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Recognition of Barkandji Water Rights in Australian Settler-Colonial Water Regimes

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Abstract: The passage of the *Native Title Act 1993* (Cth) brought with it much anticipation—though in reality, quite limited means—for recognizing and protecting Aboriginal peoples' rights to land and water across Australia. A further decade passed before national and State water policy acknowledged Aboriginal water rights and interests. In 2015, the native title rights of the Barkandji Aboriginal People in the Australian State of New South Wales (NSW) were recognized after an eighteen-year legal case. This legal recognition represents a significant outcome for the Barkandji People because water and, more specifically, the Darling River, or *Barka*, is central to their existence. However, the Barkandji confront ongoing struggles to have their common law rights recognized and accommodated within Australian water governance regimes. Informed by literature relating to the politics of recognition, we examine the outcomes of government attempts at Indigenous recognition through four Australian water regimes: national water policy; native title law; NSW water legislation; and NSW water allocation planning. Drawing from the Barkandji's experiences in engaging with water regimes, we analyze and characterize the outcomes of these recognition attempts broadly as 'misrecognition' and 'non-recognition', and describe the associated implications for Aboriginal peoples. These manifestations of colonial power relations, whether intended or not, undermine the legitimacy of state water regimes because they fail to generate recognition of, and respect for, Aboriginal water rights and to redress historical legacies of exclusion and discrimination in access to water.

Keywords: Indigenous peoples; Aboriginal peoples; native title; politics of recognition; Indigenous water rights; water governance; water planning; New South Wales; Darling River

1. Introduction

> '*. . . when the government came out and gave us our native title rights, it was recognition we are Barkandji People . . . They gave us our native title rights and took our water and that's the most valuable thing: the water and the land.*' (Barkandji Prescribed Body Corporate Director D, 13 February 2017)

Much of Australia's colonial wealth has been built on exploiting water resources for irrigation, mining and urban water supply. This exploitation has involved encroachment of Aboriginal and Torres Strait Islander peoples' rights and interests in water, in addition to rights to land [1,2]. The existence of Aboriginal customary water law and management systems prior to British occupation in 1788 was denied by European settlers for more than two centuries, as was Aboriginal title to land [3]. In 1992, the *Mabo* decision of Australia's High Court precipitated a 'judicial revolution' [4] that radically revised the explanation of the law that had evolved from foundational colonial acts of occupation. As a consequence of *Mabo*, Australian law responded with the passage of Commonwealth legislation in

1993, the Native Title Act (NTA hereafter), which recognizes: that there were legal systems in place at the time of European occupation; that Indigenous peoples' rights to land survived colonization; and that a form of native title could exist in situations in which it had not been extinguished [5].

With the passage of the NTA, a means was provided for Aboriginal and Torres Strait Islander peoples to legally claim unalienated land in those places where they could prove continuity of customs and traditions and uninterrupted connection to customary estates. The scope of the NTA was defined to include rights over waters located within traditional estate boundaries. It confirmed Crown ownership of water and minerals, while guaranteeing rights to customary use of resources for sustenance (hunting, gathering and fishing). In addition, a right to protect sites or areas of cultural significance that include waters has been recognized as a native title right. A native title right to take and use water for commercial purposes is yet to be recognized by the courts.

It took Australian water policymakers a further decade to acknowledge Indigenous water interests in the series of water governance reforms called National Water Initiative (NWI) of 2004. These reforms included the creation of legally tradeable and transferable water use entitlements, pricing of water, and, in more recent legislative change, the re-allocation of substantial amounts of water from agriculture to the environment in Australia's south-east. These neoliberal reform initiatives included recommendations to improve Aboriginal access to water for 'traditional, cultural, spiritual and customary' purposes and for increased Aboriginal participation in water planning and management [6]. In creating these legislative and policy institutions, Australian governments deployed the concept of customary practice to signal culturally distinctive forms of water rights (cf. [7]). Policy and law reform has since admitted only 'very limited, narrowly prescribed, and externally defined spaces for Indigenous Peoples to influence decisions about water use and management' [8].

As a result of the historical legacy of Australian colonization, the current distribution of water entitlements to Aboriginal peoples remains transparently unjust [3]. This injustice stems from the fact that Aboriginal peoples had free access to use and benefit from water until their lands and waters were taken without consent or compensation. As of 2013, there have been at least 34 land redistribution measures introduced by Australian governments since 1966 to redress Aboriginal land dispossession, which together have returned over a third of Australia's landmass with varying degrees of control and influence to Aboriginal peoples [9]. By comparison, however, as of 2012, Aboriginal peoples held less than 0.01 per cent of Australia's water diversions and, as we will show in this article, recent government efforts to improve Aboriginal water access have had negligible effect on increasing Aboriginal-held water allocations [3]. Moreover, Aboriginal peoples continue to hold a weak legal position in Australia's water governance frameworks, which constrains their influence in water planning and the allocation or sharing of water resources [10,11]. In regions where Aboriginal people face a high degree of contestation and competition for water, such as in the south-east of Australia where much of the country's irrigated agriculture occurs, policy and legal frameworks fail to address their rights and interests, which are seen as outside of, or irrelevant to, the formal economy. Governments may issue water licences or permits to take and use water to other parties, and Aboriginal communities are denied any opportunity to object or to negotiate commercial benefits in relation to this third party access [12]. Commercial uses and benefits from the limited instances where Aboriginal communities are specially accorded water rights are also prohibited [3]. In addition, the diversion of water and over-allocation of entitlements has resulted in severe environmental degradation that jeopardizes Aboriginal peoples' lifeways [13].

Australia's settler-colonial water regimes have now espoused recognition of Aboriginal water rights and values for over 15 years. In this article, we aim to explore (a) the recognition-based regimes used by the state to acknowledge and accommodate Aboriginal water rights claims in New South Wales (NSW); (b) the nature and extent of water rights and control that is actually conferred to Aboriginal peoples under these water regimes; and (c) the consequent outcomes and implications. To do this, we draw on the struggle over water rights in the Australian State of NSW by Barkandji Traditional

Owners (a Traditional Owner is defined as an Aboriginal person who is a member of a local descent group, having certain rights and responsibilities in relation to an area of land, water or sea).

As we will elaborate, the Barkandji's water rights struggle (and indeed, this article) is not a comparison of the treatment of the Barkandji People and their water rights with other water users, such as local farmers. Instead, their struggle centers on the NSW Government on the one hand recognizing that the Barkandji People have particular rights to be included in decision making about and accessing water with the provisions associated with native title, while on the other hand also failing to acknowledge, honor, or uphold those rights within its water regimes. We examine four regimes that determine the nature and character of Aboriginal water rights in NSW, including the Barkandji's: national water policy, native title legislation, NSW water legislation, and NSW water allocation planning. Drawing from post-colonial literature concerned with the politics of recognition, we problematize the forms of state recognition that underpin these regimes. Struggles for recognition reflect 'deeper, more fundamental material and structural inequalities that block equal participation' [14] (p. 14); thus, we find recognition to be a useful lens for understanding the power relations and asymmetries that shape and underpin water governance. For the purposes of this article, 'the state' in a generic sense, is composed of the ruling governments, institutions and agencies that operate, govern and oversee society within that state's territory [15]. Therefore, 'the state' is not inherently synonymous with the nation state, but can also refer to self-governing political entities or jurisdictions within Australia such as at the Federal, State or Local Government levels. Additionally, the use of 'State' (capitalized) is used when describing States of Australia as stipulated under the Constitution of Australia, such as the State of NSW.

Our analysis suggests that under these current water regimes, states commit to recognizing Aboriginal peoples and their water rights via a set of institutional practices and that these attempts at recognition can have problematic outcomes that fall well short of progressive transformation. These processes require that the relationships and engagements Aboriginal peoples had, have, or seek to have with water, are made legible to—and thus, governable by—the state. The translation processes of making something legible such that it can be known and governed by the state without transforming its apparatuses or epistemologies distorts by flattening complexity, decontextualizing practices and relationships, and seeking to integrate knowledges and practices into existing frameworks without transforming those frameworks [16–18]. These processes reflect what might be called 'incommensurability' [19]. The ensuing outcomes can have the effect of misrecognizing Aboriginal rights to water by circumscribing and distorting them, or can completely ignore them through what we call non-recognition. It is our conjecture that these outcomes, resulting from settler state attempts at recognition, can serve to defer and diffuse more radical Aboriginal challenges to state sovereignty in that power and control remain firmly in the hands of the state [18]. This article aligns in some ways with the work by Behrendt and Thompson [1], who, as independent advisors to a NSW Government agency, analyzed and examined 'ways to recognize Aboriginal interests in NSW rivers' (p. 41) at the time most of the NSW-based water regimes examined in this article were implemented. Nearly 15 years later, this article and its findings build on and substantiate many of their early concerns about how the then-new water regimes might restrict and misrecognize Aboriginal water rights, showing how this has played out in a specific case.

This article is structured as follows. After briefly canvassing the literature relating to the politics of recognition, we establish our case study—the recent water rights struggle of the Barkandji People—and detail the methods used to inform this article. Next, four water regimes that generally shape the recognition of Aboriginal water rights (particularly within the State of NSW) are delineated, followed by an account of the Barkandji's attempts to have their rights and interests recognized through these regimes. We analyze recognition attempts by governments through these regimes, and argue that the outcomes of such efforts can be conceptualized as 'misrecognition' and 'non-recognition'. We further show that misrecognition and non-recognition both serve to undermine the legitimacy of state water regimes. We conclude with recommendations to redress these deficient outcomes.

2. The Politics of Recognition

Water is a mobile substance that is subject to multiple and sometimes competing demands, as well as increasing state control and development [20]. There is therefore often a need for Indigenous peoples dispossessed of their territories by colonial powers to seek state recognition of their legitimate authority over water, their normative constructs, and quotidian water use practices. In response to the civil rights movements of the 1960s, many liberal states developed mechanisms for recognizing these kinds of group-based claims of oppressed minorities, and granting them special rights (e.g., affirmative action and limited sovereignty) [21,22]. Recognition has since evolved as the leading framework through which to redress historical legacies and injustices of exclusion, racism and other forms of discrimination, and to enhance the freedom of Indigenous minorities. This is particularly so in settler states [23,24], where the logic of colonization and invasion ultimately seeks to secure access and complete control over territories and resources (including water) for the benefit of the settling colonies, and thus justifies the coercion, dispossession and elimination of Indigenous peoples [25,26].

Recognition proponents anticipated that the expansion of legal and cultural norms to Indigenous peoples would 'achieve greater equality of recognition as legal persons within a political community understood as legitimate and pre-existing' [27] (p. 6). Recognition politics has been envisaged as a 'philosophical and institutional remedy to matters of "historical injustice"' [24] (p. 20). For Ivison [28], historical injustice refers not only to

> *acts of injustice that occurred in the distant past, but also how consequences of these injustices persist. These are enduring injustices—ones that continue to shape the conceptual, legal, political and institutional frameworks within which states and their citizens act*. (p. 119)

Institutional expressions of recognition manifest in the 'political projects of reconciliation, multiculturalism and development, including the granting of land rights, constitutional recognition, or social, political or material entitlements' [27] (p. 1). The recognition of Indigenous water rights represents one such institutional expression [29].

The concept of recognition has been the subject of ongoing debates over the past three to four decades, with some taking issue with its tendency to dramatically simplify, reify and essentialize group characteristics, and its encouragement of intolerance and separatism [21]. Others point out the power and resource asymmetries present in forms and practices of recognition at both individual and societal levels [30]. Political theorists like Ivison [28] identify the disempowering paradox that lies at the heart of recognition politics:

> *to seek recognition is to seek to be valued by others, which invites a critical evaluation of the beliefs and practices of the person (or peoples) making the claim. The "recogniser" thus exercises power over the "recognisee" in having the capacity to grant recognition*. (p. 121)

Where states hand down single-directional, pre-determined offers of recognition like this, they reassert their presumed power and fail to discuss or listen to those demanding recognition, an approach to recognition that Tully has termed a monological orientation [30].

Within the literature on water rights and justice, Boelens [31] and Boelens et al. [32] argue that institutional recognition of Indigenous peoples similarly poses enormous conceptual challenges and important social and political consequences for those working on water justice projects. These challenges stem from the complexities associated with identifying, recognizing and formalizing diverse and dynamic Indigenous water rights and water claims by the state. Recognizing and practicing legal pluralism by states that are fundamentally hierarchical presents significant challenges [31], as does the possibility that these rights could be re-defined and possibly over-simplified to fit within the state's own frameworks [33].

Writing in response to North American settler colonialism, Indigenous scholars Simpson [24] and Coulthard [34] question the authority of settler states to 'recognize' Indigenous peoples, and their pre-existing and ongoing rights to govern themselves. They argue that relationships between

Indigenous peoples and (North American) settler states cannot be significantly transformed through recognition, and theorize alternative strategies that do not reinforce state dominance [34], including the option of 'refusal' [24]. Povinelli [18] suggests state recognition of Indigenous identity in this way generally 'supports and strengthens the nation and capital, not [I]ndigenous peoples' (p. 56). This is because this recognition is premised on a 'fantasy' of ancient laws and traditions that serves as 'a form of otherness that . . . does not violate the core subjective of social values of settler society' [18] (p. 65). Her work serves to illuminate the deep interconnections of how power operates and is configured through specific recognition approaches by settler states, namely those which emphasize Indigenous 'tradition' as one among many types of cultural difference within the multicultural state [18].

In Australia, where there has yet to be any form of treaty between any arm of the state and any group of Aboriginal peoples, arguably the extent to which Aboriginal people must submit to, or abide by, the 'recognition' or legitimization by the state is unclear and contestable [35]. As Australian Aboriginal scholar Watson [36] notes, 'many of us affirm our sovereignty as people who have never entered into consensual relations with any state or British Crown to surrender our international status' (p. 13). Notably in the context of Australia, where sovereignty is asserted by Aboriginal (and/or Torres Strait Islander) peoples it is usually in the context of desire for negotiation, or an agreement or a treaty-making process, rather than an assertion, for instance, of unilateral decision-making to the exclusion of the state. A very recent example of this is the *Uluru Statement from the Heart*, a declaration and recommendation from the First Nations Constitutional Committee that in 2017 asserted Indigenous sovereignty—their pre-existing and ongoing rights to govern themselves [37].

Fraser [21] argues that not all types and instances of recognition politics are equally pernicious, and Hunt [23] comments that 'strategically, it does not seem that outright rejection of all forms of recognition are politically viable' (p. 29). There may be symbolic and material benefits attached to some forms of recognition, and, although these structures may uphold asymmetrical colonial power relationships and systems of governance, in some contexts they might provide the only feasible means for Indigenous peoples to pursue secure access to their territories, including to water and waterways. This is particularly so in Australia, where, as mentioned, no arm of the state has ever attempted to gain the consent of Aboriginal peoples (through treaties, for instance) [35]. Thus, the tension between contesting the dominance of the settler-colonial state through decolonial politics, and securing some form of access, rights, and material benefits through state-based recognition processes, is particularly significant and warrants scrutiny.

In the analysis to follow, we review how the politics of recognition is playing out with respect to Aboriginal water rights in Australia, as illuminated by the experiences of the Barkandji People, a cluster of related tribes from NSW. Next we establish the historical and regional context of this case study.

3. Case Study and Methods

The Barkandji People's name derives from the *Barka* (the Darling River), meaning literally people of or belonging to the river [38]. Europeans called the *Barka* the Darling River in 1829 [39] after the then Governor of NSW, Sir Ralph Darling. Barkandji country is comprised of this major river system, together with the surrounding largely arid lands in most of far-western NSW between the Murray River in the south and parts of southern Queensland in the north [40]. European occupation of Barkandji country began as early as the 1830s, as settlers used the Darling River as a transport corridor [40] and imposed British riparian law to enable expansion of the pastoral frontier [41,42]. Like many other Aboriginal and Torres Strait Island groups across Australia, the Barkandji faced severe disruption to their way of life, having to contend with policies of displacement and relocation, even eradication. Many Barkandji were coerced into church missions and government reserves and were exploited by the regional pastoral economy [39,43]. (In Australia's colonial history, a reserve served as 'a place for the exclusive occupation by native tribes' (OED), while reserves were declared to manage Aboriginal peoples. Their declaration did not entail the grant of any rights to land to Aboriginal people and their

use was paternalistically determined by colonial authorities.) As a consequence, Aboriginal peoples from this area (and other closely settled regions of south-east Australia) now have low rates of land ownership and experience other forms of socio-economic disadvantage [39]. These factors have left a legacy of 'low educational and employment outcomes, poor health and housing' [44] (p. 325), as well as spiritual, cultural, social, community, and familial impacts including intergenerational grief and loss [44,45]. These legacy issues are compounded by low availability of, and access to, support services and employment options [44], a common characteristic of Australia's regional and remote areas.

Seeking to have their unceded ancestral and customary rights and interests to these landscapes recognized by Australia's common law, the Barkandji submitted a native title claim soon after the introduction of the NTA. In October 1997 they lodged a claim to an area of lands and waters exceeding 128,000 km^2 (Figure 1). Nearly 18 years later, in June 2015, the Federal Court determined that the Barkandji held native title rights and interests to parts of the lands and waters within the area claimed [46]. While it is the largest claim of its kind in NSW [47], native title rights and interests were determined to be extinguished in the majority of the area [46]. More detail on the rights and interests recognized through their native title determination are provided in Section 4.2 below.

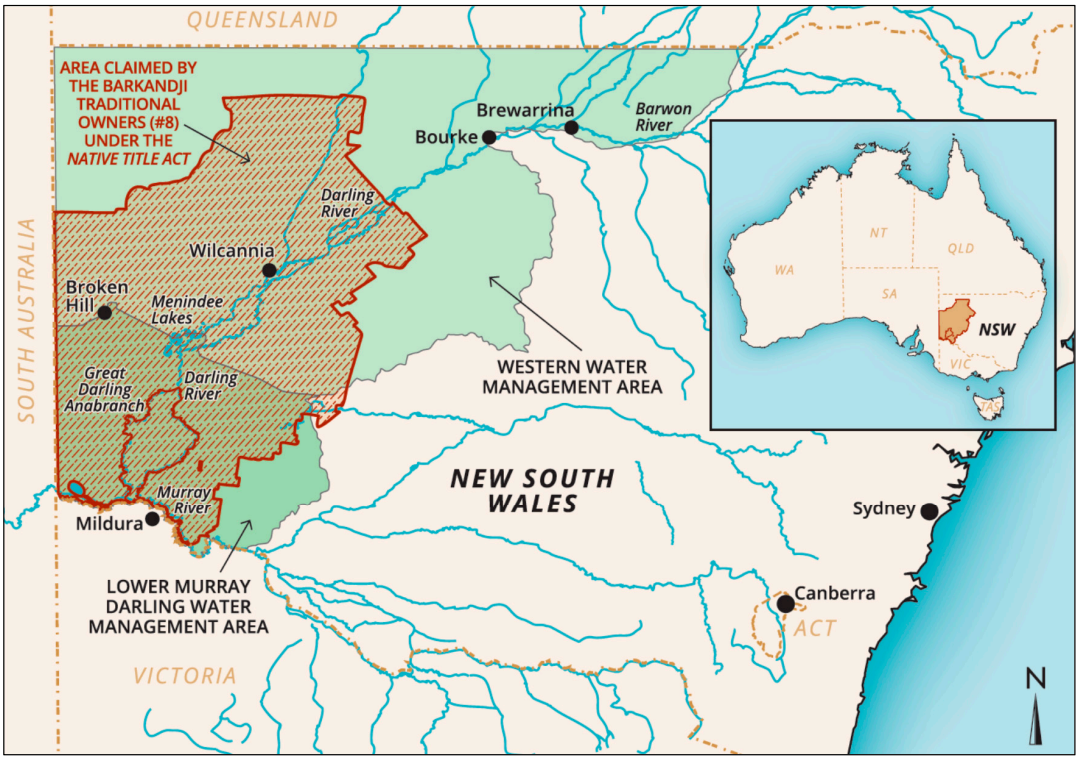

Figure 1. Map of western NSW showing the Barkandji Tradition Owners (#8) native title claim area and the water management areas it traverses. Note: Thick brown line denotes boundary of the area claimed by the Barkandji People. The lower reaches of the Darling River were excluded from this claim but surrounding lands were included.

Within the Barkandji native title claim area, the Darling River traverses two surface water management areas constituted under NSW water legislation (*Water Management Act 2000* s 11). These are the upstream Western Water Management Area, in which the Barwon-Darling River runs mostly free of dams, and the downstream Lower Darling Water Management Area, which is affected and controlled by numerous dams and other water regulation infrastructure (Figure 1). The Menindee Lakes, which are approximately in the middle of Barkandji country and are particularly rich with Aboriginal cultural heritage [38,48], separate these two water management areas. The Lower Darling provides much-needed water resources to southern NSW water users and to the downstream States of

Victoria and South Australia, but it receives low rainfall and runoff, and is reliant on declining flows from the Barwon-Darling and other upstream tributaries [49].

In addition to suffering from decades of colonial control and exclusion, as well as ongoing intergenerational impacts stemming from these injustices, Barkandji must today contend with the pressure exerted by competition from other water users and dramatically declining river health. Indeed, NSW arguably has the most over-allocated water systems in Australia [11]. Tan and Jackson [11] suggest that embargoes on issuing new licences in NSW from as early as 1976 precluded substantial Aboriginal access to water. Moreover, the management of the Darling River and its upstream intersecting rivers, has been subject to ongoing controversy particularly over the past 20 years during which time the future of cotton production has been debated. Public discussion about water use in this region reached a pinnacle in July 2017, when a national investigative television program alleged that upstream cotton irrigators had been stealing billions of dollars of water [50]. Numerous government and criminal investigations into these matters are now underway (for example [51,52]).

To consider Barkandji experiences as a case study for this article, we rely on a mixture of sources for evidence. We draw on relevant government policy, legislative, and public inquiry documents pertaining to water regimes, native title law, and their overlap, at the NSW and Australian jurisdictional levels. We also draw from 17 interviews with 21 individuals, including Barkandji Traditional Owners, their legal representatives, and former NSW Government water agency employees, all of which were conducted by the lead author between February 2017 and January 2018. Interviews were conducted in accordance with the human ethics guidelines of Griffith University (GU Ref Nos: OTH/02/15/HREC and 2016/387). Barkandji Traditional Owner interviewees were identified through a snowballing strategy [53] beginning with the Directors of the Prescribed Body Corporate (PBC), which is the corporation set up under the NTA to hold and manage native title in trust for all Barkandji native title holders. Interviewees are named throughout this article in line with their preferences specified during consent procedures. We note that Barkandji language does not have distinct 'p' and 'b' sounds, nor 't' and 'd' sounds. For this reason, Barkandji words—including the word 'Barkandji'—can have many spellings [38]. In this article, we generally take the spelling 'Barkandji' as used in legal native title processes. We are also sensitive to other spellings from sources and as requested by interviewees.

4. Barkandji's Water Rights Struggle

The *Barka* is of great significance to the Barkandji People in interconnected cosmological and material ways. Central to Barkandji culture, spirituality, and teachings, the *Barka* is home to the *Ngatji* (Rainbow Serpent), who created the lands and the rivers. The Barkandji are responsible for the *Ngatji*'s health and wellbeing, although they find this increasingly outside of their control under contemporary water governance arrangements [45,54]. Barkandji Traditional Owners' physical, mental and social health is linked to the health of the River [43,45], with many Barkandji interviewees convinced that improved river health leads to lower occurrences of crime (see also [44]). As Barkandji PBC Director A phrased it, '*Without this water, we will never survive. We will be all* 'bukali' . . . 'Bukali' *means we'll die!*' (7 February 2017). While the Barkandji People's ways of thinking about and experiencing the Darling River have changed over time, partly in response to the displacement of their People and alterations to their country brought about by European occupation, the River has consistently remained central to their cultural identity [43,45].

Issues of growing water scarcity, compromised Darling River health, and the serious resulting impacts for the Barkandji Peoples, their landscapes, and other Darling River communities has motivated some Barkandji to take action. In 2016, water concerns sparked two Barkandji-led protests. Dissatisfied with the declining health of the river and lack of sufficient government response to the critical situation, these organized protests aimed to raise awareness with governments, politicians, and the broader Australian public [55,56]. The subsequent lack of government action in response to the protests was disappointing for Barkandji protestors (Barkandji Person C, 17 February 2017).

To take action and seek recognition, the Barkandji People, like many other Traditional Owners, 'have to argue for their rights and responsibilities to be recognized within the introduced European systems of law and governance' [57] (p. 182). We now turn to consider the four key regimes that determine the extent to which Barkandji's legal rights to water are recognized.

4.1. National Water Policy

Australia's National Water Initiative (NWI), an intergovernmental agreement negotiated by the Federal, State and Territory Governments in 2004 [6], established a nationally consistent approach to water reform, including a water entitlements framework and mandatory water planning. The NWI has been described as the most significant change in water policy since Australia's Federation in 1901 [58]. Building on previous national water reform commitments, the NWI called for clear entitlements to water, trade in water entitlements, transparent statutory-based water planning and environmentally sustainable management of water.

Although Aboriginal peoples played no part in its negotiation [41], the NWI represents the first national attempt to recognize Indigenous specific water rights and interests in policy [59]. By providing the impetus for Indigenous water needs to be recognized and accommodated by State and Territory water access entitlements and planning frameworks, the NWI therefore also set the scene for more significant recognition of Indigenous water rights opportunities across Australia's water governance mechanisms. Specifically, the NWI calls for Indigenous access to be achieved through:

- including Indigenous representation in water planning, wherever possible;
- incorporating Indigenous social, spiritual and customary objectives and strategies for achieving these objectives, wherever they can be developed;
- taking account of the possible existence of native title rights to water in the catchment or aquifer area;
- potentially allocating water to native title holders; and
- accounting for any water allocated to native title holders for traditional cultural purposes [6] (cls 52–54).

The NWI guidelines stipulate that water plans should immediately include the consideration of Indigenous water uses [59].

The emphasis these clauses place on 'traditional cultural purposes' have been criticized for inadequately including Aboriginal peoples' understandings, uses and relationships with water, and for precluding economic development options [59]. Tan and Jackson [11] additionally argue the NWI's goals are prejudiced by delay and difficulties in native title determinations, and that a low priority is given to Aboriginal needs in over-allocated catchments. Alongside these criticisms, reviews have consistently commented on the poor implementation of these actions [11,60–62]. The National Water Commission's 2014 review [62] found that after more than ten years there had been 'no substantial increase in water allocation for Indigenous purposes—social, economic or cultural' (p. 5). The most recent assessment of water reform progress notes some improvement in processes of consultation and engagement, but still calls for governments to better identify Indigenous objectives in water planning frameworks [63].

As the NWI remains the current instrument guiding legislative reform and water management across Australia, State and Territory Governments are required to comply with the aforementioned principles. However, no penalties are imposed on State Governments for poor or non-compliance; therefore, there is little incentive to really drive change that meaningfully recognizes Aboriginal water rights [11,64]. Regardless, the NWI sets the context in which the Barkandji Peoples—and indeed all Aboriginal peoples—can seek to have their legal rights to water recognized. Before considering the water legislation and water sharing planning regimes specific to the Barkandji in NSW, we first consider the native title framework and the associated water rights opportunities it offers within the context of the Barkandji's native title claim.

4.2. Native Title Law and the Barkandji Native Title Claim

The *Native Title Act 1993* (Cth) (NTA hereafter) is the Australian legislative response to the landmark *Mabo* High Court decision of 1992 that rejected the colonial falsity that Australia was *terra nullius* (meaning 'land belonging to no one') at the time of European occupation. The *Mabo* decision and NTA offered hope to those seeking recognition of the existence of two tenure systems: the introduced colonial system, from which land titles and water rights regimes flow, and the pre-existing and oldest surviving system of land tenure in the world, from which native title rights derive [65].

Native title is defined by the NTA as the communal, group or individual rights and interests of Aboriginal or Torres Strait Islander peoples in relation to land and waters (s 223). To have native title rights and interests in relation to a particular area of land (and waters) formally recognized, Traditional Owners register a native title claim that then goes through what is called a native title determination (NTA s 225). This is where the court 'determines' whether or not native title exists on a case-by-case basis, and if it does, then specifies the nature and extent of the native title rights and interests (as well as any other non-native title interests in the determination area). This recognition occurs after either litigation or the conclusion of an agreement between the native title claimants, relevant government parties and others with interests in that particular area, which is called a 'consent determination'. These processes are complex and costly, and can take many years to prove and settle [66]. Some or all native title rights and interests in a given claim may be found to have been extinguished in whole or part by past valid government acts (as defined in the NTA). The extinguishment of native title is permanent and cannot be revived even if the act(s) that caused extinguishment cease to have effect (NTA s 237A). Native title rights and interests vary from rights of exclusive possession in land to minimal rights of access for limited purposes [67].

As at January 2018, 375 litigated and consent determinations have been made across Australia, while just under 300 claims await determination [68]. The Barkandji's 2015 successful determination was only the sixth of its kind in NSW since the introduction of the NTA [47]. Settling native title claims in NSW is noted to be a slow process compared to other State and Territory jurisdictions [69].

The trajectory of native title law and its practical outcomes has proven disappointing to Aboriginal peoples and their advocates [35,65]. The regime's emphasis on pre-European 'traditional' rights and interests and the requirement for claimants to prove the ongoing and unbroken existence of these rights in a demanding evidentiary process has created substantial hurdles, as well as precluded the evolution of native title rights [29,70]. In addition to protecting these Aboriginal rights and customs, the NTA also protects and upholds existing land and water title holders, validates past actions which may impair native title interests, and regulates future ones [35]. Thus, in intensively colonized areas such as the State of NSW, the difficulty of proving ongoing and unbroken continuity to place required through legal native title determination processes is heightened [1,71]. Furthermore, State Governments have been slow to accommodate and protect native title rights, if at all, in their land and water management legislation and policies [35,64,72]. As a result, there are concerns about the effectiveness of native title in protecting Traditional Owners' abilities to exercise their inherent rights, enforce their traditional laws and governance institutions, and control their resources, including water [64].

Limitations in the treatment and recognition of Aboriginal water rights by the native title regime have been well documented [3,11,12,29]. O'Donnell [12] argues there are two propositions that are clear in relation to Aboriginal native title rights to water. The first is that native title does not include ownership of natural waters on the assumption that the common law's position is that water in its natural state is not amenable to ownership. The second proposition is that where native title can be proven to exist, it generally includes rights to take and use water for only personal, social, domestic and cultural purposes. 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;

- right to have access to, maintain and protect places and areas of importance on or in the land and waters; and
- right of access to take water for those purposes.

These rights have been found to apply to flowing, surface and subterranean waters. To date, a native title right to take and use water for commercial purposes has not been recognized [12], an interpretation that, as many commentators observe, constrains native title holders' water access and utility [3,29,64,72]. While the possibility for economic uses and benefits of native title rights to natural resources, including water, has emerged in recent years, including as a recommended area for legislative reform [66], this has not yet eventuated.

Similar to many native title determinations [12], the Barkandji have a right to take water for drinking and domestic uses. Their water use right is specified as being:

> *for personal, domestic and communal purposes (including cultural purposes and for watering native animals, cattle and other stock, and watering gardens not exceeding 2 hectares), but not extending to a right to control the use and flow of the water in any rivers or lakes which flow through or past or are situated within the land of two or more occupiers*. [46] (para 6)

The term 'cultural purposes' in this water use right was also prescribed in the Barkandji's court determination to include the purposes of performing activities of a cultural nature that 'involve the use of insubstantial quantities of water' such as 'cleansing ceremonies'; 'the preparation of food or bush medicines'; and 'activities involving the teaching of native title holders about traditional laws, customs and practices' to list just a few (see [46]). Ancillary rights and interests that indirectly relate to water were also recognized, including (though not limited to) the right to hunt and fish; the right to take and use natural resources (other than water); the right to engage in cultural activities; and the right to have access to, to maintain and to protect from physical harm sites and places of importance or significance under traditional laws and customs [46] (para 6).

These and the Barkandji's other native title rights and interests can be enjoyed in specified areas alongside others' existing (non-native title) rights. Notably, a 400 km stretch of the Darling River, and several water courses and lagoons in the south of the claim are part of these specified areas. Other Barkandji river country was excluded from the Barkandji Traditional Owners #8 claim [46] (para 13), such as the lower reaches of the Darling River (see Figure 1), because at the time this 1997 application was made, another native title application covered these areas and the NTA regime prohibits overlapping claims (F. Russo, 27 June 2017).

The NTA also makes specific provision in relation to native title rights to water by:

- confirming Crown or government rights to the use, control and regulation or management of water;
- validating any water management legislation that was enacted between 31 October 1975 and 1 July 1993 (the period between the introduction of the *Racial Discrimination Act 1975* (Cth) and the NTA);
- confirming 'existing' public access to and enjoyment of waterways, beds and banks or foreshores of waterways, coastal waters and beaches where native title exists;
- preserving certain native title non-commercial activities in relation to water from some types of government regulation in Section 211 (meaning no licences are required); and
- providing a future act regime to regulate how government and third parties can affect or impact native title rights to water including procedural and compensation rights in Section 24HA [73].

Under these future acts measures, any registered native title claimants and native title holders, like the Barkandji, have the right to be notified prior to the grant of any water management or regulation related lease, licence, permit or authority that might affect their land or waters. Native title holders and claimants are given the opportunity to comment on—though not object to or prevent—any

proposed action/s. Significantly this does not apply in the making, amendment or repeal of water management or regulation legislation. Native title holders also have the right to compensation where these acts affect native title. While compensation may take the form of financial payments and/or include opportunities for employment, training and education, or cultural site protection, rehabilitation or monitoring, claiming and payment of compensation is still an emerging aspect of the NTA regime [35,74]. In any combination, these weak measures can constrain Aboriginal peoples' participation in water resource management in that they create 'legal certainty for States and third parties at the expense of native title' [11] (p. 140).

Indigenous Land Use Agreements (ILUAs) offer a potential vehicle for addressing and leveraging these water-related procedural and compensation rights [11,72,74,75], but assessing their effectiveness is difficult as ILUAs are generally reached in-confidence [75]. At the time of writing, Barkandji native title holders are in the early stages of ILUA negotiations with the NSW Government, which may at some stage include measures to address their water rights and management concerns.

As the previous section showed, national water policy includes specific provisions relating not only to native title holders but also, the possible existence of native title [6] (cls 52–54). We now turn to the NSW State-based water legislative regime, which is expected to comply with this national policy, to see how these native title specific requirements have been implemented.

4.3. NSW Water Legislation

Bringing about significant change to the previous State water legislation, the NSW *Water Management Act 2000* (WMA hereafter) is a legislative response to over twenty years of national water reform [76,77]. The WMA notably includes a broad objective to 'recognise and foster the significant social and economic benefits . . . to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water' (s 3). To meet this objective, several provisions are included in the legislation, some of which have been described as relatively more progressive and advanced compared to other jurisdictions [61,62], though cautiously so by some [3,11,78].

First, the WMA provides that the Minister can establish multi-stakeholder catchment-level water management committees of at least 12 but no more than 20 members, of whom at least two are Aboriginal persons (s 13). Across Australian jurisdictions, NSW is the only State that stipulates provisions for Aboriginal representation in this manner [11]. This measure was an improvement on previous legislation that barely recognized Aboriginal water rights [76] and tended to limit consultations to existing water licence holders only. However, this model of consultation nonetheless raises numerous problems and challenges unique to Aboriginal contexts. The prevailing power imbalances between Aboriginal and non-Aboriginal peoples broadly within Australia and in water resource management specifically, as well as the related comparatively recent recognition of Aboriginal peoples' water rights and interests in Australian water policy, largely underpin these Indigenous-specific obstacles, as does Aboriginal peoples' ontological foundations and sense of obligation to country and community [10]. For example, one or two individuals face difficulties in representing numerous Aboriginal Nations with rights and interests within a legislated water management area [79]. Without adequate support, Aboriginal representatives may find it difficult to fulfil their responsibilities and obligations to other members of their Nation, particularly amongst widely dispersed populations like those of the Barkandji. The technical and legal complexity of many of the hydrological issues and entitlement frameworks addressed by advisory groups may also inhibit effective participation [1,10,79].

While these legislative provisions for water management committees including Aboriginal representation remain in the WMA, they are no longer used (B. Moggridge, *pers comm*, 22 December 2017). In fact, these committees were only used until 2004, four years after the introduction of the Act, when water planning policy and practice changed [78] to 'mainly involve *bureaucratic* coordination and bargaining' within government departments [76] (p. 80, emphasis in original). This practice is compliant with the WMA legislation given it is the Minister's discretion to use these water catchment committees.

More recently, in 2016 and 2017 as part of 'new governance arrangements' to inform future water resource planning in parts of NSW, Stakeholder Advisory Panels (SAPs) have been established, each with 14 or 15 members [80,81]. This change was part of a multijurisdictional coordinated water planning exercise for the Murray-Darling Basin. Explicit discussion of this overlapping water regime is beyond the scope of this article. The provisions of the NSW Government's WMA including WSPs and water licensing processes operate independently of this overlapping regime [82]. Aboriginal input into water planning for these areas now occurs via individual representation in such Panels [83]. Regardless of how many First Nations' lands and waters each water planning area traverses, there are provisions for one Aboriginal community representative member on each surface water SAP [80], and two on the single State-wide groundwater SAP [81]. This model is akin to the individual representation of the WMA's water management committees and thus suffers from deficiencies similar to those discussed above. Management of water resources within Barkandji country will be informed by at least three SAPs, two of which currently have one Barkandji representative each.

Second, the WMA and its supporting regulation introduced Aboriginal specific licences for the first time [77]. Such licences include (a) cultural access licences; (b) Aboriginal community development licences; and (c) Aboriginal environment licences. While the availability of these specific purpose licences have been celebrated [61,62], they are not all available in all areas of NSW. For example, while the cultural use licences are available in all surface water and groundwater management areas, the community development licences are only available in catchments where water extraction is not yet over allocated, namely in coastal water management areas [77]. The Aboriginal environment licences are for supplementary water, the name given to periods of high river flows, and to date, are only available in relation to the Barwon-Darling River [84] (cl 50). All of these Aboriginal specific licences are conditioned with limits to volumetric entitlements, use options, and restrict or outright prohibit trade, and the actual uptake has been low for a number of possible reasons [3,11]. Barkandji native title holders have not applied for any Aboriginal specific purpose licences.

Third, NSW water legislation provides for native title rights. NSW is one of very few jurisdictions to have done so despite the NWI expectation that native title water rights be accounted for by all Australian State and Territory water regimes [72]. Under Section 55 of the WMA, water required to exercise native title rights are reserved as 'Basic Landholder Rights' and so are afforded the same priority as domestic and stock rights of riparian land owners or occupiers. Accounting for native title water rights as Basic Landholder Rights notionally positions them in the highest category of water rights as these water requirements must be met first, prior to any other consumptive water uses, even in extreme drought conditions [11,72]. Duff [72] notes that this outcome is a consequence of recognition of the native title holders' rights in relation to land; it is not dependent on any native title rights specifically in or to water. While Macpherson [29] notes that Aboriginal water rights have been 'shoehorned' to fit within this framework, perhaps as a means to reduce conflict between Aboriginal peoples and other water uses, this provision is nonetheless the mechanism for accounting for and recognizing water-dependent native title rights in NSW. Perhaps most fundamentally though, an Aboriginal group must first have overcome the hurdles of the Commonwealth native title legislation and have their rights determined for these, albeit limited, native title provisions to apply [1].

Commentators have raised three other criticisms about these NSW native title allocations. The first is that Basic Landholder Rights—including domestic and stock rights and native title rights—do not require a water access licence to take and use water (WMA s 55). As mentioned earlier though, the NTA already provides licence exemptions for native title holders, and so this specific legislative allowance is insignificant [72]. Second, as Behrendt and Thompson [1] point out, 'an entitlement to extract water does not ensure that there is any water to extract or that the water is of consumable quality' (p. 97). Thirdly, the majority of Water Sharing Plans (the regulatory water management instrument in which Basic Landholder Rights are quantified and protected—discussed below) have zero allocations for native title, rendering any apparent priority for Aboriginal water allocations as illusory [11].

The legislative provisions discussed here are implemented and operationalized through the NSW water allocation planning regime (also referred to as water sharing), which we now consider.

4.4. NSW Water Allocation Planning Regime

Water sharing, a key element of the National Water Initiative, is considered to be a fundamental tool for achieving sustainable water use. In NSW under the WMA, water sharing has been regulated through the progressive development of over 80 Water Sharing Plans (WSPs) for surface water and groundwater systems [85]. WSPs are regulatory instruments that contain enforced 'rules for sharing water between different types of water use such as town supply, rural domestic supply, stock watering, industry and irrigation and ensures that water is provided for the health of the system' [86]. As a regulation under the WMA, any breaches to WSPs attract possible litigation and/or monetary penalties (WMA s 336). WSPs are generally in operation for ten years, after which they are replaced or extended, and may be suspended in times of severe water shortages (WMA s 49(a)).

Under the NSW State water legislation, WSPs can be made via two processes, either as 'Management Plans' with the involvement of the above mentioned multi-stakeholder water catchment committees (WMA Part 3), or as 'Minister's Plans' without their involvement (WMA s 50). The initial 31 WSPs—which covered about 80% of water extracted within NSW—were prepared through water management committees. Once prepared, however, the majority were over-ridden and re-drafted as Minister's Plans by the NSW Government [78]. This over-ruling attracted much frustration [76] and litigation against the Minister [78]. Minister's Plans are not a secondary or subordinate form of WSP as determined in the aforementioned litigation cases (see particularly [87] at para 35), and as such, both formats comply with the NWI. Our review of the WSPs currently in operation reveals that all are Minister's Plans. Significantly, when preparing this type of Plan, the Minister retains discretion regarding stakeholder engagement and which notification provisions to adopt (WMA s 50(2A)) (see also [78,79]). While Aboriginal people contributed to the development of Minister's Plans through a dedicated Aboriginal unit within the NSW water agency (which existed from 2012 to 2016) [88], overall, the reliance on Minister's Plans limits opportunities for Aboriginal peoples, as well as the general public, to provide sustained and comprehensive input. This is compared to planning processes that directly involve multiple stakeholders and contain opportunities to deliberate over water-use scenarios and impacts while considering trade-offs amongst competing uses [89].

Native title water-related rights in NSW, established under the three regimes discussed above—national native title legislation, national water policy and NSW water legislation—are brought together and operationalized in WSPs as Basic Landholder Rights. All WSPs must deal with certain matters, regardless of Plan development method, of which protecting Basic Landholder Rights is one (WMA s 20(1)). WSPs identify and specify Basic Landholder Rights, including domestic and stock rights and native title rights, so they can be satisfied first before other water needs in each water management area (WMA s 20(1)). One WSP in coastal north-east NSW, for example, specifies that native title holders, being the Yaegl People, the Bandjalang People, and the Githabul People, 'are entitled to take [water] pursuant to their native title rights', without specifying volumetric limits [90] (cl 20). In contrast, another coastal WSP reserves a volumetric amount—26.6 megaliters per year—for native title requirements [91] (cl 21). As mentioned, however, the majority of WSPs have zero allocations to satisfy native title rights [11].

Although all WSPs can be updated to give effect to successful native title determinations that are handed down through specific amendment allowances, Behrendt and Thompson [1] call this a 'don't worry about it until it arises' approach, which they regard as 'far from satisfactory' (p. 104). Exactly how the accommodation and protection of native title water rights are incorporated into WSPs—either during initial development, or once a WSP has commenced and a native title claim is determined—is difficult to ascertain. Policy and government document requests offered negligible clarification. Only three former employees could assist, explaining that the procedure to incorporate native title depends on NSW Government employees first knowing a native title claim exists and the

outcome of the determination, and second, notifying the appropriate water planner for the relevant management area so that it can be accommodated in the Plan. In other words, it is an ad hoc, manual process that one former official acknowledged '*didn't work very well*' (L. Betterridge, 16 June 2017). This is evidenced by the fact that, where native title rights have been included in WSPs, this only occurred because legal representatives of native title claimants or holders raised the matter with the NSW Government and not through any government-driven process [11,92]. There is, therefore, little transparency or accountability, which complicates monitoring and reviewing, or indeed contesting, the NSW Government's approach to the protection of native title.

In the Barkandji's case, five WSPs overlap with the areas where their native title rights and interests have been recognized (including a 400 km stretch of the Darling River). Four of these overlapping WSPs commenced at various times throughout 2012 [84,93–95], several years prior to Barkandji's native title determination of 16 June 2015, but nonetheless, during the time their claim was being negotiated by the NSW Government. The fifth WSP, the *WSP for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2016* ('2016 Murray and Lower Darling WSP' hereafter), commenced on 1 July 2016 [96], more than one year *after* the Barkandji's native title determination was handed down. Yet, as of January 2018, more than 2.5 years after the Barkandji's native title rights were affirmed by the court, all five WSPs state: 'At the commencement of this Plan, *there are no native title rights in these water sources.* Therefore the *water requirements for native title rights are 0 ML/year*' [84,93–96] (emphasis added). Despite the existence of amendment mechanisms designed to reflect changes to native title during their operation and the Barkandji's best efforts to bring this error to the NSW Government's attention (see further discussion below), none the five WSPs has been updated, and so they violate the native title provisions in both the NSW Government's WMA and national water policy.

In particular, we wish to focus briefly on the 2016 Murray and Lower Darling WSP which, again, was introduced one year after the Barkandji's native title determination. When introduced (and still at the time of writing, 18 months later), it stated incorrectly that there are 'no native title rights' in the area [96] (cl 19). Arguably, this Plan was, then, invalid when written and gazetted. The initial Murray and Lower Darling WSP commenced in July 2004, with the 2016 Plan only a 'replacement' [97]. Some 'minimal changes' were made though, including 'updating share components and Basic Landholder Rights estimates' [97], which, as established above, should encompasses native title water requirements but did not. While there was 'no formal public consultation process undertaken', the NSW Government claims to have 'consulted with key stakeholder groups to seek feedback on changes required in the plan' [97]. It is possible that the flexibility and selectivity of this stakeholder engagement and consultation method stems from the discretion allowed for through Minister's Plans under regulations.

Interviews verified that the Barkandji People were not consulted about these changes to the replacement 2016 Murray and Lower Darling WSP despite the occurrence of this active, though limited, stakeholder engagement process. Consultation activities with 'key stakeholders' listed online reveals no specific mention of the Barkandji People either [98]. Ultimately, the Barkandji only learned about the 2016 Murray and Lower Darling WSP and its failure to recognize and accommodate their established rights once it was implemented. Failing to meaningfully engage with the Barkandji and accommodate and protect their native title rights, as they are entitled to, raises serious questions about the validity of the updated estimates of Basic Landholder Rights and undermines the claimed 'consistency with the current legislative framework' [97] of the updated WSP.

The practical implications from not recognizing or accommodating Barkandji native title rights in these WSPs have not yet been tested. It would seem from secondary analyses of native title legislation [72] that failure to recognize native title rights does not prevent the Barkandji People from exercising their rights over water because Commonwealth laws (i.e., the NTA) prevail over State and Territory laws (i.e., the NSW's WMA). The WSPs are, however, regulatory instruments, and non-compliance can attract fines and prosecution. It could be possible that Barkandji People, in exercising their native title rights to take and use water that is not allocated for their use in the WSP, may be perceived by compliance officers as breaching the regulation. While such a situation may seem

surprising or unlikely, this has, in fact, occurred in relation to cultural fishing rights in South Australia (see [99]), and to an extent in NSW (see [100]), and cannot be ruled out as a possibility in relation to water. As is evident from these cultural fishing cases, such prosecution certainly can be challenged successfully using a native title defense, but is a time- and resource-intensive exercise. The need to defend a right that has already been recognized appears to be superfluous.

Perhaps, though, the biggest impact these exclusions from the WSPs has had is the failure to protect water and maintain sustainable water levels that support Barkandji's enjoyment and exercise of their other water-related native title rights and interests (detailed earlier in Section 4.2). This includes, for example, the right to maintain and protect sites and places of importance or significance from physical harm, which could require significant water volumes [72]. Water needed for this kind of activity is likely to be unavailable due to complete or over-allocation of water resources in the water management areas, and would thus require the acquisition of water from existing water users, and potentially trigger compensation claims (Aboriginal Water Planning Specialist, 22 January 2018). Barkandji themselves do not have the power to reallocate this water—this lies with the State of NSW. It seems the NSW Government faces a most difficult challenge in ensuring native title rights and interests are accommodated and protected in accordance with water regimes discussed here when all available water is already allocated to existing water users (Aboriginal Water Planning Specialist , 22 January 2018).

4.5. Barkandji Experiences and Perspectives

The Barkandji Traditional Owners have made several attempts to challenge this disregard by the NSW Government. NTSCORP Limited ('NTSCORP' hereafter), the Barkandji Peoples' legal representatives, have been assisting in these attempts, which initially focused only on the 2016 Murray and Lower Darling WSP, but expanded to include other WSPs following further inquiries and research [101]. In addition to representing the Barkandji, NTSCORP has statutory responsibilities under Part 11 of the NTA to protect Traditional Owners' native title rights and interests across the State of NSW (and the Australian Capital Territory), including assisting, servicing and representing native title claimants and holders. The Barkandji first approached the NSW Government about the issue via email in July 2016 soon after the 2016 Murray and Lower Darling WSP commenced. The details of the Barkandji's native title rights and interests were set out in this correspondence, including the waters within their determination, and their overlap with this WSP (F. Russo, 27 June 2017). The NSW Government advised the matter would be investigated and the WSP updated if needed. As of November 2017, no further formal response had been received.

The issue was again raised later in 2016 as part of a NSW Parliament Inquiry into water supply for rural and regional NSW. Among other matters, NTSCORP's formal submission highlighted the cultural insensitivity and misleading nature of NSW's water sharing regimes that do not respond to legal recognition of native title rights. NTSCORP, from the position of representing the Barkandji People and other Traditional Owners across NSW, noted,

> *it is extremely distressing for Traditional Owners when the NSW Office of Water publishes Water Sharing Plan[s] that do not acknowledge successful native title determinations or pending claims of native title rights and interests within the area covered by the Plan.* [102] (p. 15)

As part of this inquiry, Barkandji native title holders were invited to present at a regional public hearing on these matters as well. The above-mentioned frustrations are captured in Barkandji PBC Director Mr Badger Bates' opening statement: 'Our Barkandji native title gave us recognition but not much else . . . we hoped that our recognised native title will give us the right to manage our river for future generations' [92] (p. 2). This inquiry is ongoing and due to be reported on by 30 March 2018. Again, no feedback or advice from the NSW Government has been received in response to these matters. (We have also made our own inquiries with the NSW Government on this matter. Our original inquiry was submitted on 21 November 2016, to which we received a response suggesting, incorrectly,

the Barkandji's native title determination 'excluded the waterways and therefore they [the Barkandji native title rights] are not reflected in the WSP' on 28 February 2017. Clarification on this response was sought on 31 July 2017, and as at January 2018 we are awaiting a response.)

According to NTSCORP, this lack of recognition in the water allocation planning regime is affecting the exercise of Barkandji's native title procedural rights concerning water regulation and management (under s 24HA of NTA). The Barkandji seek to communicate their opposition to further water extractions via their right to comment on proposed actions that may affect their native title rights to water, including the granting of new, and extensions to existing, water use and extraction licences. While acknowledging this procedural right is not a right to object or veto, an NTSCORP representative noted that the relevant NSW Government department disregards the native title holders' comments and grants the water use licences (F. Russo, 27 June 2017). The NSW Government instead:

> *. . . pointed out that the method to deal with any such objections is through the public submission process for the Water Sharing Plans. So it's a circular argument—the Water Sharing Plans are already in place, and they haven't been updated in light of the determination of native title. Yet our clients' rights are meant to be factored in through those Plans rather than through objections to individual licences being granted*. (F. Russo, 27 June 2017)

The Barkandji have also commented on water extraction approvals for the construction and use of infrastructure like pumps, bores and jetties, requesting that conditions be applied to these licences to protect and monitor Aboriginal cultural heritage in ways that align with NSW's existing cultural heritage management guidelines. The NSW Government—a different department—has been more agreeable to these requests, imposing the requested conditions on new licences, including '*even in instances where we haven't responded to a particular notice, they're now starting to include conditions to ensure that licence holders are aware of their responsibilities to protect Aboriginal cultural heritage*' (F. Russo, 27 June 2017). The discretionary and ad hoc nature of government responses to Aboriginal peoples' (and specifically, native title) water and water-related rights, which is at least partially underpinned by a lack of constraints to guide these responses, is indicative of asymmetrical power relations.

Interviews with Barkandji spokespeople and Traditional Owners reveal that they regard these events and ongoing struggles to have their native title rights appropriately recognized and accommodated as frustrating, disrespectful and insensitive. Barkandji native title holders feel that while they are expected to respond to various government requirements they receive little to no government response to their own requests. They perceive there has been little attempt by governments to provide meaningful opportunities for their engagement, demonstrating the limitations of these water governance processes to generate opportunities for mutual recognition, collaboration and partnership in governance, no matter how difficult satisfying such aspirational goals may be in a settler state. As Barkandji PBC Director B suggested, '*We never got no contacts or nothing from the government about the river! Didn't even come out and sit down with us*' (7 February 2017). Importantly, this frustration extends beyond water allocation planning discussions and encompasses a wide range of other Barkandji water-related concerns.

Many Barkandji interviewees see continued government control as a central obstacle to the appropriate recognition of their legal water rights. As one interviewee passionately described, '*At the end of the day, whatever we want put in place, the governments have already got their agenda*' (Barkandji Person B, 15 February 2017). By extension, some express disappointment in the level of respect they have been shown, as native title holders. These overlapping issues were highlighted by Barkandji PBC Director C:

> *Now that we've got our native title claim, they should be negotiating with us and consulting with us. We are the experts and the land managers . . . [But] we have to put everything up to them. They sit in their offices and make decisions from there. We want them to come out here and consult with us*. (7 February 2017)

These observations of power asymmetries are not limited to water, but spread across natural resource governance. As one interviewee noted, '*The government's always got an ulterior motive with Aboriginal people. They say one thing and do another*' (Barkandji Person C, 17 February 2017). Another noted, '*The water seems to be a different issue to the land issues, and they [government] want to keep it that way because it's about control*' (Paakindji Man, 9 February 2017). A parallel issue is the influence and seeming dominance of other (usually agricultural) interests over those of the Barkandji, particularly the interests of upstream cotton growers and foreign investors. Barkandji PBC Director E went as far as to say they see their native title determination as a '*flimsy agreement*' that is '*not real good*' due to the little power it affords their community when negotiating with other interests, including governments and other water users (10 February 2017).

Despite having been recognized as the native title claimants for nearly 18 years, and then since June 2015 the native title holders, the Barkandji feel they face an unfair and ongoing struggle for recognition and representation in water resource planning processes affecting their country. We now turn to more explicitly reflect on the Barkandji's experience in light of the insights elicited from the politics of recognition literature, and to consider wider implications for the recognition of Aboriginal water rights within Australia's water regimes.

5. Discussion

Ivison [14] argues that to dislodge the dominant focus on recognition, institutions must be open to processes of critical reflection and challenge regarding the outcomes they produce. Here, we illuminate some of the unjust outcomes resulting from attempts by the state to recognize Aboriginal peoples and their water rights, or make them legible and visible, through Australia's water regimes; outcomes which we suggest serve to defer and diffuse more radical Aboriginal struggles and challenges of state sovereignty, in that the power and control remains in the hands of the state [18]. For the purposes of analysis, we have broadly grouped these outcomes into two forms; 'misrecognition' and 'non-recognition', which are discussed in turn. Notably, while these outcomes are likely unintentional and possibly a result of failed bureaucratic processes, as we will discuss, determining or proving intentionality is a demanding task that exceeds the evidence obtained during the course of this study.

Building on James C. Scott's [16] work on legibility, we argue that forms of misrecognition can be understood as a process that renders Aboriginal peoples more governable: to frame any rights within existing, colonial systems of management, governance, and engagement so as to support, rather than challenge or subvert those systems. We identify two ways in which Aboriginal peoples are misrecognized through, or as a result of, recognition processes in Australia's settler-colonial water regimes. The first is what we term stakeholder-based misrecognition, which has the effect of rendering Aboriginal peoples as no different to other water users, with 'equal rights granted to all groups in the multicultural nation' [18] (p. 57). This politico-legal process has effectively allowed governments to allocate 'water entitlements with little regard or knowledge of Indigenous interests' [3] (p. 109), a course of action which many Aboriginal peoples believe has amplified their historical and contemporary inequities.

Consequences associated with stakeholder-based misrecognition include the possibility that the state and other actors may overlook custodial rights and responsibilities or special rights of access and management arising from international Indigenous rights norms. This then, has the effect of eliding and hampering the legitimacy afforded by others to Indigenous peoples' rights and responsibilities. Questions of sovereignty, justice, and reparations are wholly sidestepped by emphasizing the liberal conception of multicultural 'inclusion', and thus there is no platform from which to challenge the (colonial) logic of planning and management structures. Overall, stakeholder-based misrecognition has the effect that all stakeholders are positioned as, theoretically at least, 'equal', and this can weaken the political merit of any particular claims flowing from Indigeneity. It also has the effect of obscuring any structural and power imbalances that may exist between and across parties. Additionally, such an approach also effectively situates the state as arbiter of different sets of (often competing) interests,

making decisions from a position of constructed neutrality after weighing up input from many parties, obviating the state's own interest in particular outcomes, or affinities with particular stakeholders or sectors of society.

Over the past 15 or so years, an alternative type of misrecognition of Aboriginal peoples has resulted through water regime recognition processes. Under this alternative, Aboriginal peoples' rights to and interests in water are conceptualized as unique and different from other stakeholders', but only within the confines of (what the state mediates to be) tradition and culture. In this way, Indigenous knowledge—and indeed, values and rights—are shaped and must adhere to established and recognized forms of knowledge and representation, and in turn, remain on the periphery [23], or in a highly compartmentalized category of interest referred to in resource management discourse as 'cultural values' [103]. While this outcome from recognition strategies is in some ways progressive compared to the aforementioned stakeholder-based misrecognition outcome, and in part addresses Traditional Owners' demands for recognition, it has the effect of perpetuating a reified, narrow and essentialist conception of Aboriginal peoples [18] in ways akin to those seen in other environmental and land governance mechanisms, such as native title and land rights [3] and cultural heritage legislation [17,103]. Again, this process of flattening out complex ways of knowing, being and relating can be understood as a way to render a population knowable and legible—a way of making or keeping them as governable subjects of the state [16]. This misrecognition outcome turns formerly fluid, dynamic, and relational modes of identity and community formation into disciplined, fixed, simplistic and essentialized categories that existing forms of settler-colonial politico-legal processes are more equipped to deal with [16–18,21,33]. Thus, we refer to this outcome as an essentialist form of misrecognition.

Under Australia's current water regimes, the capacity of Aboriginal people to obtain and use water is greatly influenced by typologies of water use, which underpin water entitlements and use permits. This use-based interpretation and implementation that is central to Australia's water resource governance frameworks can be understood as another practice of legibility by the state. That is, it is a construction applied to water resources as a way to make water itself more knowable and governable. Attempting to translate their own diverse water needs, rights and objectives into the language of water regimes so that they may be recognized and accommodated, Aboriginal people have also generated proposals for water redistribution based on cultural-difference [3,13,42]. The concept of 'cultural flows', for example, has been proposed, which is defined as 'water entitlements that [would be] 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' [104]. This complex cultural flows proposal, however, has been simplistically and restrictively translated by policymakers in essentialized ways to concern only what the state recognizes as 'cultural' water uses, which bureaucrats and policymakers have assumed will require insubstantial water volumes (for example, NSW Aboriginal specific licences, discussed in Section 4.3) (see also [3]).

The proscriptions underpinning essentialist misrecognition and the (restrained) rights it affords, ultimately curtails the emancipatory or transformative potential of recognition. As a consequence, those Aboriginal views or objectives that differ from what the state perceives and constructs as legitimate 'traditional cultural' practices are difficult to recognize or accommodate [18,103,105]. Moreover, some have recognized that entrenching reified constructions of Aboriginal peoples into governance structures in this way, even if unintended, can have the effect of marginalizing their voices [103,105,106]. These outcomes can severely limit the capacity of recognition to strengthen Aboriginal claims for self-determination and economic self-reliance, or the capacity to respond to other powerful stakeholders. Essentialist misrecognition does result in some recognition, but it does so in ways that fix, limit, and proscribe; it does not emancipate or transform and it remains mediated and determined by the settler state, making it incomplete [18].

From examining the Barkandji's water rights struggle case study, we can also see outcomes that we term non-recognition. Non-recognition describes situations where Aboriginal peoples and their

rights go unrecognized—perhaps unintentionally—as a result of institutionalized and bureaucratic systems. The outcome of non-recognition forecloses opportunities to access and benefit from respect and possible acts of redistribution that could flow from due recognition. If misrecognition 'is a form of disrespect, and more strongly, denotes an absence of genuine mutual *esteem*' [14] (p. 14, emphasis in original), then outcomes of non-recognition are even more harmful and oppressive—regardless of intentionality.

Several possible and likely overlapping factors can help to explain this kind of failed recognition, as seen with the Barkandji's experience with the NSW water allocation regime (Section 4.4 above). There may be issues with inadequate system and notification processes across NSW Government departments during negotiations and once native title claims are determined. These failings may lead to gaps in, or delays to, departmental awareness and responses to successful determinations (see [107]). There may also be an issue of protecting and accommodating possible and actual native title rights specifically within the water-related bureaucratic agencies of the NSW Government. For instance, even though native title rights are positioned notionally as an upfront component to NSW's water allocation planning regime, these rights are only accommodated when detected through 'manual' and 'ad hoc' processes, based on imperfect governmental staff knowledge. Thus, the absence of an approach in NSW water planning and practice that systematically, consistently and thoroughly identifies and protects native title rights and interests and is tailored to each determination [1], likely contributes to non-recognition. It is important to identify that this disconnection between the legal arm of the state that recognizes native title rights, and the bureaucratic arm that ought to acknowledge and protect them, has the effect of limiting and undermining the (arguably, essentialist and already weak) recognition of Aboriginal peoples' water rights conferred through the native title regime [35].

If resources and expertise within government agencies are insufficient, this can also contribute to the ability of bureaucracies to grant due recognition. NSW Government water agencies and departments have faced political water cycle changes and undergone widespread restructures over the last several years, including the dismantling of the once 11-person Aboriginal-specific water unit [88]. Such changes have reduced the capacity of government to address these issues, according to Aboriginal people previously employed in that unit (B. Moggridge, 4 May 2017). Beyond individuals and teams of bureaucrats, though, political will from departmental leaders and governments is also needed to respond to complex and new issues of water sharing and allocation, particularly in areas where water resources are already completely or over-allocated. Meeting broader Aboriginal peoples' water needs will more than likely require the politically controversial commitment of reallocating water away from existing users [3]. There are also technical challenges, as Jackson and Morrison [59] note, in that 'there are substantial conceptual and technical difficulties facing water resource managers seeking to calculate and allocate water to meet these 'native title' needs,' (p. 30) irrespective of the water volumes that are actually available, and the political will for these changes. The failure of the NSW Government to respond to the Barkandji's requests could represent a deliberate strategy to withhold or deny due recognition of their rights, but it can just as equally be interpreted as the bureaucracy not knowing how to handle these complex issues, an indicator of the inadequacy of existing structures and systems, and/or a lack of commitment to prioritizing and addressing these issues.

Overall, though, by the virtue of the fact that settler states have claimed exclusive responsibility for overseeing the management and allocation of water resources, it similarly holds the responsibility to respond to and address these difficult challenges. This exemplifies the asymmetrical power relations in Australia's water governance between Aboriginal peoples and the colonial state. Under current water regimes, the Barkandji People hold neither the power to allocate themselves water, nor the power to force the state to protect and accommodate their rights. For this reason we argue that state failure to recognize and protect Barkandji native title rights in its water resource regimes challenges the legitimacy and justice of contemporary water governance in Australia. Furthermore, it also reveals the settler state's unjustified power to allow their institutions to continue to produce outcomes that

benefit certain constituent actors while simultaneously and unfairly denying power and agency to Aboriginal peoples.

6. Conclusions

Ivison [14] advocates that disrupting the dominant focus on state-recognition requires greater attention to 'the ways in which current social and political arrangements manifest distinct forms of unjustified exercises of power' (p. 17). Heeding this call, we have critically examined the settler-colonial water regimes that are currently used by states to recognize Aboriginal peoples' water rights and control water in NSW. In doing so, we see that state attempts to recognize, or make legible, Aboriginal peoples and their water rights can produce outcomes that have the effect of actually misrecognizing Aboriginal peoples' claims to water either through overlooking and ignoring them (stakeholder-based misrecognition), or oversimplifying, stereotyping and restricting them (essentialist misrecognition). Intentionally or not, states may also outright fail to recognize any kind of claim, an outcome we have called non-recognition. It is concerning that non-recognition is possible following affirmation by the legal arm of the state, as is the experience of the Barkandji. Ultimately, the effect of state-based recognition perpetuates the status quo where existing water users hold the power to continue to enjoy and benefit from access to highly valuable water resources, while power and agency for Aboriginal peoples to do similarly remains obstructed. These manifestations of colonial power relations fail to generate genuine recognition and respect, and in turn undermine the legitimacy of state water regimes.

To conclude, we wish to reiterate several suggestions to enhance Indigenous water resources governance in Australia that have been recommended for more than a decade by both academic (for example, [10,11,59,64]) and government reviews (for example, [62,63]). Specifically, at the NSW State level, we argue that the NSW Government needs to instigate a more systematic network notification process to inform and engage all relevant departments and agencies—including water bureaucracies—during native title negotiations and once determinations are passed. Complementing this, specifically within water planning and practice, there is a need for greater commitment and obligation 'to identify 'and engage with' all beneficiaries and interests affected by planning up front' [108] (p. 256), a step which we argue should include both native title claimants and holders in line with national water policy guidelines. Ideally, this would require an institutional response that departs from current ad hoc and manual processes and moves towards establishing and operating a clearer, though flexible, process to accommodate and protect native title rights to water [1]. As detailed above, however, this will necessarily be a complex, political and time consuming feat. We also agree with the suggestion from Mould and colleagues [105] for individuals within organizations to adjust their work styles where possible to place a stronger emphasis on informal dialog and relationships with landholders and water users, including Aboriginal peoples. This provides a means of practicing and influencing more holistic and collaborative water and river management, and potentially makes colonial vestiges of water management more visible and readily addressed. While these lessons apply particularly to the NSW Government, they could similarly improve planning practice in other Australian State and Territory Governments.

Beyond these changes to native title implementation and water planning practice and policy, we see the need for action on other fronts. As mentioned earlier, there is an increasing recognition that Aboriginal rights to water should include commercial rights. The Australian Law Reform Commission has handed down a report on reform to the *Native Title Act* in which it recommends changes that could see economic benefit accrue native title holders from the use of natural resources [66]. Any efforts to expand the currently narrow definitions of customary rights to water in either native title or water law will be welcome. While the Federal Government is yet to respond to this inquiry there is nonetheless considerable support for its recommendation amongst Aboriginal advocates [3,64,88,109]. Aboriginal lawyer Tony McAvoy sees such a reform as critical to Indigenous water rights struggles: 'real impact on the commercial market in water and therefore river management will only occur when Indigenous people are water owners themselves' [109] (p. 97). To that end, suggestions have been made for the

establishment of an independent Indigenous Water Fund or Trust to allow Indigenous peoples to participate in the water market and allocate water to meet self-determined objectives [29]. Those funds could be used to purchase licences and would be managed to provide for necessary infrastructure and other costs associated with accessing water entitlements. Purchases and use costs could be funded on an ongoing basis from a small levy on water trades [109]. Under such an arrangement, Indigenous peoples might choose to direct water to the environment and could also pursue other water use strategies to underpin contemporary livelihoods [29].

In conclusion, it is these kinds of improvements that urgently need the attention of policy makers and practitioners. A fitting arena in which to debate and develop progressive change is the renegotiation of the National Water Initiative, raised as a realistic outcome for 2020 by the national body oversighting implementation of the current national policy [63]. There can be little doubt that unlike the first time national water policy recognized Indigenous rights and interests in water in 2004, the next time around, Indigenous people will at least be consulted. It is hoped that the recognition afforded Indigenous Australians in that most important exercise goes further than consultation and engages in good faith negotiation and thereby breaks with the pattern of misrecognition and non-recognition seen in recent decades.

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