

organisation undoubtedly determined access to land and water ... A consequence of close social and ceremonial ties with Northern Territory based language groups ... is also used to describe land interests.⁶

Water landscapes hold meaning and purpose under Aboriginal laws. After thousands of years, the spiritual relationship of being part of Country remains integral, and despite the significant political and social change heaved upon the lives of Aboriginal communities the sacredness of water shapes the identity and values of Aboriginal peoples.

The creation story that opens this chapter recognises the relationship of Nyikina peoples to the river system, the land and the *liyan* (spirit) in its peoples and all things on Nyikina Country.⁷ Nyikina peoples have a name for the river, *mardoowarra* (the Fitzroy River), and *yimardoowarra* means Nyikina peoples 'belong'⁸ to the lower part of the *mardoowarra*.⁹ Underground water, which travels through neighbouring Aboriginal land, creates a joint responsibility.¹⁰

Aboriginal water management, as discussed in a Northern Territory study of water values and interests in the Katherine Region, represents a complex web of relationships:

Every aspect of water as a phenomena and physical resource as well as the hydro morphological features it creates is represented and expressed in the languages of local Aboriginal cultures: mist, clouds, rain, hail, seasonal patterns of precipitation, floods and floodwater, river flows, rivers, creeks, waterholes, billabongs, springs, soaks, groundwater and aquifers, and the oceans (saltwater).¹¹

The inherent relationships of Aboriginal peoples with land and water are regulated by traditional knowledge. For generations Aboriginal peoples have developed significant water knowledge for resource use. Aboriginal water knowledge, traditional sharing practices, climate and seasonal weather knowledge underpin water use knowledge. Aboriginal customary water use cannot be decoupled from the relationship with the environment and water resources because Aboriginal water concepts are central to community and kinship relationships. Unlike Western legal concepts, water cannot be separated from the land because Aboriginal creation stories have laid the foundations for Aboriginal water values.

The Western commercial value of Aboriginal knowledge systems – such as water knowledge, Aboriginal foods and the use of medicinal plants – has attracted significant interest from institutions and corporations because of the commercial research value of Aboriginal knowledge. I have worked, and continue

to work, in this area on a pro bono basis for Traditional Owners and Aboriginal representative organisations in the Kimberley region of Western Australia. This includes volunteer work with my husband Paul and commercial lawyer Mark Allen, negotiating and developing various stages of the ‘Mudjala Aboriginal Medicine Research and Development Project’, to ensure its unique Aboriginal knowledge use and international patent rights of community are defended. My husband Paul was employed as administrator/manager in the early days of the Kimberley Land Council (KLC) when John Watson was the KLC Chair. Our community work with the Jarlmadangah Burru Aboriginal Community and other Kimberley Aboriginal organisations is focussed on strategic capacity building, community skills training and enterprise development on country.

I lived in Derby, Western Australia, and through my marriage, I have kinship with Nyikina Mangala peoples and have been given a skin name to ensure the marriage is ‘straight’ (correct kinship marriage). My husband’s skin is Tjangala and my skin is Nangarrayi. A skin name is the kinship (group) to which one belongs. This familial relationship has opened my eyes to the significant water issues faced by Aboriginal peoples in the Kimberley region and commonalities with other Aboriginal peoples in Australia on water rights and interests.

Like Aboriginal plant and medicine knowledge, Aboriginal water knowledge can be vulnerable to unfettered exploitation by others if such knowledge has weak legal protection. Aboriginal water knowledge has the potential for commercialisation but also exploitation by non-community organisations and individuals, for instance in the way Aboriginal knowledge in Aboriginal bush foods and Aboriginal art have often been exploited.

Aboriginal language is a conduit for water knowledge – language misinterpreted by poor translation into the English language can seriously misrepresent the nature of Aboriginal water rights and interests. The variation of spellings in writing Aboriginal language is common.

The interface of Aboriginal water knowledge and water values present challenges for governments and water authorities in drafting policy and legislative instruments because these values are not understood. The water needs of Aboriginal communities are treated as just another interest group. If government is to address those challenges it should consult with Aboriginal peoples widely *prior* to drafting policy and legislative instruments and also ensure that Aboriginal peoples within their respective agencies and community are engaged in the drafting process. Australia’s national water reform process clearly lacked this involvement.

The creation stories of Aboriginal peoples across Australia have often been interpreted by non-Aboriginal writers as simple child-like narratives. During the early to mid-1900s many non-Aboriginal writers were fascinated by what was generally referred to as Aboriginal mythology.¹² But Aboriginal knowledge is complex and encoded within ceremony, creation story and is replete with cultural subtleties.¹³ Problems arise in transferring these values into Western concepts. An Aboriginal creation story interpreted by Charles P Mountford entitled the 'Salt Lakes of Kiti' illustrates a reconstruction of Aboriginal knowledge:

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

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

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

Those waters not only contaminated the rivers and lagoons, but completely inundated the tribal lands. And when these waters dried up, the whole area was changed to an inhospitable desert of salt lakes, useless to both creatures and the aborigines.¹⁴

Mountford uses words such as 'magical' to describe the 'bone' belonging to the 'medicine man'. The reference to the 'medicine man' conjures up powerful symbolism of Aboriginal primitive powers. However, the reconstruction of Aboriginal story and knowledge through a Western interpretation of values, beliefs and practices is often inaccurate, and the 'ethnographic writing of frontier settlers, colonial writers and diarists, is founded upon the writer's preoccupation, prejudice and assumptions about Aboriginal peoples'.¹⁵

Lawyers and policy drafters in the same way often deconstruct Aboriginal laws and practices, to then reconstruct them into less complex Western legal concepts. This approach fails because it seeks simplistic Western concepts which

compartmentalise the diverse social and cultural experiences of Aboriginal peoples.

Aboriginal wellbeing is integral in the development of water policy and achieves positive outcomes in Aboriginal health and self-determination as well as maximising the potential for Aboriginal economic development. Although not all Aboriginal communities seek to exploit water rights through commercial opportunities or seek to trade water rights for financial gain, wealth creation through Aboriginal water ownership would become a reality when national and state water reforms are initiated.

The complexity of the interplay between Aboriginal and Western perspectives demands the examination of a broad range of interconnected themes because the Australian legal system has developed, over time, distinct non-Aboriginal legal concepts that are at odds with Aboriginal water use. Arguments in water management and water use in this book are presented through the lens of Aboriginal ontology or put simply how Aboriginal peoples view the world and the universe, and not from the other perspectives, or beliefs and interpretations of Aboriginal water rights. To unbundle the many layers of Aboriginal meaning in water resources requires a particular emphasis on developing an Aboriginal voice and Aboriginal narrative.

The Aboriginal perspective of this book examines concepts and values of water and shows that values exist as ancestral rights which should be formally incorporated within the body of Australian law. Although ancestral water use and contemporary use represent different ideological concepts, cultural and economic water requirements of Aboriginal communities across Australia must be viewed as primary water rights.

This perspective establishes a new understanding of the significance of water to Aboriginal peoples — a value that is inextricably connected to, and informed by, a wider system of laws and customs that govern its use and protection. Aboriginal peoples continue to maintain their cultural rights to water in Australia. This requires national recognition to harmonise Aboriginal water rights and interests throughout the commonwealth, states and territories; unlike the hotchpotch of Australia's Aboriginal heritage laws. The widespread legal destruction of Aboriginal heritage sites is testament to the low worth placed on Aboriginal values, as is the unregulated sale of Aboriginal artefacts on the internet. The continued devaluation of Aboriginal ways of understanding and relating to an Aboriginal environment impedes reconciling past injustice.

Nuances of Aboriginal language are critical to understanding Aboriginal water resource use and the relationship of Aboriginal peoples within their Aboriginal

environment. This book uses Aboriginal narratives to explain Aboriginal values because Aboriginal peoples are better placed to tell their own stories. Aboriginal narratives depict the care and protection for water landscapes within ‘country’ as a legal obligation and a cultural expectation to abide by Aboriginal laws on country.

The purpose of this book is to cultivate a new understanding of Aboriginal water rights and interests by looking at key features such as Aboriginal water concepts, Aboriginal water management and Aboriginal water policy development. Because research in this area is an emerging jurisprudence, it requires an interdisciplinary approach to identify the range of Aboriginal issues that interface with Australian water management, such as international human rights.

This book is divided into three parts. Part A, ‘The interconnected waterscape’, examines the history, culture and stories of water of Aboriginal peoples in Australia and focuses on Aboriginal perspectives of water and how it is distinguished from Western and European perspectives in water values, use and management.

Part B, ‘Trading water — the disconnect in water values’ considers Aboriginal water values in relation to the Western ideologies, policies and laws that have led Australia to its current situation. These first two parts are brought together in Part C, ‘A paradigm shift for Aboriginal water rights’, which proposes solutions to address the rights and interests of Aboriginal peoples by formally incorporating robust human rights within Australian water law and policy.

This book demonstrates that when the unique Aboriginal concept of water resources, and their value and purpose, is interpreted in legislation and in common law definitions, it should be evaluated from the perspective of the Aboriginal community – which is to say, the community that holds the knowledge. There is an inherent danger in defining and interpreting Aboriginal water concepts through Euro-Australian frameworks. This often reconstructs Aboriginal concepts or cultural interpretations incorrectly and diminishes the nature of Aboriginal property rights. The federal amendments to native title legislation and its interpretation provide ample examples of diminishing Aboriginal human rights.

A changing waterscape — cultural identity in contemporary Australia

In contemporary Australia, Aboriginal identity can be a synthesis of Aboriginal and Western social constructs. Aboriginal peoples may seek to maintain Aboriginal customary practice – for example, in their spiritual attachment to water

sources to exercise cultural obligations, recognising familial relationships to place, and pursuing economic rights to water while respecting cultural values. However, Aboriginal peoples are generally expected to remain static in exercising traditional customs, law and practices, and when Aboriginal peoples adapt to Western influence and revitalize traditional laws, customs and practices they are generally excluded from exercising their inherent rights or interests. The credulous reasons given in the High Court decision of *Yorta Yorta Community v Victoria*¹⁶ that all Aboriginal peoples should remain in a time warp prior to British invasion/settlement hit hard. Aboriginal communities cannot be expected to live in a colonial vacuum.

[A]boriginal rights are not frozen in time. Aboriginal culture is inherently dynamic and adaptive and should not be bound to archaic constructs of what practices encompassed traditional life in the pre-historic past. Although Aboriginal rights are identified in a western timeframe, they are not doomed to a static existence.¹⁷

The Australian Law Reform Commission in its important inquiry into ‘The Recognition of Aboriginal Customary Laws’ (1986) acknowledged that Aboriginal communities should be allowed to adapt their customs and practices to the changing environment:

[c]hanges or adaptations in traditional rules or customs, to cope with the drastic difficulties European settlement has posed for Aborigines, may produce something which could be described as synthetic. It is hardly surprising that Aboriginals have attempted to synthesise these new elements along with their own beliefs, traditions and world view. All legal and cultural systems with a long history are likely to be synthetic in this sense. But that does not mean that they are less real or important to those whom they affect.¹⁸

Jackson, Storrs and Morrison (2005) in ‘Recognition of Aboriginal Rights, Interests and Values in River Research and Management’, note the importance of the waterscape for Aboriginal communities:

Aboriginal people have managed their water bodies and riparian areas for millennia. They rely heavily on these nationally and internationally significant wetlands for food, for cultural values, and, increasingly, for economic independence. The need for external advice or assistance has arisen chiefly from relatively recent changes driven by European settlement and other land management practices.¹⁹

Aboriginal communities are inherently connected to tangible and intangible Aboriginal values, and practices and customs that connect to Aboriginal identity,

both as individuals and collectively. A holistic set of Aboriginal water values exists within all types of water because Aboriginal identity is characteristic of water kinship. To culturally identify as an Aboriginal person is important for the individual and the community, and resonates with a unique Aboriginal perspective in defining values, beliefs and practices. Historian Jackie Huggins, a Bidjara and Birri-Gubba Juru woman, described her Aboriginal identity like this:

Foremostly I detest the imposition that anyone who is non-Aboriginal can define my Aboriginality for me and my race. Neither do I accept any definition of Aboriginality by non-Aborigines as it insults my intelligence, spirit and soul, and negates my heritage. The reincarnate anthropologists have made a stunning career out of a continuous 'Daisy Bates' serial. There are no books written by non-Aboriginals that can tell me what it is like to be Black as it is a fiction and an ethnocentric presumption to do so. I would never presume to know what it is to be white (except when I dine at the Hilton).²⁰

It has been suggested in Australia that Aboriginal culture has been weakened because of the import of Western values and beliefs:²¹

The Dreaming is a set of doctrines and values – the value of everything – which were determined once-for-all in the past. The things of the Market – money, prices, exchange values, saving, the maintenance and building of capital – which so sharply characterises our civilisation.²²

Aboriginal ownership to water and land is held, from an Aboriginal perspective, by an Aboriginal title that is passed on by kinship succession planning when there are members of a group no longer alive to care for country. The Western notion that Aboriginal law is unstructured and random is baseless.

In his award winning book *Dark emu black seeds*, Bruce Pascoe unearthed archival materials in drawings of permanent dwellings and agricultural use of the land by Aboriginal peoples which contradicts the notion of Aboriginal peoples as nomadic 'hunters and gathers'.²³ Aboriginal customary values and beliefs are regulated by rules under Aboriginal laws that have operated for thousands of years. Australia's emerging colonies and plans for economic development saw governments demand unfettered possession of the land: '[p]re-European Aboriginal *country* was a set of complex and changing rights over land which does not translate into British real estate land subdivision'.²⁴

Aboriginal peoples in Australia have experienced economic competing rights for their lands and waters since the introduction of common law and the concepts

of English property law. These two distinct legal systems continue to be in dispute because of the increased demands on the use of and access to water, and demands for land and resource development. The ‘bundle of rights’ concept used in court judgements on determinations of native title compartmentalises cultural or legal rights as unconnected and separate rights (see Chapter 6).

Most notably, since the Commonwealth *Native Title Act (1992)* Aboriginal peoples have sought to assert their ownership of the land and the waters under the Australian legal system, and court decisions have not always met the expectations of Aboriginal communities.

The culture of the common law has imposed a conceptual grid over both space and time which divides, parcels, registers, and bounds people and places in a way that is often inconsistent with Indigenous participation and environmental integrity.²⁵

Professor Craig Arnold, an internationally recognised scholar on issues of land use, water, property, and the environment, argues that ‘property concepts applied to understand human being’s relationship with an object of property such as private property rights or the concept of the property right require a new metaphor’ – that rights in property should be seen as a ‘web of interests’ in order to explain how everything is interconnected.²⁶

Professor Arnold’s concept of understanding the wider relationships between the owner of the property and the property itself struck me as a concept that could provide a better understanding for others to appreciate Aboriginal concepts and values of water. Aboriginal water values are not simple generic concepts that represent all Aboriginal peoples, as nuances exist. The development of a metaphor for Aboriginal relationships to water may be challenging because of the diversity which underpins community knowledge and community groups.

Australian society has defended the right to progress and to capitalise the development of the lands and waters, whilst available water resources such as groundwater and soaks held for millennia by Aboriginal groups have been marginalised by the establishment of the Australian colonies and the federation of Australia’s states. Western values in property ownership underpin the control of the land and waters by non-Aboriginal interests and gives advantage to property owners in water. Exclusive ownership in water provides a legal expectation to fully participate in policy development.

In the development of Australian capitalism other forms of ownership have become important, but the value accorded [to] land ownership has not diminished and,

quintessentially represented in pastoral property, it continues to confer social and economic power.²⁷

The dialogue on water rights and property rights is similar to the issues surrounding native title and Aboriginal freehold land because Australia's hierarchy of rights and interests favours dominant Australian societal values.

Labelling indigenous property rights as different from or non-analogous to common law interests in land ... is an assertion of the cultural superiority of Western legal schemes over those of Aboriginal peoples ... The continuance of such stereotypes makes it easier to assume the inferiority of Aboriginal property rights ...²⁸

Dominant values reside where Australia's legal concepts such as native title laws expressly state that the common law must prevail above Aboriginal rights.

Challenging the myth of *aqua nullius*

Gleeson CJ has argued that 'the next legal battleground for Australia will be water'.²⁹ There are transboundary water conflicts in various parts of the world and water scarcity is a major policy issue for developed countries and, according to the World Health Organisation, more so for developing nations. Clean water is vital for all peoples no matter where they live on this earth. Many communities do not have adequate clean water and services, including Aboriginal peoples living in remote areas of Australia. In the same way *terra nullius* was used by foreign powers and governments to seek to extinguish Aboriginal peoples ownership over Australia, there remains an intransigent myth of *aqua nullius*. Both fresh and marine waters, as well as submerged land, occupied and used by Aboriginal peoples, require urgent attention. Aboriginal communities' desire to exercise their traditional fishing rights across Australia are over regulated and a prime example of flawed government policy.

When the common law arrived with the First Fleet it brought Western views on water use and a failure to understand that Aboriginal country was unlike England or Europe. History records numerous examples of the British Empire and Government colonising the occupied lands of Indigenous peoples in countries such as Australia, the USA, Canada, New Zealand, parts of Africa and various island communities. The British plan to colonise the Indigenous-held lands and waters of Australia was backed up by hundreds of years of British experience and knowledge of interacting with Indigenous peoples.

The economic value of water in Australia today is highly prized. From an Aboriginal cultural perspective, however, water equates to much more than a water utility, aesthetic water value and drinking water, and is characterised through many layers of customary knowledge.

Australians use more than 14,600 million cubic metres of water a year – the equivalent of 30 times the capacity of Sydney Harbour ... [It] is the basis of one of our largest industries; it accounts for \$90 billion worth of infrastructure investment; it contributes about \$6 billion to annual revenues through irrigated agricultural production in New South Wales.³⁰

The European four seasons of autumn, winter, spring and summer are not the seasonal cycles of Aboriginal peoples in Australia. Prior to British contact and the staggered stages of colonisation, Aboriginal communities applied laws within their respective countries to manage and resolve land or water issues.

Aboriginal water rights today should be regarded in a similar manner as Aboriginal land rights were when they were legally recognised by the High Court *Mabo* decision which formally acknowledged that Aboriginal title survived. Aboriginal peoples will always tell you that their sovereignty exists, yesterday, today and tomorrow. In the same way that Eddie Mabo and others changed the way Australian society understood *terra nullius* and challenged the fiction that British colonial settlement extinguished Aboriginal rights to land, water and resources, we also need to challenge the prevailing fiction of *aqua nullius*.³¹

Aboriginal communities relate to and contemplate value in the environment as integral to Aboriginal identity in a way that articulates both communal and individual belonging to country. The land, the waters and the creation stories are the essence of Aboriginal identity, where ‘sacredness’ particularises an inherent relationship to the environment unique to Aboriginal peoples. There is nothing English about an Aboriginal environment.

The landmark decision in *Mabo v Queensland [No 2] 1992 (Cth)*³² reformed the national dialogue on the concept of common law and statutory property rights. The *Mabo* decision did change the way all Australians had been conditioned to understand *terra nullius* and the notion that British colonial settlement had extinguished Aboriginal rights to land, water and resources.³³ Strangely enough, around the time of Australia’s recognition of native title the Council of Australian Governments (COAG) was planning radical structural legal reform for water resources, which did not include reflecting upon the importance of Indigenous water rights and interests.

In the early 1990s when COAG decided to establish a national water reform framework, our peak Australian human rights agencies, Aboriginal organisations and Aboriginal Local Land Councils advocated for Aboriginal water rights to be included in the national discussion. Little interest was shown for First Peoples' water rights. In 2004 COAG agreed to implement the 'National Water Initiative' and the states entered into a legal agreement (the Intergovernmental Agreement) to advance a blueprint for national water reform.

Among other things, it meant that separating water from the land introduces water as new category of property right. The question of interests and rights to water became more complex for all stakeholders under these reforms. This was particularly so for Aboriginal communities because federal, state and territory laws had, prior to the introduction of national water reform, virtually ignored the water rights and interests of Aboriginal peoples.

A new understanding of the multiple issues involved with incorporating Aboriginal water rights and interests is overdue. An examination of the breadth of legal issues and social determinants affecting Aboriginal water access and use in Australia has not been previously attempted from an Aboriginal perspective, nor has a legal textbook been dedicated to articulate the themes discussed in this book.

The importance of research being undertaken by Aboriginal peoples on water issues is crucial to inform policy and law reform, and over time incrementally increases the critical mass of Aboriginal legal researchers and academics. In the words of Valerie Cooms, an Aboriginal Judge of the National Native Title Tribunal and Traditional Owner of the Nunukul people of North Stradbroke Island, 'unless there are more Indigenous people writing and publishing, there's not a lot for other scholars to hang their theory on'.³⁴

An informed national discussion between Aboriginal communities and other water users is a priority, in particular how national policy and legislative water reform will be guided and based upon foundational Aboriginal concepts and values about, and relationships with, water that prioritise traditional Aboriginal knowledge. It is important to recognise the diversity of the Aboriginal values in water and the rich dialogue held in Aboriginal language. This recognition will create the paradigm shift needed to position Aboriginal water rights as Australia's priority.

Chapter 2

'WE BELONG TO WATER' — ABORIGINAL IDENTITY AND CULTURAL AUTHORITY

Aboriginal social, cultural, spiritual and economic water values are interwoven, as spiritually-linked concepts and values held within Aboriginal kinship, among all water resources.

According to Gagudju, a Senior Lawman of the Bunitj, the distinct cultural identity of Aboriginal people intrinsically exists as an inseparable part of the environment:

If you feel sore ...
headache, sore body,
that mean somebody killing tree or grass.
You feel because your body in that tree or earth.
Nobody can tell you,
You got to feel it yourself.¹

Western social constructs struggle to accommodate Aboriginal water values – which permeate the relationship of Aboriginal peoples' connection to country. Jackson and Morrison (2007) suggest that 'the characteristics of Aboriginal water use warrants further consideration of the broad landscape perspectives in assessing impacts and engaging Indigenous communities'.²

In Australia, Aboriginal peoples recognise a unique cultural identity within the water landscape through familial connections,³ recognising kinship values and identity through such descriptors as saltwater, freshwater and bitterwater, which are especially relevant when travelling across traditional trade routes and boundaries.⁴ In 2006 we went to Narooma for a family fishing holiday and called in to see Lionel Mongta, a Traditional Owner of Gulaga Mountain in the south coast of New South Wales. In conversation he explained that 'saltwater refers to Aboriginal coastal communities, freshwater to communities from