

Indigenous Rights to Water in northern Australia

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- * About northern Australia;
- * Noting NSW Act most advanced in many respects – Water Management Act – where there statutory objects of general recognition, a Water Trust and some licenses granted for economic and cultural purposes.

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- * Across northern Australia, 30% of the land is owned by diverse Indigenous peoples (Altman *et al.*, 2009). This land is owned under a variety of tenures, much of it communally in trust.
 - * Where does water stand here?
 - * Natural waters flowing, surface and subterranean not owned by anyone;

Land & Water Taskforce Final Report 2009

Key findings

- * The north's unique environments are of global significance.
- * Conservation and management of land and water resources are critical to the economy of northern Australia.
- * The northern beef cattle industry (including Indigenous pastoral land) involves around 90 per cent of the land area of northern Australia.
- * Economic opportunities exist for Indigenous people to build on their comparative advantage in providing customary and commercial services on the vast Indigenous estate.
- * The potential for growth in groundwater-irrigable land in northern Australia is estimated at between 100 and 200 per cent, or around 20 000 – 40 000 hectares.
- * Mosaic agriculture has been identified as an appropriate model for new agriculture in northern Australia that warrants further consideration.

Basic Propositions

Introduction

- * The Indigenous worldview does not generally separate land and water in terms of rights and responsibilities. The legal recognition of the Indigenous relationship to country including water in Australian law fragments that worldview.
- * The traditional rights and interests of Indigenous peoples including in relation to water are not universally legally recognised in Australian law and when recognised at law it is of a limited nature.

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- * Native title rights and land rights legislation recognise Indigenous rights in relation to water, but in different ways. For example, the NT Land Rights Act includes the land and waters of the inter-tidal zone within the freehold title. Whilst the *Native Title Act, 1993* excludes the inter-tidal zone from the definition of land. Thus there can be no right to control access by native title holders to the inter-tidal zone.

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- * Natural waters are not the subject of ownership by government and land owners including native title holders.
 - * This includes the vesting of the right to the use and control of water in the Crown, government or relevant government agencies under water management legislation.
 - * The Northern Territory may be an exception where the vesting also uses the words the property in – but in my view the end result is no different.

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- * The control over access to water on or in the land subject to land rights or exclusive possession native title is significant and an important Indigenous right in relation to water.
 - * The common law riparian rights of land owners to use water including under land rights legislation no longer exist but have been replaced by a limited form of statutory rights to access water for domestic purposes, watering of stock and the keeping of domestic vegetable gardens pursuant to local water management legislation (ICM).

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- * The abolition of common law riparian rights does not affect native title rights to take and use water.
 - * Native Title and Land rights constitute substantive property rights and are not only the recognition of customary rights of usage such as gathering water, hunting and fishing.

Cultural & Subsistence rights

- * Native title rights to access and use water for non-commercial purposes - protected to some extent by the Native Title Act, 1993 from State/Territory legislation;
- * Land rights legislation that grants inalienable freehold;
- * Traditional usage legislation;
- * Federal & State Indigenous Heritage Protection legislation;
- * The beginning of recognition in NWI water allocation plans –statutory instruments in most jurisdictions and therefore legally binding – not in WA;

Native title customary & subsistence rights

- * A right to take water, for the purposes of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs;
- * a right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters.
- * the right to have access to, maintain and protect places and areas of importance on or in the land and waters.
- * A right of access to take water for those purposes;

These rights have been found to apply to both flowing and subterranean waters.

Section 211 of the *Native Title Act, 1993*

Section 211 of the NTA allows native title holders to access and take and use water without the requirement for a licence and without committing an offence when conducted as part of the activities of: (a) hunting; (b) fishing; (c) gathering; (d) a cultural or spiritual activity; (e) any other kind of activity prescribed for the purpose of this paragraph.

The provision does not act as a general relief from the obligations of obtaining a licence when a native title right or activity is outside or unrelated to these listed activities. Some uncertainty exists about the full implications for the native title right to access and take water which could be resolved by adding the taking of water per se.

Land rights legislation eg *Aboriginal Land Rights (Northern Territory) Act, 1976 (ALRA)*

- * an Aboriginal or group of Aboriginals has rights of use and occupation of Aboriginal land in accordance with Aboriginal tradition, pursuant to section 71(1) of the Act – these are rights to use the natural resources of the land including water.
- * Control over access - permit system;

Customary and Subsistence – usage rights

- * Legislation that recognises Indigenous usage/traditional usage of land and waters;
- * not dependent on the legal recognition or proof of native title or traditional ownership - they are freestanding statutory rights, as it were;
- * generally only recognised for “subsistence” and not for commercial purposes;

Some examples, Northern Territory *Pastoral Act*

- * The Northern Territory *Pastoral Act* provides that one of its objects is to “to recognise the right of Aborigines to follow traditional pursuits on pastoral land.”
- * The terms of the reservation provide that Aborigines who ordinarily reside on the land subject to the pastoral lease and who by Aboriginal tradition are entitled to use and occupy the pastoral lease area can “take and use the water from the natural waters and springs on the leased land;”
- * The right to take and use water is prefaced by the words “notwithstanding any other law of the Territory” in the Act. This ensures that the right is not limited by such legislation as the *Water Act* in the Northern Territory, which generally requires a licence to take and use water.

the *Territory Parks and Wildlife Conservation Act*

- * specifically provides that it does not restrict the “right of Aboriginals who have traditionally used an area of land or water from continuing to use that area in accordance with Aboriginal tradition for hunting, food gathering (otherwise than for the purpose of sale) and for ceremonial and religious purposes.”

Indigenous Heritage Protection legislation

- * Federal Act –*Aboriginal and Torres Strait Islander Heritage Protection Act*, 1984 provides a “last resort” Ministerial discretion to protect significant areas including water and at;
- * Legislation at a State and Territory level makes it a criminal offence to destroy a site or area- called “blanket protection” but subject to a political discretion to destroy or affect the site in the broader community interest;
- * not a property right.

NWI COAG Agreement 52-54

Indigenous access

- * Indigenous representation in water planning wherever possible (statutory object in QLD);
- * Water plans include social, spiritual and customary objectives (some compliance);
- * Take account of native title rights to take and use water (no compliance) in water plans and “may need an “allocation””;
- * Water allocated to native title to be accounted for (no compliance),

Right to a cultural flow

- * Emerging concept due to Indigenous advocacy;
- * To be separate from environmental flow;
- * Existing and draft NT water allocation plans acknowledge its importance but don't know how to assess or measure it and conclude cultural sites and flow mostly protected in environmental flows;

Katherine Water Allocation Plan for the Tindall Limestone Aquifer in the Northern Territory

- * “Whilst it is recognised that cultural flows and environmental flows are not the same, the Plan assumes that the provisions for environmental flows will maintain the condition of places that are valued by both Indigenous and non-Indigenous people for cultural purposes. Further research and monitoring to improve our understanding of environmental and cultural flows will be initiated as part of the implementation of the WAP.”

Cultural Flow –Draft Plan Mataranka

- * Cultural flow and protection of Indigenous cultural sites explicitly recognised as objective of plan;
- * Is assumed this is catered for in the environmental flow;
- * Best endeavours to do the research to identify water related cultural values and a method to quantify water for Indigenous cultural purposes;

Mataranka Draft WAP released for public comment November 2010 – Cultural flow

- * The draft Plan recognises the deep spiritual affiliation that the people of the Wubulawun, Yangman, Mangarrayi, and Beswick Aboriginal Land Trusts have with the many springs, soaks, billabongs, streams, creeks and rivers associated with aquifer. These sites include Bitter and Rainbow Springs, Roper River and Red Lily Lagoon.
- * The draft Plan and associated Implementation Strategy contains strategies for the identification of Indigenous cultural values, and the maintenance of stream flow at sites of significance.

Mataranka Draft water Plan - cultural

3) Protection of Indigenous environmental and cultural values

a) This Plan assumes that provision of recharge for environmental protection will also maintain the condition of places that are valued by Indigenous people for cultural purposes;

b) Despite subclause a), it is recognised that cultural flow requirements may not align entirely with environmental requirements and any research that becomes available that assists in the identification of cultural flow requirements will be considered during the review of the plan.

Note: CSIRO research report 'Indigenous Water Cultural Values of the Mataranka and Roper River Area' will be completed during the life of this plan and outcomes from the report will be considered during the review of this Plan if available at that time.

Mataranka draft Plan (cont'd)

Part 4. Water for non-consumptive purposes

17. Water for environmental, Indigenous cultural and other in stream public benefits

- a) The amount available for environmental, Indigenous cultural and other in stream public benefit outcomes for any water accounting year will be a minimum 80% of the recharge as calculated by the model based on the previous wet season's (November 1 to April 30) recharge.

Note: The Roper River relies on recharge into the Tindall Limestone Aquifer (Mataranka) during the wet and subsequent discharge during the dry to maintain its perennial nature. The protection of this discharge is critical to maintain ecosystem function as well as to protect instream public benefit outcomes, including the social and cultural values intrinsically linked to the Roper River such as; fishing, boating, aesthetics and spiritual fulfilment. The quantity of flow needed for environmental purposes is not yet fully understood and as such, a conservative percentage of the annual recharge will be maintained for environmental purposes.

Mataranka (cont'd)

29. Research and investigation

- a) The Department of Natural Resources, Environment, The Arts and Sport will use its best endeavours to ensure that following studies are to be undertaken during the term of the Plan:
- * A report identifying Indigenous water related cultural values of the Mataranka and Roper River Area.
 - * A report setting out a methodology to quantify water requirements for Indigenous cultural purposes.

Native Title and Land Rights

- * Australian law currently recognizes in certain circumstances Indigenous rights to take and use water for non-commercial purposes.
- * There is an emerging native title jurisprudence concerning a right to trade in natural resources, which potentially could include water in the future.
- * Native title law and land rights legislation recognises an Indigenous right to control access to water but not the ownership of water.

Control over access to water on land

- * Despite the legal position that land ownership does not include ownership of natural waters on or in that land – control over access to the water on that land is an important legal right; Native Title limited by s24HA of *Native Title Act, 1993*;
- * Similar to the position that whilst minerals are owned by the Crown a miner still needs access to those minerals – which in the case of the Commonwealth NT Land Rights Act requires the permission of traditional owners – subject to a national interest Ministerial decision.

Blue Mud Bay case

The **Blue Mud Bay case** in the Northern Territory provides for Indigenous control over access to the waters and land of the inter-tidal zone but only in relation to grants of freehold title made under the *Aboriginal Land Rights (Northern Territory) Act, 1976* in the Northern Territory which extend to the low water mark.

The decision does not apply in relation to determinations of native title.

Northern Territory of Australia v Arnhem Land Trust [2008]
HCA 29

Native Title

An Exclusive possession native title determination – includes an Indigenous right to control access to water but not the ownership of water and a right to make decisions about access by people to the use of the waters.

These rights to control access to water and to make decisions about how the waters are used are subject to three important qualifications. One, they can only exist and be legally recognised where exclusive possession native title is recognised and secondly are subject to existing rights of access and use of the waters conferred by or arising under a law of the Northern Territory, relevant State or Commonwealth. Thirdly, s24HA of the NTA.

Common Native Title rights with respect to water

A right to access and take water, for the purposes of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs. It can include:

- A right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters;
- The right to have access to, maintain and protect places and areas of importance on or in the land and waters;
- A right of access to take water for those purposes;
- These rights have been found to apply to both flowing, surface and subterranean waters.

Indigenous Commercial Recognition

- * National Water Initiative – Inter Governmental COAG Agreement 2004 – paragraph 25 iv);
- * Land & Water Taskforce Report 2009 – Recommendation 12;
- * Land Rights legislation including control over access in form of a permit system under ALRA;
- * Developing law of native title – right to trade, exchange;
- * Developing concept of a Strategic Indigenous Reserve;

NWI Indigenous need

The NWI includes a requirement for an Indigenous specific grant of water for commercial use and this is not widely recognised nor implemented in water allocation plans (paragraph 25 ix) of the NWI).

National Water Initiative -

Water Access Entitlements and Planning Framework Outcomes

25. The Parties agree that, once initiated, their *water access entitlements* and planning frameworks will:

ix) recognise indigenous needs in relation to water access and management;

water access entitlement – a perpetual or ongoing entitlement to exclusive access to a share of water from a specified consumptive pool as defined in the relevant water plan.

consumptive pool – the amount of water resource that can be made available for *consumptive use* in a given water system under the rules of the relevant water plan.

consumptive use – use of water for private benefit consumptive purposes including irrigation, industry, urban and stock and domestic use.

Northern Australian Land and Water Taskforce Final Report – Recommendation 12

The allocation of water rights under statutory water plans should explicitly recognise Indigenous Peoples' rights and interests in water and ensure that:

- * Cultural allocations are made from the non-consumptive pool as water entitlements that are legally and beneficially owned by Indigenous Peoples; these allocations should be sufficient and adequate in quantity and quality to maintain the spiritual, cultural and social livelihoods of Indigenous Peoples of northern Australia
- * An equitable allocation from the consumptive pool is made available as an Indigenous reserve to the Indigenous Peoples of northern Australia
- * An Indigenous Water Fund is established to underwrite Indigenous purchases of water allocations from existing (fully allocated) consumptive pools.

A right to trade in natural resources including water

- * The most explicit new development in native title jurisprudence is the recognition of a native title right to trade.
- * There has been recognition of such a right in Australia for some time but it appears to have “slipped under the radar” as it has been part of consent determinations in the Torres Strait and has not been the subject of any commentary to my knowledge. For instance, in *Kaurareg People* in 2001 a native title right to engage in trade in relation to the natural resources of the determination area was recognised.
- * Natural resources in this case are defined to include water. The judge in this case noted that: “ It is worthy of note that the Kaurareg, in addition to the close cultural and spiritual connection they have with the islands, have traditionally played an important part in the complex trade and customary exchange networks that have long linked Australia, the various Torres Strait Islands and New Guinea.”

Kaurareg People v Queensland [2001] FCA 657 (23 May 2001).

Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland

- * In the most recent Torres Strait native title case in June 2010 in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland* 1060 the Federal Court recognised a right to take marine resources including fish for trading or commercial purposes.
- * The full Federal Court has also now looked at a right to trade in the context of contested litigation in native title cases in the Northern Territory. It is not clear specifically what this will mean in relation to water until there are further cases;

Northern Territory v Alyawar

- * In *Northern Territory v Alyawar* in 2004 the Court at first instance (the trial judge in the Federal Court) found that there was a native title right to trade in the following terms:

...the right to share, exchange or trade subsistence and other traditional resources obtained on or from the land and waters;

Full Court NT v *Alyawar* et al

- * On appeal to the Full Federal Court in this case, the Northern Territory Government submitted that a right to trade could not be a right in relation to land or waters and therefore could not be a legally recognizable native title right and interest. The Full Federal Court held that a right to trade is a right relating to the use of the resources of the land and therefore that as a matter of principle there can be found to exist such a native title right.
- * The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it would not be a right in relation to the land.
- * The same analysis applies in relation to the resources of the water/s.

Native title right to share or exchange subsistence and other traditional resources

- * The appeal Court went on to further find that the existence of such a right had not been proven on the evidence in this particular case. It was decided that the Judge in the lower Court was in error in finding the existence of such a right in this particular circumstance.
- * To quote: “The evidence relied upon by his Honour in this respect was not exposed in any detail beyond his earlier reference to the evidence of the applicants that they had asserted the right to use the natural resources of the claim area. In the circumstances, it is difficult to see how this evidence was capable of supporting a finding of a native title right to trade in the resources of the area. There appears to have been no evidentiary support for this aspect of the determination.”
- * The Appeal Court therefore amended the particular native title right to read as follows: The right to share or exchange subsistence and other traditional resources obtained on or from the land and waters;

Shows two things:

- * Proof of a native title right based on evidence and activities of a “traditional nature” inherently limiting as doesn’t recognise a right to the land and waters and therefore rights over any use of resources in the modern context;
- * Difficulties of proof per se;
- * Why recognition of SIR so important as gets Indigenous people into commercial space without need of proof of native title or traditional ownership;

Strategic Indigenous Reserve

- * Cape York Heritage Peninsula Protection Act, 2007 (QLD) for the Aboriginal communities economic and social benefit;
- * To be recognised in next review of Gulf Water Plan (QLD);
- * Water Allocation Plans in Katherine and Draft Mataranka Plan;

Strategic Indigenous Reserve

- * Mataranka Draft WAP – 25/% of consumptive pool – **4 875 ML/year**
- * Water Resource (Mitchell) Plan 2007 – Cape York QLD creates an Indigenous reserve from unallocated water to be used for economic and social aspirations of Aboriginal community (s27); Volumetric limit for all water licences to take indigenous unallocated water from the Cape York Peninsula region area is 5000 ML (s 28).
- * Katherine Tindall Aquifer – 680 ML in trust based on potential Indigenous holdings of 2% in plan area – if native title claim successful;

Draft Water Allocation Plan - Mataranka

- * Draft Water Allocation Plan – Tindall Limestone Aquifer, Mataranka released on 11 November 2011 has as one of its main objectives:

Maintenance and support for traditional land use in the predominately Indigenous owned land surrounding the Mataranka Water Planning Area through the protection of culturally significant water dependant sites as well as ***providing access to water for commercial development.***

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- * The draft Plan also provides a dedicated allocation of water for the social and economic benefit of Indigenous Groups living in the Plan area, called a Strategic Indigenous Reserve. This water has been reserved in recognition of the desire by Indigenous groups to develop Aboriginal Land Trust Land within the Plan area in the future.

18. Consumptive pool

b) The maximum annual extraction of water for consumptive purposes (hereafter the consumptive pool) is 19 500ML/year, calculated as 15% percentage of the long term annual average modelled recharge within Tindall Limestone Aquifer (Mataranka) (130 000ML/year) as stated in Part 2 Clause 3.

Mataranka Draft Water Allocation Plan

20. Water for licensed use

a) The maximum annual extraction of water available for licences (the licence pool) is the remaining consumptive pool once the requirements of the rural stock and domestic demand are met, being 18 960ML/year.

b) 4 875 ML/year of the licence pool is reserved for a Strategic Indigenous Reserve (SIR). This represents 25% of the consumptive pool.

c) 500 ML/year of the licence pool is set aside for future applications with licence entitlements under 100 ML/year.

d) As stated in Part 2 Clause 13, water is allocated to beneficial uses. Upon the commencement of this Plan, groundwater extraction licences can be granted for the following beneficial uses, via processes determined by the Controller.

- i. public water supply;
- ii. agriculture;
- iii. aquaculture; and
- iv. industry.

SIR for both cultural and economic purposes - a water access entitlement

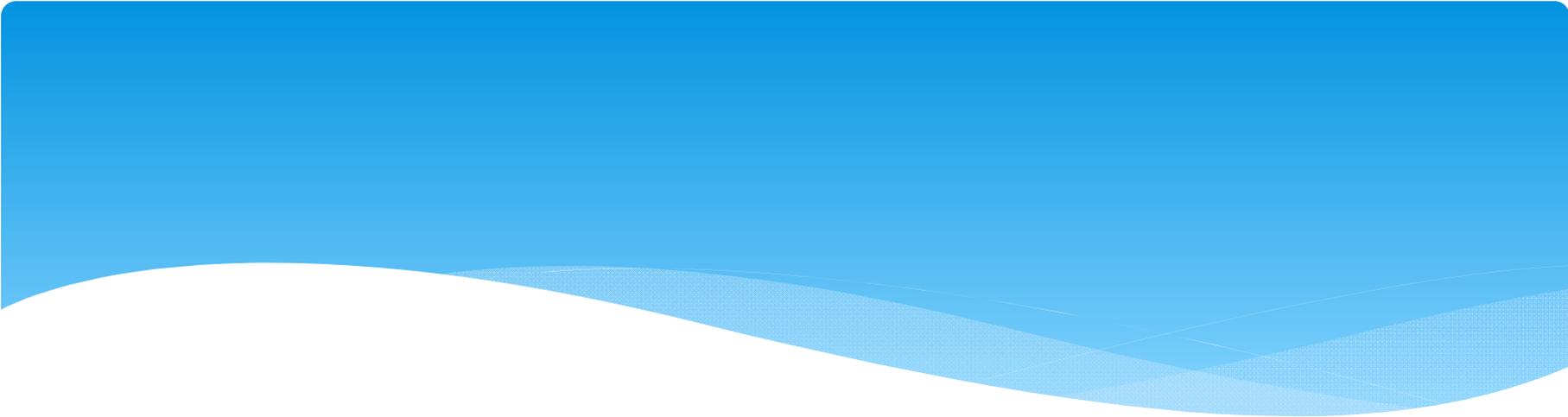
- * The inclusion of a right to an Indigenous cultural flow as an integral part of water planning both as part of the environmental flow and as an allocation to a SIR water access entitlement.
- * In my opinion an Indigenous cultural flow (given its clear relatedness to a truly sustainable environmental flow) be primarily specified as a separate reserve in connection with the allocation to the environment and not subject to licensing.
- * The Strategic Indigenous Reserve would be primarily for economic use but could also be used to support social and cultural values if thought appropriate by the Indigenous group concerned.
- * This also provides “some” flexibility in terms of recognising the unity of the Indigenous view of country and water as not separate entities;

Strategic Indigenous Reserve (SIR) – consumptive pool

- * There is an emerging consensus concerning the need to establish an Indigenous specific allocation from the consumptive pool and this is a means of satisfying the NWI requirement to grant water access entitlements to address indigenous needs (clause 25 iv).
- * Should be a mandatory legal requirement in say local water management legislation – obviously an easier ask in northern Australia;

Significant policy questions remain to be resolved including:

- * How will the allocation amount/percentage of the consumptive pool be calculated?
- * What is the priority of the allocation?
- * Who holds the water access entitlement?
- * Should only legally recognised traditional owners under land rights legislation or native title receive such an allocation?
- * Where systems are fully allocated, how can local Indigenous groups acquire an allocation from the consumptive pool? (will they, for example, need to buy licences in the market through an Indigenous water trust as proposed by some Indigenous groups?)



One method by which the amount of water for the reserve could be determined is to establish criteria in the Act that take into account in the water plan area:

- * the percentage of Indigenous land ownership/interests;
- * that land ownership is not the only criteria for access to a water entitlement and that a minimum amount apply in such circumstances;
- * the existing entitlements held by Traditional owner interests be taken into account;
- * the extent of Indigenous need and disadvantage;
- * a cultural flow component to maximise Indigenous engagement in water management;

Water Trust

- * The establishment of a Water Trust to ensure that Indigenous people in over allocated plan areas can purchase water access entitlements and hold them on trust if needs be pending the finalisation of local plans to use the water allocated. These can be created at the local community level and recognised in the regulations.
- * Noting one exists in NSW.

An Indigenous water holder

- * the Federal Government could establish an Indigenous equivalent to the Commonwealth Environmental Water Holder, that is an Indigenous Water Holder that could buy water access entitlements for Indigenous purposes especially in fully allocated or over-allocated systems and transfer them to Indigenous interests or individuals.
- * The major potential downside with such a proposal is the potential for government to set overly prescriptive rules that undermine Indigenous decision-making.

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- * exists a provision (s110) that provides for the dis-application of certain State laws that would inhibit the Commonwealth Environment Water Holder in relation to water declared Ramsar wetlands, water dependent eco-systems that support listed threatened species, listed threatened ecological communities and water sites specified in the regulations for the Federal Act.
 - * Such a provision with respect to an Indigenous water holder would facilitate the achievement of this outcome