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SLIDES: Crystalised Not Frozen: Addressing Historical Exclusion of Traditional Owners from Water

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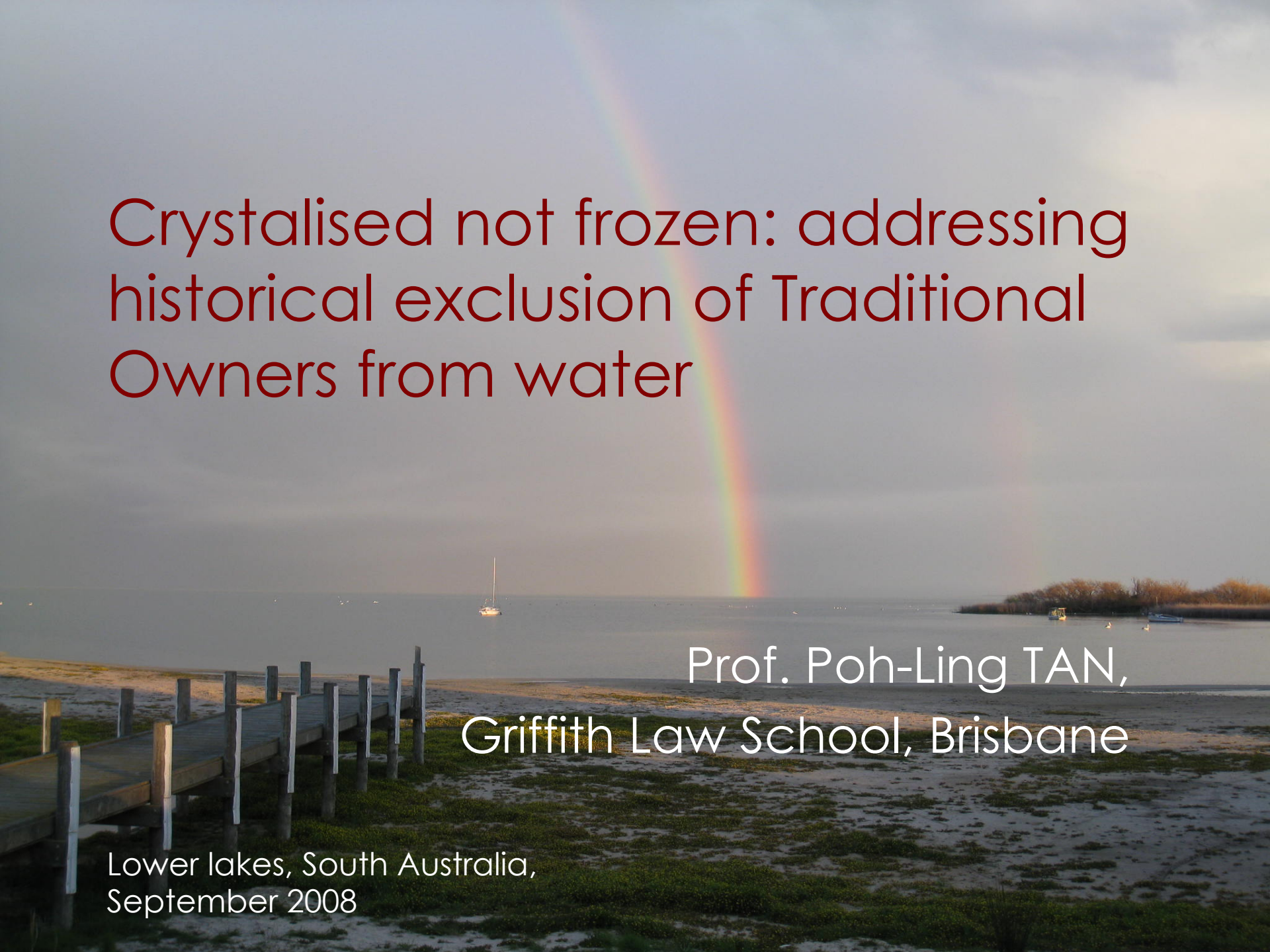


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A landscape photograph of a body of water, likely a lake or bay, with a vibrant rainbow arching across the sky. In the foreground, a wooden pier with vertical posts extends from the left side into the water. The water is calm, and a small sailboat is visible in the distance. The sky is overcast with soft, grey clouds. The overall mood is serene and natural.

Crystallised not frozen: addressing historical exclusion of Traditional Owners from water

Prof. Poh-Ling TAN,
Griffith Law School, Brisbane

Lower lakes, South Australia,
September 2008

Background

- The Crown in the right of the Australian states have vested rights to 'use, flow and control of surface and groundwater'.
- The High Court in *Mabo (No 2)* 1992 recognised pre-sovereignty notion of Indigenous land title/water use
- Followed by *Native Title Act 1993 (Cth)*
- 2 decades of reform – separation of land and water rights, environmental rights to water, water planning
- Water Act 2007 (Cth) and the MD Basin Plan 2012

Outline

- 1. Incomplete response of the native title regime**
- 2. Looking outside the NTA**
 - Queensland
 - NSW
- 3. Basin Plan issues**
 - Consultation leading up to the Basin Plan
 - Aboriginal Waterways Assessment

1. Incomplete response of the Native Title Act 2004 (NTA) regime

- Focus of NTA
 - historical traditional-cultural rights
- NT rights difficult to prove
 - Brennan CJ “the tide of history has washed away any real acknowledgement” of traditional laws and customs
 - Interpreted as needing continuing connection to land since time immemorial (Yorta Yorta case).
- Taken together with the National Water Initiative 2004 provides a re-active policy approach.

2.1 Looking outside the NTA - Queensland

Water Act 2000

- Recognises interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning s. 10
- Allows exercise of traditional activities or cultural purposes (without permit) s. 20 B

Wild Rivers Act 2005 (repealed 2014)

- preservation of natural features and ecological functions of rivers in natural or near natural condition

Cape York Peninsula Heritage Act 2007

- Requires water reserve for Indigenous purposes

WR Plan/ <i>WR Declarations</i>	Size of Reserve	Recognition of ..
2nd generation Gulf, Mitchell WRP 2007	5,000 ML in Mitchell, 50 to 17,000 ML in 7 rivers in Gulf	Economic and social wellbeing
<i>Wild River Declarations</i> , Archer, Lockhart, Stewart 2009, Wenlock 2010,	20,000 ML, from 4 rivers, larger than General reserve 3,700 and Strategic 10,200	Cape York
Wet Tropics WRP 2013	100 – 1000 ML	Cape York Indigenous reserve
3rd generation Burnett WRP 2014	1000 ML	
Warrego, Paroo, Bulloo and Nebine WRP 2016 (WITHIN THE MDB except for Bulloo)	100 ML from each of the 4 rivers	Economic and social aspirations; social and cultural values

2.2 Looking outside the NTA - NSW



Education
materials
prepared by the
Aboriginal Water
Initiative, NSW

Water Management Act 2000 (NSW)

s. 3 The objects of this Act are to provide for the sustainable and integrated management of the water sources of the State for the benefit of *both present and future generations* and, in particular:

...

(c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including:

- (i) benefits to the environment, and
- (ii) benefits to urban communities, agriculture, fisheries, industry and recreation, and
- (iii) benefits to culture and heritage, and
- (iv) *benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,*

3 different special purpose water access licences

- **Aboriginal cultural access licence (CAL)** usually 10 ML- CAL in Murrumbidgee for 2150 ML
- **Aboriginal Community Development licence***
 - Water for economic development of Aboriginal communities up to 500 ML per licence
- **Supplementary water (subcategory “Aboriginal environmental”) access licences**
Flow rules to protect Aboriginal cultural values dependent on water.

3.1 Basin Plan issues

Consultation leading up to the Basin Plan

- 450 Indigenous submissions (21 corporate) to Draft Basin plan
- Corporate submissions objected to draft plan for similar reasons
 - Cultural flows
 - Specific economic and social outcomes addressing Indigenous disadvantage

3.2 The way forward: reviews of water resource plans

Chapter 10, Part 14 Basin Plan– WRP requirements, Indigenous values and uses

- Mandatory obligation to identify objectives and outcomes of Indigenous values and uses
- “regard must be had” to the Indigenous values and uses
- May identify opportunities to strengthen the above
- Strong + mandatory emphasis on consultation
- Mandatory regard for views on cultural flows
- Retention of current protection
- Position Statement 14A – sits uncomfortably for some states



MDBA's Aboriginal Water Assessment Program- emphasis on surface water, wetlands yet ...

for Aboriginal people, the tracks and sites of Dreaming significance link surface and subsurface water sources, and reducing GW flows prevent water spirits from travelling from one point to another, thus impacting on river health.

(Victorian Traditional Owners Land Justice Group)

Conclusions

- Addressing ongoing injustice for Indigenous people require consideration of distributive aspects
- 2 states in MDB have stepped outside of NT regime to provide commercial water entitlements
- Basin Planning to step up provisions for Indigenous people, but may end up only holding the line