



The NSW Aboriginal Land Council's
Comments for the Murray-Darling Basin Authority on the
Guide to the Proposed (Murray-Darling) Basin Plan

November 2010



**NEW SOUTH WALES
ABORIGINAL LAND COUNCIL**

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Murray Darling Basin

This report has been prepared by the NSW Aboriginal Land Council.

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1. Comments in context

The NSW Aboriginal Land Council

The NSW Aboriginal Land Council (NSWALC) is the peak representative body for Aboriginal people in the state of NSW. NSWALC represents the interests of over 17,000 members and 119 Local Aboriginal Land Councils (LALCs) across NSW, the majority of which are located within the Murray-Darling Basin Area (the Basin Area).

Since its first meeting in 1977, and as has been recognised in the *Aboriginal Land Rights Act 1983*, the objective of NSWALC is to foster the best interests of *all* Aboriginal peoples in NSW. In pursuit of such an aim, NSWALC has a particular focus on supporting, protecting and promoting Aboriginal Land Rights, Aboriginal Culture and Heritage and the economic development aspirations of the Aboriginal peoples of NSW.

Historical Context

Since the Dreaming and at least for tens of thousands of years Aboriginal peoples have owned and occupied the land of the Basin Area. This continuing occupation was, prior to dispossession, typified by active and sustainable management of country; land, water and all natural resources were owned and managed for the spiritual, cultural, environmental, social and economic benefit of generation after generation.

The harm and enduring injustices wrought by the forced dispossession of Aboriginal peoples from their lands is evident in both the Aboriginal communities and the natural environment of the Basin Area, and cannot be denied. Even in such circumstances, the ongoing significance of land, water and the natural environment (including all of its resources) to the lives of Aboriginal peoples of the Basin Area also cannot be denied.

Despite the traditional occupation and ownership of all the lands and waters of the Basin Area and beyond, the legal entitlements of Aboriginal peoples to their water in NSW remains at just 0.2% of the state's licensed allocations (an underrepresentation by population)¹. This situation has historically resulted from the denial of Aboriginal land rights, and the coupling of water rights with

rights to land. However, ironically with the decoupling of land and water rights since 2000, gains in land rights under statutory mechanisms such as the *Aboriginal Land Rights Act 1983*(NSW) have not been met with comparable gains in rights to water. As a result, Aboriginal access to water remains inequitable and in addition the economic potential of land rights gains are also undermined².

Aboriginal Entitlements to Water

The *Water Act 2007*(Cth) and *Water Regulations 2008*(Cth) lamentably fail to include the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by the Australian Government on 3 April 2009, as a relevant international agreement to be given effect in the preparation of the Murray-Darling Basin Plan (Basin Plan).

However, as with the following recommendation from the Social Justice Commissioner's Report of 2008, it is believed that:

"any negotiations the Australian Government are involved in regarding water, should ensure that as a minimum the rights of Indigenous peoples' enshrined in the Declaration on the Rights of Indigenous Peoples are fully considered. This also applies to the Basin Plan"³.

As noted, while the following excerpt from the *United Nations Declaration on the Rights of Indigenous Peoples* is vested with more moral authority than legal authority, it presents for the Authority's considerations the inherent rights of the Aboriginal peoples of the Basin Area to the water of the Murray-Darling Basin.

"Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands,... waters and ... other resources...

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. *Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.*

Article 28

1. *Indigenous peoples have the right to redress, ... for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.*

2. *compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.*

Article 29

1. *Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources...*⁴

The 2004 Council of Australian Governments *Intergovernmental Agreement on a National Water Initiative* (National Water Initiative) also goes some way towards recognising Aboriginal Australia's inherent right to water. It commits the Governments of Australia to "recognise Indigenous needs in relation to water access and management" in their *water access*

entitlements and planning frameworks⁵.

Clause 52 of the National Water Initiative specifically requires Governments to "provide for Indigenous access to water resources... through planning processes that ensure:

- i) inclusion of Indigenous representation in water planning wherever possible; and
- ii) *water plans* will incorporate Indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed"⁶.

Despite this, and the increasing recognition of both the ongoing injustices of Aboriginal dispossession and the importance of Aboriginal knowledge to land and water management, the National Water Commission admits that "little improvement has been made in incorporating Aboriginal values and needs into water planning since the National Water Initiative"⁷.

The Basin Plan is seen as presenting a real opportunity to incorporate Aboriginal water values and needs into water planning. In so doing, it is hoped that the Basin Plan will go some way toward redressing the ongoing inequities of water resource distribution in this country. It is in this context that the following comments are made.

2. Aboriginal Water Allocations

Cultural Flows

The Guide indicates that “[t]here are likely to be opportunities for implementing the Basin Plan in a way that contributes towards the cultural objectives for Aboriginal people in the Basin”⁸. This statement falls short of the expectations of Aboriginal peoples of the Basin Area, and of the commitment envisaged by the National Water Initiative.

It is appreciated that the Guide acknowledges the following definition of ‘cultural flows’ provided by the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) and the Northern Murray-Darling Basin Aboriginal Nations (NMBAN):

“Water entitlements that are legally and beneficially owned by the Aboriginal nations and are of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Aboriginal nations; this is our inherent right”⁹.

As is acknowledged by the Guide the concept of ‘culture’ to Aboriginal peoples encapsulates broad and complex interactions of social, spiritual, environmental and economic dimensions¹⁰. In this context, the notion of ‘cultural flows’ is provided as shorthand for the far more complex, interwoven and diverse connections Aboriginal peoples have with country.

It is common for the full diversity of Aboriginal peoples’ interests in natural resources to be treated dismissively as merely ‘cultural’. On the other hand, the *Aboriginal Land Rights Act 1983* (NSW) commendably recognises that such interests are of “spiritual, social, cultural and economic importance” to Aboriginal peoples.

The euro-centric notions that reduce the rich complexity of Aboriginal interests in natural resources to “mere intellectual or emotional”¹¹ must be avoided wherever Aboriginal rights to water are considered.

Native Title

The recognition of native title and its extension to customary use rights in natural resources has provided a significant theoretical step towards recognising the inherent rights of Aboriginal peoples to water. However in practice, native title has a difficult evidentiary burden and generally takes years to resolve. As such, it is suggested that the Aboriginal interests in water will be overlooked if left to the auspices of native title alone¹².

The poor history of native title determinations in NSW, and the limited provision of native title allocations within the state’s regime of water sharing agreements bear this out¹³. In addition, the case law suggests that where native title is found to exist, the native title right to water will be limited and non-commercial¹⁴.

A 2003 Murray-Darling Basin Commission scoping study made the following dire prediction for native title rights to water in the Basin Area:

“Recognition of native title, to the extent that it eventually occurs at all in the Basin, will undoubtedly be confined to very small parcels of land and to requirements that native title holders be informed or consulted about ‘mainstream’ natural resource management decisions”¹⁵.

Equitable access to water resources for the Aboriginal peoples of the Murray-Darling Basin cannot be left to depend on the legal recognition of native title.

Evidence Base for Basin Plan Decisions

The Guide acknowledges that “critical data gaps” remain in respect to the understanding of Aboriginal water use and values. It is understood by NSWALC that research has been proposed to remedy the information gaps. However it is also understood that the required research is not due to be completed until after the initial Basin Plan is finalised.

It is appreciated that the Authority wishes to proceed with its decision making on an evidentiary basis. However, the Guide also acknowledges the value of stakeholder advice where there are weaknesses in available data.

The current lack of data on Aboriginal values and interests in water must not be used, to again exclude Aboriginal peoples from their rightful entitlements to water.

Basin Community Committee considerations

It is understood that the Indigenous Water Subcommittee of the Basin Community Committee has considered a proposal to recommend to the Authority that the Basin Plan contain entitlements to 5% of each water resource plan for Aboriginal people as Cultural Flows. The quantum of the proposed allocations is understood to be an interim measure until more evidentially supported figures can be ascertained.

The proposed allocations are to be owned and managed through the MLDRIN and NMBAN confederations on behalf of the Aboriginal peoples of the Basin Area. It is understood that it is proposed that the allocations be sourced from the environmental allocation (3%) and the Sustainable Diversion Limit allocation (2%) of each water resource plan.

While such an allocation represents only a minimal compensatory need, it is understood that the Basin Community Committee has been amenable to the details of this proposal.

As is recognised in the *United Nations Declaration on the Rights of Indigenous Peoples*, the Aboriginal peoples of the Murray-Darling Basin:

- Have an inherent right to the water resources of the Murray-Darling Basin Area; and
- Have the right to redress for the dispossession of water resources; with a specific right to compensation in the form of water resources of equal quality, size and legal status to that which they were dispossessed of.

To seek to redress the past and ongoing injustices of dispossession, and to act upon the agreed commitments of the National Water Initiative, the Murray-Darling Basin Authority must ensure:

1. That Aboriginal Water Allocations (Cultural Flows) are provided for in each water resource plan prepared under the Murray-Darling Basin Plan.
2. That the Aboriginal Water Allocations of each water resource plan are legally and beneficially owned and managed by the Aboriginal peoples of the Murray-Darling Basin.
3. That Aboriginal Water Allocations may be utilised by the Aboriginal peoples of the Murray-Darling Basin for spiritual, cultural, environmental, social and economic purposes of their choosing.
4. That the each water resource plan provides for at least a 5% Aboriginal Water Allocation.

Practical impediments to accessing Aboriginal water entitlements

Cultural access licences under the NSW water management framework can provide for Aboriginal access to water resources. However, in practice the costs, infrastructure needs and administrative requirements associated with accessing allocations under these licences, pose significant barriers for Aboriginal peoples to access their allocations.

For example the Nari Nari Tribal Council's water allocation, under the first and only cultural access licence issued in NSW, can cost up to approximately \$10,000.00 p.a. In addition applications must be lodged every three (3) months, with representatives of the Council having to travel from around Hay in the Riverina to Sydney to lodge the licence¹⁶.

Aboriginal access to water resources was traditionally managed by the Aboriginal peoples of the Basin Area themselves, without economic impost. It should also be noted that, as with the Nari Nari Tribal Council's allocation, which is used to wet a billabong /wetland area, the clear public environmental benefit this provides in addition to the culturally specific benefit to the local Aboriginal people, is provided at a cost to the local Aboriginal people.

For Aboriginal peoples to have equitable access to water, the economic and administrative impediments for accessing Aboriginal Water Allocations must be reconsidered.

Cultural and Environmental Flows

As the example of the Nari Nari Tribal Council's use of its cultural access licence allocation demonstrates, cultural land management practices related to water often have a compatibility with broader environmental objectives including those of the Basin Plan specifically. While that is the case, this must not distract from the distinctive nature of the 'cultural flows' of the proposed Aboriginal Water Allocations.

Aboriginal cultural management or care of country must no longer be resigned to a mere component of the environment.

Critical Human Water Needs

*"Access to safe water is a fundamental human need and, therefore, a basic human right"*¹⁷.

Kofi Annan, United Nations Secretary-General

While it is contended that Aboriginal peoples have a specific inherent right to water resources, Article 25 of the Universal Declaration of Human Rights states that: *"Everyone has the right to a standard of living adequate for the health and well-being of himself [sic] and of his [sic] family"*¹⁸. This is a Human Right of universal application to all citizens.

The universal application of the basic human right to water dictates that the non-commercial consumptive needs of Aboriginal peoples and communities, for such purposes as drinking and washing, must be kept distinct from cultural water access rights sought under the Aboriginal Water Allocations advocated for.

The consumptive needs of Aboriginal communities for purposes such as drinking and washing must be met by the 'critical human need' component of the Sustainable Diversion Limits as for all citizens of the Basin Area.

Existing Aboriginal Water Entitlements

Somewhat similarly, all licensed allocations currently owned by Aboriginal organisations or individuals (other than those provided for by cultural access licences) must be treated as those owned by any other organisation or individual.

Aboriginal owned licensed water allocations (other than those of cultural access licenses) must not be incorporated into the calculation of the Aboriginal Water Allocations of each water resource plan.

3. Aboriginal Water Trust

As noted above, significant economic barriers exist for Aboriginal peoples to access water. In 2000 when the NSW Government was considering water reforms that led to the *Water Management Act 2000* (NSW), and the decoupling of water and land rights, NSWALC proposed that an Aboriginal Water Trust should be established to provide the financial basis for Aboriginal access to water in the emerging water market. In 2002 the NSW Government established an Aboriginal Water Trust. However the Trust established had a greatly reduced agenda from that of the one proposed, and only \$5 million funding for the first two years of its operation; this in a market estimated to be worth \$5 billion at the time¹⁹.

With its limited funding, which was exhausted by late 2009, and its restrictive scope for operation, the NSW experiment with an Aboriginal Water Trust was perhaps less than successful. However, the underlying principles of the initiative and the mechanisms and objectives of the Trust as it was first proposed, remain commendable.

Adequate funds should be placed into an Aboriginal Water Trust to purchase access to water for Aboriginal peoples of the Basin Area.

The principal role of this Aboriginal Water Trust will be to purchase water licences on the open water market and to trade the water entitlements it has accumulated for no less than a stipulated period, e.g. ten (10) years.

Funds accumulated during this stipulated period will be used by this Trust to purchase further licensed water entitlements, and will be managed to provide for necessary infrastructure and other costs associated with accessing Aboriginal water entitlements.

All water licenses purchased by this Trust shall be beneficially owned by the Aboriginal Peoples of the Basin Area.

4. Aboriginal Participation in Water Management

The *Water Act 2007*(Cth) requires that the Basin Plan is to be prepared to give effect to amongst other international instruments; the Rio de Janeiro Summit's *Convention on Biological Diversity* and the *RAMSAR Convention*.

Article 8(j) of the *Convention on Biological Diversity* commits Australia to:

"respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity..."

The *Convention* also recognises the following in its preamble:

"the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity".

More specifically, the *Guidelines for establishing and strengthening local communities' and Indigenous people's*

participation in the management of wetlands stemming from Resolution VII.8 of the *RAMSAR Convention* contain clear directions to involve Aboriginal peoples in the planning and decision making process around the management of *RAMSAR* and other wetland sites²⁰.

In addition, as noted above Clause 52 of the *National Water Initiative* specifically requires Governments to include *"Indigenous representation in water planning wherever possible"*

The Authority's level of engagement with the Aboriginal communities of the Basin Area through the *Indigenous Water Subcommittee* of the *Basin Community Committee*, and with the *MLDRIN* and *NMBAN* confederations is to be commended. However, the 2003 *Murray-Darling Commission Scoping Study* found that there was a "chasm between the perception of available opportunities [to become meaningfully involved in Basin natural resource management activities] and the reality experienced by Indigenous people"²¹.

The same study highlighted the need for formal mechanisms to involve Aboriginal knowledge holders at the local level in water resource management decisions. It appears that the Indigenous Partnership Agreements of the Living Murray Initiative went some way to remedying this situation. However the distribution was limited to the Iconic Sites of that initiative.

Aboriginal participation and the incorporation of traditional ecological knowledge must be increased at all levels of water management planning across the entire Basin Area.

5. Socio Economic Impacts

The severe lack of quantitative data on Aboriginal water use, interests and values (noted above), and the underdevelopment of socio-economic assessment methodologies specifically for Aboriginal related water requirements, is understood to make it difficult to predict with any certainty the impacts the Basin Plan's water reforms will have on Aboriginal peoples and communities of the Basin Area²².

What can be said with certainty however, is that there are seriously held concerns in the Aboriginal communities of the Basin Area about indirect job losses, increased competition for employment and greater strain being placed on the increasingly scarce provision of public services.

Demographic considerations

Census data indicates that there were approximately 70,000 Aboriginal people living in the basin area in 2006, comprising 3.3% of the Basin population, and 15% of the national Indigenous population. However it is significant to note that the Aboriginal population of the Basin Area is increasing relative to that of the non-Aboriginal population. The Aboriginal population grew at a rate of 17% from 2001 to 2006 compared with the modest 3% growth of the broader Basin population. It should also be noted that the migration patterns primarily underpinning this trend are expected to continue²³.

Distribution patterns for the Aboriginal and non-Aboriginal populations of the Basin Area also appear somewhat distinct; "whereby Indigenous people are far less likely to reside in large regional centres such as Albury and Queanbeyan and tend to be more widely

scattered in smaller localities across the Basin [towns and localities with populations of less than 10,000 people]"²⁴

In respect to the predicted impacts of the Basin Plan reforms this distinction in distribution has significance. It is suggested that the diversity of the economies of larger regional centres provides greater resilience to predicted socio-economic fallout from the Basin Plan's water reforms. This view leads to predictions with disproportionately dire implications for the Aboriginal population of the Basin Area, given its current distribution; "towns with a population less than 25,000 people, which predominantly rely on irrigation for its economy, are not sustainable in the longer term"²⁵.

Socio-Economic Considerations

It has been conservatively estimated that the Aboriginal population of working age in the Basin Area will increase by 44 per cent from 40,467 in 2001 to 58,260 in 2016. With such an increase 21,381 Aboriginal people of working age would need to be employed by 2016 to merely maintain the current employment rate; requiring the creation of a further 6,165 job opportunities from the 15,216 employed in 2001.

However, if the Commonwealth Government's aim of "closing the gap" is actually to be met, then 34,257 Aboriginal people would need to be employed in the Basin Area by 2016²⁶. This in an area where the current employment rate for Aboriginal males and females across the Basin Area is 40% and 30% respectively; compared with 70% and 60% for non-Aboriginal males and females respectively.

The limited participation of Aboriginal people in the agricultural sector across the Basin Area, may be suggested as a limiting factor in regards to the socio-economic impact of the Basin Plan reforms²⁷. However, failure to achieve parity participation in the Basin's key economic sector is perhaps more suggestive of the current socio-economic disadvantage of the Aboriginal population of the Basin Area. The levels of workforce participation in low skilled laboring positions across all industries supports this view; 30% of the Aboriginal male workforce and 20% of the Aboriginal female workforce²⁸.

Socio-Economic Vulnerability

With an increasing proportion of the Basin population, current levels of socio-economic disadvantage (including specific factors such as limited employment and education outcomes), and with cultural, familial and social ties to place and country that make it difficult to migrate from areas likely to be economically affected, the Aboriginal population of the Basin Area would seem to be disproportionately vulnerable to the socio-economic impacts of the proposed Basin Plan reforms.

When allied with the predicted impacts of the Basin Plan's reforms on essential and community services, which are already under-accessed by Aboriginal peoples, it is not difficult to see the potential for the Cotton Catchment Communities CRC's prediction that the Basin Plan reforms will lead to "increased concentration of disadvantaged Aboriginal people". Yet despite such clear predictions it seems that less attention is paid in the research literature to the economic implications for Aboriginal peoples of the Basin Plan reforms²⁹.

Further research into the socio-economic implications of the proposed Basin Plan reforms for Aboriginal communities is urgently required.

Mitigation Measures

Proposals for mitigating the socio-economic impact of the Basin Plan's water reforms that focus on compensating irrigators, landowners and owners of allied businesses are unlikely to assist Aboriginal people; as Aboriginal eligibility for such compensation will be minimal based on such criteria.

Government programs and strategies to mitigate the socio-economic impacts of the Basin Plan reforms must include specific measures to target Aboriginal socio-economic disadvantage and vulnerability.

Role for Aboriginal Land Councils

The network of Local Aboriginal Land Councils (LALCs) across the NSW portion of the Basin Area, play a key role in their communities in terms of providing employment and facilitating economic development. Recent amendments to the *Aboriginal Land Rights Act 1983 (NSW)* require LALCs to strategically maximise the use of their assets by developing Community, Land and Business Plans, which include objectives and strategies for the carrying out of business enterprise and the investment of assets.

Government mitigation measures must utilise the existing organisational structures for Aboriginal people in the NSW Basin Area; the strategies developed must recognise and support the role Aboriginal Land Councils play in delivering economic development opportunities to their communities.

More Information

For more information on the issues raised in this submission, please contact the Policy and Research Unit of the NSW Aboriginal Land Council on 02 9689 4444.

Endnotes

- ¹Altman.J & Arthur.B.; Water licences and allocations to Indigenous people for commercial purposes: An Australia-wide scoping exercise; A report prepared by the Centre for Aboriginal Economic Policy Research for the National Water Commission; February 2009; at p 5
- ²Jackson.S, Moggridge.B. & Robinson.C.; Effects of changes in water availability on Indigenous people of the Murray-Darling Basin; a scoping study; A Report prepared by the CSIRO for the Murray-Darling Basin Authority; June 2010; at p 73.
- ³Australian Human Rights Commission Aboriginal and Torres Strait Islander Social Justice Commissioner's Native Title Report 2008;2009 at p183.
- ⁴United Nations Declaration on the Rights of Indigenous Peoples; accessed at http://www.hreoc.gov.au/social_justice/declaration/assembly.html on 20 November 2010.
- ⁵Council of Australian Governments; Intergovernmental Agreement on a National Water Initiative 2004; Clause 25 IX.
- ⁶Council of Australian Governments; Intergovernmental Agreement on a National Water Initiative 2004; Clause 52.
- ⁷National Water Commission; reproduced in Jackson et al; Note 2; at p153.
- ⁸Murray-Darling Basin Authority; The Guide to the Proposed Basin Plan Vol 1; 2010; at p 196.
- ⁹Murray-Darling Basin Authority; Note 8 at p196.
- ¹⁰Murray-Darling Basin Authority; The Guide to the Proposed Basin Plan Vol 1; 2010; at p26.
- ¹¹Onus v. Alcoa of Australia Ltd. [1981] HCA 50; (1981) 149 CLR 27; Gibbs C.J.
- ¹²Jackson.S., Tan.P.L. & Altman.J; Indigenous Fresh Water Planning Forum Proceedings, Outcomes and Recommendations; CSIRO, Griffith University & The Australian national University; March 2009; at p9
- ¹³Only two of NSW's 35 Water Sharing Plans have made allocations for Native Title rights –Jackson et al; Note 12; at p9
- ¹⁴Jackson et al; Note 2; at p66
- ¹⁵Jackson et al; Note 2; at p73
- ¹⁶Jackson et al; Note 12; at p 13
- ¹⁷United Nations Secretary-General K. Annan; reproduced in the World Health Organisation's Water as a Human Right accessed at http://www.who.int/water_sanitation_health/en/rtw1.pdf on 23 November 2010.
- ¹⁸Article 25 of the Universal Declaration of Human Rights
- ¹⁹Jackson.S & Robinson.C.; Indigenous participation in water planning and management; Northern Australian Land and Water Science Review; October 2009; at p19
- ²⁰RAMSAR Convention Resolution VII.8: Guidelines for establishing and strengthening local communities' and Indigenous people's participation in the management of wetlands Accessed at http://www.ramsar.org/cda/en/ramsar-documents-resol-resolution-vii-8/main/ramsar/1-31-107%5E20736_4000_0__ on 25 November 2010.
- ²¹Murray-Darling Basin Commission Scoping Study 2003; reproduced in Jackson et al; Note 2; at p77
- ²²Jackson et al; Note 2; at p147
- ²³Aboriginal Affairs NSW; Two Ways together Report on Indicators 2009; 2010; at p25
- ²⁴Jackson et al; Note 2; at p33
- ²⁵Rizza.A.; The potential effects of changes to water allocation policy on financing the agricultural sector and businesses in the Murray Darling Basin; Report to the Murray Darling Basin Authority; October 2010; at p6
- ²⁶Jackson et al; Note 2; at p36
- ²⁷Aboriginal Affairs NSW; Note 23; at p80.
- ²⁸Aboriginal Affairs NSW; Note 23; at p80.
- ²⁹Jackson et al; Note 2; at p61

