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To cite this article: Martuwarra RiverOfLife, Katherine S Taylor & Anne Poelina (2021) Living Waters, Law First: Nyikina and Mangala water governance in the Kimberley, Western Australia, Australasian Journal of Water Resources, 25:1, 40-56, DOI: [10.1080/13241583.2021.1880538](https://doi.org/10.1080/13241583.2021.1880538)

To link to this article: <https://doi.org/10.1080/13241583.2021.1880538>



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Published online: 03 May 2021.



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Living Waters, Law First: Nyikina and Mangala water governance in the Kimberley, Western Australia

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ABSTRACT

The 'Living Waters, Law First' water governance framework centres Living Waters, First Law and the health/well-being of people and Country. The framework is based on a groundwater policy position developed by the Walalakoo Aboriginal Corporation (WAC), the Nyikina and Mangala peoples' native title corporation, in the West Kimberley, Western Australia in 2018. This article celebrates Traditional Owner's pragmatic decolonising strategies. It explores the emerging conceptual challenges to the status quo by comparing the Living Waters, First Law framework to Australia's settler state water governance framework, represented by the National Water Initiative. Bacchi's 'what is the problem represented to be' approach is used to interrogate the underlying assumptions and logics (2009). We find that there are incommensurable differences with First Law and the Australian water reform agenda. Yet, our analysis also suggests 'bridges' in relation to sustainability, benefits and responsibilities could promote dialogues towards decolonial water futures.

ARTICLE HISTORY

Received 30 October 2019
Accepted 18 November 2020

KEYWORDS

First Law; Living Waters; First Nations; Indigenous; well-being; water governance

1. Introduction

'Our ancestor Woonyoomboo with our sacred ancestor Yoongoorrookoo (serpent) created the Mardoowarra (Fitzroy River) and its tributaries. The Mardoowarra is a gift to human and non-human beings, such as the birds, the animals and all the plants within this system . . . We advocate the protection of all river tributaries and wetlands which re-charge and connect the ancient aquifers and underground to surface water systems. These Living Water systems are connected to the Mardoowarra. First Law and custom that govern the river include Warloongarri law. Since Bookarrarra (the beginning of time)¹ this First Law ensured the health of the living system of the Mardoowarra. The importance of these laws is the principles that the law is in the land and not in man. It is framed around values and ethics of co-management and co-existence which continue to facilitate inter-generational relationships between the shared boundaries of all the River nations through ancient songlines, contemporary customs and practices. Under Warloongarri law, the Traditional Owners of the Mardoowarra regard the River as a living [sacred] ancestral being (the Rainbow Serpent), from source to seas, with its own "life-force" and spiritual essence. It is the "River of Life" and has a right to Life.'

(WAC, 'RE: proposed water allocation plan', message to the Department of Water and Environmental Regulation, June 2018, via email).

Living Waters, Law First is a cultural governance framework for water is based on a policy position developed by the Walalakoo Aboriginal Corporation (WAC) in Western Australia. A central objective of the framework is to look after Living Waters. Care for Living Waters is enmeshed with human health and well-being. Living Waters are connected physically and spiritually in each Booroo ('Country'), including connections that run through the earth and aquifers. Thus, the management of rivers, billabongs springs, soaks, flood plains and aquifers are all connected, and based on reciprocal relationships.

Water is connected to identity, culture, livelihoods and economies. This story illustrates how the physical manifestations of the epic journeys of Woonyoomboo and the sacred ancestral being, Yoongoorrookoo, entwine with ethics, values, custom, law, language and inter-generational obligation, as water moves above ground, down rivers and permeates through groundwater systems (Pannell 2009). WAC elders asserted that '... water has meaning beyond the need to drink and sustain life, because as custodians we see ourselves as an integral part of the landscape, the Mardoowarra, and our cultural values are strongly associated with water rights and responsibilities' (Watson et al. 2011). These relationships are detailed in the *Birr nganka Yimardoowarra* ('the knowledge source of the Mardoowarra's people'), a hydro-ecological framework developed by Nyikina women

elders. Senior elder Annie Milgin explains, ‘Birr Ngangka – the cycle of life, story and law in Nyikina Country – is not just for people: it animates and informs all life’ (Milgin et al. 2020).

Attention to water governance is warranted because water issues are never ‘just’ about access to water volumes. Water is contested on multiple levels, from access to rules to societal discourses (Zwarteveen and Boelens 2014). Decisions about water have profound impacts on people’s lives. Water justice depends on the fairness of water governance processes and outcomes (Nikolakis and Grafton 2014). In Australia, a major contributor to injustice is a governance system based on water colonialism.

Australia’s First Peoples have responded to water colonialism with a range of water policy positions, actions, declarations, academic research and other outputs (Taylor, Moggridge, and Poelina 2016). Nevertheless, research led by First Peoples on nation building and water self-governance is often overshadowed within the literature (Hemming et al. 2019). The need for change is acknowledged, but the debate often reflects the discourses and actions of settler state water management planning. Limited attention is paid to how First Peoples are actively decolonising water governance or how decolonisation can be operationalised, especially in relation to co-governance.

Here, we take an explicitly decolonial stance on water governance that supports First Peoples’ resurgence, local nation building and revitalisation of First Law.

Following Smith, we refer to the decolonising practices of envisioning the future, reframing of the status quo and democratising decision making (1999). Traditional Owner’s *vision* for water governance is described in the Living Waters, Law First framework. The ‘water governance’ hegemony is *reframed* by exploring water co-governance based on First Law. Water governance is *democratised* by Traditional Owners through foregrounding First Law principles for water decision making.

After describing First Law, Living Waters, we consider potential implications for Australia’s National Water Initiative (NWI). Previous work has highlighted the need for reform (e.g. Nelson, Godden, and Lindsay 2018; Hartwig, Jackson, and Osborne 2018; Jackson 2017a; Tan and Jackson 2013; J. Altman 2004; S. J. Hemming and Rigney 2014; Marshall 2017). The NWI implicitly precludes options such as cultural governance and co-governance. A reformed NWI that is inclusive of such models would need to find ways to harmonise with First Peoples’ diverse water governance frameworks and institutions. Comparing the NWI to the Living Waters, Law First framework allows us to explore, in specific detail, areas of conceptual similarity and difference.

Our analysis of the two different world views is based on Bacchi’s ‘what is the problem represented to be?’ approach (2009). Bacchi suggests that government policy can be examined by questioning how the policy ‘problem’ is represented. This approach assumes that the implicit representation of a ‘problem’ reveals much about the politics of the policy ‘solutions’. We chose Bacchi’s approach for its analytical insight into politics, power and representation. In addition, using a tool designed for policy analysis in this context subverts hegemonic assumptions about who makes ‘water policy’ in Australia.

After highlighting the tensions, we consider how points of similarity could be used as ‘bridges’, drawing people(s) together across knowledge divides (Anderson and McLachlan 2016). Cultivating bridges of shared understanding are crucial because they are the building blocks for a shared water future based on equity, reciprocity, and well-being of all. Bridges are necessary for confronting the challenges of decision-making power, ownership, responsibilities and rights. Combining the ‘bridges’ and conceptual ‘gaps’, we propose a research agenda as a starting point for dialogue about broader water reform and highlight the importance of asking ‘unsettling’ questions.

Together, the analysis and case study provide pragmatic strategies towards water decolonisation in the Kimberley, Western Australia. Our work adds to the growing literature in Australia about First Peoples’ diverse water governance frameworks and strategies. Our contribution is to promote dialogic action in an effort to decolonise water governance in Australia.

2. Background

Before describing the Living Waters, Law First framework, we outline our methodological approach. We describe how we conceptualise the terms ‘Living waters,’ ‘First Law’ and ‘cultural governance’ in this article.

2.1. Research collaboration

This article has three authors, RiverOfLife, (Martuwarra), Poelina and Taylor. The Martuwarra is the lead author and we acknowledge Yoongoorookoo, the sacred ancestral living being, through the Martuwarra and in turn through the River’s affiliation with Warloongarri Law (‘river law’) as creator and keeper of First Law (RiverOfLife, Poelina, and McDuffie 2020). Acknowledging the Martuwarra reflects the fact that people, land and water are not separate. Country shapes the human authors as they shape and represent Country in their writing (Bawaka Country et al. 2015). The Aboriginal English word, ‘Country,’ can be used in several ways

(Pleshet 2018). We capitalise Country as a proper noun. Country is a living presence to which people relate. Country also connotes the estate of specific people, e.g. Nyikina Country.

Poelina is a Nyikina Warrwa woman. ‘Ngayoo yimardoowarra marnin;’ she belongs to the Mardoowarra/Fitzroy River (note: Martuwarra is the river’s generic name and Mardoowarra is the Nyikina spelling). Taylor is an Australian born woman of British/European descent. Both are residents of the west Kimberley, where this case study is located. Where Poelina provides specific comments from her perspective as a Nyikina Traditional Owner, it is indicated in the text. Otherwise a collaborative co-authorial voice between Poelina, Taylor and Country can be assumed.

WAC’s research programme is directed by their six-person research committee, which is a subsection of the WAC’s board members (i.e. from a board of Nyikina and Mangala people). We thank Annie Milgin, Linda Nardea, Anne Poelina, Patricia Riley, Robert Watson, and Kimberley (Bo) Watson for their contributions.

2.2. Methodological approach

According to Poelina, the challenge before the Martuwarra and her peoples is to frame their own ‘dreaming’ and imagine how their water governance can be strengthened through the goodwill of governments (Poelina 2020). Goodwill is critical to constructive co-governance partnerships and changes to water governance that advance First Law must also be protected by appropriate legislation to avoid being undermined by arbitrary administrative fiat. Our observations are privileged by tens of thousands of years of water governance wisdom and authority in partnership with the Martuwarra’s guardians. Our intent is to describe decolonisation envisaged by Traditional Owners to re-imagine the future, dreaming and celebrating resilience and well-being.

Consistent with Traditional Owner’s visions, this article draws on critical and decolonising methodologies to support our collaborative research approach. We begin by assuming that all research is grounded in value systems and is therefore political; by valuing First Peoples’ knowledges; and by using the practice of academic inquiry towards emancipation and social justice (Freire 2005; Denzin, Lincoln, and Smith 2008).

By ‘decolonisation’ we refer to the undoing of colonisation that leads to material changes, returning stolen lands and waters (Christie 2014; Tuck and Yang 2012). Water decolonisation is a process that supports First Peoples’ water sovereignty, shifting power, decision making authority and material access back to Traditional Owners. It implies that new relationships need to be developed between the Australian

government and First Peoples. It implies changes to the relationships between the water sector, commercial water users, civil society and First Peoples. We understand water decolonisation to be an unfolding process, leading not to the pre-colonial past, but a yet-to-become future (Césaire 2000; Tuck and Yang 2012).

Smith proposes that research for decolonisation can encompass many forms and practices. Here we highlight some of Smith’s ‘twenty-five Indigenous projects’: envisioning, reframing, sharing and democratising decision making (1999). This article describes how Traditional Owners decolonise by reframing water management, envisioning and democratising through new governance structures, sharing First Law stories about Living Waters. In this article, reframing occurs through policy analysis (see section 4 for detail). Democratising happens by questioning the colonial constructions of decision making processes/bodies that are enforced by settler legislation, and undergoing reforms that reinstate First Peoples’ principles (Smith 1999).

The story of Traditional Owners’ envisioning, reframing and democratising water governance is aligned with the literature on Indigenous resurgence and nation (re)building (Hemming et al. 2019). Resurgence refers to the actions that reconnect people with homelands, cultures, and communities, renewing roles and responsibilities to both water, people and other life (Corntassel 2012). Practising water governance for Living Waters revitalises Law, supporting First Peoples using ‘their powers and responsibilities as Nations in order to promote an Indigenous-centred discourse on sustainable self-determination’ (Corntassel 2008, p121). Renewing relationships between neighbouring First Peoples within the catchment is integral to resurgence (Poelina, Taylor, and Perdrisat 2019; Corntassel 2012). Thus, visions of water governance decolonisation are also visions for well-being between Living Waters, lifeways and livelihoods and ALL peoples on and with Country (Poelina 2020).

2.3. First law, living waters

The inherent rights of First Peoples to govern their lands and waters is embedded in their Law, sometimes called customary or traditional law. Here we refer to it as ‘First Law’. First Law is considered to come from the land (Black 2010; Lim, Poelina, and Bagnall 2017; Graham and Maloney 2019). Through First Law, law of the land, everyone is under this law and no one is above it. First Law grounds First Peoples’ ontologies, relationships and obligations. These deep relationships and world views are framed as Indigenous jurisprudence that combine the past, present and the future into an ethics of care (Anker 2008). First Law is central to sustaining Traditional Owners’ ways of life, livelihoods and well-being.

According to First Law, relationships to water (and land) are defined by responsibilities, not just by rights (M. Graham and Maloney 2019). Thus, Traditional Owners are custodians who have a duty to protect the water that nourishes billabongs in the dry season and the river that flows during the wet season (Toussaint et al. 2001). Nyikina and Mangala Traditional Owners continue to adhere to the lessons of Woonyoombo's story as it underlies the construction and resilience of their identity, health and well-being, cultural inheritance and guardianship for the Martuwarra and Living Waters (Colleen Hattersley 2009).

But what are 'Living Waters'? Many people use this Aboriginal English term to describe waters that are alive. Nyikina Living Waters are *Oongkooor*, the permanent waters inhabited by spiritual beings/water snakes and are the source of energy that animates Country (Milgin et al. 2020, p7). Nyikina man Paddy Roe described several connected springs as, 'that's all my spirit ... 'cos I born here I born 'mongst these yungurugu [i.e. Yoongoorrookoo] ... yungurugu is the rainbow snake he hold that water always never go dry must be something there underneath' (Benterrak, Muecke, and Roe 1984). Further into the desert, Walmajarri people talk about *jila*, the permanent water places that are *wunggur ngaba* – Living Water – inhabited by the *Kalpurtu* serpent ancestral beings (Sullivan, Boxer, and Bujiman 2012). Moving several hundred kilometres south of the river, Karajarri people refer to *pulany*, the powerful ancestral snakes who live in *jila* (Yu 2000). Further south still, Noongar people know the *Waugal*, the rainbow serpent, created wetlands, the trail evidenced today by Living Waters (Wooltorton, Collard, and Horwitz 2019). Living Waters are 'at the heart of a person or group's country' (Lingiari Foundation 2002, p8).

First Law instils obligations on the guardians to look after Living Water systems as this life force sustains all other life, human and non-human. As guardians of Living Waters, Traditional Owners have a duty to place its interests ahead of their own. Guardianship/custodianship for water is inter-generational, relational and dynamic. Consistent with First Law, Living Waters must be given appropriate respect and the correct protocols need to be followed by the right people for that Country (Appleyard, Macintyre, and Dobson 2001). Observation, visitation and relationship is important (Poelina et al. 2020). Looking after Living Waters requires attention to the signs which indicate the balance of all life. The complexity of these relationships are being fully developed in the research being undertaken with Senior Nyikina Elders Annie Milgin, Linda Nardea and Hilda Grey to translate Nyikina concepts and knowledge of *Birringangka Yimardoowarra* into a seasonal calendar (Milgin et al. 2020).

Poelina's view is that a Living Water First Law first framework promotes reciprocal responsibility through an ethics of care based on the relationship between all living systems. It enshrines key values and ethics to promote well-being and the balance and sacredness of all life. Importantly, it recognises that water is a living life force that humans have an obligation to care for in a respectful manner. Traditional custodians must recognise and protect all inhabitants who are connected to these ancient living water systems (Poelina 2017). This is the Living Water Law. Poelina says that from her perspective, the spirit of the water is living. This then creates and continues the life cycle from the minute, the diatoms, to the largest, such as the sawfish, crocodiles, bull sharks, birds, fish, plant and other river creatures which live in harmony with people and the River Country (Poelina and Fisher 2020).

2.4. Water governance and decolonisation

Australian settler state water governance is the set of colonial imposed systems that control decision-making. Responsible water governance is pivotal to decolonising water as it is central to Indigenous identity and an expression of self-determination. Water governance is the set of systems that control decision-making about water use and management (Curran 2019). Water governance matters because it effects water access and distribution, who is making decisions, and who is determining the rules under what conditions. In Australia, water colonialism limits what can be achieved by the settler government's system of water governance. Water colonialism is the system of assumptions/beliefs, processes and actions, based on colonial imperialism, that exclude First Peoples, their laws and responsibilities (Robison et al. 2017). The consequence of water colonialism is that water is distributed to predominantly benefit 'white water citizens,' an idealised water user who fits the colonial story and advances imperial objectives (Berry and Jackson 2018). In the Murray Darling Basin, First Peoples' water holdings are small and diminishing (Hartwig 2020). State sanctioned 'water grabs' are still ongoing with plans mooted for northern Australia (Australian Land and Water Taskforce 2009; Australian Government 2015; Douglas et al. 2011; O'Neill et al. 2016).

The implicit assumptions of water colonialism discourses limits the way that 'water management' is imagined and preclude consideration of whose rules – the settler state's or First Peoples' – are being upheld by water governance (Taylor, Longboat, and Grafton 2019). In Australia, the term 'aqua nullius' refers to the erroneous belief that water belonged to no one prior to British colonisation (Marshall 2017). Aqua nullius remains built into the foundation of

Australian governance. A ‘paradigm shift’ is needed (Marshall 2017) for justice and equity. Furthermore, settlers have much to gain from First Peoples’ perspectives (Bozhkov et al. 2020).

‘Cultural governance’ was used by WAC to delineate between First Peoples’ governance and Australian settler state water governance. Cultural governance is consistent with First Peoples’ ontologies, expressing their laws and jurisdictions. Cultural governance refers to a complex, adaptive and continuing contemporary practice. It resists false dichotomies of material/spiritual aspects of water. Living Waters are a connected system in a cultural landscape. Therefore, cultural governance pertains to all water on Traditional Owner’s Country, not just that which maintains specific sites.

‘Cultural’ is a contentious term and has the potential for mischaracterisation. For example, First Peoples’ ‘cultural’ water values are frequently misinterpreted by settler water managers/regimes to refer to pre-colonial practices only, focusing on the intangible/symbolic rather than material water access (Jackson 2017b). Political understandings of First Peoples’ water sovereignty are often side-lined by settlers capturing/studying ‘cultural’ water associations (Hemming et al. 2019). Despite the misinterpretations, the terms ‘culture’ and ‘cultural’ are becoming synonymous with First Peoples’ culture, including Law, language, institutions and ontologies. Other ways of describing ‘cultural governance’ might be ‘Nyikina and Mangala governance’ or ‘Aboriginal governance’ of water.

Cultural governance and Australian settler state governance could be brought together to form ‘co-governance’. By ‘co-governance,’ we mean a hybrid system of shared decision-making authority between the Australian government and First Peoples. This conceptualisation could include input from community, industry and other groups but must be centred on First Peoples’ decision-making authority and responsibilities according to First Law. Co-governance is distinct from participatory water management processes. Even ‘participatory’ modes may view First Peoples as ‘just another’ stakeholder among many, and colonial structures of power are retained (O’Bryan 2018).

The co-governance relationship between neighbouring First Peoples/First Nations is as important, if not more important, than the relationship between First Peoples and the settler state. Co-governance balances individual Nations’ autonomy with regional responsibilities through collaboration, negotiation, and observance of First Law. As we describe in section 3, regional governance systems (such as the Martuwarra Council, which is based on *Wunan*) pre-date colonisation. Contemporary co-governance reinstates core principles of these systems and renews

relationships between peoples (Norman, 2012, Poelina, Taylor, and Perdrisat 2019).

Working towards water decolonisation can take many forms. Here, we focus on water governance but observe that decolonising actions are diverse and can include improving security of drinking water supplies, undertaking ceremony, walking for water, or developing games and water quality monitoring (Alcantara, Longboat, and Vanhooren 2020; Longboat 2013; Abu, Reed, and Jardine 2019; LaPensee, Day, and Jaakola 2018; McGregor 2013). Everyday acts of visiting water, caring for water and sharing stories about water all contribute to decolonisation and resurgence.

2.5. Well-being and water governance

Well-being of people and water is a key objective of the Living Waters, Law First framework described in section 3 below. Living Waters depend on the reciprocal relationships between people and water (RiverOfLife, Poelina, and McDuffie 2020). Likewise, human well-being is connected to the health of water and Country (Ganesharajah 2009; Griffiths and Kinnane 2011). Kwaymullina explains, ‘country is loved, needed, and cared for, and country loves, needs, and cares for her peoples in turn’ (2005 p.1).

Well-being is also sustained by revitalising law and culture. Health, including mental health, is concerned with spiritual, social, emotional, cultural, physical, mental and economic well-being (Burgess et al. 2005; J. C. Altman and Kerins 2012; Dockery 2010; Swan and Raphael 1995). Conversely, colonisation, history and racism contribute to ill health (Swan and Raphael 1995; Poelina 2020). Thus, the Living Waters, Law First framework supports wellbeing through strengthening connections to Country, Law and culture.

3. Case study

In this section we overview WAC’s water policy position. Some background is provided about the NWI but this is brief, given that it is well represented in the water policy literature (examples: O’Donnell 2013; RiverOfLife et al. 2020; Gray and Lee 2016; Marshall 2017; Connell and Grafton 2011; Grafton and Wheeler 2018; Alexandra 2018). We chose to make our comparison with the NWI in order to make conclusions relevant to the national framework, which is being reviewed in 2020 (Productivity Commission 2020). We note that Western Australia has not yet fully implemented the NWI (Hart, O’Donnell, and Horne 2019; Butterly 2012). Nevertheless, it plans to enact compliant legislation in the near future (Government of Western Australia 2018; Department of Water 2013).

3.1. WAC groundwater governance policy position: First Law, Living Waters

WAC is a registered native title body corporate (RNTBC). It was established to represent Nyikina and Mangala peoples after the determination of 26,215 square kilometres of exclusive and non-exclusive possession land under the Native Title Act 1993 (Cth) in the west Kimberley, Western Australia (Walalakoo Aboriginal Corporation 2019). These lands stretch from tidal waters of the King Sound along the lower reaches of the Mardoowarra and to the Great Sandy Desert (WAC, 2017).

In 2018, WAC developed a groundwater policy position in response to a groundwater allocation plan consultation run by the Western Australian Department of Water and Environmental Regulation (DWER). WAC sent DWER a formal written response. The DWER will complete a Draft Derby Water Allocation Plan, which will then be released for public comment. At the time of writing this article, the initial consultation was over but the draft Plan was not yet available. WAC’s response to the pre-plan consultation was developed by a subcommittee and Taylor, with reference to previous work such as WAC’s Healthy Country Plan (2017). The draft was further developed by Poelina, reviewed by the WAC Board via email, and then emailed to DWER by WAC’s Chief Executive Officer in June 2018.

WAC’s policy position acknowledges the rights of neighbouring Traditional Owner groups to govern water on their Country. Figure 1 indicates the language groups of the broader Fitzroy catchment. The smaller Derby water allocation plan area encompasses several native title determination and application areas: Bunuba#2, Warrwa, and Mawadjala Gadjidgar, and Nyikina and Mangala (Figure 2). Given the type of analysis and objectives of this article, it is outside of the scope to discuss the responses by other Traditional Owner groups. We also note that there are a variety of other perspectives, for example by the cattle grazers who hold pastoral leases. Figure 2 shows the pastoral stations – Yeeda, Meda, Mowanjum, Mount Anderson, Blina, Liveringa and Debesa – that overlay native title lands in the proposed plan area.

3.1.1. Vision

WAC’s policy position was established in their Healthy Country Plan: ‘Mardoowarra and our creeks, springs, wetlands . . . are protected and we have control of our water rights’ (WAC 2017). WAC reiterates this vision and identifies several aims for the groundwater management plan, ‘No negative impacts on *jilas*, wetlands, creeks, billabongs, or culture’. WAC’s priorities for the water plan included: Traditional Owner’s water obligations and rights, native title rights, community drinking water supplies, maintaining water in the environment, and water for Nyikina and Mangala peoples’ potential future commercial use.



Figure 1. Towns and languages of the fitzroy river catchment. Language label location is indicative not exact. Source: <https://klrc.org.au/>.

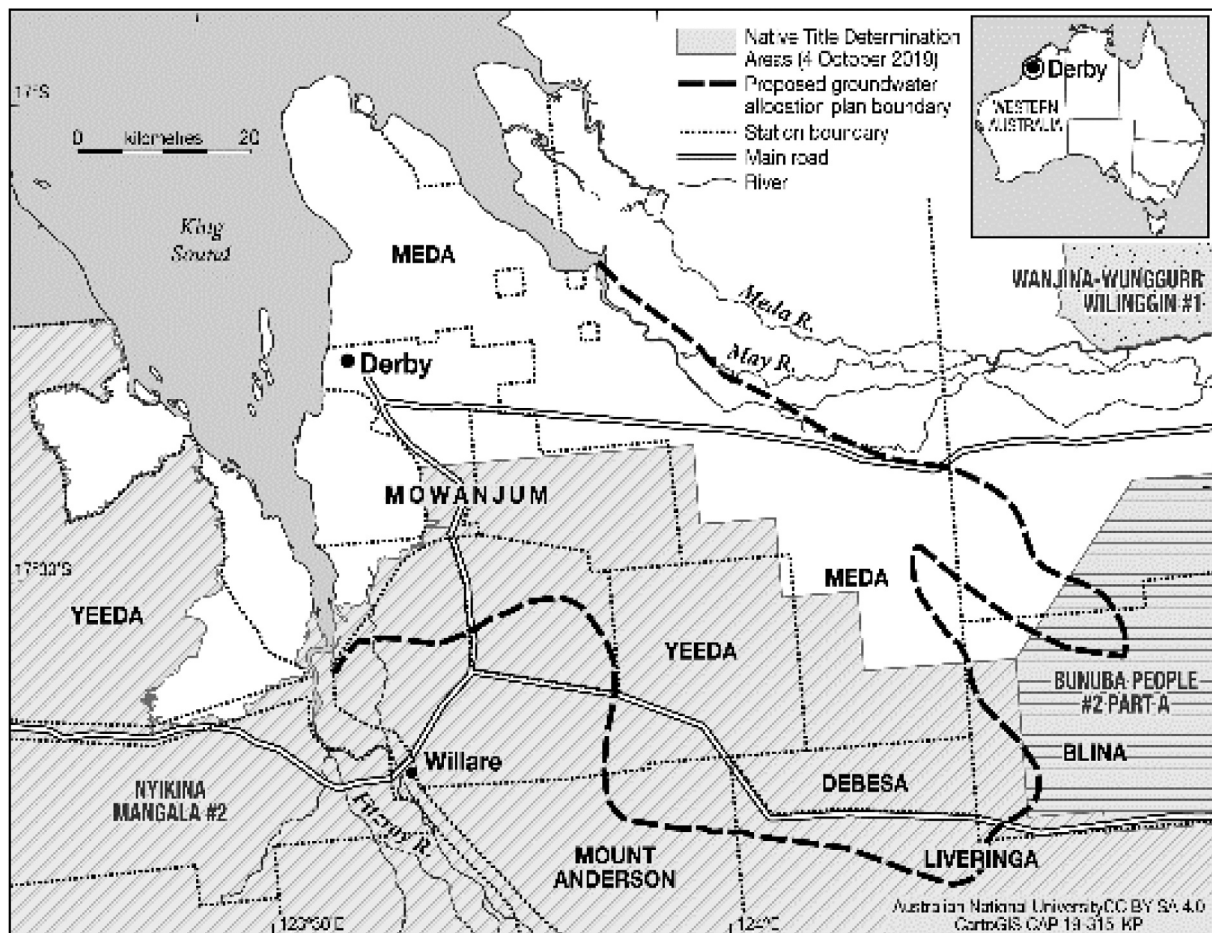


Figure 2. Approximate location of the proposed boundary for the new groundwater allocation plan as per DWER's pre-draft plan consultation 2018.

3.1.2. Principles

WAC listed the following principles:

Land, water and people are not separate.

Access to clean water is a universal and basic human right.

As guardians of the Mardoowarra, we have a duty of care to ensure inter-generational equity to water for current and future generations.

Living Water is a living spirit which generates and holds memory and includes rivers, wetlands, soaks, billabongs, flood plains and aquifers*.

Cultural governance of water is essential

Projects that support sustainable life and livelihoods on the river country are the highest benefit uses of water (not extractive industries)

WAC asserted Nyikina and Mangala peoples' rights to make decisions using free, prior and informed consent, particularly regarding water planning and infrastructure

*Wording for this principle was updated in 2019 based on feedback from Traditional Owners in the research committee

3.1.3. Cultural governance

Cultural governance underpins the policy position. As mentioned earlier, 'cultural governance' is water decision-making by Traditional Owners according to First Law. WAC is building avenues to support cultural governance. WAC proposed that Western Australian government water law and policy be revised to 'recognise Traditional Owner's inherent rights to water, responsibilities as water custodians, and water managers under First Law'(WAC, 'RE: proposed water allocation plan', message to the DWER, June 2018, via email).

Further strategies that support cultural governance include forming collaborative partnerships with stakeholders, building capacity of WAC's members, conducting water research and knowledge sharing by elders, and on-the-ground conservation work by the Nyikina Mangala Rangers.

3.1.4. The Mardoowarra Fitzroy River Council

In addition to their position on the draft Derby Plan, WAC contributes to cultural governance by being

a member of the regional water leadership body, the Martuwarra Fitzroy River Council ('Martuwarra Council'). The Martuwarra Council is a coalition of peoples from across the Fitzroy catchment, bringing together Bunuba Dawangarri Aboriginal Corporation RNTBC, Walalakoo Aboriginal Corporation RNTBC, Yanunijarra Aboriginal Corporation RNTBC, Wilinggin Aboriginal Corporation and the Yurriyangem Taam and Warwa native title claim groups (Poelina and Fisher 2020).

The Martuwarra Council revitalises Wunan throughout the catchment for the purpose of water management. Wunan is the First Law of regional governance (Doring and Nyawarra 2014) traditionally regulating land tenure, sharing of resources and trade through the Kimberley based on a circular economy (Doring and Nyawarra 2014). The Council has endorsed terms of reference which enshrine the principles of *Warloongarri* law/river law (Lim, Poelina, and Bagnall 2017). *Warloongarri* Law unifies all the Martuwarra First Nations, through key values, ethics and codes of conduct to promote and protect their collective well-being. Under their guardianship and authority the first duty is to uphold the right of their sacred ancestral River to live and flow (Poelina, Taylor, and Perdrisat 2019).

The co-operation, unity, organisation and mobilisation of the Martuwarra Council strengthens cultural actions and is consequently an 'instrument of liberation' (Freire 2005, p8). The truth, healing and reconciliation between members of the Martuwarra Council is enabling the transition away from colonisation and towards wellbeing, empowerment and self-determination.

3.1.5. *Knowledge(s) and science*

WAC supports water management underpinned by what is often termed 'two-way learning' or 'two-eyed seeing' (Bartlett, Marshall, and Marshall 2012; Purdie, Milgate, and Bell 2011). That is, 'western' science and Nyikina and Mangala knowledges/sciences together. First Peoples are championing the benefits of two-way science (Woodward et al. 2020).

3.1.6. *Strategies for water management and licencing*

Living Waters are interconnected and relational systems and, thus, require time spent reflecting the connected nature of water through Country, health, wellbeing, love and protocols. To achieve this, WAC further suggested that the future Derby allocation plan could monitor and report on cultural objectives, and that Traditional Owners have greater involvement in decision making, monitoring and ongoing assessment of water use. Although water licencing is not the only issue of concern, it can have a significant impact. WAC supported the Martuwarra Council's calls for

a 'moratorium' on water licencing and water (re)allocation by DWER until water plans in the catchment are finalised (Dickie and Walalakoo Aboriginal Corporation 2018).

Sustainable industries are those which are compatible with protection of Living Waters under First Law. WAC advocated for peer reviewed scientific, social and cumulative impact assessment, which must inform and regulate an adaptive water management plan, responsive to climate change.

To manage consumptive use, WAC has proposed to develop and trial voluntary, formal agreements between WAC and water licence applicants/development proponents. The purpose would be to promote better working relationships and to manage water. The agreement could be related to, yet independent from, DWER's water licencing process. The water licence holder might agree, for example, to provide water monitoring data directly to Traditional Owners on a negotiated schedule. For the proponent, an agreement would demonstrate 'social licence' by a willingness to respect Traditional Owners and First Law by gaining free, prior and informed consent from Traditional Owners. Water use agreements could be modelled on Indigenous Land Use Agreements (ILUAs). For equity reasons, is also important that Traditional Owners are also able to access water for consumptive use to support future enterprises.

3.2. *The National Water Initiative*

The 2004 NWI is an agreement between the Council of Australian Governments (COAG) about water management (Council of Australian Governments 2004). The NWI aims to achieve a 'nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes', primarily through water property rights reform. The NWI is structured around eight key elements² and ten objectives. These objectives cover water access entitlements, water planning, environmental management, environmentally sustainable levels of abstraction, water trading, risk assignment, water accounting, reporting, efficiency and recognition of the connectivity of surface and groundwater systems. The NWI also considers 'adjustment issues' faced by water users and communities when the government takes action to correct for over-allocation/overuse.

Much is written about the NWI and its implementation. Here, we focus on how First Peoples' water rights, interests and responsibilities are incorporated. First Peoples are not explicitly referred to within the NWI's objectives or key elements (Clauses 23 and 24). However, one of the NWI's intended outcomes is to 'recognise indigenous

needs in relation to water access and management' (Clause 25ix). Clauses 52 to 54 cover 'Indigenous Access' to water and representation in water planning. The NWI says that water plans should incorporate Indigenous 'social, spiritual and customary objectives'. Water plans must incorporate the 'possible existence of native title rights to water in the catchment or aquifer area,' and water for 'traditional cultural purposes' must be included in accounting. A final notable item is that water planning frameworks will provide a statutory basis for protecting Indigenous and cultural values under the banner of 'environmental and other public benefit outcomes' (Clause 25ii).

The NWI's Indigenous access clauses have been critiqued and found inadequate for many reasons, including their discretionary nature (Tan and Jackson 2013; Jackson and Morrison 2007; Marshall 2017). The NWI requires that native title rights are accounted for, yet water planning frequently fails to do so (Productivity Commission 2017). The Native Title Act 1993 (Cth) itself is problematic (e.g. I. Watson 2002). The arising native title rights to water are limited to the rights to domestic, social and cultural purposes, but not for commercial purposes (O'Donnell 2013). Under the NWI, water remains vested in the Crown.

The Australian government recognises that the NWI has 'unfinished business' and that future water reforms need to have better outcomes for First Peoples (Productivity Commission 2017). However, changes must address the structural issues. We interrogate how the NWI conceptualises water policy 'problems' in order to understand more about possible areas for reform.

4. Analysis: 'what is the problem represented to be'?

To deconstruct the logics of both the NWI and the Living Waters, Law First frameworks, we use a 'what's the problem represented to be?' style analysis (Bacchi 2009). This post-structural approach proposes that policy presents 'solutions' that can be traced back to representations of 'problems'. Questioning the underlying logic and the often unexamined assumptions makes politics visible and creates space for challenging the status quo (C. Bacchi 2000). Here, Bacchi's approach is used towards decolonising ends, reframing the water policy 'problems' addressed by the Australian government and reclaiming space for First Peoples' interpretations of water governance.

The 'what is the problem represented to be' approach asks six questions of policy:

- (1) What is the 'problem' represented to be in a specific policy or policy proposal?

- (2) What presuppositions or assumptions underpin this representation of the 'problem'?
- (3) How has this representation of the 'problem' come about?
- (4) What is left unproblematic in this problem representation? Where are the silences?
- (5) Can the 'problem' be thought about differently?

What effects are produced by this representation of the 'problem'?

- (1) How/where has this representation of the 'problem' been produced, disseminated and defended? How has it been (or could it be) questioned, disrupted and replaced?

The six questions guided a content analysis of:

- WAC's submission to the Western Australian government about the proposed Derby Water Allocation Plan (WAC, 'RE: proposed water allocation plan', message to the DWER, June 2018, via email).
- The NWI (Council of Australian Governments 2004).

We interpret the NWI with evidence from the literature. Where possible, references have also been provided in support of our interpretation of WAC's water framework.

Both governance frameworks aim to address overlapping and connected water issues. Thus, they reflect multiple water policy 'problems'. To limit the scope of this article, our analysis focuses on water allocation, management and the roles of settlers and First Peoples. Drinking water service issues were excluded. The results are summarised in Table 1 below.

5. Discussion

The analysis in Table 1 shows two contrasting approaches to water governance.

In brief, WAC's framework honours Living Waters according to First Law and responds to the policy 'problem' of colonisation's threats to the system integrity. By contrast, the NWI's representation is based on managing water resources as natural capital and the central 'problem' of inefficient and unsustainable resource use.

5.1. Underpinning assumptions and sources of knowledge

Different problem representations arise from disparate knowledge systems. Each framework has an ontological foundation that encompasses systems of law, culture, science and ways of knowing water. The contrast

Table 1. What is the problem represented to be?.

WPR?	NWI	Living Water, Law First
What's the problem(s)?	First Peoples' need better water access. Water management is inefficient, environmentally unsustainable and inconsistent between jurisdictions.	Australian water management erases First Peoples' water sovereignty and Law. The well-being of Living Waters/people/Country is threatened by proposals for unsustainable development that expands the colonial 'frontier'(Langton 1999. "Water Rights: The New Frontier in Northern Australia." Draft paper for CINCRM. Darwin, N.T.: Centre for Indigenous Natural and Cultural Resource Management, Northern Territory University.)
What are the assumptions?	Water is governed according to Australian law. Australian governments have authority for decision making and First Peoples' claims to water are limited/aqua nullius (Marshall 2017). Water is a resource/natural capital (Cook and Bakker 2012). Separating land and water property rights facilitates water trade (National Water Commission 2011). Resources can/should be allocated to maximise human consumptive use/benefits (N. Graham 2011).	Water is governed according to First Law (Poelina, Taylor, and Perdrisat 2019). Traditional Owners have custodial responsibility and inherent rights for water. Living Waters have an ancestral spirit. Land, water and people are not separate (Milgin et al. 2020). Living Waters are already in use (by plants, animals, etc.) and thus water is already fully 'allocated'. Water plans are a 're-allocation' (Poelina, Taylor, and Perdrisat 2019).
How has this representation come about?	Water colonialism (Robison et al. 2017) Techno-managerial view of water (Parsons and Fisher 2020).	From the Bookarrarra. First Peoples' contemporary policy and scholarship.
Where are the silences?	First Peoples' water, rights and responsibilities (Marshall 2017). Reciprocal relationships with water.	Market based mechanisms for distributing water.
What are the effects?	Beneficiaries are settlers (Berry and Jackson 2018). Decision making power and responsibility remains with Australian government.	Emphasis on First Law, quality of relationships and well-being. Shifts in decision making power and responsibility towards Traditional Owners.
How is this representation produced;	Reproduced through government funded programmes, state/territory water policy and law, and dominant discourse of water sector and media. Land tenure and the grandfathering of water entitlements (Jackson 2017a).	Produced through WAC decision making and policy implementation, dialogue with government, establishment of Martuwarra Fitzroy River Council, media, literature and advocacy.
And how could it be questioned?	Questioned through formal processes such as the triennial review (Productivity Commission 2017), media and scholarship.	Questioned by water management orthodoxy.

between water as spirit, versus water as resource, is typical of comparisons of 'western' and 'Indigenous' frameworks (Parsons and Fisher 2020).

WAC's policy is based on the foundation of First Law that comes from the land and is tied to the *Bookarrarra*. This law of relationship are the values, ethics, and rules for living in harmony with nature and our fellow non-human beings. These 'rules' are the codes of conduct necessary to maintain balance and harmony with each other and with Country. This is the First Law which continues through *Bookarrarra* and on into modernity. *Bookarrarra* is the fusion of past, and how this is actioned in the present but always focused on the future generations (Poelina 2020). Consequently, Living Waters, Law First, assumes water as an ancestral spirit, placing emphasis on the quality of relationships, adherence to Law and ensuring well-being of the interconnected system.

By contrast, the NWI is based on European laws that has misinterpreted First Peoples' systems land and water title/custodianship (Lilienthal and Ahmad 2017; Marshall 2017). Colonial laws have excluded First Peoples and can be considered 'maladapted' to the Australian landscape (N. Graham 2011, p20). The NWI assumes water is an inert resource and focuses on access to quantities of water quantity water (Cook and Bakker 2012). Consequently, the nature of property rights and understandings of 'ownership' are contested (Marshall 2017). For example, the NWI unbundles land

and water entitlements, whereas under First Law, land and water are intrinsically connected.

The contrasting foundations effect how water is distributed according to each framework. The NWI highlights market mechanisms to reallocate water to its highest market use. There is a focus on using water efficient technology to provide a 'solution' to water problems. By contrast, WAC asserts that projects that support sustainable life and livelihoods on the river Country are the highest benefit uses of water. WAC centres the responsibility of Traditional Owners to make decisions that look after Living Waters.

Representations of the roles of First Peoples and settlers are starkly different between the two frameworks. The NWI makes provisions for First Peoples' water access, emphasising native title rights to water. However, the NWI does not link this problem (lack of access) to underlying colonial structures or recognise First Law and its commensurate obligations and responsibilities. Thus, the NWI presents a 'solution' of settler government regulated water allocation plans, without challenging or transforming those systems (Hartwig, Jackson, and Osborne 2018). As WAC's framework makes clear, Traditional Owners are asserting their water obligations, authority and Law.

The persistence of water colonialism in Australian water management reflects an asymmetric power dynamic. In comparison with First Peoples' water

governance frameworks, the NWI dominates the water management discourse in Australia. Notwithstanding that the federal government has limited constitutional powers for water, the NWI is reproduced through an array of state, territory and federal legislation, policies, funded programmes and the dominant water sector discourse. By contrast, the First Law, Living Waters is reproduced by WAC's decision-making processes and policy implementation, dialogue with government and collaborating in the Martuwarra Council. Despite the imbalance in resources, Traditional Owners are successfully sharing their message through advocacy and diplomacy.

5.2. Subverting water policy 'problems'

The comparison of Living Waters, Law First with the NWI highlights the necessity of explicitly questioning the assumptions behind the logic of water policy. By applying insights from decolonising theory, Bacchi's method is recontextualised as a decolonial tool. Through their policy and water governance work, Nyikina and Mangala Traditional Owners assert themselves as self-determining peoples and not 'just another' stakeholder (O'Bryan 2019).

Unless the tensions between water policy 'problem' representations are resolved, the NWI will remain antithetical to First Peoples and their Law. Yet, decolonisation is happening (Poelina 2020). First Peoples do not need to wait for the Australian government to sanction actions that fulfil their responsibilities to Country. The utility of WAC's groundwater policy position is that it does not rely on Western Australian government policy changes (although these could also help). The *Birr nganka Yimardoowarra* framework could be the foundation for a monitoring programme to track broader, environmental, individual and community well-being (Milgin et al. 2020). Water use agreements can be established between WAC and water users. Taking action to look after water places is an ongoing part of life and is also a critical part of the Nyikina Mangala Rangers' work. Advocating for cultural governance is a statement of authority and self-determination. It is also an invitation for Australia to engage in frameworks other than the NWI.

5.3. Bridges

Scholarship, advocacy and First Peoples' policy documents continue to propose pathways forward. Yet, the Australian government has been reticent to engage with the substance of First Peoples' water discourses, particularly with aspects that implicitly or explicitly refute settler state authority. Indeed, colonial logic precludes these discourses (Scholtz 2008; Morris and Ruru 2010). Transformative change starts with dialogue that

engages with First Peoples' discourses and that does not restrict the terms of debate to colonial mindsets.

WAC wishes to bring together Australian and First Law water governance systems. In a post-determination native title era, Traditional Owners are redefining and reasserting their rights, interests and responsibilities. On the national level, further work is needed to bridge the conceptual 'gaps' and create a contemporary Australian framework for water governance.

Based on our reading of the NWI and WAC's policy position, we suggest some concepts that could form 'bridges' between knowledges (Anderson and McLachlan 2016; Camkin and Neto 2013; Abu, Reed, and Jardine 2019). These include: sustainability, environment, benefits, and responsibility. The list of potential 'bridges' is non-exhaustive. The important thing is not the 'bridge' itself, but starting productive dialogue that leads to meaningful action.

Both the WAC and NWI frameworks assume that water use needs to be sustainable. Both representations link water usage to potential benefits, including economic benefits. Both aspire to protect the environment. Under the NWI, water users and the government have responsibilities (clause 2). Living Waters, Law First is strongly focused on responsibilities.

Using responsibilities as a 'bridge,' could shift discussions away from securing rights to take water. There could be opportunities to reframe what water responsibilities and water 'ownership' look like based on Living Waters and reciprocal relationships.

These bridges are accompanied by invitations to see 'water development' and 'economies' differently (Gibson-Graham, Cameron, and Healy 2013). WAC's framework cultivates space for alternative economies, such as the culture conservation economy (Poelina, Taylor, and Perdrisat 2019). Supporting WAC's vision is the economic case for developing human, cultural, natural and social capital in the Kimberley, rather than intensive industries that deplete the environment and under-deliver local benefits (Connor, Regan, and Nicol 2019). Asking, 'what types of economies are compatible with Living Waters?' promote economic possibilities and alternative 'development' paths.

Flipping the policy 'problem-solution' framing around, we could instead ask 'what are we trying to cultivate/grow?' What policies support renewal, responsibility, reciprocity, and restored relationships? This reframes water as a space of dialogue and invitation.

Caution is required to avoid false equivocation, tokenism and perpetuating colonial assumptions. Colonial thinking can sanitise, co-opt and rebrand '... even ideas that are a threat' to the settler state (Yunkaporta 2019, p74). For example, excellent research on cultural values exists in which

Traditional Owners share their water wisdom and perspectives (Examples: Toussaint et al. 2001; Barber and Woodward 2018; Rea, N and Anmatyerr Water Project Team 2008; Jackson 2015; B. J. Moggridge, Betteridge, and Thompson 2019). And yet, looking at water through lens of ‘values’ can exclude or depoliticise questions of rights, interests and authority (Hemming et al. 2019). Assessments of ‘cultural values’ has tended to essentialise, focusing on the symbolic, rather than the material, and thereby marginalising Indigenous interests within environmental evaluations and technical processes (Jackson 2017b).

Changing the discourse presents a significant challenge. The 2020 Productivity Commission (PC) review of the NWI’s Issues Paper, for example, frames First Peoples’ ‘water needs’ narrowly (PC 2020). It focuses on an agenda set by the NWI’s existing clauses that are demonstrably inadequate. The authority of the Australian government is unquestioned. The inquiry specifically asks for information about how states and territories include ‘Indigenous cultural values in water plans,’ rather than how they include Indigenous peoples’ governance systems, rights, interests and objectives. The NWI explicitly provides for native title rights and Indigenous objectives, so it is curious that ‘values’ is used as a catchall term. The PC Issues Paper indicates that the NWI policy settings may be revised and enhanced, but avoids structural change. The terms of reference for debate remain narrow and centre settler perspectives.

‘Bridges’ need to work towards the more ‘unsettling’ questions. That is, questions that disrupt settler narratives. Undoing colonisation, returning lands and waters, and changing the story about water in Australia are challenging ideas. Unsettling questions seek to respond to, rather than avoid, these challenges.

5.4. Future research

An agenda for future research might explore conceptual tensions starting with the ‘bridges’ of commonality identified earlier. From there, more unsettling questions can be asked. Some suggestions are provided to go beyond colonial water frameworks. This list builds on previous recommendations for progressing reform (such as Taylor, Moggridge, and Poelina 2016; Marshall 2017; Nelson, Godden, and Lindsay 2018; Morris and Ruru 2010; O’Byrne 2019) and the ongoing work within the literature to deconstruct and reframe water governance, such as the Indigenous water quality principles developed by Moggridge and Mihinui (2018). The list is not definitive. Our intent is to stimulate discussion rather than provide a complete list of steps forward for water reform for decolonisation.

Sustainability

- What does ‘sustainability’ of water resources look like when reframed as the wellbeing of Living Waters?

Benefits

- How could water distribution processes change if the principle of ‘sustainable life and livelihoods’ is prioritised over water market value?
- How are the NWI’s ‘environmental and public benefit outcomes’ distinct from outcomes for Living Waters?

Responsibilities

- What are the responsibilities to Living Waters under First Law that are held by different people(s)? (By Traditional Owners, settlers, visitors, farmers, scientists, peoples upstream/downstream etc.)
- How would Australian concepts of water governance and property change if rights were de-emphasised, and water responsibilities and reciprocity given greater priority? See also, Marshall’s ‘web of interests’ conceptual model (2017).

5.4.1. Co-governance

Achieving equitable co-governance can be difficult, particularly when power is asymmetric (Wilson 2020). WAC’s position on co-governance raises further questions:

- What are the advantages and disadvantages of co-governance as a strategy for water decolonisation? What are the practical considerations, such as sharing water management costs and regulatory activities?
- What are the other decolonising options?
- What are the policy positions on water governance taken by Traditional Owners in different regions?

Exploring these questions cannot be done unilaterally. Here, we used WAC’s framework as a case study but there are more than 50 native title Prescribed Bodies Corporate in Western Australia, and more than 200 in Australia (PBC, 2018). Native title claims are ongoing, and First Peoples’ sovereignty exists regardless (Césaire 2000; Christie 2014). Governance occurs at multiple scales, including the local level and the regional level. In sum, as Australia works towards water justice, the water reform agenda needs to respond to the diversity of First Peoples’ water governance systems.

6. Conclusions

First Law tells us that Law is in the land, and that Law is in Living Waters. Since the Bookarrarra, First Law has provided a framework for understanding water and relationships to it. According to First Law, Nyikina and Mangala peoples have responsibilities, duties, and rights to water, which are embedded in water governance and management systems. In this paper, we call it a 'Living Waters, Law First' water governance framework, and provide a case study describing its application.

By examining water policy problem representation, we have highlighted the conceptual incommensurability between Living Waters, Law First, and colonial frameworks. Nevertheless, 'bridges' could be built between knowledges to facilitate dialogues and transformative change in water governance. We propose several such bridges and a research agenda to reimagine water governance in Australia. In our view, the paths forward must support First Peoples' resurgence, revitalisation of Law, and the well-being of Living Waters and people.

Indigenous wisdom and leadership informed WAC's water governance framework. It is based on collective, continuing, deep and enduring relationships with the Martuwarra, and Living Waters. Traditional Owners are keen to hear the stories of how Indigenous peoples and First Nations around the globe are protecting their waters and reclaiming First Law.

WAC's longer term, broader aspiration is to contribute to the revitalisation of *Warloongarriy* Law is a vision of First Peoples' working together to sustain their collective health and well-being. Their vision is to uphold their duty as guardians to protect their sacred spiritual ancestor serpent, *Yoongoorookoo*. This level of unity and organisation is strengthening their collective resilience. Water decolonisation is already happening. Complementing the work of WAC, the Martuwarra Council seeks to achieve the Traditional Owners' vision: Living Waters, Law First, values and strengthens the health and well-being for both human and non-human beings within the lands and waters.

Notes

1. *Bookarraarra* is a Nyikina concept without an English equivalent. *Bookarrarra* is the beginning time (Hattersley 2014, p44). *Bookarrarra* integrates the past, present and future. Some people call this concept the dreaming or dreamtime; it is everywhen, a complex of meanings with sacred authority connecting land and people (Stanner and Manne 2011).
2. The NWIs eight key elements are; 1. Water access entitlements and planning frameworks, 2. Water markets and trading, 3. Best practice water pricing and institutional arrangements, 4. Integrated management of water for environmental and other public

benefit outcomes, 5. Water resource accounting, 6. Urban water reform, 7. Knowledge and capacity building and 8. Community partnerships and adjustment.

Acknowledgments

We acknowledge the equal contribution of all authors of this article to engage in this collaborative exploratory, reiterative process of evidence; theory, principle-gathering, and analysis. This research is supported by Australian Government Research Training Program (RTP) Scholarships, the Australian Research Council Australian Laureate Fellowship FL190100164, 'Water Justice: Indigenous Water Valuation and Resilient Decision-making' and the Australian National University Water Justice Hub. Thank you to WAC's board members, CEO Damian Parriman, and the WAC research committee, Annie Milgin, Linda Nardea, Anne Poelina, Patricia Riley, Robert Watson, and Kimberley (Bo) Watson for their generosity in sharing this case study. We would also like to acknowledge (in alphabetical order) Quentin Grafton, Sue Jackson, Emma Lee, Erin O'Donnell, Sandy Toussaint, and Sandra Wooltorton for their constructive suggestions during the development of this paper.

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Martuwarra, RiverOfLife has been listed as an author because consistent with many Indigenous epistemologies, Country is recognised as an active, creative and relational being. Country as author unsettles and de-centres humans as the 'knowers' of knowledge. In this paper, we depict "three levels of the real that enrich this cosmos": rivers, humans and hearing and feeling the spirit of River Country (Muecke, 2020:70). The world could be viewed as tripartite "with Nature, Humanity and the Spiritual existing in parallel" or it can be considered in terms of 'metamorphoses' and transformations connecting humans, animals, plants, rocks, etc. (Muecke, 2020:70). 'I am the river and the river is me'. Voiced as lead author, the Martuwarra RiverOfLife's, position reflects a worldview in which interrelationship of living with and feeling nature is normal. It is a position underpinned by a recognition of Indigenous narratives as riverine expressions of ancient heritages of place-based love. River Country shapes the human authors as they represent rivers in their writing (Bawaka Country et al. 2015).

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