

Indigenous access to water in Australia: legal and policy limitations and the need for governance reform

Reference PAP005092.

Assoc Prof Poh-Ling Tan,¹ Griffith University and Dr Sue Jackson, CSIRO

Key words: water, Indigenous rights, Indigenous culture, Australia, native title, co-management, policy

Introduction

Economic rationalism imbued with development imperatives underpinned Australian approaches in water policy in past decades. When it became apparent during the 1970s that water was over-allocated in the heavily irrigated states of Victoria and New South Wales, its quality deteriorated and land salinised, the economic viability of irrigated agriculture became a contentious issue. Structural reform under policy developed in the 1990s primarily focussed on economic instruments such as property rights and water markets with lesser attention to sustainability and Indigenous interests were overlooked in major policy and legal reforms to the water sector.

The interests of Indigenous peoples appeared on Australia's water agenda for the first time with the National Water Initiative (NWI). The objectives of the NWI include providing for sustainable use of water, increasing the security of water access entitlements and ensuring the economically efficient use of water. These are to be achieved principally by strengthening environmental flow provisions, removing barriers to markets in water, and providing for public benefit outcomes through water planning mechanisms. Parties to the NWI have agreed to that water planning frameworks should recognise Indigenous needs in relation to access and management.

Improved regional water planning is the foundation of the NWI. While water planning can take many forms, the NWI is concerned with water allocation. In preparing surface and ground water management plans for areas of concern, jurisdictions are to follow nationally

¹ Paper presented by Poh-Ling Tan, email p.tan@griffith.edu.au. The complete version of this paper is under review by Environment and Planning C and this is a summary.

consistent guidelines for undertaking transparent, statutory planning that relies on best available information (NWI, Clause 23(ii)). Process-wise, the jurisdictions are expected to consult and involve communities, including Indigenous groups (NWI, Clause 52 and 95).

Indigenous access is to be achieved principally through planning processes that incorporate Indigenous social, spiritual and customary objectives; strategies for achieving these objectives; take account of the possible existence of native title rights to water in the catchment or aquifer area; and account for any water allocated to native title holders for ‘traditional cultural purposes’ (NWI, clauses 52-54). Statutory water plans will provide ‘environmental and other public benefit outcomes’ which include ‘Indigenous and cultural values’ (NWI, clause 25 and schedule B(ii)).

Many of the new bodies established to provide community input into water and catchment planning have Indigenous representatives, as encouraged by the NWI. Some jurisdictions, such as Queensland, are legally required to include Indigenous representatives on water management advisory bodies. Nonetheless, a 2009 assessment of the implementation of the NWI found that it is rare for Indigenous water requirements to be explicitly included in water plans, and most jurisdictions are not yet engaging Indigenous peoples effectively in processes. Besides those findings, the National Water Commission recommended that “processes should also make clear how Indigenous groups can pursue their legitimate economic objectives”.

There is little compulsion for states to embrace these entreaties. More generally, there are no penalties imposed for non-compliance of the NWI. The assessment relies on ‘naming and shaming’, in contrast to the earlier approach in 1994-2004 where financial incentives to states were withheld for non-compliance. Further we argue that states have based their general approach on mere compliance with the native title regime, despite the broader call to incorporate Indigenous objectives in water plans and actively engage Indigenous people in water resource assessments. This narrow reading of state obligations under native title has consistently stunted the commercial prospects that might arise from Indigenous access to water.

Features in implementation in NWI affecting Indigenous interests

Besides the restrictions of the native title regime, several features in the implementation of the NWI affect the degree to which Indigenous people benefit from its provisions, as well as the benefit to the broader nation derive from Indigenous participation in key NWI activities. A critical impediment to Indigenous access is the constrained state of water resources particularly in south-eastern Australia. In NSW, for example, which arguably has the most over-allocated water systems in Australia, embargoes on new licences were put in place as early as 1976 , thus precluding substantial Indigenous access.

- (1) In times of water scarcity use must be prioritised. The NWI provides no guidance as to how to proceed in addressing competing claims beyond trading mechanisms and an expectation that trade-offs will be informed by socio-economic analysis and best-available science. In regard to water to protect native title interests, there is nothing in the *Water Management Act 2000* (NSW) which quarantines water for this purpose. Little satisfaction can be gained from an entitlement to extract water in the exercise of native title rights if there is insufficient water to extract or if it is polluted.
- (2) McFarlane attributes the lack of compliance of the NWI to the provisions which are expressed in discretionary terms, e.g. ‘where possible’. Although discretion provides flexibility to suit a wide array of circumstances, impediments and competing priorities may result in inaction or lack of attention to Indigenous priorities. Little guidance is provided to water resource managers and regional bodies in meeting the Indigenous access and participation objectives. A feature of the NWI consistent with a general problem observed by others is that water decision-makers are being required to optimise traditionally conflicting ideals with limited and uncertain information.
- (3) The extent to which a native title entitlement will satisfy native title requirements can only be determined on a case by case assessment; however, it is significant that a review of New South Wales’ 35 Water Sharing Plans (WSP) reveals that only two have provided an entitlement for native title. We argue that for these two WSP, the approach in water planning was to relegate native title rights to equal to or less than human domestic and pastoral stock use. Except for Western Australia, most of the State Plans for implementing the NWI suggest that water managers appear to be waiting for native title determinations before assessing the potential requirements arising from successful claims (see Western Australian Government, 2007). The NWI requires that water plans take account of the *possibility* of native title. The very slow tempo of settlements in south eastern Australia may prejudice potential claimants. In NSW for example, as of November 2010, there had been only two determinations that have recognised the existence of native title. With so few determinations this level of proof may continue to limit substantially, and for some time, the number of instances in which water is allocated for native title purposes. If Indigenous specific allocations are dependant on the legal recognition of title then many Indigenous groups may be further dispossessed of customary rights.
- (4) For decades, administrative discretion characterised water management, with institutional capture by powerful interests. With reforms in the mid 1990s, a more consultative model developed for water planning. Even under the NWI, however, state agencies tend to view consultation more as information giving than active participation by communities. Planning outcomes continue to manifest a failure to fully consider Indigenous interests and aspirations and rely on an outdated heritage

consultation paradigm. These shortcomings are shown clearly in the *La Grange Groundwater Plan*, recently developed in Western Australia. At commencement of the planning process in La Grange, current statutory provisions allow for Indigenous participation in the lowest level of plans. Thus the Department of Water went beyond their statutory duty to engage the Indigenous communities through an Indigenous liaison person. The primary mechanism by which Indigenous values are to be protected is by constraining the level of permissible extraction across the total area, within a low level of risk. Management zones around high values areas, within which licensing conditions are more onerous, provide another level of protection. Besides, according to the Department, Indigenous interests are recognised in several ways, including: protection of environmental and cultural *in situ* values provision of water for the environment; improved provision of community water supplies, involvement in planning; and through effective engagement processes. These mechanisms are seen to be appropriate by the Department given the low level of information available, the significance of the values, the relatively low level of water use and the relatively low capacity for intensive management in this remote area. Some processes, however, are not securely bedded in law and policy, namely Indigenous involvement in water resource monitoring and management, and a policy on Indigenous access to water for economic use. It is worth noting that the WA Government's NWI Implementation Plan is quite specific in limiting Indigenous access to water resources to 'non-consumptive cultural purposes' (Western Australian Government, 2007, page 33). Further, the La Grange Plan does not commit the water agency to improving community water supplies. The plan affords traditional owners a minor part in the management of the water resource, e.g. as respondents to licence applications and participants in the cultural heritage assessment of applications. In light of the insights and recommendations of the cultural values study, written before the successful native title decisions, it is likely that the native title holders see their role in environmental management as a much more determining and influential one.

New mechanisms to meet Indigenous water requirements

In the more recently colonised parts of northern Australia, where water use is increasing but the resources are not yet fully developed, Indigenous people are advocating special measures to advance Indigenous water rights. Even in NSW where colonisation first occurred and where competition over water is high, a number of specific and relatively recent measures were introduced to improve Indigenous access to water. These statutory measures establish an entitlement to water and were developed with some input from representative Indigenous organisations.

NSW has introduced two types of special purpose licences for Aboriginal interests. As a rule, special purpose licences are generally not able to be traded, and are not accorded any specific priority under s 58 of the *Water Management Act 2000* (NSW).

The first, Aboriginal cultural access licences, are not to be used for commercial purposes. They are available only on an annual basis and may be renewed. It appears that Aboriginal cultural licences will be granted as a matter of course, that is, licenses will be granted upon application. Capped at 10 ML per licence per year, they allow holders a small volume of water, and are limited to traditional and domestic uses. It is likely that these licences will only benefit communities not able to successfully prove the existence of native title. Those who hold native title will already have rights for traditional activities and domestic requirements under the NTA. It is unclear whether these licences are granted to a community through an incorporated body or to individuals. Cultural access licences appear not to be popular and their shortcomings have been noted elsewhere.

Aboriginal commercial (sometimes referred to as community development) licences are the other special purpose licence available. They are the first of their kind in Australia and may be granted over surface or groundwater and used for any general commercial purpose including aquaculture, and manufacturing. Unlike other specific purpose licences, Aboriginal commercial licences can be traded on a temporary basis. As far as we have determined, two water sharing plans in NSW provide for these licences. The first is the 2003 Dorrigo WSP, and the second, 2004 Stuarts Point Aquifer WSP. The Kempsey Local Aboriginal Land Council own land atop the Stuarts Point aquifer, have previously grown native flowers on this site and have aspirations for further horticultural crops.

The provision of Indigenous water reserves are important outcomes in Gulf and the Mitchell Water Resource Plans in Northern Queensland, finalised in 2008. Thus far reserves are *only* available from rivers in Cape York as a direct result of negotiations between interested parties which led to the landmark Cape York Agreement in 1996 and the *Cape York Peninsula Heritage Act* which followed in 2007. The purpose of the reserves is to help Indigenous communities in the Cape York Peninsula Region area achieve their economic and social aspirations.

While these special measures are positive outcomes, they do not appear to be a result of Indigenous engagement in the water planning process. There is little evidence that Indigenous people in the Gulf and Mitchell Catchments were involved in negotiating the amounts allocated through the reserves, therefore it is unclear whether the volumes allocated will meet their needs. Further, none of the other rivers in the Gulf region with significant Indigenous populations in their catchment areas have such provisions attached. Indigenous reserves may be used for the achievement of economic and social aspirations of Indigenous people, but as yet there is no process for defining the purpose. Water allocated through these reserves will take the form of water licences and will thus not be tradeable,

unlike the majority of entitlements (called water allocations) which will result from water plans. As yet, there have been no applications made for water from the reserves.

Relevant factors for policy development

Various international conventions and protocols have responded to the anti-racist norms of post-war international law and global concern over Indigenous rights. In advocating greater self-determination, Indigenous groups have sought increased legal and political protection of natural resources and their customary estates. Thus the strongest argument for the consideration of a co-management regime for water resources lies with the international law standards to which Australia is a signatory. In April 2009, after a two year delay, Australia formally issued a statement of support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This late endorsement of the UNDRIP has depended on the views of the Federal Government of the day. The Rudd government's election promise that Labor would be guided by UNDRIP's benchmarks and standards has been partially carried out. A number of Articles relate to aspirations of Indigenous peoples' water rights, in particular requiring signatories to:

- consult and cooperate in good faith with Indigenous peoples' own representative institutions, to obtain their free, prior and informed consent before implementing legislative or administrative measures that may affect them (Art 19);
- acknowledge the right on Indigenous peoples to maintain and strengthen their spiritual relationship with their traditionally owned territories and waters (Art 25);
- recognize and protect Indigenous rights to own, develop, control lands territories and resources traditionally owned, occupied or used (Art 26);
- consult and cooperate in good faith to obtain free and informed consent prior to the approval of any project affecting their lands or territories particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Art 32).
- take appropriate measures, including legislation, to achieve the ends of the Declaration (Art 38).

The UNDRIP has already formed the basis for pertinent laws in Bolivia and other Latin American countries. Even countries such as Australia, that have not enacted domestic laws implementing UNDRIP provisions, should still acknowledge UNDRIP's strong moral and authoritative suasion and its' potential to influence the interpretation of statutes. Relying on the UNDRIP, Indigenous groups across Australia, have developed policy statements calling on the Australian Government to be 'responsive to the rights of Indigenous people'.

Conclusion

Despite the existence of the NWI guidelines for plans to *immediately* include consideration of Indigenous water use, water plans rarely specifically address Indigenous requirements. The NWI envisages a situation in which water may need to be allocated to meet certain Indigenous requirements: Indigenous subsistence use, landscape features of value and native title. Research elsewhere has pointed to the substantial conceptual and technical difficulties facing water resource managers seeking to calculate and allocate water to meet these needs. Overcoming the difficulties facing water assessments will require concerted effort from state water agencies, research organisations and Indigenous groups.

Law reform and native title organisations point to a narrow ‘recognition space’ for native title, and their calls for substantive reform of legislation have yet to be heeded. In these circumstances, water policy makers and water managers should avoid a reading down of the NWI. The phrases ‘wherever possible’ and ‘wherever they can be developed’, as they appear in NWI statements, should receive a purposive interpretation, referring to measures that are capable of happening, or having the potential to be developed instead of current ambivalence by most States.

Across Australia Indigenous groups assert their rights to create inclusive processes and collaborative relationships. The neglect of Indigenous peoples’ economic aspirations and livelihood opportunities under the present model of native title is of particular concern given the considerable commercial value of water under newly established trading systems. Governments have allocated water entitlements with little regard or knowledge of Indigenous interests and many Indigenous people believe that contemporary water resource management is amplifying inequities.

Australian water regimes are being challenged to address native title rights and interests held by Indigenous peoples in a similar fashion to the challenges posed to marine and coastal zone management in the Northern Territory over the past twenty years. The trend in the coastal space is towards co-management of shared marine resources that addresses Indigenous claims and expectations for economic prosperity and cultural well-being, whilst accommodating other existing interests. Vigorous legal intervention has now clarified the extent of Indigenous sea rights and upturned northern Australian fisheries management. Many of the same strategies are being employed in the water management arena, although successful litigation is yet to disrupt water law, policy and practice. From the international arena, UNDRIP provides a strong normative basis for policy action for Australia and other countries facing the same challenges. How Australia rises to the challenge will be watched by developed and developing countries.