

Indigenous Interests in Water: A Comment on the ‘Water Property Rights—Report to COAG from the Water CEOs Group’ Discussion Paper

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This submission makes some brief comments on the Water Property Rights Discussion Paper. We do this from a very particular perspective, as researchers at the Australian National University’s Centre for Aboriginal Economic Policy Research (CAEPR) in Canberra. Since its establishment in 1990, CAEPR has undertaken considerable research on Indigenous economic development and policy issues. A proportion of CAEPR’s research corpus has focused on the issue of Indigenous property rights in resources, usually associated with rights embedded in land rights law and more recently, since 1993, in native title law.

The Water Property Rights Discussion Paper outlines a set of common rules for fresh water entitlements and allocation to ensure a greater efficiency in use. We concur with the general principles laid out in the Discussion Paper that look to ensure a more sustainable use of water, in the broad sense of ecological, economic and social sustainability. We also concur with the focus on equity, both between users today and inter-generationally. It is recognised that the Discussion Paper is dealing principally, at this stage, with theoretical issues seeking to establish a water property rights framework that would be acceptable Australia-wide. The Discussion Paper does not deal with particular groups within Australian society who may have special interests in water.

Nonetheless, it seems important, even at this early juncture, to make some mention of one special interest group—Indigenous Australians. We do this for four broad reasons:

1. The water property rights framework that is being advocated is predicated on three important elements: security of tenure, transferability and clarity of specification. Arguably, these are all areas where there is enormous uncertainty from the Indigenous perspective, with regard to their water property rights interests in the native title era.
2. It can be argued that the depressed economic status of Indigenous people in Australia today is explicable, at least in part, by the alienation of their ancestors’ property rights in land and in resources. Also, historically, water rights have not been regarded as property in the same way as land and resources. A case can be made for ensuring that Indigenous interests in any property rights that are to be newly-created should be acknowledged, and a portion reserved (hypothecated) for Indigenous interests, to avoid mistakes of the past.
3. The very extent of the Indigenous estate in Australia—somewhere between 15 and 20 per cent of the continent (Pollack 2001) including substantial water catchment areas

and in some jurisdictions far more (e.g. 42% of the Northern Territory rising potentially to 52%, and over 80% of the NT coastline)—suggests that the actual or potential property rights in fresh water of this group cannot be ignored. All too often the alienation referred to above has occurred because an Indigenous voice has not been heard in newly-emerging debates about efficient and equitable allocation of property rights.

4. While recent case law has clarified a number of important issues in relation to the legal institution of native title, considerable uncertainty remains regarding potential native title rights and interests in fresh water. Such rights and interests may extend beyond the Indigenous estate, for example in situations where the quality of fresh water that flows on Indigenous land is impaired on other lands. Such uncertainty in itself generates transactions costs.

It seems uncontested that at present Indigenous interests, practices, and uses in, or associated with, different waters have not been acknowledged in the current water reform agenda. These interests are extremely diverse across the Australian continent and probably always were. Nevertheless they need to be considered, understood, valued and integrated into any emerging water property rights framework. For future water resource markets to function efficiently and equitably Indigenous property rights in water will need to be recognised and any particularities—some created by western laws, some by the articulation between western and customary laws—accommodated. Without such accommodation, we would argue, uncertainties and inefficiencies in any new water market will be created, with potentially high transactions costs and large compensation expenses.

The *Native Title Act 1993* (Cth) (NTA) is the key statute that generates some potential ambiguity for the clear definition of property rights in water. Since the 1992 decision by the High Court of Australia in the Mabo case, which recognised the existence of native title as part of the common law of Australia, there has been growing impetus for the definition, recognition and protection of Indigenous rights in both onshore and offshore waters. The NTA provides for the possibility of native title rights in the sea, at the same time confirming government ownership of water and minerals, while guaranteeing native title rights to customary use of resources, rights that are often dependent on inland water. In such situations possession can be differentiated from use rights. For example, the floodplain wetlands that are often grossly affected by allocation of water to other purposes are critical to the customary economies of many Aboriginal groups.

Section 24 of the NTA validates so called ‘future acts’ carried out by governments relating to the management of inland waters after 1 July 1993 and to other management regimes after 1 January 1994. The NTA provides for the validation of other acts by each State/Territory and would apply to the issue of permits and licences. This provision recognises that native title rights can be extinguished or suspended to the extent that they are inconsistent with another right. However, in accord with the Australian constitution, compensation is payable by the State under ss.24HA(5) and 24HA(6) for either extinguishment or diminution through the grant or issue of an inconsistent right. The

implications of this on water management plans may differ between States given their different statutory bases for determining, issuing and regulating water rights and interests.

Two States, NSW and Queensland, have objectives in their water statutes that recognise the rights and interests of Aboriginal and Torres Strait Islander peoples. The NSW *Water Management Act 2000* is most comprehensive. The definitions in this Act define native title rights in a limited sense to mean ‘the right to take and use water for domestic, personal and non-commercial communal purposes’. Regulations prescribe the maximum amounts of water that can be taken and used for such purposes in any one year. McKay (2002) suggests that the recent High Court decision in *State of WA v Ward* supports the proposition that the new Water Acts do not extinguish or limit customary native title rights to hunt, fish, gather and participate in cultural and spiritual activities. Again, use rights can be distinguished from rights of possession.

To provide a better explication of the possible implications of this statutory framework, based on economic principles, some recent research at CAEPR has used the concept ‘hybridity’ to analyse the inter-cultural nature of the economy on much of the Indigenous estate (Altman 2001). The hybrid economy, while highly variable, can be conceptualised as consisting of three sectors: the customary, the market and the state. The NTA recognises and protects extant Indigenous native title rights in the customary sector. How customary elements of the hybrid economy will interact with a wider commercial water market will need careful consideration. If the articulation between customary and commercial rights are overlooked, two potentially negative outcomes are possible. First, there will be no incentive for customary use to be efficient. Potential efficiency losses here may be small scale compared to commercial use, but may nevertheless be of strategic value especially in upstream water catchment areas. Secondly, and more significantly, if commercial use impairs customary use, then there are legal avenues of recourse for native title interests. Such scenarios are most likely where property rights and legal regimes are most contested, that is where Indigenous land and sea rights are already exercised and where there are legally recognised native title parties. When non-market (customary) interests in water are taken into account there are problems in the clarity of definition of rights in water.

An associated issue that might hamper a clear definition of property rights is that while the COAG framework focuses on private rights and use of water, native title is a communal (or group) right. Davies (2001) discusses this issue in the context of natural resource management more broadly. Native title holders have no legal option other than to hold and manage native title communally. This is because native title is defined by common and statute law as a system of collective rights. By negotiated agreement, native title holders may choose to relinquish their native title to the crown. It is also possible to relinquish native title in favour of allocation of individual property rights to group members. However, if they continue as native title holders, native title interests must operate collectively as the title itself is inalienable and indivisible (Mantziaris and Martin 2000). This has clear implications for potential trade in any newly-established water markets.

The NTA framework has a set of procedures that are designed to ensure that native title interests are not unfairly treated. These vary somewhat between past and future acts and between valid and invalid actions. There are also alternative dispute resolution mechanisms within the NTA framework that encourage agreement making.

As already noted, the NTA does not confer full property rights in fresh water to native title parties. The property right is only partial, covering customary use rights. In so far as future developments might affect native title interests there is requirement that native title holders or claimants are notified and have a right to comment on such proposals. Not to go through such due process runs the risk of invalidity. This so-called right to negotiate (RTN) is a limited right, but if extinguishment or impairment of native title rights are a possibility then there is a basis for either seeking compensation or for brokering agreements that can be registered. There is an emerging view that negotiating agreements is less costly and preferable to litigation. Indigenous Land Use Agreements (ILUAs) are voluntary agreements between a native title group and other stakeholders about the use and management of land—Neate (1999) has referred to them as a risk management tool for Indigenous Australians. ILUAs that encompass water rights could establish a similar agreement process for the use and management of fresh water.

Native title holders whose status has been so determined and whose rights have been affected by past acts are entitled to compensation under the NTA. This compensation is payable either by the Commonwealth alone or with the States/Territories jointly, but not by any third party who acquired an interest as a result of a past act. With respect to land, compensation is provided on the basis of ‘just terms’ and to date has been capped at the equivalent value of a freehold estate. The operations of just terms is unclear in relation to water rights and markets. It is important to note that under the NTA framework, native title rights can be extinguished or impaired by other legislation, but such extinguishment or impairment must be compensated. Legislation which does not provide for such recognition and compensation may be invalid, at least in part, or challengeable in the court.

The current uncertainty about the workings of the future acts and of past acts compensation regimes under the NTA framework also generates uncertainty about how new water property rights and markets might be created unencumbered (or undistorted) by a wide range of native title interests. Under such circumstances, it would be remiss of us if we did not make some suggestions to the Water CEOs Group for addressing the issues that we have outlined above. The following possibilities are canvassed:

- COAG should consider acknowledging and explicitly recognising the potential impact of native title on water property rights. This could include the development of a national approach, including the use of standardised terminology, to recognising native title rights in water.
- COAG should support the development of a communications and public education strategy that explains the nature of native title rights in water. In particular, there is a need to investigate appropriate means to enhance the capacity of Indigenous

stakeholders to engage more effectively with the emerging water market and trading framework.

- COAG should consider the value of initiating research case studies that assess the impacts of current water policies and frameworks on native title water rights, and that explore the potential for negotiation of local and regional water use agreements that parallel the ILUA framework.
- COAG should facilitate equitable Indigenous representation on government and industry bodies involved in water management. This should be regarded as a two-way process. A better understanding of the effects of any new property rights in water on indigenous interests can be gained through taking Indigenous knowledge into account, and Indigenous representation could also ensure greater direct dissemination of information to the Indigenous community about reform proposals and their potential benefits and costs.

In conclusion, this submission argues that COAG cannot create an efficient water market if the new property rights framework focuses only on commercial and private utilisation of water. There is another set of users that now has customary rights to water recognised in law. Our overarching argument is that Indigenous interests in water, now recognised in the native title statutory framework and emerging case law, must be accommodated from the outset. To establish an efficient water market requires not only the recognition of customary rights in water, but also some consideration of innovative approaches that might accord such rights commercial (or quasi-commercial) status to encourage efficient use and possible trade. To ignore such interests would run the risk of generating high future transactions costs, because legal debate would follow, inevitably, about the relative merits of commercial and customary rights and the possible impairment of native title rights; and/or potential for expensive compensation if native title rights are improperly impaired or extinguished.

Indigenous stakeholders should be considered from the outset in any proposal for the creation of new property rights in water—their diverse rights, interests, values and activities should be recognised and incorporated into water management planning. Ignoring Indigenous stakeholders runs the risk, alluded to at the outset, of further alienating an already disadvantaged group from rights in valuable resources. As significant land and coastline owners, Indigenous interests have statutory procedural rights to protect their native title. The continual triggering of the assertion of such rights through creation of an insufficiently inclusive definition of water property could entrench from the outset avoidable inequities and consequent inefficiencies in a new water property rights framework.

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