorporation of Aboriginal knowledge in managing water resources.

The National Water Initiative and state and territory legislation do not currently comply with the international legal standards expressed in the *United Declaration on the Rights of Indigenous Peoples*. The *Declaration* points out that Aboriginal water rights are inherent primary rights in the stakeholder hierarchy and that Aboriginal water rights are unique, according to international human rights standards. If the Australian Government recognised Aboriginal water rights on this legal basis, then Aboriginal communities would exercise their water rights through a more effective system.

It is not appropriate for Aboriginal water rights to be recognised by the Australian government as merely rights of another stakeholder group. This policy approach has been adopted in the Murray-Darling Basin in relation to allocating the water rights and

¹³⁸⁴ Northern Australian Indigenous Land and Sea Management Alliance, *A Policy Statement on North Australian Indigenous Water Rights* (November 2009) Northern Australian Indigenous Land and Sea Management Alliance 1 <<http://nailsma.org.au/sites/default/files/Water-Policy-Statement-web-view.pdf>>.

¹³⁸⁵ *United Nations Declaration on the Rights of Indigenous Peoples* (1 July 2011) United Nations <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>. See Article 25 of this *Declaration*.

¹³⁸⁶ *Ibid*.

interests of industry, irrigators, agricultural production and the environment above that of Aboriginal peoples.

That the Australian Federal Government proposed to formally support the *United Nations Declaration on the Rights of Indigenous Peoples*¹³⁸⁷ was confirmed by Murray Radcliffe of the National Water Commission at the Indigenous Water Focus Group in Adelaide in 2008, prior to its formal announcement. However, the Australian Government has still failed to consult with Aboriginal communities on how to give effect to the *Declaration*, and other human rights standards, in reforming Australian water policy so as to fully recognise and protect Aboriginal rights and interests in water resources.

To increase the substantive rights of Aboriginal peoples, and to move away from political symbolism in policy development, it is required that the 'Indigenous Access' clauses of the National Water Initiative Agreement incorporate into Australian water policy and legislation the international standards expressed in the *Declaration*.¹³⁸⁸ Any reform to national water policy and law should also include culturally focussed research on recognising and developing Aboriginal water rights as a cultural and commercial right. A review of national water policy should also recognise how Indigenous communities seek to progress these opportunities in their respective communities.

Governments across Australia are recognising that there is a lack of co-ordination among government agencies in designing policies and programs and delivering services to Aboriginal communities. Governments are also recognising that categorising Aboriginal issues and addressing them individually, does not work.¹³⁸⁹

¹³⁸⁷ Tom Calma, 'UN Declaration on the Rights of Indigenous Peoples: Australia Should Sign', *Koori Mail* (Lismore), 24 September 2008, 27.

¹³⁸⁸ *United Nations Declaration on the Rights of Indigenous Peoples* (1 July 2011) United Nations <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>. See Article 25 of the *Declaration*.

¹³⁸⁹ Department of Aboriginal Affairs (NSW), 'Draft NSW Aboriginal Languages Policy' (2002) unnumbered.

The historic over-allocation of water resources by successive Australian governments was implemented without any regard to Aboriginal water rights or human rights. The rights and interests of Indigenous peoples have also been overridden in other areas of Australian policy.

Under section 109 of the Australian Constitution, the *Racial Discrimination Act* can operate to override any State or Territory legislation which contravenes its provisions ... it can be overridden by the express legislative intent of the Commonwealth Parliament, as happened with the 1998 *Native Title Act* Amendments. The Federal government does have the legislative power to fully incorporate its obligations under International Convention on the Elimination of Racial Discrimination.¹³⁹⁰

George Williams has emphasised that the *Racial Discrimination Act 1975* (Cth) has proven vulnerable to political policy change, where ‘the Act has been overridden twice in ten years’.¹³⁹¹

[i]n 1998 for native title and in 2007 for the Northern Territory Intervention, a federal law provided that if it was racially discriminatory it was to operate despite the Racial Discrimination Act.¹³⁹²

A proposal for a Federal Bill of Rights in Australia may provide more empowerment for the incorporation of water rights for Aboriginal peoples; however, Australia’s record on restricting the rights of Aboriginal peoples is well documented.

Hill J has proposed a Bill of Rights for Australia and highlighted that ‘Chapter III of the Australian Constitution was modelled on the provisions of Article III of the United States

¹³⁹⁰ National Human Rights Network, ‘Australian Non-governmental Organisations Submission to the Committee on the Elimination of Racial Discrimination’ (National Association of Community Legal Centres, January 2005) 14.

¹³⁹¹ George Williams, ‘Racist Premise of our Constitution Remains’, *The Sydney Morning Herald* (Sydney), 7 April 2009, 11.

¹³⁹² Ibid.

Constitution (1791); the Australian Constitution did not include the American model of entrenched rights¹³⁹³ because of ‘the rigidity of its constitutional framework and laws’.¹³⁹⁴

The fact [that] there is no real push for an enacted bill of rights in Australia may be the result either of apathy or satisfaction with the present system (or, which may be the same thing, at least no real dissatisfaction with it).¹³⁹⁵

Government opinion has generally dismissed the consideration of human rights in a constitutional instrument. The Australian Constitution is administrative in character whereas the United States Constitution expresses the role of government in a relationship with its citizens. Amar has summed up the American Constitution, saying:

[the] brevity and bluntness of the document and its intimate relation to the central narrative of the American people make it a brilliant focal point drawing together ordinary citizens ...¹³⁹⁶

The Federal Government initiated the National Human Rights Consultation in 2008 to call for public submissions on how human rights and responsibilities should be protected in Australian society.¹³⁹⁷ Submissions were to indicate society’s preference for a statutory Bill of Rights or Charter of Rights to frame and protect society.¹³⁹⁸ The Federal Government has confirmed that the United States Bill of Rights model, which is constitutionally entrenched, will not be considered.¹³⁹⁹

¹³⁹³ Justice Graham Hill, *Which Way to Damascus? A Bill of Rights or Chapter III of the Constitution* (30 June 2004) Federal Court Intranet <http://intranet.fedcourt.gov.au/upload_judges/judges/Damascus.htm>.

¹³⁹⁴ A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, London, first published 1885, 1908) 122-127.

¹³⁹⁵ Ibid.

¹³⁹⁶ Justice Ronald Sackville, *The 2003 Term: The Inaccessible Constitution* (30 June 2004) Federal Court Intranet <<http://intranet.fedcourt.gov.au/search97cgis/s97.cgi?Action=View&VdkVgwKey=%20>>.

¹³⁹⁷ New South Wales, *Charter of Rights Update*, Parl Paper No1/09 Gareth Griffith QC (January 2009) 1.

¹³⁹⁸ Ibid.

¹³⁹⁹ Ibid.

The most important feature of a charter is a provision requiring the courts to interpret legislation, wherever possible, in a way consistent with the charter's recognition of rights.¹⁴⁰⁰

The National Human Rights Consultation Committee, 'National Human Rights Consultation Report' (2009) indicates that from the 29,153 submissions there was support for a human rights act, and a random telephone survey had shown 87.4 per cent support for the introduction of a human rights act.¹⁴⁰¹ The 31 recommendations in the Human Rights Report also include the protection of civil and political rights and the possible inclusion of social and economic rights.¹⁴⁰²

The vulnerability of Aboriginal peoples has been amplified under the suspension or amendment of statutory legislation – for example, the Australian government's suspension of the *Racial Discrimination Act 1975* (Cth), which diminished the rights of Aboriginal peoples in Australia.¹⁴⁰³ This clearly demonstrates the limitations of international law principles even when these principles have been incorporated into domestic law.

Disparities between riparian nations – whether in economic development, infrastructural capacity, or political orientation – add further complications to water resources development, institutions, and management. As a consequence, development, treaties, and institutions are regularly seen as, at best, inefficient: often ineffective; and occasionally, as a new source of tensions themselves.¹⁴⁰⁴

¹⁴⁰⁰ Andrew Lynch, 'Judge Right on Rights', *The Australian* (Sydney), 20 March 2009, 28.

¹⁴⁰¹ National Human Rights Consultation Committee, 'National Human Rights Consultation Report' <<http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Documents/NHRCReport.pdf>>.

¹⁴⁰² Ibid.

¹⁴⁰³ See Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, Report No 117 (November 2011). In Chapter 10 of this report I provide a detailed analysis of these impacts upon Indigenous peoples.

¹⁴⁰⁴ Aaron T Wolf, *Transboundary Waters: Sharing Benefits, Lessons Learned* (27 March 2007) International Conference on Freshwater, Bonn 1 <http://www.water-2001.de/co_doc/transboundary_waters.pdf>.

Tom Calma, a former Aboriginal and Torres Strait Islander Social Justice Commissioner, commented that the question of Aboriginal rights ‘is left to the whim of government, where each jurisdiction in Australia has different procedural requirements’.¹⁴⁰⁵ In the development of native title legislation and case law, Australian governments have watered down the *Native Title Act 1993* (Cth) through statutory amendment. Without a modern treaty agreement with governments, the legal recognition of Aboriginal rights and interests in water, natural resources and land, remains tenuous.

Kirby J in the High Court decision in *Wik Peoples v Queensland*¹⁴⁰⁶ held that the recognition of property rights is central to domestic stability.¹⁴⁰⁷

[p]roperty rights of any kind are not fictional. They concern the interests of individuals. Where they involve estates or interests in land, their recognition and protection by the legal system is important to the social and economic stability and peace which is the function of the sovereign to protect and enforce.¹⁴⁰⁸

In reaction to the *Mabo v Queensland* [No 2]¹⁴⁰⁹ judgment, the Western Australian government passed the *Western Australian Act* in 1993 to provide a blanket extinguishment on native title, and to challenge the constitutional validity of the *Native Title Act 1993* (Cth).¹⁴¹⁰

[t]he Act purports to validate all grants of title to land made in Western Australia between the 31 October 1975 and 2 December 1993 ... to extinguish all native title in Western Australia existing immediately before the commencement of the Act and to create a substitute ‘rights of traditional usage ...’¹⁴¹¹

¹⁴⁰⁵ Aboriginal and Torres Strait Islander Commissioner, ‘Native Title Report 2008’ (Human Rights Commission, 2009) 69.

¹⁴⁰⁶ (1996) 187 CLR 1.

¹⁴⁰⁷ Ibid at 206.

¹⁴⁰⁸ Ibid.

¹⁴⁰⁹ (1992) 175 CLR 1.

¹⁴¹⁰ Stella Tarrant, *Biljabu and Others v the State of Western Australia* (5 June 2008) HCA; <<http://www.austlii.edu.au/au/journals/AboriginalLB/1994/13.html>>.

¹⁴¹¹ Ibid.

In the High Court *Western Australia v Commonwealth*¹⁴¹² decision, the Commonwealth asserted that the *Western Australian Act* was inconsistent with both s 10 of the *Racial Discrimination Act* and Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.¹⁴¹³

Genuine equality incorporates the notion of justice and the proposition that equality requires those in the same circumstances to be treated the same and those in relevantly different circumstances to be treated differently ... genuine equality, rather than being a project of eliminating difference, requires uniqueness to be preserved.¹⁴¹⁴

The Australian Government incorporated articles from the *International Convention on the Elimination of All Forms of Racial Discrimination* in the *Racial Discrimination Act 1975* (Cth) to entrench human rights and prohibit racial discrimination.¹⁴¹⁵ However, there is nothing that would protect Indigenous rights if the Australian Government were to decide to legislate on the basis of race to the detriment of Indigenous peoples, for example, the amendments in the *Native Title Amendment Act 1998* (Cth).¹⁴¹⁶

There is a plethora of international instruments in law intended to ‘urge’ nation States to provide international human rights standards for Indigenous Peoples and to ensure active Indigenous participation within all levels of water governance, management and use.

The Aboriginal cultural concept of waters, as with the land and resources, would however be misinterpreted by a range of Western trained professionals such as lawyers, anthropologists and the judiciary. The representatives of non-Aboriginal

¹⁴¹² *Western Australia v Commonwealth* (1995) 187 CLR 373. *Wororra Peoples v Western Australia* and *Biljabu v Western Australia* joined the Commonwealth against Western Australia.

¹⁴¹³ Stella Tarrant, *Biljabu v the State of Western Australia* (5 June 2008) <<http://www.austlii.edu.au/au/journals/AboriginalLawBulletin/1994/13.html>>.

¹⁴¹⁴ *Ibid.*

¹⁴¹⁵ Megan Davis and Hannah McGlade, ‘International Human Rights Law and the Recognition of Aboriginal Customary Law’ (‘Background Paper’ No 10, Law Reform Commission of Western Australia, March 2005) 21.

¹⁴¹⁶ *Ibid.*

interest groups to water, governments and the legal system itself have struggled under the ‘fragility of the legal concept of native title’ and Aboriginal water rights.¹⁴¹⁷

Aboriginal peoples in Australia do not hold entrenched constitutional rights to water resources and the legal recognition of Aboriginal water rights as an entrenched human right under Australian law has lacked any serious debate.

The implication for Aboriginal water rights in Australia under the proposed statutory federal model has been discussed by Wilcox J, who compares it with the entrenched rights in the Canadian *Constitution 1982, Charter of Rights and Freedoms*:¹⁴¹⁸

[p]ublic servants and parliamentary counsel [believed] that one of the great consequences of the Canadian Charter was that it effectively required Ministers, and their Departments, to build human rights values into the scheme of their draft bills.¹⁴¹⁹

Australian barrister Julian Burnside suggests that ‘Australian society is unaware of the standard of rights because our society assumes they exist’.¹⁴²⁰

Australians have a strong instinct for human rights. Although Australia does not have a written bill of rights, we have a shared sense that some ideals are basic to our society. Most of the basic elements of a constitutional democracy are found in our constitution, but others are taken for granted: we tacitly accept them as basic and inalienable.¹⁴²¹

¹⁴¹⁷ *Risk v Northern Territory* [2006] FCA 404.

¹⁴¹⁸ Justice Murray Wilcox, *Should Australia have a Bill of Rights?* (30 June 2004) Federal Court Intranet<<http://intranet.fedcourt.gov.au/search97cgi/s97.cgi?Action=View&VdkVgwKey=%20>>.

¹⁴¹⁹ *Ibid.*

¹⁴²⁰ Julian Burnside, *Watching Brief: Reflections on Human Rights, Law and Justice* (Scribe, 2007) 173.

¹⁴²¹ *Ibid.*

Burnside (2007) argues that the value judgements which found currency in Australian society during the Howard government, and were reflected in decreasing Australian support for the broad spectrum of human rights, has reinforced the notion of ‘otherness’.¹⁴²²

Australia’s human rights record has been seriously damaged by our treatment of refugees. It will not be repaired by the cinematic simplicities of Russell Crowe. Utilitarianism [was] used in the eighteenth century to justify slavery, in the nineteenth century to justify child labour, and in the twentieth century to justify the Nazi’s treatment of the Jews ...¹⁴²³

In 2006 Amnesty International Australia conducted a poll of 1001 voters by Morgan Research and reported that 61 per cent of people believed that a national Charter of Rights already operates in Australia.¹⁴²⁴

Aboriginal peoples in Australia lack the historic and contemporary legal recognition of their inherent sovereignty, and by the continued amendments to statutory and Commonwealth laws such as native title and the suspension of the *Racial Discrimination Act 1975* (Cth) it is clear that Aboriginal peoples have little control over their future. In the absence of a federal treaty that would legally recognise Aboriginal rights and interests since colonial settlement, there remains no historic relationship of negotiation between Indigenous peoples and the nation State.

The commodification of culture is a critical aspect of globalisation and has direct impact on Indigenous societies and ongoing survival of the local markets operating within them. Recent experience in Australia should highlight the fact

¹⁴²² Ibid 94.

¹⁴²³ Ibid.

¹⁴²⁴ George Williams, ‘A Court Short on Answers’, *The Australian* (Sydney), 26-27 January 2008, 29.

that rights that have been recognised in the past – native title and heritage protection – can be extinguished ...¹⁴²⁵

Richard Bartlett (2001), in summarising treaties and agreements negotiated in other common law countries, states:

The policy and practice in Canada is dramatically different from that in Australia. The Canadian policy of reaching settlements by agreement has worked ... The objectives of securing a bridge between traditional and contemporary approaches to development, and providing certainty and clarity for land and resource use and management, are being achieved ... such objectives are being achieved without the gross denial of equality, or the ludicrously wasteful expenditure of the processes of the Native Title Act.¹⁴²⁶

Dialogue on a Federal Charter of Rights or a Bill of Rights for Australia has provided the opportunity to debate and examine whether Australia's legal system incorporates the values of our times. In relation to Aboriginal water rights, the failure to have entrenched legal protection for Aboriginal peoples is also a primary reason for the continued uncertainty in law and policy planning. In this context the exercise of cultural and economic rights will continue to be problematic for Aboriginal communities.

9.2 The Impact of Human Rights Instruments: Issues for States and Territories

In the New South Wales town of Toomelah, Aboriginal peoples share one water tap with hundreds of other community members and Aboriginal children play in raw sewage.¹⁴²⁷

¹⁴²⁵ Jason De Santolo, 'Responses to the 'Sealord Deal': Fishing for Insights' (2004) 4 *Journal of Indigenous Policy* 64.

¹⁴²⁶ Richard Bartlett, 'Canada: Indigenous Land Claims and Settlements' in Brian Keon-Cohen (ed), *Native Title in the New Millennium* (Aboriginal Studies Press, 2001) 362.

¹⁴²⁷ Joel Gibson, 'Damming the River of Shame', *The Sydney Morning Herald* (Sydney), 3-4 January 2009 14.

Recognised minimum standards of international human rights have little effect on the status quo among rural and remote Aboriginal regions and are hardly improving the living standards of Aboriginal communities.

In its Annual Report on Aboriginal Community Water (2006), the New South Wales Aboriginal Working Group identified that ‘many Aboriginal communities have poor quality drinking water and deteriorated sewerage and water service infrastructure’.¹⁴²⁸ The Report highlighted the consistent presence of E. coli in the drinking water systems in Aboriginal discrete communities.¹⁴²⁹

In Australia, water is vested in governments that allow other parties to access and use water for a variety of purposes. The 1994 Council of Australian Governments’ water reform framework and subsequent initiatives recognised that better management of Australia’s water resources is a national issue.¹⁴³⁰

Earlier chapters in the thesis demonstrate that water requirements do require responsive management processes to allocate the available water resources during drought cycles and to ensure human consumption. However the thesis research identifies that Aboriginal communities in Australia have an inferior standard of water rights, water service delivery, water entitlements or allocations, water management and a limited representation within the National Water Initiative framework. Aboriginal concepts of water within an Aboriginal ontological framework have not featured in any prominence in this nation’s water paradigm.

¹⁴²⁸ New South Wales Aboriginal Community Water and Sewerage Working Group, ‘Aboriginal Community Water Supply and Sewerage Systems’ (‘Draft Report’, Department of Commerce NSW Sustainable Water Solutions, 2006) 5.

¹⁴²⁹ Ibid 23.

¹⁴³⁰ National Water Commission, ‘Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory’ (2004) Australian Government <http://nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>.

The United Nations articulates a concept of water resources within a natural resource paradigm which is governed by four dimensions: the social dimension is the equitable use of water and its distribution over the various sectors of society, the economic dimension is the efficient use of water resources and its role in overall economic growth, the political empowerment dimension is the application of democratic opportunities to influence and monitor political processes and outcomes; and the environmental sustainability dimension is when an improved water governance is achieved by increasing the quality of water flow to ecosystems, services, aquifers, wetlands and other habitats.¹⁴³¹

The United Nations declares access to water to be a human right.¹⁴³² The *International Labour Indigenous and Tribal Peoples Convention* (1989), ratified by 17 countries, expressed provisions for Indigenous control over natural resources in Article 15 of this Convention:¹⁴³³

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.¹⁴³⁴

Prominent principles of water resource management appear in various international instruments – for instance, in the Dublin Principles (United Nations 1991), the water policies of the World Bank (1993, 2003), and those of the Asian Development Bank (2001).¹⁴³⁵

¹⁴³¹ United Nations Educational Scientific and Cultural Organization, *The 2nd United Nations World Water Development Report: Water, a Shared Responsibility* (4 October 2006)

<http://www.unesco.org/water/wwap/wwdr2/table_contents.shtml>.

¹⁴³² Tamar Keirnan, 'Water Justice: Water as a Human Right in Israel' Gidon Bromberg (ed), ('Working Paper', No 15, Henrich Boll Stiftung, Friends of the Earth, Middle East March 2005), 1.

¹⁴³³ Erica Irene A Daes, *Preliminary Report on Prevention of Discrimination and Protection of Indigenous People: Indigenous Peoples' Permanent Sovereignty over Natural Resources*, E/CN.4/Sub.2/2003/20, 'UNESCOR', 55th sess. 'Agenda Item 5(b)', 21 July 2003, 5.

¹⁴³⁴ Ibid.

¹⁴³⁵ Stephen Garnett and Bev Sithole, 'Sustainable Northern Landscapes and the Nexus with Indigenous Health: Healthy Country Healthy People' ('Research Report', NTU07, Land and Water Australia, 2007) 35.

Larissa Behrendt (1995) has analysed the socio-economic status of Aboriginal peoples in Australia, and identified a lack of social and economic power to control or manage their affairs.¹⁴³⁶

The Aboriginal community has a low socio-economic position in Australia. This lack of social and economic power coupled with the small Aboriginal population means that its political power within the non-Aboriginal community is minimal. This lack of power should be noted in relation to the ability of Aboriginal people to have resources to deal with government, mining and pastoral interests.¹⁴³⁷

The polarisation of Aboriginal policy in state politics indicates that addressing the water rights and interests of Aboriginal peoples will be extremely challenging, in spite of human rights legislation.

Social welfare provided by government since the 1970s produces a revolutionary change in the Aboriginal economy ... Aboriginal people withdrew from participation in the real economy. Participation at the low end of the real economy was replaced by passive welfare. People came back home to work nominally in the institutional economy of the mission – an economy which was becoming more and more dependent on government funding.¹⁴³⁸

H C Coombs (1993) has argued that ‘the requirement of federation was to allay the conflict and metropolis-rural dichotomies between the States and the Commonwealth where Aboriginal people can be forgotten’.¹⁴³⁹

Gough Whitlam, former Prime Minister of Australia, has argued that human rights are central to Australian society:

¹⁴³⁶ Larissa Behrendt, *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy* (Federation Press, 1995) 39.

¹⁴³⁷ Ibid.

¹⁴³⁸ Noel Pearson, *Our Right to Take Responsibility* (Noel Pearson, 2000) 29-30.

¹⁴³⁹ H C Coombs, ‘Towards a New Federation’ in Essays of H C Coombs *Shame on Us! Essays on a Future Australia* (first published 1992, revised ed 1993) 32.

It is unfair and absurd that universally proclaimed human rights are not available in some Australian States and are differently expressed in those Australian States where they are available ... Human rights are more important than States' rights.¹⁴⁴⁰

The United Nations Water Development Report (2006) recognised that 'governance systems control the management and allocation of water'.¹⁴⁴¹

Water is power, and those who control the flow of water in time and space can exercise this power in various ways.¹⁴⁴²

The *Indigenous Peoples Kyoto Water Declaration* (2003) recognises the international law paradigm in Indigenous rights to water includes the ownership, control and management of lands, natural resources and traditional territory, the exercise of customary law, Indigenous representation in Indigenous institutions, the free prior and informed consent to land development and to control and share the benefits of traditional knowledge.¹⁴⁴³ The *Indigenous Peoples Kyoto Water Declaration* includes the 'right to self-determination that is exercised in full authority, control and as permanent sovereignty over water and other natural resources'.¹⁴⁴⁴

Former President of the Australian Human Rights Commission, Catherine Branson, argues that Australia's system of democracy has failed to protect human rights:

¹⁴⁴⁰ Gough Whitlam, *Abiding Interests* (University of Queensland Press, 1997) 92-93.

¹⁴⁴¹ United Nations Educational Scientific and Cultural Organization, *The 2nd United Nations World Water Development Report: Water, a shared responsibility* (4 October 2006) UNESCO <http://www.unesco.org/water/wwap/wwdr2/table_contents.shtml>.

¹⁴⁴² Ibid.

¹⁴⁴³ 'Indigenous Peoples Kyoto Water Declaration' Third World Water Forum, Kyoto Japan, March 2003, 2.

¹⁴⁴⁴ Ibid 1-2.

We have not been confident that our democratically elected representatives had the possible implications of the laws made clear to them ... for example, sedition laws, mandatory detention laws and the Northern Territory Response.¹⁴⁴⁵

Although both federal and state laws may recognise the existence of certain rights and protections in human rights, the mechanisms to implement human rights standards such as the right to water or the principles of self-determination for Aboriginal peoples cannot be presently enforced.

The *Human Rights Act 2004* (ACT), the first Bill of Rights in Australia, has no provision for Aboriginal peoples to claim land or waters such as native title; land title is held under Commonwealth leases in the territory.¹⁴⁴⁶

In the Preamble of the ACT Act there is recognition of Indigenous peoples which states, ‘although human rights belong to all individuals, they have special significance for Indigenous people, the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance’. The *Human Rights Act* should be viewed as supporting the special agreements already existing between Indigenous people ... for service delivery, land agreements and protection of other rights and development of protocols.¹⁴⁴⁷

In s 27 of the ACT Act (‘Rights of Minorities’) it is stated that ‘anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practice his or her religion, or to use his or her language’.¹⁴⁴⁸ There is no specific mention of Indigenous peoples and their rights under the legislation.

¹⁴⁴⁵ Catherine Branson, ‘Take Judges out of Human Rights Process’, *The Australian* (Sydney), 8 May 2009, 27.

¹⁴⁴⁶ National Human Rights Network, ‘Australian Non-governmental Organisations Submission to the Committee on the Elimination of Racial Discrimination’ (National Association of Community Legal Centres, January 2005) 13.

¹⁴⁴⁷ Australian Capital Territory Government, ‘Towards an ACT *Human Rights Act*: Report of the ACT Bill of Rights Consultative Committee’ (May 2003) 105.

¹⁴⁴⁸ *Human Rights Act 2004* (ACT) s 27.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) includes recognition of Aboriginal peoples and their status as ‘First Peoples’ and recognition of cultural rights. However, the jurisdiction of the *Charter* to hear a legal cause of action in relation to denying a right to water is untested.¹⁴⁴⁹

Section 19(2) (‘Cultural rights’) of the *Charter* states:

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community:

- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- (c) to maintain their kinship ties; and
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

In the Preamble of the *Charter* it is stated that ‘human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters’. The *Charter* covers a class of rights that are predominantly ‘civil and political rights’, based on rights in the *International Covenant on Civil and Political Rights*, to which Australia is a party.¹⁴⁵⁰

In Colmar Brunton’s research on the impact of the *Charter* the findings which are relevant to this thesis chapter are stated, that is, 24 per cent of applicants accessed the *Act* under the ‘Cultural Rights’ provision and 3 per cent of the applicants cases were based upon human rights law and native title.¹⁴⁵¹

¹⁴⁴⁹ New South Wales, *Charter of Rights* Update, Parliamentary Paper No1/09 Gareth Griffith QC (January 2009) 2.

¹⁴⁵⁰ Law Institute of Victoria, *Charter Impact Project Report: Colmar Brunton Findings* (1 January 2012) Law Institute of Victoria <<http://www.liv.asn.au/News-and-Publications/Victoria-Human-Rights-Charter>>.

¹⁴⁵¹ Ibid.

There is no evidence that either the *Charter* or the *Human Rights Act 2004* (ACT) protect the rights of Aboriginal peoples or meet the expectations of protecting those rights.

Article 17 of the *Universal Declaration of Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination* has implemented limited protection for Aboriginal peoples in Australia.¹⁴⁵²

Tom Calma, a former Aboriginal and Torres Strait Islander Commissioner, in the ‘Native Title Report’ (2008) raised his concerns for the future of Indigenous water rights.

I am concerned that as Australia becomes increasingly scarce of water due to climate change, long periods of drought, over-allocation to industry and agricultural stakeholders, and population growth and migration, the capacity of recognition and security of Indigenous rights to water will become increasingly important and highly competitive.¹⁴⁵³

The United Nations Permanent Forum on Indigenous Issues has put forward several concerns to Nation States, also addressing contentious water rights issues in Australia. The Permanent Forum has urged that ‘water should not be privatised’, that ‘traditional values in Indigenous economic traditions to water are engaged’, that ‘Indigenous peoples be engaged with full participation and consultation for waterways’, and that ‘water policy decision-making and development should include Indigenous men and women from all levels of government’, and it argues for a ‘Charter of Corporate Accountability with Indigenous Peoples’.¹⁴⁵⁴

The Australian Government has endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) in which Indigenous water rights are expressed in Articles 8, 20, and 24 through to 32. The recognition of Indigenous water rights and interests in

¹⁴⁵² Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2008’ (Human Rights Commission, 2009) 69.

¹⁴⁵³ Ibid 171.

¹⁴⁵⁴ United Nations University Institute of Advanced Studies, ‘Water Discussion Paper for the United Nations Permanent Forum on Indigenous Issues, New York 2007’ 1-8
<<https://www.ias.unu.edu/default.aspx>>.

the *Declaration* are yet to be implemented in Australian water legislation to protect the rights to water of Indigenous peoples in Australia. Because successive Australian Governments have failed to view the National Water Initiative within a human rights paradigm there is a significant negative impact on Aboriginal water rights and interests.

The international standards and principles which have been discussed in this chapter articulate a guarantee of rights. However if they are not incorporated into domestic law, in this case Australia's legal system, then they are merely construed as guiding principles. Australian Governments in recent times have suspended the human rights of Aboriginal communities under the *Racial Discrimination Act* 1975 (Cth) to implement government policy and this clearly identifies that the objectives of the Act are vulnerable to 'the whim of government policies'.

Since the High Court's decision in *Mabo* [No 2] v *Queensland*¹⁴⁵⁵ the considerable amendments by successive governments to native title legislation has more often than not 'watered down' Aboriginal rights and interests and instead strengthened the position of non-Indigenous groups and interests. The treatment of Aboriginal water rights and interests will be determined by a government's commitment to utilise human rights principles in Australia's legal system which impacts on Indigenous communities.

9.3 The Garma Conference: Indigenous Water Rights for Australia

During the 2008 Garma Conference in north-east Arnhem Land, the author and other selected Indigenous people from Australia and other countries initiated a cross-global dialogue on the status of Indigenous water rights and interests. The primary issues discussed were water trading and water property rights, the protection of Indigenous water knowledge, and the proposed submissions to the United Nations Educational Scientific and Cultural Organization's 'Water and Culture Database', the 2009 Water

¹⁴⁵⁵ (1992) 175 CLR.

Forum in Turkey and the Eighth United Nations Permanent Forum on Indigenous issues.¹⁴⁵⁶

In collaboration with the United Nations University of Traditional Knowledge, the North Australia Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, the Indigenous delegates at the Garma Water Conference produced a framework for a declaration of Indigenous Water rights to be presented at the 2009 World Water Forum in Turkey.¹⁴⁵⁷ Following several drafts, it became clear that Indigenous perspectives on water were not dealing with the potential impact of the commercial exploitation of water and any advance to the debate on rights was set aside.

In the Preamble of the Draft Indigenous Water Declaration (2009) from Garma, the document stated that ‘we do not believe that water should solely be treated as a resource or a commodity’ and that water is a ‘being with a spirit’.¹⁴⁵⁸ The Draft Water Declaration also stated that Indigenous peoples have ‘inherent rights in water, including customary, cultural, economic, potable use, sanitation requirements and the control of water planning and allocation’.¹⁴⁵⁹ The method for exercising these rights was not clearly articulated in the draft document and there was a compromise in the language and definitions used mainly to emphasize solidarity in Indigenous water rights.

The Draft Water Declaration did not attempt to reflect the history of water rights under the government system that relates to Australian law; nor the absence of domestic treaties and entrenched rights that are to be found in other countries. The Draft Water Declaration took the form of a generic international declaration, and the substance of the declaration was framed in language more reminiscent of international law instruments.

¹⁴⁵⁶ Yothu Yindi Foundation, ‘Garma Festival Program 2008’, 9 <<http://www.yyf.com.au/>>.

¹⁴⁵⁷ Email from Lorrae McArthur to Virginia Falk, 12 November 2008. In accordance with Australia’s *Copyright Act 1968* (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹⁴⁵⁸ Ibid.

¹⁴⁵⁹ Email from Lorrae McArthur to Virginia Falk, 7 April 2009. In accordance with Australia’s *Copyright Act 1968* (Cth) under the Act’s ‘fair dealing’ provisions for research and study, this research thesis in its entirety does not infringe copyright.

¹⁴⁵⁸ Ibid.

¹⁴⁵⁹ Ibid.

Nor did the Draft Water Declaration address the particular objectives and policy strategies regarding water rights for Indigenous peoples in Australia. Thus, in deciding whether to endorse the Draft Water Declaration at that time, the author decided against endorsement of the draft because the cultural, political and economic position of Indigenous peoples in Australia was poorly represented in the jointly drafted document. In essence, substance was being sacrificed in order to incorporate the particular views of a number of overseas Indigenous delegates.

This experience of drafting a declaration with international Indigenous peoples highlights the degrees of difference in perspective on water rights among Indigenous peoples. Notwithstanding our shared values and beliefs regarding water, the drafting process and the generic language used in this instrument watered down the water policy position and the recognition sought by Indigenous peoples in Australia.

9.4 Ethical Principles: A Benchmark for Australian Standards

The lack of a water ethics discourse in Australian water management policy results in a serious deficiency of moral and legal commentary and critique on the competing water rights and interests and ethical benchmarks regarding the state of consumptive and non-consumptive water allocation. The national water reform policy and legislative framework have failed to recognise the ethical parameters of Australia's water governance arrangements.

Ethical standards and measurable indicators which relate to the impact of water property rights and allocations on Aboriginal-owned land and native title have yet to be framed. In relation to the national water market, there is a policy gap in Australia, where private and public financial investment is not assessed or measured as 'best practice', nor assessed on whether the proposed financial investment in the water market, and projects dependent on freshwater supplies, have negative impacts on Indigenous and other stakeholders.

In recent times the introduction of ethical investment standards in environmental projects has raised the bar for establishing water ethic principles in water projects. One example of applying ethical considerations to financial investment and project development has been established by ‘the international banking community under the Equator Principles, which provides a voluntary code of conduct for responsible project financing’.¹⁴⁶⁰ The ‘Equator Principles’ is a landmark agreement signed by some of the world’s banks, agreeing ‘not to finance projects that endanger communities or the environment’.¹⁴⁶¹

In addition to the ‘Equator Principles’, where there will be impact on Indigenous communities, Governments and corporate entities in Australia who seek to develop water intensive projects should be required to codify a framework of water ethic principles and implement a rigorous assessment of proposed projects to identify whether they are a ‘socially responsible investment’. Where such projects have high water extraction and the possible contamination of watercourses, they should be refused investment capital by those banking institutions that are signatory to the Equator Principles.

The adoption of the Equator Principles in relation to industry and government projects would also support the principles of environmental integrity in national water policy and water legislation. Currently, commercial investment in water projects does not have to adhere to any principles of ethics in water or corporate responsibility in water enterprise.

The Westpac Bank of Australia and the Australia New Zealand Bank are corporate signatories to the Equator Principles¹⁴⁶² and, as signatories, should fund financial investments in commercial projects only where the project is environmentally responsible. However, the contentious Gunns’ pulp mill in northern Tasmania was partially funded by the Australia New Zealand Bank. The Tasmanian mill project

¹⁴⁶⁰ Benjamin Richardson, ‘The Ties that Bind: Indigenous Peoples and Environmental Governance’ in Benjamin Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart, 2009) 337, 367.

¹⁴⁶¹ Westpac Bank, ‘The Equator Principles’ (November 2006) <everygeneration.com.au>.

¹⁴⁶² Ibid.

received consistent criticism in the media in relation to the mill's potential toxic chemical residue that could contaminate the ocean and endanger important sea life colonies.¹⁴⁶³

Due to the intense media coverage, the Australian New Zealand Bank withdrew capital funding from the \$2 billion Tasmanian mill project – an action underpinned by the bank's commitment to environmental corporate responsibility.¹⁴⁶⁴ The latest potential investor, the Richard Chandler Corporation, has pulled out of a bid for a large stake in Gunns' Tamar Valley pulp mill.¹⁴⁶⁵ The Tasmanian Premier, backing the Gunns project, commented that 'it was quite alarming that big business could be undermined by small minority groups'.¹⁴⁶⁶

The inclusion of ethical principles framed with cultural integrity could provide the necessary checks and balances to the national water reforms. The flow-on effect of establishing a benchmark of ethical principles in the use of water resources has the capacity to address the cultural and environmental concerns of Aboriginal peoples in relation to the high level of water extraction by industry under government supported projects. In addition, proposed water projects which have unsustainable water requirements, such as high extraction levels of water and mining processes with significant potential for contamination of water resources, could have their funding withheld. What is required is

[a] foundation of identifying water ethics in drafting water interests ... [and] ethical practices [that] underpin all policy, legislation and the private and public sector management of water.¹⁴⁶⁷

¹⁴⁶³ The Greens Tasmania, *The Tasmanian Pulp Mill News* (18 September 2006) 1-4.

¹⁴⁶⁴ Westpac Bank, *The Equator Principles* (November 2006) <everygeneration.com.au>.

¹⁴⁶⁵ Australian Broadcasting Corporation, *Gunns Deal Off, Boss Blames Green Groups* (13 March 2012) ABC News <<http://www.abc.net.au/news/2012-03-09/gunns-investor-pulls-out/3879344>>.

¹⁴⁶⁶ Ibid.

¹⁴⁶⁷ Santa Clara University, *Common Grounds, Common Waters: Toward a Water Ethic* (19 February 2008) Santa Clara Journal of International Law Symposium <<http://scjil.wordpress.com/program-description>>.

The Australian water policy position on the allocation and use of water resources would benefit from ethically informed government decision-making and accountability. An ethical code of conduct is required for water intensive projects or projects that impact significantly upon water resources in fresh and saltwater. Australian Governments have failed to adequately protect water resources required by Aboriginal peoples and to limit commercial projects which entail high environmental risk to contaminate or over-exploit water resources.

To ameliorate the poor living standards of Aboriginal peoples and advance the protection of their water rights requires more than merely acknowledging international law principles and standards or incorporating them into Australian law. It also requires a framework of ethical principles in national water policy and state and territory water legislation, in order to independently assess commercial projects as socially responsible investments.

Chapter 10: Conclusion and Recommendations

This thesis has examined and analysed, from an Aboriginal perspective, what Australia has generally ignored – namely, the rights and interests of Aboriginal peoples since European occupation and over the staggered colonisation of Aboriginal lands, waters and resources. Despite the ‘discovery’ of this continent, by the application of common law and the sovereign right of the Crown to water resources, Aboriginal peoples continued to assert and exercise their rights and interests under Aboriginal laws. Senior law men and women, and Aboriginal communities across Australia, conceptualise ‘belonging to country’ and their rights to access and use water through the lens of Aboriginal sovereignty.

From an Aboriginal perspective the relationship with water is sacred and underpins a kinship connection through birth, life and death. Aboriginal laws exist in parallel to Western law, and there is limited common ground between Aboriginal and Australian law. Aboriginal laws which regulate the access to and use of water are steeped in ancestral oral story and familial relationships which inherently connect an Aboriginal person and community to a water site, a river or the sea. Aboriginal language is a conduit to comprehending one’s rights and obligations to a water landscape, and to mark the spiritual and physical boundary of Aboriginal water rights and interests on ‘country’. The thesis chapters demonstrate the importance in conceptualising Aboriginal water values, beliefs and laws from an Aboriginal ontological framework. Aboriginal language carries the Aboriginal definitions and purpose of water, and the communal obligations to ‘care for country’.

Aboriginal perspectives on water are framed within a very different ontology than that of Western water values. As noted, Craig Arnold’s essay ‘The Reconstruction of Property: Property as a Web of Interests’ (2002) argues that the Western concepts of private and public property regimes, as well as their effect on environmental values, and the impact of the modern property concept in identifying property as a ‘bundle of rights’, requires a

‘new metaphor’.¹⁴⁶⁸ I have claimed that Arnold's approach is particularly relevant in terms of reframing property concepts in relation to Aboriginal water rights and interests from an Aboriginal perspective, and also for redefining the inadequate Western interpretation of Aboriginal water rights and interests in statutory regimes.

Similarly, David Lametti's ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003) proposes a ‘new metaphor’ in property relationships centred upon the intangible and tangible ‘objects of social wealth’.¹⁴⁶⁹ Lametti suggests that the use of ‘definitions can influence the substantive discussion on rights-based property paradigms’.¹⁴⁷⁰ I have argued that the Australian definitions of water and the construct of Australian property rights have misrepresented the definitions of Aboriginal water rights and the way property rights are understood and determined under Aboriginal laws.

The redefining of Aboriginal water rights and interests within an Aboriginal property paradigm is consistent with the position advanced by Tully (1994), who acknowledges the importance of Indigenous legal scholars ‘reconstructing’ and shifting the paradigms of Western theories to assert the full recognition of Aboriginal property systems.¹⁴⁷¹ I have argued that it is imperative ‘to reconstruct and shift’ Western legal theories and the Australian water policy framework to duly recognise and incorporate Aboriginal water rights and interests into Australian law through the lens of Aboriginal property relationships, reflecting the water values Aboriginal communities hold in their relationship with ‘country’.

The thesis has argued that Aboriginal water values and water concepts should be informed by an Aboriginal ontology in order to interpret Aboriginal meaning. The view of Bradley Bryan in ‘Property as Ontology: On Aboriginal and English Understandings of Ownership’ (2000) is that it is important to question Australian conceptions of

¹⁴⁶⁸ Craig Anthony Tony Arnold, ‘The Reconstruction of Property: Property as a Web of Interests’ (2002) 26 *Harvard Environmental Law Review* 281.

¹⁴⁶⁹ David Lametti, ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003) 53 *University of Toronto Law Journal* 328.

¹⁴⁷⁰ *Ibid.*

¹⁴⁷¹ *Ibid* 154.

property law to assess whether Australian property regimes are compatible with Aboriginal cultural interpretations of their relationship with property.¹⁴⁷² Chapter 4 of the thesis has argued that the Aboriginal concept of ownership is embedded in a unique and complex conceptual framework possessing inherent cultural characteristics that strictly determine Aboriginal water rights and interests.

The thesis has argued that when the unique Aboriginal concept of water resources, and their value and purpose, are interpreted in legislation and in common law definitions, they should be evaluated from the perspective of the Aboriginal community – which is to say, the respective community who hold the knowledge. There is an inherent danger in defining and interpreting Aboriginal water concepts through Australian ontological frameworks that often reconstruct Aboriginal concepts or ‘cultural interpretations’ incorrectly and diminish the nature of Aboriginal property rights.

Recommendation 1: *The Commonwealth, State and Territory Governments should, with leadership from Aboriginal communities and representative Aboriginal organisations, review, redefine and implement an Aboriginal ontological framework to inform common law and statutory regimes regulating water rights and interests.*

Chapter 4 of the thesis demonstrated the problems generated by the Western reconstruction of Aboriginal customs, laws and practices in water exhibited in the *Native Title Act 1993* (Cth), and the treatment of these customs, laws and practices by the courts. For Aboriginal claimants seeking a determination of Aboriginal ownership under native title in Australia, the judicial interpretation of Aboriginal laws may recognise a continuing relationship of Aboriginal peoples to the land and the waters but will generally stop short of fully recognising Aboriginal rights and interests. Although the legal recognition of Aboriginal laws had been overdue, the introduction of native title laws has required Aboriginal claimants to reconfigure their laws, customs, and practices to convey Aboriginal concepts and values in terms of incongruent Western legal language.

¹⁴⁷² See Bradley Bryan, ‘Property as Ontology: On Aboriginal and English Understanding of Ownership’ (2000) 13(3) *Canadian Journal of Law and Jurisprudence*.

In *Mabo v Queensland* [No 2]¹⁴⁷³ the Court considered the common law reasoning on Aboriginal title in *Milirrpum v Nabalco*.¹⁴⁷⁴ According to that court's reasoning, Aboriginal peoples living in their community who enjoy only usufructuary rights, but not proprietary rights, do not impede the recognition of communal title.¹⁴⁷⁵ The notion of 'usufructuary or *sui generis* rights' is not an Aboriginal concept under Aboriginal laws, and in many ways the legal construct of *sui generis* diminishes the capacity of Aboriginal peoples, because it fails to include the exercise of anything other than non-economic rights.

The thesis demonstrates the inappropriate use of certain descriptors under native title law. The Australian concept of Aboriginal title unduly constrains the exercise of water rights and interests of Aboriginal peoples. The narrow interpretation of water rights under native title provides limited opportunities for Aboriginal peoples to exercise customary rights and interests, under the principles of self-determination, within Australia's legal system. For Aboriginal communities to engage in opportunities of economic development in water resources held under their native title ownership, the concept of Aboriginal proprietary title must be redefined by native title holders.

I have argued that Aboriginal water rights and interests under the native title regime should encompass the full spectrum of water property rights and interests. For example, Toohey J held in *Mabo v Queensland* [No 2] that Aboriginal ownership was 'an abstract bundle of rights enjoyed by reason of the connection of ownership'.¹⁴⁷⁶ I have argued that the notion of a 'bundle of rights' as a legal concept thus applied to explain Aboriginal ownership is an inadequate rhetorical analogy because it is not an Aboriginal law concept. My research shows that it is not possible to neatly compartmentalise Aboriginal ownership rights into separate 'bundles' of rights in property.

¹⁴⁷³ (1992) 175 CLR.

¹⁴⁷⁴ (1971) 17 FLR 141.

¹⁴⁷⁵ Paul Patton, 'The Translation of Indigenous Land into Property: The Mere Analogy of English Jurisprudence' (2000) 6(1) *Parallax* 34-35.

¹⁴⁷⁶ *Commonwealth v Yarmirr* (1999) FCA 1668 [220] quotes (Toohey J) in *Mabo v Queensland* [No 2] (1992) 175 CLR 1 [207].

Recommendation 2: *The Australian Government should, with leadership from Aboriginal communities and representative Aboriginal organisations, review native title legislation and case law to provide for culturally appropriate definitions of Aboriginal land and water rights.*

In Chapter 6 I argue that Aboriginal health is integral in any national dialogue on Aboriginal water rights and interests because there is an interrelationship between access to natural resources, such as clean drinking water, and the enjoyment of good health among Aboriginal communities. Jon Altman, the Australian National Director of the Centre for Aboriginal Economic Policy Research,¹⁴⁷⁷ has suggested that ‘to close the gap of indigenous life expectancy in Australia [requires] amending the law to provide Aboriginal land owners with legal property rights over resources’.¹⁴⁷⁸

The omission of self-determination principles in Indigenous water management policy and legislative instruments directly impacts upon Aboriginal communities’ water rights. As a consequence, Aboriginal communities lack the economic influence which other water stakeholders in industry and agriculture enjoy.

I argue that recognition of an Aboriginal ‘reserved water right’ in Australia would provide economic certainty for Aboriginal peoples and a substantive legal recognition of Aboriginal water rights and interests. I argue for the need to include permanent water allocations for Aboriginal communities outside the consumptive pool under the national water management regimes.

Recommendation 3: *The Commonwealth, States and Territories should, with leadership from Aboriginal communities and representative Aboriginal organisations, implement national water reforms to provide for:*

¹⁴⁷⁷ Patricia Karvelas, ‘Push for Aboriginal Rights over Resources’, *The Australian* (Sydney), 11 April 2008, 6.

¹⁴⁷⁸ Ibid.

- (a) perpetual water allocations for Aboriginal communities outside the consumptive pool which meet the water requirements deemed by Aboriginal communities consistent with the principles of self-determination; and*
- (b) a Reserved Water Right regime allocated for Aboriginal communities to develop economic capacity and intergenerational prosperity; and*
- (c) biennial and independent reporting to Parliament on the progress of implementing these water reforms within the respective jurisdictions.*

Chapter 8 demonstrated the failure of Indigenous policy and planning processes formulated and implemented by Australian Governments – policies which have not addressed the poor outcomes in health, wealth and wellbeing of Aboriginal peoples in Australia, and Aboriginal peoples’ right to water. The correlation between Aboriginal health, the lack of Aboriginal wealth creation, the over-allocation of water, and the contamination of water resources in Aboriginal communities has been neglected as a national policy issue. The Australian Government’s ‘*Closing the Gap*’ Indigenous policy has likewise failed to include Aboriginal water rights and interests as a pivotal policy response.

Although native title recognition of ‘country’ is an important milestone in Australian legal jurisprudence, native title lacks the capacity to provide for economic development and to generate equity in commercial enterprise. The thesis has demonstrated that achieving intergenerational equity requires the inclusion within water policy planning of mandatory commitments to advance Aboriginal wealth development through perpetual water rights.

Recommendation 4: *The Commonwealth, States and Territories should, with leadership from Aboriginal communities and representative Aboriginal organisations, provide for:*

- (a) Aboriginal peoples' 'special association to water' to recognise this as a First Right before other water rights; and*
- (b) government strategies to increase Aboriginal participation in the Australian water market and increase the ownership of water property assets in Aboriginal communities; and*
- (c) economic benefits under statutory water legislation to promote wealth creation within Aboriginal communities; and*
- (d) meaningful consultation with Aboriginal peoples to identify and allocate permanent water rights in under-allocated and over-allocated water resources; and*
- (e) adoption of Aboriginal wealth creation policies and strategies, consistent with the principles of self-determination within national Indigenous policy frameworks, to include water ownership; and*
- (f) Aboriginal water rights to ensure communities can utilise communal and private water rights and interests; and*
- (g) tradeable Aboriginal water access licences; and*
- (h) a national water policy which excludes caps on water resources held by native title claimants; and*
- (i) water resources for Aboriginal peoples under the principles of intergenerational equity.*

Chapter 5 on the Murray-Darling Basin demonstrated that the contextual meaning of Aboriginal water values and Aboriginal property rights in water are not easily translated

into Australian values, concepts and frameworks. Australian definitions such as ‘cultural, social and spiritual’ are inadequate for identifying Aboriginal values because they are derived from Anglo-Australian ontological perspectives. Australian water policy and legislation fails to have due regard for Aboriginal concepts and meanings relating to water.

Australian courts and policy makers struggle to comprehend the complexity of Aboriginal ontology. The thesis demonstrates how the simplistic use of Australian concepts as applied to native title misinterprets Aboriginal concepts.

Recommendation 5: *The Commonwealth, States and Territories should incorporate:*

(a) recognition of the Aboriginal concept of the inseparability of land and water within water policy and legislative instruments; and

(b) Aboriginal ontological concepts of water within definitions used to draft policy and legislation to convey the values and meanings of Aboriginal water use.

The thesis has demonstrated that a national focus is required in the development of water policy reform for Aboriginal peoples, so as to significantly improve their participation, access and management of water rights and interests. Australia has focused on the allocation of water resources for stakeholders in farming and industry. The allocation of water rights and water ownership between the Commonwealth (under the National Water Commission) and the States has become politicised and controversial. This political melee has disenfranchised Aboriginal peoples within a polarised water rights debate.

The introduction of water reforms for managing Australia’s water resources has failed to include dialogue on Aboriginal water rights and interests in the policy development stage. As a consequence Australian water legislation has failed to address any acceptable level of certainty for Aboriginal communities’ access to and use of water. Governments must

recognise and incorporate Aboriginal water requirements in water management legislative instruments.

Recommendation 6: *The Commonwealth, States and Territories, with leadership from Aboriginal communities and representative Aboriginal organisations, should amend legislation to incorporate a national system of Indigenous water rights and interests, so as to provide a perpetual range of rights and allocations that are not subject to the water requirements of other stakeholders.*

The thesis has demonstrated that Aboriginal water concepts cannot be separated from the land because the creation stories have laid the foundations for Aboriginal water values and the cultural use of water for Aboriginal peoples. The lack of formal consultation during the national discussion on reforming water management has resulted in a significant gap in addressing property rights regarding Aboriginal water requirements.

The case study in Chapter 8 on water rights in Western Australia demonstrated the inconsistent implementation of the national water reforms and significant gaps within the national framework, allowing the Western Australian Government to ignore the recognition and provision of Aboriginal water requirements. In the absence of substantial national water reforms in Western Australia, due to the government's lack of progress in passing the Water Resources Management Bill, the water rights and interests of native title holders and the interests of Aboriginal communities are in limbo. The failure of the Western Australian Government, to incorporate Aboriginal water rights and interests such as the provision of 'reserved water rights', and perpetual water allocations for Aboriginal communities is in stark contrast with the treatment of non-Indigenous water users.

The discretionary nature of the 'Indigenous Actions' under the National Water Initiative Agreement limits government's commitment to Indigenous water policy, especially in the absence of compliance mechanisms in the respective jurisdictions. I argue in the thesis that, to provide certainty for Aboriginal peoples and their unequivocal rights and interests

in water requires a balanced legislative framework which protects First Peoples' water rights.

Recommendation 7: *The Commonwealth, States and Territories, with leadership from Aboriginal communities and representative Aboriginal organisations, should review the national water reform framework and legislative instruments to include:*

- (a) the recognition of Aboriginal peoples water rights and interests as 'First Peoples' within their jurisdictions; and*
- (b) guiding principles to protect and advance Indigenous water management and water planning within their jurisdictions; and*
- (c) mandatory actions for Indigenous water rights and interests under the National Water Initiative; and*
- (d) biennial reporting to the National Water Commission, measured against international standards of human rights; and*
- (e) reserved water allocations for Aboriginal communities outside the consumptive pool within all jurisdictions.*

Chapter 5 demonstrated the significant social, cultural and environmental impacts resulting from the historic over-allocation of water resources in the Murray-Darling Basin catchments since the introduction of river regulation and irrigation projects. The government emphasis on increasing economic wealth for the pastoral and agricultural industries in Australia stands in stark contrast to the treatment of Aboriginal interests, and this has disenfranchised Aboriginal peoples' access to and use of water in the Murray-Darling catchments.

In 2011 the National Water Commission's third Biennial Assessment of the National Water Initiative¹⁴⁷⁹ reported that Indigenous stakeholders' progress was deficient across all water management jurisdictions.¹⁴⁸⁰ I argue that, in spite of the introduction of national water reforms in Australia and the revised Murray-Darling Basin Plans, the outcomes for Aboriginal communities are negligible.

Chapter 5 also demonstrated the impact of the Commonwealth's *Water Act 2007* and *Water Amendment Act 2008* upon the water rights and interests of Aboriginal communities, and identified the gaps in the legislative regime. I argued that the *Water Act 2007* fails to include the necessary recognition and incorporation of Aboriginal water rights and interests in the Murray-Darling Basin, and that the focus is, instead, almost exclusively on the rights and interests of non-Aboriginal stakeholders.

The establishment of environmental flows under the Commonwealth water legislation has resulted in an improvement to the Murray-Darling Basin's ecosystem, but in the absence of legislative recognition of the relationship of Aboriginal communities to the Murray-Darling catchments the environmental river system remains divorced from its spiritual context.

Murray-Darling Aboriginal water rights and interests are understood by their respective river communities in the context of Aboriginal ontological paradigms. Aboriginal water management practices are congruous with Aboriginal water values in their capacity to sensitively nurture the river systems. I argue that the protection of Aboriginal water rights is a necessity under human rights standards because Aboriginal peoples' relationship to water is central to Aboriginal identity.

¹⁴⁷⁹ National Water Commission, *The National Water Initiative: Securing Australia's Water Future*, (Australian Government, 2011) iii. The Biennial Assessment of the National Water Initiative is regulated under s 7 of the *National Water Commission Act 2004* (Cth).

¹⁴⁸⁰ Ibid. Commencing from 200 at app B on the progress of the National Water Initiative Actions.

Recommendation 8: *The Commonwealth and the States under the Murray-Darling Basin Plan, with leadership from Aboriginal communities and representative Aboriginal organisations, should:*

- (a) review water policies and strategies, catchment practices, legislative instruments and Indigenous national resource management frameworks, to incorporate and implement mandatory water requirements for Aboriginal peoples in the Murray-Darling Basin Plan; and*
- (b) apply human rights benchmarks to the national water reform regimes; and*
- (c) review and amend the Water Act 2007 and the Water Amendment Act 2008 (Cth) to enshrine the legal recognition of Indigenous water rights and interests and their cultural obligations in the Murray-Darling river systems; and*
- (d) develop and implement an Indigenous-based methodology to research the impact of Australian water reforms on Indigenous water rights and interests, and identify knowledge gaps in Aboriginal water management in the Murray-Darling region; and*
- (e) review and amend the Water Act 2007 (Cth) to give effect to Indigenous peoples relationship to and customary knowledge of the Murray-Darling Basin environment, and initiate co-management of the Murray-Darling Basin with Aboriginal communities who are recognized as ‘traditional owners’; and*
- (f) establish Indigenous water rights under water management legislation as a separate category under the Murray-Darling Basin Plan; and*
- (g) undertake academic research on the Murray-Darling Basin catchments to inform the Basin Plan on the inherent customary and economic water rights of Aboriginal peoples with an association to the Murray-Darling region; and*

(h) consider an independent inquiry to examine and make recommendations on Aboriginal communities' legal and beneficial rights to use the Basin's water resources.

Chapter 9 demonstrated that, in Australia, Aboriginal peoples lack historic and contemporary legal recognition of inherent Aboriginal sovereignty. Commonwealth, State and Territory laws have impacted negatively on Indigenous rights and interests, in spite of clearly articulated international human rights standards.

The inclusion of ethical principles framed with cultural integrity would provide the necessary checks and balances to the national water reform process. Establishing a benchmark of ethical principles for the management of water resources has the capacity to reconcile the cultural and environmental concerns of Aboriginal peoples – most notably in relation to the high level of water extraction by industry under government supported projects.

Recommendation 9: *The Australian Government should:*

- (a) formulate and implement strategies to advance the protection of Indigenous water rights and interests which incorporate ethical principles and standards in national water management; and*
- (b) implement a framework of ethical principles in national water management, for the independent assessment of commercial projects to determine socially responsible investments.*

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