

Aboriginal Water Sovereignty: Australia

Presentation to the
International Symposium: Exploring our Legal
Relationship with the Living World

Australian Earth Laws Alliance
Griffith University 25-26 October 2018



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Dr Virginia Marshall

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The liberation of nature?

- Natural rights and the rights of nature approach flows from western concepts of environmental ethics.
- Indigenous traditional values and belief systems are unrelated to both these and the concepts of classical liberalism.
- The theories of Blackstone, Hume, Locke and Smith are foreign to the interpretation of Indigenous beliefs, values and laws, nor can they explain Indigenous ontologies governing the use of land or water.

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In John Locke's view, Western proprietary rights and interests are based on a natural law that underpins a natural right to property.

Under Locke's principles, where Indigenous peoples do not seek to 'labour and maximise the natural resources' this goes against God's declaration that humankind has dominion over the land and resources: hence their property rights and interests would not exist.

Bruce Ziff, *Principles of Property Law* (Carswell 2010, 5th edn) 36-41.

J Locke, *Two Treatises of Government* (New York: American Library, Mentor ed, 1963, 1690.

J Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration*, in J W Gough (ed), Basil Blackwell, Oxford, 1946).



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Locke's theory is said to have 'legitimated the theft of lands and resources of the native peoples in America' as the result of natural law assumptions.

N.B. overwhelming evidence shows that sophisticated Aboriginal land and water management of the Australian continent fostered highly productive and biodiverse landscapes and waterways. Colonialist preconceptions of 'labour' and misconceptions of the Australian environment blinded them to this.

e.g. see: Gammage, W 2011, *The Biggest Estate on Earth: How Aborigines made Australia*, Allen & Unwin, Australia.



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- David Hume rejected the position held by natural law theorists but viewed property rights through a utilitarian approach;
- Hume held that through the creation of wealth and private property, benefits would flow on to the community at large;
- However, under Hume's principles, Indigenous peoples would be forced to reject communal or customary title and Indigenous laws.

See David Hume, *A Treatise of Human Nature*, T H Green and T H Grose (eds), (Longmans, Greens and Co, 1874) in Bruce Ziff, *Principles of Property Law* (Carswell 2010, 5th edn).

Samantha Hepburn, *Principles of Property Law* (Routledge-Cavendish 2006, 3rd edn) 7-8.

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Under Adam Smith's 'Wealth of Nations' theory, economic competition in the open market would eliminate any inequality or inefficient institutions and companies (including Aboriginal organisations and not-for-profit bodies) since (he claimed) the market would create 'balance' through competition.

J C Smith and David N Weisstub, *The Western Idea of Law* (Butterworths 1983) 581.

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Rights of Nature

Rights of Nature advocate Roderick Nash asserted that:

‘These western theories emanate as a means to dominate the environment and to facilitate the human control of the environment, with the ability to modify and exploit the available resources’.

Roderick Nash, *The Rights of Nature: A history of Environmental Ethics* (Primavera Press Leichardt Australia 1990) 22.



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Rights of Nature and Earth Jurisprudence

David R Boyd advanced ‘the rights of nature’ as the solution to global environmental despair; where nature is oppressed by the ongoing assertion of human superiority, the universal ownership of land and wildlife for economic purposes, coupled with a dominant culture and legal system that supports self-destruction.

David R Boyd, *The Rights of Nature: A legal revolution that could save the world* (ECW Toronto Canada 2017) xxiv

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Rights of Nature and Earth Jurisprudence

- Earth jurisprudence harnesses a western ethical philosophy that promotes the legal recognition of nature as an entity with a legal status of personhood using *sui generis* types of legal trusts and the public trust doctrine.
- But where is the evidence that the creation of substantial and procedural rights of nature and legal personhood of rivers is a feasible response to flawed or ineffective environmental policies and statutes?



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Rights of Nature and Earth Jurisprudence

- The challenge in the rights of nature ideology is that it is counter-intuitive and counter-productive to the Indigenous laws, customs and practices of Australia's First Peoples.
- The Rights of Nature construct undermines the exercise of Indigenous self-determination and inherent governance.



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Rights of Nature and Earth Jurisprudence

The Preamble of the **draft UN Declaration on the Rights of Mother Earth**, which refers to *‘recognition and to defend the rights of mother earth’*, appears oppositional to the inherent role of Aboriginal peoples to manage and protect their country, including the lands, the waters, totemic relationships with plants and animals.

Proposal of Universal Declaration of the Rights of Mother Earth, adopted on April 24, 2010

<http://pwccc.wordpress.com/2010/04/24/proposal-universal-declaration-of-the-rights-of-mother-earth/>

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Rights of Nature and Earth Jurisprudence

The draft Preamble constructs language that:

- Enforces restrictions on Aboriginal laws, limiting and regulating inherent Indigenous rights and obligations (Article 1(7))
- Article 3(e) of the draft Declaration seeks ‘effective norms and laws’ to defend the earth, effectively dismissing existing Aboriginal norms, laws, practices and obligations to Care for Country

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Rights of Nature and Earth Jurisprudence

- Advocating for the rights of nature on grounds that all humans over-exploit, abuse and contaminate the environment is misleading and insulting.
- It is also antithetical to Aboriginal peoples' inherent rights and obligations as First Peoples, which have operated effectively for tens of thousands of years in Australia.

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Who speaks for Country?

- Aboriginal communities of Australia relate to and contemplate value in the environment as integral to Aboriginal identity in a way that articulates both communal and individual rights and interests.
- 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.

Virginia Marshall, 'A web of Aboriginal water rights: Examining the competing Aboriginal claim for water property rights and interests in Australia' (PhD thesis, Macquarie University, Sydney, 2014) 136.

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Who speaks for Country?

Water landscapes hold meaning and purpose under Aboriginal laws:

- From an Aboriginal perspective, water is inseparable from the land. In many Aboriginal creation stories (not myths) water came first, then the land.
- Water is sacred and underpins Aboriginal kinship connection in birth, life and death;
- Examples of the Aboriginal obligations to 'Care for Country' include maintaining waterholes, continuing fire management practices and monitoring the health of all things within traditional boundaries.

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Who speaks for Country?

The Indigenous peoples of Australia have a primary, unique, and inherent obligation to exercise the ownership, protection and management of the Australian environment, but Australian domestic laws and policies fail to properly support Indigenous Australians in the exercise of such obligations.

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Who speaks for Country?

- Aboriginal communities, for over two hundred years of colonisation, have been invisible in colonial constitutions and federalism (1901). Australia's Constitution affirms the invisibility of the First Peoples.
- Social activism (people's movements) still run cold on restoring Aboriginal peoples leadership role on land, water and resource management.

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Who speaks for Country?

- The Australian Government's blueprint for water resource use, the National Water Initiative, does not provide Indigenous peoples with any legal certainty in regard to water rights.
- The NWI includes just three discretionary Indigenous clauses (cl. 52, 53 & 54) to represent thousands of years of actively maintaining pristine waters, lands and respect for all living things.

Australian Government, National Water Initiative

<http://www.agriculture.gov.au/SiteCollectionDocuments/water/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>

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Who speaks for Country?

Indigenous peoples in Australia have been, and continue to be, impacted by the doctrine of discovery - *terra nullius* and *aqua nullius* - and they continue to be invisible to those seeking to exercise proprietary rights over Australia's rivers.

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Observations from a decade ago

‘we honour the Indigenous peoples of this land, the oldest continuing cultures in human history’

Former Prime Minister Kevin Rudd, in the National Apology to Indigenous Peoples of Australia

‘The National Apology reinforces the appropriateness and timeliness of this approach to the interpretation of all relevant Australian legislation’

Former judge to the High Court of Australia Michael Kirby

Commonwealth Parliament, The National Apology (Kevin Rudd), 2008
Northern Territory v Arnhem Land Aboriginal Land Trust [2008] HCA 29 Kirby J [72].



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A Web of Aboriginal Water Rights: Examining the competing Aboriginal claim for water property rights and interests in Australia

Virginia Marshall, PhD thesis, Macquarie Law School,
Macquarie University

<http://hdl.handle.net/1959.14/324110>

3,727 downloads (24/10/18)



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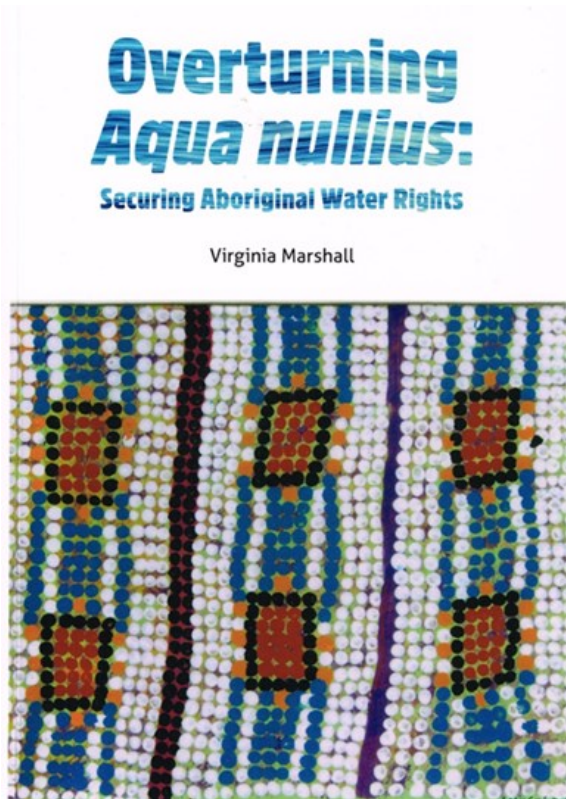
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“Just as the Australian Law Reform Commission report of 1986 may have expedited the arrival of land rights for Australia’s indigenous peoples, so I believe Dr Marshall’s book **will influence the future of water rights as they affect Aboriginal and other indigenous peoples in Australia.**

Looked at from the perspective of history, we are definitely on a path to correct the injustices and silences of the past. Dr Marshall can be proud of the contribution she has made to the rights of her people by writing this book. Its impact is now a challenge before all Australians.”

The Hon Michael Kirby AC CMG, former Judge of the High Court of Australia, in the foreword to *Overturning Aqua nullius*

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