

Indigenous Water Rights within the Murray Darling Basin

by Monica Morgan, Dr Lisa Strelein and Jessica Weir

The Murray Darling Rivers Indigenous Nations (MDRIN or 'Indigenous Nations') are a confederation of Indigenous Nations representative of the Indigenous peoples with an inherent relationship to their lands and waters of the Murray and Lower Darling Region. This relationship spans over many thousands of years. Each Nation occupies a core area of land on either one or both sides of each major watercourse, which can overlap into and share country with an adjoining Nation. Each of these Indigenous Nations has a unique connection to their particular stretch of river that is sourced in their creation story and is governed by their distinct traditional laws and customs. Each Indigenous Nation is a self determining autonomous entity and makes decisions based on their traditional affiliations between family groups that are directed and united through language and kinship lines.

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MDRIN are the first peoples of the Murray Darling Basin, the first managers, the first to earn their livelihoods, and the first to congregate and recreate on the rivers. Because of their asserted sovereignty through law and spirituality, they are the contemporary custodians. This relationship places Indigenous Nations of the Murray Darling Basin in a unique situation as interest holders. In the current context of the water reform debates, the difficult task of determining how best to manage the scarce water resources of the Murray and Darling Rivers cannot side-step the inherent rights of the Indigenous Nations to these water resources and the surrounding ecosystem.

As part of the Murray Darling Basin Commission's (MDBC) vision for sustaining communities in the Murray Darling Basin, the Commission has been engaging with Indigenous communities, and consulting with MDRIN. MDRIN was formed in 1998 to provide a coordinated approach to policy development and management of the Murray Darling Basin. It should be stressed, however, that for generations many of the Indigenous Nations have sought engagement with governments and agencies to assert their inherent rights as the owners of the river system and to the surrounding environment.

The *Living Murray Initiative*, an initiative of the Murray Darling Basin Commission, ran a parallel community consultation process with the diverse Indigenous Nations and other Indigenous communities who assert association with the Murray River, so as to gauge their responses to the *Initiative*, and to feed into the work of the Murray Darling Basin Ministerial Council.

In summary the key issues that arose from the consultations were identified as:

- Recognising the need for **justice**
- Establishing a package of **rights**
- Development of **reparation** and **compensation**
- Embracing Indigenous **self determination**
- Development of an **economic base** for Indigenous Peoples
- Ensuring cultural and environmental **heritage protection** measures.

It is important to understand the diversity of Indigenous interests in the Murray River, and not regard Indigenous people as a homogenous group. MDRIN are a confederation of traditional owner groups. The distinction between a community of traditional owners and the local Indigenous community is complex. Traditional owners are not always members of the local Indigenous communities that exist on their traditional country, and not all members of those local Indigenous communities are traditional owners. These different communities of interest must be appropriately represented in the decision-making processes of the MDBC.

The Indigenous Nations as the traditional owners of the Murray Darling Basin have unique and inherent rights and specific interests that arise from Indigenous ownership and custodial responsibilities. Indigenous rights in the Murray Darling Basin will be discussed in this article under the headings procedural and substantive rights.

Procedural rights: the right to be engaged in decision-making

Indigenous peoples have called for substantive involvement in policy and decision-making, as well as direct involvement in environmental management. In international law, a measure of whether Indigenous peoples enjoy equal rights in respect of effective participation in public life is to ensure that 'no decisions directly relating to their rights and interests are taken without their informed consent'. Informed consent requires more than mere consultation.

However, imposed structures of governance can undermine the integrity of the internal authority structures of the Indigenous Nations and destabilise the outcomes of engagement. Indigenous people have their own rights and obligations under Indigenous law and custom in the Murray and Darling Rivers. The laws of Indigenous nations regulate the transmission of property rights, access to land and waters, responsibilities relating to land and waters, use of resources, and a myriad of other rights, responsibilities and community controls.

There is a role for government to play in resourcing the development of Indigenous governance arrangements in a manner that is responsive to the needs and aspirations of specific Indigenous groups for self-sufficiency and self-determination. Providing resources for permanent structures of engagement can

lead to efficient policy development and meaningful outcomes built on sound human rights principles.

Substantive rights: Indigenous Nations as owners and custodians

Indigenous rights to onshore waters are part of an holistic system of land and water management. This system has been fractionalised and encroached upon by European systems of land and water management, and by the accompanying environmental impact. The right to enjoyment of a healthy river system is both a substantive right and is fundamental to the enjoyment of other rights, such as fishing rights.

A central concern expressed in the *Living Murray* consultations was that current catchment management practises are not considering the cultural knowledge of the Indigenous Nations. Indigenous Nations and knowledge holders have expressed a desire to share this knowledge in the management of their traditional country. However, this willingness to share knowledge must be measured against a concern to control access and use of knowledge, including language. The right to protect cultural knowledge extends beyond knowledge about specific places, and protecting those places. Indigenous Nations seek to maintain the ownership of intellectual and cultural property and any commercial advantage that may be derived from their use.

Indigenous people have been marginalised from their economic base, and have a right to be included in the economic benefits derived from the heritage of their natural resource management. Where water rights are to be separated from land, Indigenous peoples' interests in the access, use and enjoyment of those waters should be adequately protected.

As a broader group, Indigenous peoples in the Murray Darling Basin region are a significant group. They are therefore an important part of the region's economy and social fabric. Nevertheless, there are significant social and health issues confronting Indigenous communities. All Indigenous people in the Murray Darling Basin have the right to equal enjoyment of human rights. Indigenous people should be guaranteed equal enjoyment of health, housing, and access to clean water- a critical health issue in all communities to avoid high morbidity and mortality rates.

Outcomes and mechanisms

It is one thing to acknowledge rights, and another to implement outcomes and identify mechanisms to protect and recognise these rights.

Sustainability and the precautionary principle

The precautionary principle should be applied when making decisions on the impact of returning water to the environment. The implications of failing to return health to the river system has a disproportionate impact on Indigenous peoples relationship with the Murray as it is linked to their cultural and spiritual identity and their status as first peoples of the Murray Basin.

An economic imperative to maintain healthy water supplies does not fully reflect Indigenous interests in the land and waters. It is within their inherent rights, and is the essence of the Indigenous interest, to have the ability to continue to enjoy the natural resources of the Murray Darling waterways as necessary for their future. This future is dependent on the condition that the environment and the biodiversity of flora, fauna and aquatic life has integrity and is alive. The interconnectiveness between humanity and the environment as a holistic entity is not negotiable.

Indigenous priority in water allocation: a cultural flow

The allocation of water rights should consider a cultural flow in addition to an environmental flow, arguably on a Nation by Nation basis, and before commercial or other economic interests. Section 211 of the *Native Title Act 1993* provides a precedent for the prioritisation of Indigenous rights to natural resources second only to environmental and scientific research concerns. Indigenous peoples are entitled to seek such a priority in the future allocation of water resources.

Further areas that should be investigated concern secured town water supplies. There are a number of Indigenous settlements along the Murray and Darling Rivers that do not have secured water including domestic entitlements.

For the Indigenous peoples of the Murray River, water resources are an opportunity for developing rural industries. Water allocation rights can mean inclusion in the water trading environment for economic development opportunities, or for achieving cultural and environmental objectives by allocating water for cultural or environmental flows.

Non-discrimination principle

The *Racial Discrimination Act* 1975 (Cth) (RDA) provides protection for Indigenous peoples' individual and collective rights. The RDA creates an obligation on governments to deal with Indigenous interests in a non-discriminatory manner, and governments and agencies must exercise their power to deal with property in a manner consistent with the RDA.

Equal treatment in this context must take into consideration the equal enjoyment of rights as citizens, particular interests as Indigenous peoples and the history of discrimination. Specific measures may be required to ensure the standard required by the RDA is met.

Co-management

In the Murray Darling Basin, co-management could be negotiated with each Indigenous Nation separately, working under an umbrella agreement with MDRIN. MDRIN would negotiate the principles of co-management, and then each Nation has the opportunity to negotiate their own co-management arrangements, including issues of membership and governance.

For MDRIN, broadly, co-management: includes the management of all of the country for each Indigenous Nation, including water management; is part of Reconciliation and the Treaty process; and, importantly, is just a small part of the recognition of Indigenous rights in the Murray Darling Basin. Co-management is only one part of the broader recognition of Indigenous rights in the Murray Darling Basin, the recognition of other substantive and procedural rights remain to be negotiated.

Native title

Native Title is based on the sovereignty of Indigenous Nations and the rights to land and waters that predate the assertion of sovereignty by the British and continued after the colonisation of the continent with the recognition and protection of the common law. The *Native Title Act* refers to the 'land and waters' as a single proposition. Determinations of native title have similarly undifferentiated land and waters in the determination area and successful determinations have listed access to water or water related rights. Registered native title applicants also have substantive rights to be consulted over developments on their claimed country.

Recent cases have restricted the extent to which Indigenous peoples will have access to native title as a means to protect their inherent rights or to enforce their traditional laws. The wholly or partially extinguishing effects of historical tenures will be particularly devastating for Indigenous peoples of the South East of Australia. The extent of extinguishment and the limits that have been built into the legal doctrine of native title suggest that native title should not be the only benchmark for the engagement of Indigenous Nations.

Land and water legislation

Responsibility for the control and management of inland waters and waterways rests primarily with the States. Increasingly State and Territory laws and policies in relation to waters are being guided by international law and national policies. The principal forum in which these national policies are developed and implemented is through the Commonwealth of Australian Governments (COAG).

Only the New South Wales and, to a lesser extent, the Queensland legislation contain provisions dealing with distinct Indigenous interest in waters (*Water Management Act 2000* (NSW), *Water Act 2000* (Qld)). This lack of legislative recognition is reflected in the water allocation plans currently being developed or implemented in most Australian jurisdictions.

MDRIN are concerned that each of the instruments relied on to relate specifically to water sharing have limited reference to Indigenous interests. The decision which has overarching ramifications to water is the COAG decision of 1994 on water reform. It is our concern that the rights and interest of the Indigenous peoples of Australia to on shore and off shore waters have not been given recognition by the Commonwealth, and most

States and Territories.

In Conclusion

Recognition of Indigenous peoples rights in relation to the natural and cultural heritage and economies of the River will enable the Murray Darling Basin Commission, the Ministerial Council and the governments involved to support the Indigenous Nations and communities' desire to foster a partnership model for cultural and natural resource management in rural and regional Australia that can provide a leading example for the nation.

There is an opportunity for positive developments within the Community Advisory Council to the Ministerial Council, the MDBC and the Ministerial Council itself, to provide direction toward the processes and frameworks to give recognition of the unique and diverse governance of the Indigenous Nations. These processes will allow for the development of special measures: to set out procedures for negotiated agreements, to facilitate adequate representation and to gain the informed consent of the Indigenous Nations to be centrally involved in policy and management decisions on natural resources within the Basin.

This article is based on the executive summary of a submission to the *Living Murray Initiative*, entitled *Indigenous Rights Discussion Paper – Living Murray Initiative, in support of the Indigenous final report to the Living Murray Initiative*.

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Further information on the *Living Murray Initiative* can be obtained from www.mdbc.gov.au

[1] Report to the Murray Darling Basin Commission, *Indigenous Response to the Living Murray Initiative*, April 2003, 11.

[2] See also Murray Darling Basin Commission, *Shared Country Shared Vision: Scoping study on Indigenous involvement in natural*

resource management decision making and the integration of Indigenous cultural heritage considerations into relevant Murray-Darling Basin Commission Programs, August 2003.

[3] Report to the Murray Darling Basin Commission, *Indigenous Response to the Living Murray Initiative*, April 2003.

[4] See also, Altman, Jon and Michelle Cochrane, Indigenous Interests in Water: A comment on the 'Water Property Rights – report to COAG from the water CEOs group' discussion paper. <http://www.anu.edu.au/caepr/Publications/topical/AltmanCochranewat>

[5] Weir, J. *Indigenous Rights in the Murray Darling Basin: Co-management*, paper prepared for the Murray Darling Rivers Indigenous Nations, 25 October 2003, based on discussions about co-management held at the MDRIN meeting, Lake Boga, Victoria, 25-26 September 2003.

[6] (1992) 175 CLR 1 at 60, per Brennan J.

[7] ATSIC and Lingiari Foundation Partnership, *Indigenous Rights to Waters Report and Recommendations*, ATSIC 2002.

[8] ATSIC and Lingiari Foundation Partnership, *Indigenous Rights to Waters Report and Recommendations*, ATSIC 2002.

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