

# Aboriginal water rights

## Legal analysis of submissions to the Review of the Commonwealth Water Act

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### Contents

1	Context	1
2	This paper	2
3	Themes in the Submissions	2
	3.1 Water allocations	2
	3.2 Aboriginal engagement in water planning and management	3
	3.3 Interactions with Environmental Water	5
	3.4 International agreements and instruments	6
4	Conclusions	8
	About Environmental Justice Australia	9

## 1 Context

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In May 2014, the Parliamentary Secretary to the Minister for Environment announced an independent review of the *Water Act 2007* (Cth) ('the Water Act'). The Review is being undertaken by an Expert Panel and will report to the Parliamentary Secretary shortly. The Review is a requirement under the Water Act.

A number of submissions made to the Review have been concerned with issues of indigenous recognition and participation in water resources management and how these issues are (or more significantly, are not) reflected in the Water Act.<sup>1</sup> A common sentiment in these submissions, as expressed by the National Native Title Council, is that 'current water law does not adequately recognise and protect indigenous water interests.'<sup>2</sup>

<sup>1</sup> Specifically, Submission 26 (Friends of the Earth), Submission 29 (Inland Rivers Network), Submission 32 (Katie O'Bryan), Submissions 37 (Environmental Justice Australia), Submissions 62 (Federation of Victorian Traditional Owner Corporations), Submission 63 (National Native Title Council), Submission 72 (Northern Basin Aboriginal Nations, NBAN), Submission 73 (Murray Lower Darling Rivers Indigenous Nations, MLDRIN)

<sup>2</sup> Submission 63 – National Native Title Council, p.7

## 2 This paper

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This paper identifies the main submissions made by indigenous organisations and environmental NGOs (and one individual submission) to the Review and considers, from a legal perspective, whether and how the proposals within those submissions could be implemented.

The submissions are categorised into the following themes:

- Water allocations for Indigenous peoples;
- Engagement in water planning and management;
- Environmental water;
- International agreements and conventions.

## 3 Themes in the Submissions

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### 3.1 Water allocations

#### 3.1.1 Submission Content

Submissions concerning water allocation provisions under the Water Act propose that indigenous water entitlements and allocations be recognised and established, including:

- Recognition of Indigenous water ownership;
- Statutory provisions for establishment and operation of indigenous cultural flows;
- Incorporation of cultural flows into water plans;
- Allocations of water to Aboriginal communities for economic development purposes;
- Requirements on State Governments to allocate 5% of water available in each Water Resource Area to Aboriginal People as cultural flows (3% from environmental water and 2% from consumptive water).

Establishment of a ‘cultural flows’ model of Aboriginal water entitlement<sup>3</sup> is reiterated across a number of submissions, and reflects work being done for the National Cultural Flows Research Project (‘NCFRP’)<sup>4</sup>. NBAN refers to a distinction between ‘Cultural Environmental Water’ and ‘Cultural Commercial Water’ and proposes allocation and funding mechanisms to come from existing buy-backs and small levies on water trades.<sup>5</sup>

A number of submissions identify that the economic justice aspects of Aboriginal water allocations are related to imperatives to address disadvantage and the historic expropriation of land and water resources.<sup>6</sup> They state that water law, including the Commonwealth Water Act, should not be seen in isolation from processes of colonisation. The Federation of Victorian Traditional Owners Corporations stated:

The separation of water from the land, and the importance given to its consumptive use and economic values has resulted in limiting water use and regulation for the benefit of industries or individuals with well-established economic and political power. The challenges faced by Indigenous people in seeking to develop water-

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<sup>3</sup> See *Echuca Declaration* (2010), <http://www.savanna.org.au/nailsma/publications/downloads/MLDRIN-NBAN-ECHUCA-DECLARATION-2009.pdf> (viewed 3 November 2014), Part 1, Article 1:

“Cultural Flows” are water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations.’

<sup>4</sup> <http://culturalflows.com.au/> (viewed 13 November 2014)

<sup>5</sup> See *Submission 72 – Northern Basin Aboriginal Nations*, [21]-[27]

<sup>6</sup> See eg *Submission 26 – Friends of the Earth*; *Submission 72 – Northern Basin Aboriginal Nations*, [28]-[31], [34]; *Submission 63 – National Native Title Council*, p.10-11

dependent businesses and enterprises is illustrated by the fact that while Indigenous people own almost 20% of the country's land mass, Indigenous-specific water entitlements are estimated at less than 0.01 per cent of Australian water diversions... Achieving the aims of the Closing the Gap strategy will require Aboriginal people to have access to water for Aboriginal economic development. The freedom for Aboriginal people to choose how to define and pursue economic wellbeing is fundamental and must be respected. The historical allocation framework will not meet the consumptive economic needs of Aboriginal people.<sup>7</sup>

### 3.1.2 Comment

The Commonwealth Water Act is a framework statute and as such does not directly create or establish rights and entitlements to water resources (which is the province of the States and Territories). Instead its main function is to influence how State water rights and allocation systems in the Basin operate, particularly with the intention of remedying over-allocation and achieving ecological sustainability. The Basin Plan includes the requirement that Water Resource Plans must be prepared with regard to the views of Aboriginal people about cultural flows.<sup>8</sup> It does not, of course, compel any establishment or operation of cultural flows.

State water legislation is required to be consistent with the (Commonwealth) Water Act and implement the Basin Plan, the key legal instrument under the Water Act. In principle this could include requirements on the States and Territories to provide for recognition and implementation of indigenous interests through mechanisms such as cultural flows and dedicated forms of indigenous proprietary interest in water resources such as a cultural water licence or other form of specific Aboriginal entitlement. Such reforms would require identification of an appropriate head of constitutional power that would enable the Federal Parliament to pass such laws.

In structure, a system of Aboriginal allocations could operate similarly to environmental water entitlements, which comprise proprietary entitlements, as well as 'planned water' that is dedicated solely to environmental purposes (a form of 'rules-based' water). That is, Aboriginal access to water resources could operate as a property-based systems of access, as well as planned or administrative systems of access to resources. Aboriginal access to water resources is recognised in the National Water Initiative ('NWI'), with a focus on planning but also with reference to native title rights. In drafting provisions for a type of 'planned water' dedicated to meeting Aboriginal interests and aspirations – a model of 'planned cultural water' – the concept of 'planned environmental water'<sup>9</sup> may be an instructive analogy.

Legislating for recognition and operation of 'cultural flows' may be feasible in principle, although this requires careful consideration and articulation of the meaning and content of 'cultural flow'. The Echuca Declaration concept of cultural flow<sup>10</sup> is referred to, for instance, in submissions from NBAN, Friends of the Earth, the Federation of Victorian Traditional Owners Corporations, the National Native Title Council, and MLDRIN. Generally, this intends 'cultural flow' to include access to water resources for cultural and spiritual purposes and also for economic development purposes (including commercial purposes). The scope of cultural flow in this context is expansive and assumes an integrated character of various purposes (cultural, economic development and justice).

The capacity for the Commonwealth to legislate for Aboriginal water allocations will be confined and affected by the scope of Federal constitutional power to do so and, as such, the identification of an appropriate head of power. This is considered further below.

## 3.2 Aboriginal engagement in water planning and management

### 3.2.1 Submission Content

Submissions regarding Aboriginal engagement in water planning recommended initiatives such as:

- Requiring State and Commonwealth agencies to incorporate Aboriginal rights and interests into water resource plans;
- Requiring the First Peoples' Water Engagement Council ('FPWEC'), an advisory body to the National Water Commission, to play a leading policy role and requiring FPWEC advice to be taken into account in decision-making;

<sup>7</sup> Submission 62 - Federation of Victorian Traditional Owners Corporation, p.6

<sup>8</sup> Basin Plan, s 10.54

<sup>9</sup> Water Act 2007 (Cth), s 6

<sup>10</sup> MLDRIN Echuca Declaration (2009)

- Requiring planning and management provisions to be consistent with the NWI;
- Requiring meaningful involvement (or full participation) of Aboriginal peoples in all levels of water planning and management;
- Requiring specific indigenous expertise among membership of the Basin Consultative Committee;
- Amending section 21 (general basis on which Basin Plan to be developed) to include:
  - provisions requiring recognition of adverse impacts on Aboriginal people and the need for special measures for consistent with international agreements;
  - the content of Water Resource Plans to be developed in a manner requiring negotiation with Aboriginal peoples;
  - water resource plans to describe how cultural flows will be implemented;
  - States and Territories to maintain Aboriginal Water Units within government agencies.

NBAN has submitted, for instance, that the Water Act should be amended to require water resource plans to be developed in a manner consistent with international guidance on impact assessments (Akwé Kon principles<sup>11</sup>). They have also emphasised the importance of Aboriginal law, custom and knowledge to planning processes and that this ancient knowledge (and its recuperation) ‘should be respected and given the same amount of investment as is put into managing data which spans the last 130 years of Basin water history.’<sup>12</sup>

The National Native Title Council submitted<sup>13</sup> that the water resource planning process to this point does not comply with current legislative requirements to include Aboriginal participation and incorporate Aboriginal objectives and strategies.<sup>14</sup>

### 3.2.2 Comment

In general, these submissions fall into two categories.

First, there are submissions by those seeking to amend the Water Act to provide for greater indigenous representation and/or involvement in the decision-making processes and administrative machinery at the Commonwealth level. For instance, submissions include proposals to amend parts of section 172 of the Water Act to require the Murray Darling Basin Authority (‘MDBA’) to engage specifically with Indigenous Communities about the use and management of Basin water resources, to require indigenous water management to be a field of management of the MDBA, and to expressly require indigenous expertise on the Basin Consultative Committee.<sup>15</sup>

Second, there are proposals to amend the Water Act to impose obligations on the States and Territories in respect of water planning, such as genuine involvement of Aboriginal Peoples at all levels of planning, and the incorporation of Aboriginal interests or cultural flow processes into water planning (through water resource plans).

Amendment of the Water Act to alter the consultative, expert and administrative machinery operating under the Act is not problematic, as this intends to provide for further, targeted measures aimed at establishing indigenous representation and/or expertise in these processes.

Amendment to the Water Act to add additional and specific obligations on State and Territory authorities and water planners to take into account indigenous interests in water planning, including giving effect to cultural flows, are potentially important legal measures. However, these measures would rely on the existence and operation of an appropriate constitutional basis for the Commonwealth to legislate in this manner. Again, that question is dealt with below. From both a legal and practical point of view, legislative obligations on State and Territory water planners to establish and implement mechanisms such as cultural flows would require careful consideration of the appropriate

<sup>11</sup> Convention on Biological Diversity Conference of the Parties 7 Akwe: Kon Guidelines (2004), <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf> (viewed 13 November 2014)

<sup>12</sup> Submission 72 – Northern Basin Aboriginal Nations, [37]

<sup>13</sup> Submission 63 – National Native Title Council, 8-9

<sup>14</sup> See e.g. Basin Plan, Part 14

<sup>15</sup> Submission 32 – Katie O’ Bryan

processes and vehicles that would allow integration of these dimensions of water planning with other key elements, notably Sustainable Diversion Limits ('SDLs') and environmental water.<sup>16</sup>

### 3.3 Interactions with Environmental Water

#### 3.3.1 Submission Content

Submissions in relation to environmental water propose:

- A statutory Traditional Owner role in the governance of the Commonwealth Environmental Water Holder ('CEWH');
- A 5% reserve for Aboriginal Peoples which should be managed with technical assistance from the CEWH;
- The portion of the 5% reserve for Aboriginal Peoples that comes from environmental water (termed 'Cultural Environmental Water') be managed to optimise cultural and environmental outcomes.

NBAN's detailed proposals for sourcing a component of cultural flows entitlements from the 'environmental water' pool are noted above. Friends of the Earth identify the importance of interactions between environmental water (and its institutions) and 'cultural' water. They note the roles of 'co-benefits' of environmental and cultural water entitlements and, crucially, the importance of 'co-management' in this framework.<sup>17</sup>

#### 3.3.2 Comment

Proposals for Aboriginal water that impact on the environmental water holdings held by the CEWH in accordance with Part 6 of the Water Act ('environmental water') need to bear in mind the current provisions related to environmental water and constraints and limitations on the CEWH and what can be done with environmental water.

While the CEWH is an independent statutory authority with powers and responsibilities to handle and manage environmental water under the Water Act,<sup>18</sup> its actions are confined by the statutory functions of the CEWH and, again, the constitutional bases on which the Water Act operates. In particular, the CEWH's functions are limited to those performed for the purpose of protecting or restoring environmental assets (principally of the Basin) to give effect to international agreements.<sup>19</sup> Where those purposes align with Aboriginal cultural purposes the CEWH may be able to further facilitate Aboriginal involvement in environmental water management. However, the Water Act provides uncertain scope for environmental water and the functions of the CEWH to operate expressly for Aboriginal cultural purposes and to achieve indigenous needs or aspirations. These functions and provisions are to be interpreted in a manner that will further the objects of the Water Act<sup>20</sup> and these include managing Basin water resources in the national interest, in a way that optimises economic, social and environmental outcomes, and to give effect to relevant international agreements. Each of these categories of objects could be interpreted as including Aboriginal cultural purposes but that interpretation is uncertain.

The intention to manage Basin resources in the national interest<sup>21</sup> may assist in advancing uses of environmental assets in a manner more sympathetic to Aboriginal cultural interests, as may the requirement to optimise social outcomes.

The intention to give effect to international obligations may also be an interpretive device in the use and management of environmental water. The categories of international agreements to which the Water Act gives effect is not closed,<sup>22</sup> but moreover key international environmental agreements such as the Convention on Biological Diversity ('Biodiversity Convention')<sup>23</sup> do contain provisions to advance the interests of indigenous communities.<sup>24</sup>

<sup>16</sup> NBAN's submission in part considers how this might work, at least at a high level, with percentages of water coming from SDLs and from environmental water. More detailed arrangements for 'inter-operability' of water allocations and uses would also need to be considered, such as how cultural flows may interact with environmental flows.

<sup>17</sup> *Submission 26 – Friends of the Earth Melbourne*

<sup>18</sup> *Water Act 2007* (Cth), ss 104-110

<sup>19</sup> *Water Act 2007* (Cth), s 105(3)

<sup>20</sup> *Acts Interpretation Act 1901* (Cth), s 15AA

<sup>21</sup> *Water Act 2007* (Cth), subs 3(a)

<sup>22</sup> See *Water Act 2007* (Cth), s 4, especially 'international agreement' and 'relevant international agreement' (especially paragraph (i)).

<sup>23</sup> The *Biodiversity Convention* is a 'relevant international agreement' for the purposes of the Water Act: see section 4 ('relevant international agreement', paragraph (b)).

<sup>24</sup> *Biodiversity Convention*, Art 8(j):

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

Proposals to achieve a form of Cultural Environmental Water or other reforms to establish clearer Aboriginal roles and functions under the Water Act would best be achieved through amendments to the Water Act to establish these functions as distinct but inter-related with environmental water institutions and practices. Achieving these changes also would best be done through amendment to the overarching objects of the Water Act under section 3, as well as any other correlating objects or purposes within the body of the Water Act. Such measures would necessarily require an appropriate and sufficient constitutional basis.

### 3.4 International agreements and instruments

#### 3.4.1 Submission Content

The submissions include the following proposal regarding how the Act should implement international agreements:

- The Act should implement relevant principles contained in human rights instruments and in particular the United Nations Declaration of the Rights of Indigenous Peoples ('UNDRIP') and Article 8(j) of the Biodiversity Convention.

For example, NBAN seeks amendment of section 21 of the Water Act 'to ensure consistency with how the biodiversity elements of the convention are treated within the Water Act and how the Water Act treats the cultural rights of Aboriginal Peoples.'<sup>25</sup>

Submitters including NBAN, academic and native title lawyer Katie O'Bryan, the Federation of Victorian Traditional Owner Corporations, and Friends of the Earth argue for amendment of the Act to require express recognition of the UNDRIP in the legislation and/or adoption of its principles. Widening the base of international instruments and principles referred to in the Act, and clearer and express adoption of international measures benefiting Aboriginal communities, are important themes in a number of submissions.

#### 3.4.2 Comment

The Commonwealth's power to legislate for water management arises from the external affairs power of the Constitution, among various other powers.<sup>26</sup> The Water Act operates to give effect to certain international obligations as relevant to the management and use of water resources in the Basin. The international agreements referred to in the Act are environmental treaties, including the Ramsar Convention, the Biodiversity Convention, bilateral migratory bird agreements<sup>27</sup> and the Climate Change Convention. Other international conventions to which Australia is a party may also be applicable if they are relevant to the use and management of Basin water resources and they prescribed by regulation.<sup>28</sup>

The UNDRIP is a non-binding declaration of the UN General Assembly. It is an instrument developed and to be used in the context of other international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights.<sup>29</sup> The UNDRIP was endorsed by the Australian Government in 2009. It has been described as 'the most comprehensive and advanced international instrument dealing with Indigenous peoples' rights. Effectively, it is a tool that can facilitate addressing the contemporary effects of oppression and colonisation.'<sup>30</sup>

Although not a treaty and therefore not subject to ratification, it is likely that the UNDRIP has sufficient status to allow the Commonwealth Government to legislate on the matters contained in it. The competence of the Commonwealth Parliament to legislate to give effect to non-treaty instruments is broad<sup>31</sup> and the Parliament could legislate to bring UNDRIP into domestic law, including those provisions relevant only to water law.<sup>32</sup> The UNDRIP contains the most appropriate provisions and principles expressing cultural and developmental rights for Aboriginal Peoples relating to water resources.<sup>33</sup> For instance, Article 26 of UNDRIP refers to indigenous peoples' rights to, and States obligations to give

<sup>25</sup> Submission 72 – Northern Basin Aboriginal Nations, [5]

<sup>26</sup> See generally *Water Act 2007* (Cth), ss 9-11

<sup>27</sup> *China-Australia Migratory Bird Agreement* ('CAMBA'), *Japan-Australian Migratory Bird Agreement* ('JAMBA'), *Republic of Korea – Australia Migratory Bird Agreement* ('RoKAMBA')

<sup>28</sup> *Water Act 2007* (Cth), s 4 ('relevant international agreement', (i))

<sup>29</sup> [1976] ATS 5

<sup>30</sup> Australian Human Rights Commission *The Declaration Dialogue Series Paper 1: Giving Full Effect to the Declaration – A National Strategy* (2013), 4

<sup>31</sup> *Victoria v Commonwealth* (1996) 187 CLR 416 ('ILO Case'); see also S Joseph and M Castan *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2001), p.93, see also generally Tony Blackshield and George Williams *Australian Constitutional Law and Theory: Commentary and Materials* (3<sup>rd</sup> ed, Federation Press, 2002), 778-782, 793, 797-798.

<sup>32</sup> Partial implementation of an international instrument through domestic law is sufficient to its validity, so long as the 'deficiency' in implementation is not in substance inconsistent with the international instrument: see *ILO Case* (1996) 187 CLR 416, 489

<sup>33</sup> See eg *UNDRIP*, Art 26(1): 'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'; Art 29(1): Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources'; Art 32(1):

legal recognition and protection of rights to, 'lands, territories and *resources*.'<sup>34</sup> Article 32 provides for rights regarding development and use of lands, territories or resources, including specific reference to water resources.<sup>35</sup>

The Water Act would be an appropriate and effective vehicle therefore to give effect to these provisions of the UNDRIP. Certain submissions<sup>36</sup> proposed amendment of the Water Act to include the UNDRIP expressly as a 'relevant international agreement' under section 4 of the Water Act. The difficulty with this approach is that the UNDRIP is not an 'international agreement', in that it is not a treaty or agreement to which Australia is a party,<sup>37</sup> but rather is a 'soft' law instrument.<sup>38</sup> In this respect, adoption of UNDRIP provisions into the Water Act could not be through amendment of this definition under section 4. An alternative legislative drafting arrangement would be needed, such as a more expansive definition of 'relevant international instrument' or stand-alone inclusion of the UNDRIP in section 4 and/or elsewhere. These revisions (however drafted) would also necessitate consequential amendments to other sections of the Water Act where 'relevant international agreements are referred to, such as sections 3 and 21.

Other international agreements also contain relevant and applicable provisions on indigenous or cultural rights and their recognition. For instance, under the Biodiversity Convention, respect for and preservation of indigenous cultures is seen as important, if ancillary, to the main subject-matter of the Convention.<sup>39</sup> Other agreements may be more general in nature or content but contain provisions regarding cultural recognition, such as the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>40</sup>, which requires the integration of culture into sustainable development.

### 3.4.3 Other matters: the 'race power' as a constitutional basis for amendment to the Act

The principal constitutional foundations for proposed amendment to the Water Act, so as to advance Aboriginal rights and interests, have been identified above as the Parliament's power to legislate with respect to external affairs.

The submissions do not make reference to other constitutional heads of legislative power. This is perhaps not surprising given the relative force and authority of international instruments, such as the UNDRIP and Biodiversity Convention, and their guidance to beneficial legislation in this regard.

Note should be made however of the constitutional capacity of the Commonwealth to legislate 'for the people of any race for whom it is deemed necessary to make special laws',<sup>41</sup> the so-called 'race power.' The submissions do not raise the possibility of using this head of constitutional power as a basis for legislating positively in favour of more expansive or innovative Aboriginal rights and interests in water law and policy. However it could be used to achieve some of the objectives identified in submissions.

It should also be noted that under present initiatives to recognise Aboriginal and Torres Strait Islanders peoples in the Constitution the view has been expressed that the 'race power' should be removed from the Constitution, but that a new provision should be included to allow the Commonwealth Government to legislate for the benefit of Aboriginal and Torres Strait Islander people and therefore a valid head of power would remain for water reform.<sup>42</sup> Progress on Constitutional recognition may also, in the longer-term, influence what Aboriginal recognition in water law might or could look like.

The effective test<sup>43</sup> for valid legislation under the existing head of power (s 51(xxvi)) is that such a law is 'special' and also

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Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

34 UNDRIP, Art 26(3), emphasis added.

35 UNDRIP, Art 32(1)-32(2):

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources... States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

36 Submissions 32 – Katie O'Bryan and Submission 72 – NBAN

37 See *Water Act 2007* (Cth), s 4 ('international agreement'); see also *Vienna Convention on the Law of Treaties* (1969), Article 2(1)(a): '... 'treaty' means an international agreement concluded between States in a written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation...'

38 On the distinction of 'hard' (binding) and 'soft' (non-binding) international measures, see eg Pierre-Marie Dupuy 'Soft law and the international law of the environment' (1991) 12 *Michigan Journal of International Law* 420

39 *Convention on Biological Diversity*, Art 8(j)

40 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* [2009] ATS 25, Art 13 (entered into force 18 December 2009). 'Sustainable development' is also an object of the Act and of other relevant international agreements such as *Convention on Biological Diversity*, Art 1

41 *Constitution*, s 51(xxvi)

42 See e.g. Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples *Interim Report*, 15 July 2014, [2.18]-[2.17] and Commonwealth Government, *Recognising Aboriginal and Torres Strait Island Peoples in the Constitution: Report of the Expert Panel* <http://www.recognise.org.au/about/expert-panel-report/>

43 The test strictly includes the requirement that the law be 'deemed necessary', although this has been held to a matter for the judgment of the Parliament: *Western Australia v Commonwealth* ('Native title Case') (1995) 183 CLR 373, 462

that it applies to the people of a particular race (rather than applies to race in general).<sup>44</sup> It is not settled as to whether such ‘special laws’ may operate to the detriment as well as the benefit of the group to which they are targeted. The point is that they must operate ‘differentially’ on the people of a particular race.<sup>45</sup> In any case, for the Commonwealth Water Act to be amended to require, for instance, States to develop Water Resource Plans that include measures to establish water allocation devices of particular benefit to Aboriginal peoples would, on its face, be a valid law within this power. Similarly, the ‘cultural flows’ concept of water allocations could be implemented under this power - for example obliging water resource plans to include Aboriginal cultural allocation provisions. Appropriately drafted, such laws should not offend other relevant constitutional provisions, such as section 100 (which prohibits the Commonwealth from abridging, ‘by any law or regulation of trade or commerce’, the rights of the States or their residents to ‘the reasonable use of waters of rivers for conservation or irrigation’).<sup>46</sup>

## 4 Conclusions

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Review of the Commonwealth Water Act has been informed, among other sources, by submissions relating to Aboriginal rights and interests in water governance. These submissions raise a wide range of issues, including proposing amendment to the Commonwealth Water Act which could provide improved, beneficial outcomes to Aboriginal Nations in the Murray-Darling Basin. Many of the submissions and ideas advanced need to be considered in the context of the complex balance of Federal and State jurisdiction over water resources. Sufficient constitutional foundations on which the Commonwealth could legislate for wider recognition of Aboriginal rights and interests in water are likely to exist, although careful navigation through constitutional-legal realities – and political realities – would be required.

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<sup>44</sup> *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *Native Title Case*, 460-461

<sup>45</sup> *Native Title Case*, 461

<sup>46</sup> That is, where any such legislation avoids characterisation as a law or regulation of trade or commerce: see *Morgan v Commonwealth* (1947) 74 CLR 421; applied in, for example, *Lee v Commonwealth* [2014] FCA 432, [84]-[102]



# About Environmental Justice Australia

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We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

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