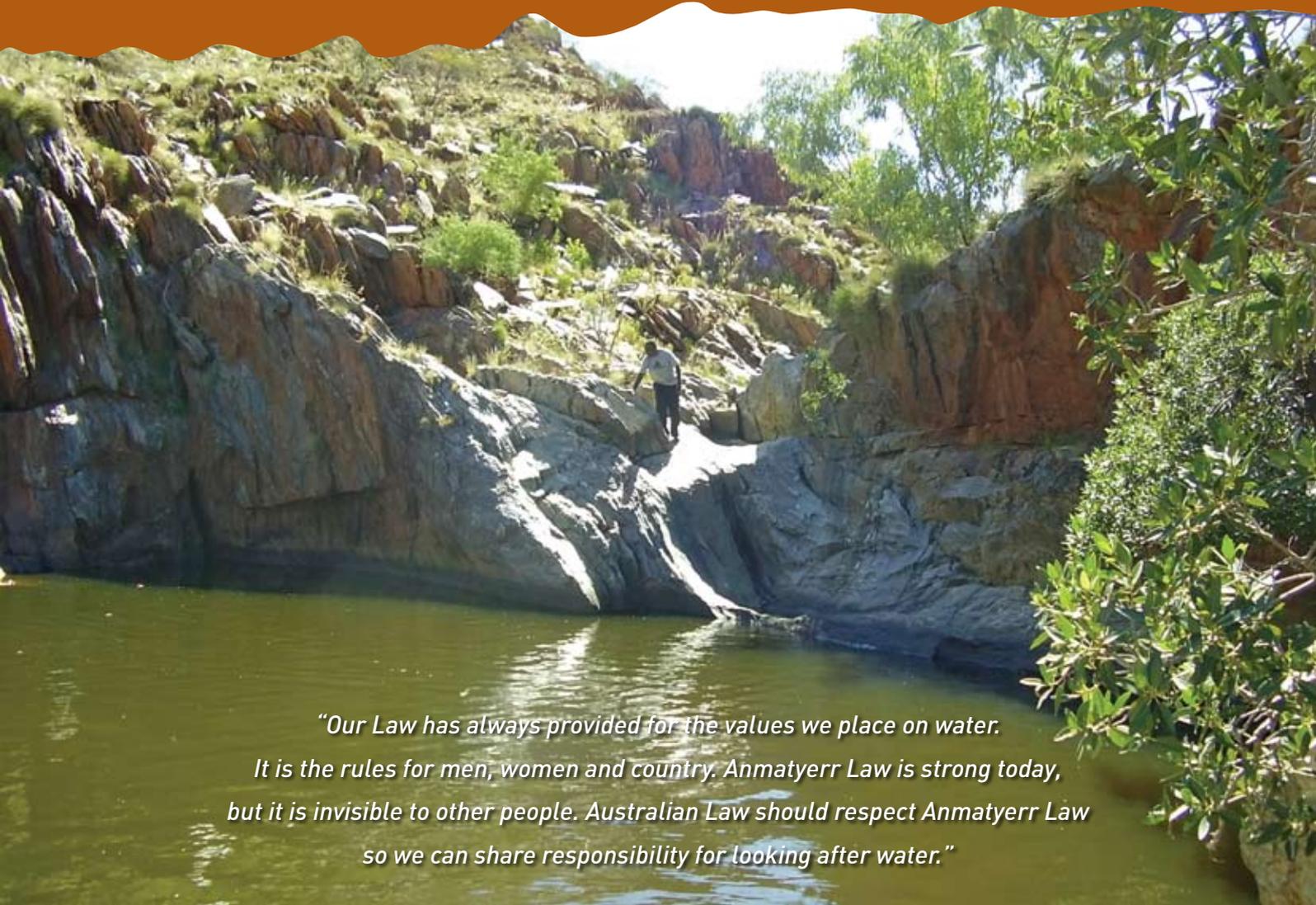




An Agreement Approach that Recognises Customary Law in Water Management



*"Our Law has always provided for the values we place on water.
It is the rules for men, women and country. Anmatyerr Law is strong today,
but it is invisible to other people. Australian Law should respect Anmatyerr Law
so we can share responsibility for looking after water."*

Quote workshopped by Anmatyerr people and the Water Project Team

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of Land & Water Australia. Project completed December 2008.
Principal Investigator: Professor Donna Craig, Macquarie University





COVER PHOTO: Anna's Reservoir Conservation Reserve (Mer Ngwurla), a permanent waterhole in Central Australia near Alice Springs, Northern Territory.

Indigenous Law and cultural traditions remain strong and active in many parts of Australia.

This project demonstrates a way for local Indigenous groups and other stakeholders to agree on the management of significant places and local issues with the aim of improving cultural and natural heritage and Indigenous futures.

Introduction

About 180 kilometres north-west of Alice Springs is a beautiful, permanent waterhole surrounded by rocks and cliffs, Anna's Reservoir Conservation Reserve or Mer Ngwurla to the local Anmatyerr* people.

More than 2,000 Anmatyerr speaking people, and approximately 200 non-Anmatyerr people, live in the Ti Tree region in central Australia where Mer Ngwurla is situated. Strong cultural traditions remain intact in Anmatyerr communities in this region of the Northern Territory.

While specific families in the Anmatyerr language group are the traditional owners and managers of Anna's Reservoir Conservation Reserve or Mer Ngwurla and the country around it, many people in the area use, or have an interest in this water place.

Locally, a table grape industry, horticultural crops, eight pastoral stations, one Indigenous Land Trust station, two roadhouses and art centres, the town of Ti Tree, and at least eight Anmatyerr communities all rely on groundwater. Proposed mines would further increase groundwater extraction.

There were strong concerns within the Anmatyerr communities about the difficulty of access to Mer Ngwurla and the environmental degradation from lack of appropriate care.

"We need to get on to our country to hunt, conduct ceremony, care for kwaty (water), swim and teach young people ... on the whole we get on well with other land managers. Maintaining this harmony is important to us..."

" Access means that roads need to be graded and maintained. Unrestricted use of water by cattle means we cannot drink the water, swim or harvest food. There are many bores in Anmatyerr country. We would like to know when, where and why bores are drilled."

" Sharing country means sharing knowledge about how water use might affect our culture. Sharing country also means making decisions together. Good relationships are built on respect for each other and working together."

The Anmatyerr voice workshopped by the Anmatyerr Water Project Team

To the Anmatyerr people, Mer Ngwurla is a place of utmost importance; a place of history, recreation, learning and Law. Anmatyerr people carry responsibilities for country. They would like to look after this rock hole properly and utilise it as a place for cultural education and awareness.

Old people have historical accounts, songs, ceremony, ground paintings and body paintings for places. With this knowledge comes the responsibility for passing it on to upcoming generations, sometimes as children's stories, other times as sacred law.

* Anmatyerr is pronounced u-mutch-er-a

To improve the Anmatyerr people's participation in management and decision making at Mer Ngwurla, the research team discussed the issues held by those with an interest in this place.

The team negotiated an agreement for the management and future use of Mer Ngwurla between representatives of the local active parties, the Anmatyerr Traditional Manager, the local pastoralist and the main local business owner.

This fact sheet outlines the background, context and process for the development of the draft Anmatyerr Agreement.

The Anmatyerr Agreement

Across Australia there are many places of great importance to Indigenous people not covered by formal management processes. Many are being lost or degraded due to environmental and human impacts.

These places may be icons to the local Indigenous people; as significant to them as the Sydney Opera House is to the people of Sydney.

While Mer Ngwurla (Anna's Reservoir) and many comparable small and 'remote' places are of utmost significance to Indigenous people, it is almost impossible for Governments and representative bodies such as land councils to negotiate management agreements for every place of significance to Indigenous people.

The Anmatyerr Agreement offers a model for managing places that may be low priority for authorities and for which there are no resources. The alternative of doing nothing means lost opportunities for cultural and natural heritage management and indigenous futures, and deep dismay to local interests.

Informal, contractual or in-principle agreements exist outside formal legislative conditions. Any motivated person or group can enter into an 'agreement in principle', a formally agreed contract; move forward together and achieve collective and individual goals.



Time spent on country includes children learning from adults.

Indigenous and non-Indigenous approaches to water management have much in common: to provide clean drinking water, maintain healthy biodiversity, and control weeds and pests.

Indeed, this option is highly desirable given the local ownership of such arrangements and their operation without external pressures or restrictions.

Local agreements between active parties can be resolved relatively quickly and lead to positive outcomes for ecological and human health, strengthening culture and harmony with other parties, and providing livelihoods and economic gain.

The Agreement for Anna's Reservoir Conservation Reserve (Mer Ngwurla) is between the active local parties. It is based on international precedents and the recommendations of many Australian inquiries and has wide application.

It places Customary Law on an equal footing with the laws and best practise management of the other interest groups. The Agreement acknowledges the rights of traditional owners and managers to manage water places and the assertion of native title rights to land and water. It also incorporates social and economic benefits.

Importantly, the Agreement is founded on respect and recognition of Anmatyerr Law and Governance.

Background to the Anmatyerr Agreement

International and Australian laws and policies state that Indigenous people have a right to look after their country and culture, and Customary Laws of Indigenous people should be respected.

The project team examined agreements made in Australia and overseas, to assess what would work best.

Canada has a 'Regional Agreement' process between Indigenous people and others who use their country and the natural resources. Customary Law is discussed and given some recognition and importantly, economic future and social benefits are central to the Agreements.

In Australia, the Tumut-Brungle Agreement in NSW between a mining company and local people is an Agreement that empowered Indigenous people and respected Indigenous culture. The local people were represented by an Indigenous owned and managed Council. The Tumut-Brungle Agreement informed the development of the Anmatyerr Agreement.

Mer Ngwurla (Anna's Reservoir Conservation Reserve) and the immediate surrounds fall under the Northern Territory jurisdiction and the Parks and Wildlife, Pastoral and Water Acts, Cultural Heritage legislation and the Indigenous Protected Areas Authority. The respective organisations with responsibilities for these laws and regulations are stretched for resources and unable to provide substantial input. The organisations and their personnel are also seen to be 'far away' by Anmatyerr people.

Swimming and camping on country provides people with opportunities to teach and learn culture and to relax with family and friends in neutral spaces.



Northern Territory Parks and Wildlife who are responsible for managing Mer Ngwurla as a Conservation Reserve under the Anna's Reservoir Plan of Management (2002), also work with the Central Land Council to negotiate joint management of Northern Territory National Parks and Conservation Reserves.

For the Anmatyerr Agreement, these two organisations weren't able to be active parties because compared to the larger and more complicated places they spent much time and resources on, Mer Ngwurla was considered too small in size, population and issues.

Formal Agreements under the Acts for Native Title, Indigenous Land Rights and Joint Management, involve governments and representative bodies. Although the two organisations were unable to contribute time or resources to the project, the remaining stakeholders were still keen to reach an Agreement and to do so outside the legislation.

The project team and the Anmatyerr people felt that there is always a way forward. Whilst Mer Ngwurla may not command Government attention, there were precedents and international and national policies that meant a solution was possible.

Anmatyerr Law and Natural Resource Management

For Anmatyerr people, country is inherited to look after and proper custodianship is regarded as essential to the survival and health of the land and its people.

Anmatyerr people in Central Australia care for their land, water, people and ancestors under the protocols and rules of Customary Law and Governance. Anmatyerr Law is regarded as bottom law and Australian Government Law as top law, because the latter always displaces the first.

This makes it hard for Anmatyerr people to look after their country the Anmatyerr way. The consequences are significant in health, socio-economic and environmental terms.

" Our Law has always provided for the values we place on water. It is the rules for men, women and country. Anmatyerr Law is strong today, but it is invisible to other people. Australian Law should respect Anmatyerr Law so we can share responsibility for looking after water."

" Anmatyerr Law underpins our culture. It has never changed the way the white man's law changes."

The Law tells us about skinship, how we look after each other and work together. Our Law is our system of government – you call it Customary Governance."

Quote workshopped by Anmatyerr people and the Water Project Team



Senior spokesman of Anmatyerr values, Eric Penangk, born Ryan's Well 1927, Merekartwey for Atwel (Bushy Park Station) and Yerramp (Honey Ant) and Kwaty (rain) dreaming man.

The 'skinship way' of relating to land and water is integral to Anmatyerr culture. Within the Anmatyerr language group are 8 skin groups.

April Campbell, an Anmatyerr woman, explains it this way,

" All land and water has traditional owners (Merekartwey) and traditional managers or caretakers (Kwertengwerl) who are designated by descent, skin and ancestral relationships. All people and country are related through their skinship."

' Skinship tells us who owns and manages country. Merekartwey and Kwertengwerl have different roles that ensure the right ways for managing country (mer) and water (kwaty) are followed. These senior leaders speak for us and we must listen."

Quote workshopped by Anmatyerr people and the Water Project Team

Responsibilities for local water places may include:

- ▶ Letting the country know we are there and staying or leaving accordingly
- ▶ Using resources, hunting and fishing appropriately
- ▶ Protecting the integrity of the country through respect and management
- ▶ Protecting sacred areas;
- ▶ Providing for a new generation and teaching them on country; and
- ▶ Learning and performing ceremonies.

“Our cultural values of water are part of our law, our skinship responsibilities, our history and our everyday lives. Everyone and everything is related.”

Quote from an Anmatyerr person

The combination of traditional owners and traditional managers or caretakers ensures the country, land, water, Dreamings and ancestors are properly cared for.

The traditional manager speaks for a place and makes decisions about that place – they have responsibilities for that place on behalf of the traditional owner.

The traditional owner is often quiet, standing behind the traditional manager, expecting the manager to do the right thing for that country.

The traditional manager for Mer Ngwurla, Eric Penangka (penangk skin group), is the person who speaks for Mer Ngwurla.

Most rock holes and springs in Anmatyerr country are named and have cultural meaning that is linked across the landscape. Much of this law is secret and considered powerful.

One of the most sacred Dreaming trails which passes through Anmatyerr country is the Kwaty or Rain Dreaming. The location, songs, paintings and knowledge of the ceremony that accompany the rain Dreaming are the sacred and secret knowledge of initiated men. During droughts in the early days of settlement, pastoralists would ask the rain maker, a senior law man, to conduct the ceremony to make it rain.

The information signage at Anna's Reservoir Conservation Reserve gives an overview of settlement but no information about Anmatyerr culture and no use of Anmatyerr language.

Anmatyerr people would like the sign to also say Mer Ngwurla and to include some cultural knowledge and significant historical stories.

Anmatyerr Customary Law and Commonwealth Law

Natural resource management for land owned and managed by Indigenous people is shaped by the legal and policy contexts at national, state, regional and local levels.

Key aspects of the national legal and policy context include: Closing the Gap; Caring for Country (Department of Environment, Water, Heritage and the Arts); Indigenous land rights; Native Title; the National Water Initiative and the National Framework of Principles for Delivering Services to Indigenous Australians (COAG 2004).

The Intergovernmental Agreement on a National Water Initiative requires that all uses and users of water include consideration of Indigenous water use.

In Australia, Indigenous Land Use Agreements (ILUA's) and Area Agreements are negotiated under the Native Title Act 1993 (Commonwealth). This means restrictions on what an agreement can include. Governments and Land Councils are required to be signatories.

In-Principle Agreements are able to recognise customary law in water management. They are an invaluable mechanism for the acknowledgement of Indigenous rights and interests especially for managing land and water places.

Whether private or not, these non-contractual agreements can include any matter of interest to one of the parties. Recognition of customary law has the greatest possibility in the field of cultural and natural resource management where there is considerable common ground between traditional Indigenous and mainstream practices.

At least five independent reports support the need to build suitable processes and governance structures that reflect both Indigenous and Australian law.

The Intergovernmental Agreement on a National Water Initiative requires that all uses and users of water include consideration of Indigenous water use.

- 1 The Review of Indigenous Customary Laws by the Law Reform Commission of Western Australia (2006) recommended “*community based self-identifying and self-organising governance structures that are developed locally*”.
- 2 The Northern Territory Indigenous Economic Development Strategy (NT Government 2005) recommended the importance of “*matching traditional governance and authority structures of Indigenous cultures with contemporary forms of sound governance*”.
- 3 The Northern Territory Law Reform Commission (2003) Inquiry into Indigenous Customary law in the Northern Territory recommended that: “*Australian Law, where appropriate should work in conjunction with Indigenous Customary Law*” and that “*Indigenous communities should be assisted by government to develop law and justice plans which appropriately incorporate or recognise Indigenous customary law as a method in dealing with issues of concern to the community*”.
- 4 The Sessional Committee on Constitutional Development (NT Legislative Assembly 1992) recommended “*recognition of Indigenous Customary Law as a source of Northern Territory law on a par with common law*”.
- 5 The Australian Law Reform Commission (1986) recommended that “*Indigenous customary law should be recognised in appropriate ways by the Australian legal system. Recognition may take different forms, however codification or direct enforcement are not appropriate*”.

In summary, legislation, guidelines, policies and recommendations from Inquiries such as the above, unanimously reinforce the need to create ways to provide for Indigenous Customary Law and water values in decision making and management processes.

Cultural water values are often threatened by the impacts of cattle and feral animals that often have unlimited access to waterholes and watercourses.



Key Findings and Recommendations

A number of Australian Inquiries and Reports have recommended that Indigenous customary laws and governance should be recognised and given equal weight to the laws of other people.

Secret and sacred laws should not have to be made public, similar to the standard 'commercial-in-confidence' principle. Nor should they have to be written down.

Local agreement-making and governance that respects customary law has the potential to create major improvements in cultural and natural resource and heritage management with social, health and economic benefits to indigenous communities

One of our main recommendations is for Indigenous groups to have their own separate culturally based organisation to give authority but not necessarily visibility to their individual law and culture. These locally operated Indigenous organisations can then liaise with other parties over matters of common or separate interest.

Principles, supported by the National Water Initiative, to embed in Water Governance Agreements:

- ▶ Local partnerships based on sharing responsibility at all levels,
- ▶ Cooperative, coordinated and flexible approaches appropriate to the situation,
- ▶ Local agreement and activity happens before lobbying for new support from external sources,
- ▶ Focus on effectiveness of actions at the local level ie. improved access for Indigenous people, and
- ▶ Ensure focus on economic participation, development of Indigenous delivered services.



The next generation of Anmatyerr traditional owners and managers working towards culturally based employment in natural resource management.

Policy Implications



Water is valued for many reasons (Law, economic, spiritual, recreational, education). Some water places are free sites or neutral spaces where people relax.

Local governance agreements can help to improve some of the big issues in Australia, including land and water management, cultural and natural heritage, reconciliation and Indigenous livelihoods and economies.

The approach has application for Indigenous groups seeking greater respect for established systems of law and governance and recognition of these systems in decision making. This is especially the case for resources such as water, land and minerals.

Water governance and agreement-making should be prefaced with the following principles.

- ▶ Codification of customary governance is not required (similar to 'commercial-in-confidence').
- ▶ Recognition of customary law by government decision makers where it does not conflict with Australian law.
- ▶ Working together to develop natural resource plans which recognise Indigenous customary law.
- ▶ Matching customary governance and authority structures with contemporary governance.
- ▶ Support for self-organising local governance structures that have balanced clan and gender representation and downwards accountability.

Research Team

The research project and team were funded by Land & Water Australia. This project is part of a wider body of work and a wider team of Anmatyerr people and others who have worked together on water issues in this region, including how cultural values can be provided for in water plans; how to give authority but not necessarily visibility to Indigenous water laws; and training and livelihood pathways in water and resource management that have a cultural basis and tangible outcomes.

- ▶ Macquarie University: Professor Donna Craig, Professor Michael Jeffery
- ▶ Northern Territory Government: Participation led by John Childs (Department of Natural Resources, Environment and the Arts)
- ▶ Independent social and environmental scientists: Dr Naomi Rea, Dale Hancock, Dr Collins Gipey
- ▶ Anmatyerr co-researchers and cultural supervisors: Eric Penangka, Tony Scrutton, April Campbell.

For More Information

The full report from this project, *Agreements that Recognise Customary Law in Water Management*, including a model agreement, is available on the Social and Institutional Research Program's website at www.sirp.gov.au

Authors to the report, *Agreements that Recognise Customary Law in Water Management*, are Eric Penangka, Josie Nabangardi and Tony Scrutton, the Traditional Managers of Mer Ngwurla and Cultural Supervisors of this Project, and Professor Donna Craig from the Macquarie University Centre for Environmental Law with social and environmental scientists Dale Hancock, Dr Naomi Rea and Dr Collins Gipey.

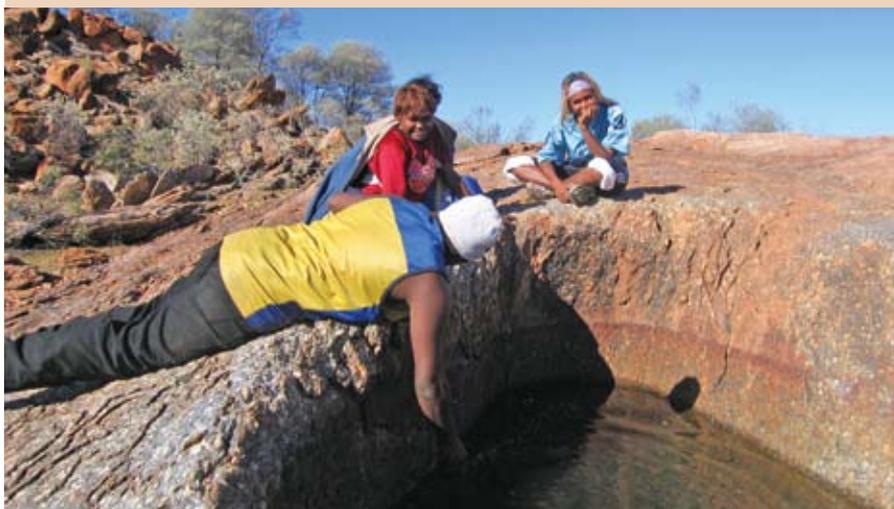
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Young Anmatyerr people engaged in natural resource management training as part of developing sustainable livelihoods; a major way of providing for cultural values.



Young Anmatyerr women participating in resource management training and learning about Anmatyerr culture and history on a local pastoral station.

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