**Country, Climate, Colonialism (2023)**

**29 March: Pathways to Water Justice with Dr Erin O’Donnell**

[Welcome from Elder Georgina Nicholson]

JULIA: Our theme this year, of course, is Country, Climate, and Colonialism. And today I have the pleasure of introducing you to Dr. Erin O'Donnell. Dr. O'Donnell will be presenting today on cultural water for cultural economies, pathways to water justice.

And I'm briefly going to read out Dr. O'Donnell's biography for you all. Dr. Erin O'Donnell is a Water Law and Policy Specialist focusing on water markets, environmental flows, and water governance. She has worked in water resource management since 2002 in both private and public sectors. Erin is a Senior Research Fellow and Senior Lecturer at the University of Melbourne Law School. She is recognised internationally for her research into the groundbreaking new field of legal rights for rivers. Her work explores the challenges and opportunities these new rights create for protecting the multiple social, cultural, and natural values of rivers. Dr. Erin's work is informed by comparative analysis across Australia, Aotearoa New Zealand, the US, Bangladesh, India, Colombia, and Chile. She has also worked for the World Bank examining water markets and their role in water security and sustainable development.

Since 2018, Erin has been a member of the Birrarung Council, the voice of the Yarra River in Melbourne. She works in partnership with Traditional Owners across Australia on a range of projects, and in 2023, Erin will commence an ARC-funded research fellowship to explore the opportunity of treaty to address aqua nullius, increase Traditional Owner power and resources in water, and create more sustainable and legitimate settler-state water laws. Thank you, Erin. It's a pleasure and a thrill to have you here. Over to you.

ERIN: Thank you so much, Julia, and it's just such a pleasure to be here. I'm really looking forward to having this conversation with everyone here. I'm looking forward to seeing your questions come through. Let me begin by sharing my screen. Bringing up some slides. So click there. Okay, so hopefully that's coming through for everybody.

Today I'm gonna be talking about the concept of ending aqua nullius. So we are really gonna be stepping into this space of talking about what has happened to water since the British invaded Australia.

Before I get started on that, I would also like to acknowledge Country, and just to pick up on the wise words of Auntie Georgina before acknowledging that the land has been stolen, and therefore so has the water also been stolen. We're gonna be spending a bit of time talking about that today. So I acknowledge that we are meeting today on the sovereign lands of the Woiwurrung People. I pay my respect to their Elders past and present, and I acknowledge that they have never ceded their rights and obligations to care for the lands and waters. I also like to begin with this, a short extract from this beautiful poem by Ambelin Kwaymullina, a Palyku woman in Western Australia. "You are on Indigenous lands, swimming in Indigenous waters, looking up at Indigenous skies." This is an important reminder for all of us that no matter where we are, we are on Indigenous land, whether we're in the city, or out in the country, it is all Indigenous land.

So to get us into this topic today then about aqua nullius, I imagine you've all heard of terra nullius and the idea that, the assumption I guess, that the British made when they turned up, that the land belonged to no one. It's a pretty convenient assumption, and possibly the best cover for the greatest theft the world has ever seen. There are no treaties in Australia, as Auntie Georgina mentioned, yet we hope that this might be about to change. But there are no treaties, so the legitimacy of the Australian state remains contested.

Again, we've had conversations going back decades on the theme of land and land rights and the acknowledgement of terra nullius. So the Mabo case back in 1992 was really the first formal acknowledgement by the High Court of Australia that Aboriginal laws continue to persist unless they've been extinguished by specific acts by the Crown or the Australian state and society.

What it didn't really talk about was water. And water has remained sidelined as a result, through all of the native title conversations, water hasn't really gained the central status that land has had. And aqua nullius, a term that Virginia Marshall really drew to the public attention in her 2017 book, is the watery echo of terra nullius. It's the assumption that has not been displaced yet, and it is equally erroneous.

When we think about water theft, this is obviously something that has happened since British invasion, and I'm gonna give you these quotes here from Elders, from Gunditjmara people. "Stolen lands, stolen waters, and stolen authority too." This speaks to what has been taken from Auntie Evon Barker. Auntie Denise Lovett talks about, "Only through the frontier wars has that water become a commodity." So this is a reminder of the violence of the theft, the fact that it dates back to those frontier times, but it is an ongoing issue as well.

So dispossession remains a fact of life for Aboriginal people today when it comes to water. So we see Aboriginal water ownership, for instance, in the Murray-Darling Basin, being less than 0.2% of available water. In some parts of the Murray-Darling Basin, Aboriginal populations can be as high as nearly 10%. So there is clearly a significant disparity, even if you're just looking at population, which is not in any way a legitimate measure of what Aboriginal water should have. It's all Aboriginal water, it has never been ceded. This ongoing dispossession is exacerbated by water markets because it makes it incredibly expensive for Aboriginal people to try and recover any water. So it is both a factor of history, but it is also very much in the present that water is continually being dispossessed from Aboriginal people.

This sets up two really big problems for settler-state water law, and it is the assumption of aqua nullius that underpins both of these problems. So firstly, we have a legitimacy problem. I'm gonna talk more about that in the moment, but this stems from the fact that there have been no treaties, and that therefore law has a real legitimacy problem because it is still contested. If terra nullius was an erroneous and invalid assumption, then so is aqua nullius, and our water laws depend on that assumption.

There is also a sustainability problem. I don't know that anybody could look around Australia right now and see sustainable water management anywhere. That's an absolute indictment on the way the settler-colonial state has cared for water, and cared for rivers, and cared for Country. We're simply not doing anywhere near enough of a good job.

For those of you who haven't been following along in New South Wales, millions of fish have died over the past week because of poor management of rivers, and I don't know if it's possible to pick a worse thing in this situation, but one of the worst things about that is that back in 2019, there were two separate reviews that identified that mismanagement of water was a major factor in an earlier fish kill. And yet, despite the floods, despite the fact that at that time the rivers were in drought, and now they really aren't, the factors driving the fish kill have not been addressed. So aqua nullius is at the heart of both legitimacy and sustainability problems.

So let's drill into this legitimacy problem a little bit. If we look around Australia, everywhere except South Australia has a provision in the legislation that basically grants the Crown the right to use, flow, and control all water in the state. Now, South Australia doesn't explicitly state that anymore, but they still basically rely on it. So the Crown is still responsible for issuing licences, as it is everywhere in every state and territory jurisdiction in Australia. So this is contingent on the assumption of aqua nullius. Why should the Crown have the right to control all water? What is the legal basis of that if aqua nullius is contested? And I think this is gonna come up in future treaty negotiations because this is an illegitimate foundation on which we are managing water in the settler state of Australia.

So we've got unacknowledged contestation, and we've got at the heart of it, an unacknowledged legal pluralism, because everywhere in Australia, there will now be multiple forms of law. There will be the settler-state law and all of the various layers between local government, state government, and federal government. There will also be the enduring laws of Traditional Owners and First Nations people. And their laws remain, their cultural protocols remain intact. They continue to guide the way that Traditional Owners care and manage for their cultural water to support cultural economies, healthy people, and healthy Country. So by failing to engage with that legal pluralism, the state again creates that space for illegitimacy at the heart of our water laws. We've got this sustainability problem, and I flag this in terms of the fish kill. We can see again here that that's, there's another photo that I've started with over there, where we're seeing fish die, we're seeing them die in floods. We're seeing particularly native species be heavily impacted, mainly because carp, as it turns out, do a lot better in water that doesn't have a whole lot of oxygen left in it. So the ongoing mismanagement of rivers is really driving ecological destruction.

We've been through horrendous droughts. The indicators suggest we are about to flip back into an El Niño weather event over the next few years. So it's highly likely that we will go from flood back into significant drought. And of course we do have these immense floods that have caused phenomenal damage, particularly in Eastern Australia. What I find fascinating about the discussion of floods and the discussion around how do we care for and manage water differently and better is that when we had the bushfires, we did see a turn towards cultural burning, the recognition that Traditional Owners have been caring for Country, and that fire has been an active part of that, and that one of the ways you prevent catastrophic bushfire is through the careful use of fire, as supported by Traditional Owner sciences and methodologies. We haven't seen that a similar response in light of the floods or the droughts.

Traditional Owners across Australia have been managing water successfully for 60,000 years and more as Auntie Georgina mentioned. So we need to start seeing ideas of cultural water start coming into the mainstream of water use. So by ignoring aqua nullius, by failing to acknowledge it, and by failing to understand that water was held, and owned, and managed, and cared for before the British arrived, and that there has been no legitimate takeover of that water, the settler state has cut itself off from 60,000 plus years of knowledge of how water can be managed to support thriving, prosperous, healthy communities and healthy Country in Australia. So that's the sustainability problem.

Where does this leave us? So I'm gonna acknowledge here that this cultural water paradigm concept has come from the work of Melissa Kennedy. Melissa's a CEO of Tati Tati Kaiejin. She is a co-author on "Water is Life", which I'll be talking about a little bit at the end of this presentation. Melissa is also a Research Fellow at the University of Melbourne. She's a Tati Tati woman and a very dear friend. She put this diagram together to help settler people like me, like the Victorian government, understand how our understandings as settler people of the way we use water, connect with the cultural water paradigm.

So you can see here you've got two small circles, and this reflects the settler state's current understanding of water. So we have environmental water over on one side, that's water that's there for the health of the environment. We're clearly not doing a particularly good job with that, but it's there, and it has, you know, that reform has been a lot of hard work to get even as far as we have. And of course on the other side, you've got commercial or consumptive use. So water that is used for irrigation, or for industry, you can start seeing even water used for towns getting picked up on some of that because of the commercial outcomes that the towns support as well. And then you've got cultural water, which is a way of integrating all of the different ways that water supports wellbeing. And this is the fundamental difference between the settler-state paradigms of water where different uses are separated and isolated from each other, and you've got trade-offs between, say, how much water can the environment get, versus how much water can consumptive uses or commercial uses have. And there's this binary relationship as though you can only get environmental outcomes at the cost of commercial productivity, and vice versa. Cultural water says they are all interconnected, and not only healthy Country, and cultural economies are integrated, but also they're part of sovereignty and self-determination. Cultural water is about giving effect to responsibilities to care for Country. It's about demonstrating and reinforcing connection to place, and it supports emotional and spiritual wellbeing. This significant difference, this significantly more integrated vision of water, this is the opportunity if we are brave enough to overcome the challenges of aqua nullius.

So when we think about addressing aqua nullius, and this is where I really want to take this, what are the pathways to water justice? How do they start to come together? What do they look like? So this diagram, which I thought I had cited, but I clearly have not, comes from the National Cultural Flows Research Project. And it's taken from the Law Report, which was authored by Rebecca Nelson, Lee Godden, and Bruce Lindsay under the auspices of the Traditional Owner-led National Cultural Flows Research Project.

And you can start to see in this diagram how the elements of water justice can start to come together. So at the centre there we have water rights. And I talked before about the dispossession, which is both historical and ongoing. So Aboriginal people in Australia, on the mainland of Australia, own almost none when it comes to water rights. Very, very, very vanishingly small amounts. So increasing their access to water rights, even within the settler-state framing is a significant step forward.

But it's not enough, right? Water rights still trap you very much within the way the settler state chooses to manage water. So the next circle here is about influence in water landscapes. How were water landscapes cared for? And what role do Traditional Owners play in shaping that? So increasing their power and agency in shaping the way that water landscapes are looked after is that second circle.

And then thirdly, we have transforming foundations. This is a reset of the relationship between Traditional Owners and the settler state when it comes to water, and that's the kind of thing that treaty could give rise to.

So putting these things together, and they can be progressed simultaneously as well. These are the pathways that you can employ to address aqua nullius in Australia. And they are all equally important. Even though water rights still fit within the settler-state system, they increase power for Traditional Owners, they increase the ability of Traditional Owners to actually show people how they care for water, and what caring for water looks like under a cultural water paradigm. And that can help make it easier for some of the transform foundation stuff to start actually taking shape as well.

So bringing these things together, rather than seeing them as isolated pathways is really important. When we look around the world, what can we see in other places that already have treaties and how those treaties in particular are starting to tackle these pathways to water justice? Now I'm gonna acknowledge that no settler-state country anywhere in the world is doing this right or doing enough. They each have partial strategies. Traditional Owners, First Nations peoples across the world continue to resist, continue to reinvigorate their own laws and policies. They continue to care for water, and they continue to push the settler state for the reform that they need. But we can also start to see some instructive examples that might be useful in the Australian context, particularly as we begin to engage with the treaty process.

So the first place I'd like to take us to is Aotearoa in New Zealand. And everybody's probably heard about Te Awa Tupua, the *Whanganui River Claims Settlement Act* from 2017. This sent headlines racing around the world because it was the first time a river had been recognised in law as a legal person. So happy to talk a bit more about that in the questions if people are interested. But the critical thing about this is that it is a claim settlement. It is part of the treaty dispute settlement process in Aotearoa New Zealand. And the reason why Te Awa Tupua is a legal person is part of that dispute negotiation.

So in this instance, Māori claimed the entire river. They said, this is Te Awa, and under the Treaty of Waitangi, it is protected. It belongs to us. The state wasn't prepared to hand it over in its entirety. And so they created the idea that the river could own itself as a legal person. And so you've got these two really interesting juxtapositions here around Section 12 of the legislation, which talks about Te Awa Tupua as an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, all its physical and metaphysical elements. That's a really beautiful and powerful statement. And then of course you've got Section 14, which is the settler-state version. It's a legal person with all the rights, powers, duties, and liabilities of a legal person. But this is part of transforming the foundations. It's recognising that the river is alive, it's recognising that Whanganui have specific and ongoing relationships and obligations to the river, and it's giving effect to the provisions within the Treaty of Waitangi. So that's Aotearoa New Zealand.

Let's look at Canada then for an example of how to increase First Nations people's influence in water landscapes. So the correlational Yukon Water Board in the Yukon Territories is comprised of representatives from three different government structures. So you've got the Government of Canada at the national level, you've got the Government of Yukon, so both of those are settler-state government entities, and you've got the Council of Yukon First Nations. And collectively then they manage the Yukon Water Board.

But although this is an example of increasing power and influence of First Nations people in water and water management, the continued assertion of the Crown jurisdiction over water and the marginalisation of indigenous legal waters undermines this co-governance. So even when you've got a treaty, even when you've got a governance arrangement that brings First Nations voices into the decision-making space, if you are not challenging the ontologies that underpin what brings people together and frames the conversation and frames the actions, then indigenous legal orders continue to be marginalised by that process. And that obviously comes from the work of Nicole Wilson. So there's, again, there is always this tension between what is a genuine transfer of power from the settler state, as opposed to something which merely brings First Nations people into a settler-state framing.

And of course, we're gonna finish up with water rights. And the USA is one of the best examples of this since 1908, which is that Winters case that I've referenced over there. First Nations people, tribes across the United States have been able to claim water rights. Now the way the system works in the US, particularly in the Western US, you have a system called prior appropriation. And what that means is the person who can demonstrate that they've been using their water first, going way back in time. So it might go back 100, 150 years, 200, 300 years, if we're talking about tribes, the person who's got the earliest use of water gets all of their water every year, and then if there's any left over, the next person gets some and so on and so on down the line. So you only get any water if all of the people above you in time have got some of, have got their water, and there's some left.

So it's a really binary system, and that's a really important context for the Winters doctrine and what's actually happened in the United States. So many tribes now have very secure water rights because they're dated back to either their reservation or in acknowledgement of their ongoing use of the water since time immemorial, they can suddenly have the most secure rights on the system. It takes decades for this process to occur. So the United States has a really weird water allocation system in which any new uses of water, even if they're recognised as that the oldest uses on the system, have to go through what can be a multi-decadal adjudication process before you actually get the physical water that you can use.

Today in the Colorado River, which is experiencing its worst drought on record, tribes hold approximately 20% of those river basin rights. That's an underestimate because many of the tribes have not yet been through this adjudication process. They hold these water rights. That's such a significant power base. And when we think about what's happening in Australia, remember we talked about Traditional Owners in the Murray-Darling Basin only having 0.2%, and that comes from the work of Lana Hartwig and Sue Jackson. So significant difference in water rights and water ownership. And yet tribes are still, still almost entirely left out of the ongoing negotiations about the future management of water in the Colorado River as all of the states and Mexico try and make sense of what needs to happen under climate change. How do they deal with this extraordinary drought? I know there's been recently floods and things in California, but the Colorado River system remains at significant risk of having to shut down hydropower, of having to potentially turn off supplies to towns.

Traditional, tribes rather, are selling their water to towns to keep taps turned on to be good neighbours. So they've got significant power and agency, and yet they still find it extraordinarily difficult for their voices to be heard at the highest of levels where these decisions are made about water management.

So is there evidence of any of this happening in Victoria? Can we see some of these pathways towards water justice and towards ending aqua nullius actually emerging in the Victorian context? We can certainly see evidence around transforming foundations. So Victoria definitely has the furthest progressed treaty process. And so if we think about that, we've got the truth process underway through the Yoorrook Justice Commission. We've got a voice through the First Peoples' Assembly of Victoria, which are about to have their elections. And we've got a significantly advanced treaty process with the rules of the game I think have now been agreed, and so we could expect treaty negotiations to get underway anytime in the next sort of 12 to 18 months. So that's genuinely exciting, and the opportunity for transforming foundations is there.

So far, because of the nature of the conversation, water hasn't played a significant role. So we are yet to see how that might come out in the negotiation process, whether it's likely to be an early item that Traditional Owners are really interested in discussing, or whether it's something which is seen as something to be pushed off further. So the potential for that transforming foundations is there, but we're yet to see how it's gonna play out in the water context.

When we think about increasing influence in water landscapes, we can definitely see evidence of this in Victoria. And part of that is through the Birrarung legislation. So you can see there a photo on your screen of Wurundjeri-Woiwurrung Elders speaking on the floor of parliament when this legislation was passed in 2017. This was the first time that Traditional Owners had been invited into parliament to speak, and the first time in parliament that Woiwurrung language was spoken. So there's an amazing video, and I'm happy to provide the link to that one, and it's definitely worth watching. What makes this Birrarung legislation interesting is that it recognises the river as a living and integrated natural entity. This came from the leadership and advocacy of Wurundjeri-Woiwurrung people in the creation of this legislation. So it reflects their relationship with the river. They have a significant role to play in the management of the river through the Birrarung Council, of which I'm a member as well. But it's that profound shift to recognise rivers as living entities that is significant in this space. This has now been followed up through a number of different action plans, including "Water is Life" that I'll talk about towards the end of the presentation.

So the state has now committed to creating legislation to enable all waterways to be recognised as living entities and for Traditional Owners as a unique voice of those waterways. So this increasing influence in the way that water landscapes are understood, we're starting to see that ontological challenge because of the way that Traditional Owners view water and waterways, that is now starting to change at a really foundational level, the way the settler state engages with water, the way it understands water. It says water is not just a resource, it's actually far more than that, it's a living being. And of course water rights. So I'm gonna preface this by saying there has been improvement on water rights, but there's still a significantly long way to go.

So again, we know that water ownership by Traditional Owners is vanishingly low, but there has been recent improvements. So in 2020, two gigaliters on the Mitchell River was returned to Gunaikurnai people. And you can see this fantastic quote here by their former CEO, Roger Fenwick, about it being a momentous outcome for that water to be returned to Gunaikurnai people. And they can use it for any of those purposes, customary practices, cultural values, economic independence, and to heal Country. So that water is currently sitting instream in that river and at the behest of the Traditional Owners, Gunaikurnai people, that water is being left in the river to heal the river and the wetlands as it moves down through the Mitchell River.

In southwestern Victoria, just last year, 2.5 gigaliters was returned to Gunditjmara people. And again, it's for their purposes, they are choosing at this point in time to leave it in the river system to care for Country. A further 1.36 gigaliters has been set aside in Northern Victoria. This is really important because Northern Victoria is fully, or one might even say overallocated. So finding water available to Traditional Owners, and to be able to return that without buying it from other people is a really difficult thing. So that's something the Victorian state government has done. The federal government has committed to buy water in the Murray-Darling Basin. They've got $40 million on the table. That has been sitting there since 2018, and we have not yet seen a single penny of that spent. So over time, water prices have gone up. And now unfortunately, that money, that $40 million buys about half the water that it would've purchased back in 2018. So the dispossession is ongoing, even just through government inaction in these circumstances.

So to finish up, I'm going take you through very quickly then the "Water is Life" process. So this is the new policy in Victoria about Aboriginal water rights. It is a policy that I was engaged in as one of the co-authors, along with Melissa, a Tati Tati woman, and Brodey Hamilton, Gulidjan man. And Brodey's just, he's part of the Eastern Maar peoples and he's one of the people that is celebrating the native title ruling from earlier this week. So I'm just gonna take a moment to acknowledge that as well. This "Water is Life" process is the new policy for the Victorian government to, I can see someone celebrating, that's so nice. Yeah, we really should celebrate that. It was an incredibly exciting, exciting moment.

So this new policy sets out some significant commitments by the Victorian government. It also features the voices of Traditional Owners. So I'll tell you just a little bit about that in a second. But this is the first policy of its kind where you've got the settler-state voice alongside that of the Traditional Owners. So they are published together. They are published in a way that acknowledges the enduring sovereignty of the Traditional Owners alongside the settler state.

This is the slide that I'm probably not gonna spend too much time on, but we can come back to it if there are questions. But this is just a quick summary of those outcomes. And again, you can see those pathways to water justice informing the way that this policy has been designed.

So in Part 1, this is all about increasing Traditional Owner influence in water landscapes. So there's that commitment to that new legislation to recognise all waterways as living entities. You've got formal partnership agreements that are fully funded between Traditional Owners and water authorities and catchment management authorities. An increased role in the way environmental water is being managed. Public land management, so there's a Public Land Act Reform Process, which is underway in which Traditional Owners could be enabled under this new legislation to be appointed directly as public land managers. So you're stepping aside from this idea of partnership and into a direct empowerment of Traditional Owners to care for public land. And then we've got some longer-term goals there around, again, recognising Traditional Owners in law as waterway managers, as environmental water holders. This is a long-term plan, but you can see that that transition, that increase in power and agency for Traditional Owners.

Part 2 talks about water rights, and I'm not gonna go through that in too much detail, but it's basically, here are the ways the state is going to explore returning water to Traditional Owners. And here are the things that the state will do to make sure that Traditional Owners are not being immediately hit with significant fees and charges. The work of Lana Hartwig shows that in New South Wales, fees and charges have been a major factor in driving Traditional Owners to be forced to sell their water rights. So that was a really important thing that we wanted to make sure would not happen here.

So now for the really exciting bit. This is my favourite part of the "Water is Life" document. 27 different Traditional Owner groups have prepared their own statements of expectation and demand relating to water. So they acknowledge aqua nullius and they reject it. I should also note that the government side of Water is Life also acknowledges aqua nullius. Doesn't go quite so far as showing exactly what it's gonna do about it, but it is again, the first document of its kind where a settler-state government has acknowledged that aqua nullius exists and that it's a problem.

When you look around, and I really encourage all of you to go and read the words of the Traditional Owners in this document, they're incredibly powerful. They are rich, sophisticated, place-based, relationship-driven statements about what Traditional Owners want when it comes to water. And you can see common themes emerging here around sovereignty and self-determination, a holistic approach which reflects that cultural water paradigm, the importance of water for identity, creation stories. It's central to the life and livelihoods of Traditional Owners across Victoria. And then of course some really practical things about water ownership and resourcing of Traditional Owners so they can actually carry out their obligations to care for land and water. And with enormous grace, Traditional Owners acknowledge the importance of working together to protect and care for water and waterways.

This is something that I am exposed to a lot on the Birrarung Council working with Elders like Uncle Dave Wandin who speaks very eloquently about the need to walk together to heal Country. And so that's probably where I'm gonna leave it for now with this important acknowledgement that there is so much to learn, there is so much to gain for our waterways if we can just acknowledge the mistake of aqua nullius and genuinely act to address it. And so I think we'll go to questions.

JULIA: Thank you, Erin, for your presentation. We have a few questions that have come through, so I'll just start reading a few from the top. One person would like to know, "Are there any examples of water treaties "from Latin or South America?"

ERIN: So, that's a good question.

Off the top of my head, I don't think there are treaties in South America, but there are, yeah, there are other provisions that governments have made. So for instance, in Colombia, the Constitution recognises that indigenous peoples have specific rights under the Constitution. And that has given rise to the protection of the Rio Atrato, which is a river in Colombia, and the recognition of that river as a legal entity on the basis that the best way to protect the rights of the indigenous peoples who live along and dependent on that river is to acknowledge and protect the rights of the river itself. So the court, the constitutional court in Colombia define those rights as biocultural, reflecting the inherent relationships between people in place.

So I guess a treaty doesn't necessarily have to be the only way forward, but there needs to be some kind of agreement making and acknowledgement of Indigenous sovereignty. So even in those circumstances, that may not be enough, but it's, yeah, we can see different pathways emerging in some of those different areas.

JULIA: Thank you. Okay, next question. "I'm wondering about the possibilities of water justice "in relation to sea Country, "given the overlay of domestic law and international law "of the area. "Are any examples?"

ERIN: That's a really exciting question. So as you may know, there was a treaty that's just recently been signed to better protect oceans in international waters. So we're yet to see how the ratification process is gonna proceed on that, but that starts to create some real opportunities further offshore. Sea Country and its connection into freshwater management is also an area that's really vastly overlooked in the Australian context and in settler states generally.

Some of the interesting examples that I'm seeing at the moment come from Western Australia where there has been an acknowledgement of sea Country and marine protected areas that are Indigenous protected areas, and a push from that government to vest the ownership of that, of those areas in the Traditional Owners themselves. It's often a joint vesting in the Crown and the Traditional Owners. So Lauren Butterly is doing some work with other people in Western Australia on this, and it has, yeah, it has seen sea Country return to Indigenous management through those IPAs. So that's, yeah, that's an exciting space.

I am, yeah, I'd really like to see more effort from all settler-state governments across Australia to better integrate. I mean, yeah, we have enough difficulty thinking about water and land in a joint way, but to acknowledge the crucial connection between freshwater and sea Country. Yeah, it's an under-explored area.

JULIA: Okay, next question. "Could the various sections in the state and territory water acts mentioned earlier "that give relevant rights to the Crown be taken to legally extinguish prior or inconsistent traditional rights to the same water?" Do you want me to read that again?

ERIN: Yeah, no, that's okay. I can, I've got it up here. Thank you. Look, that is a really good question, and I think what we've got here is the difference between law as it stands versus law as it could or should be. So I think in the current context, I think it probably is an extinguishment, although as Aileen Moreton-Robinson reminds us, the hurdle for extinguishment should be very high. So the mere fact that the Crown is taking over control should not be enough. But the issue of those water rights to others may be the thing that actually triggers the extinguishment under the existing system. But if we acknowledge that it was never legitimate, and I think that's the unresolved issue from Mabo is that none of these legal systems that we operate under in the settler state are legitimate. So treaty has the potential to unsettle that, both literally and metaphorically, and to create a space in which any potential extinguishment could be reconsidered.

JULIA: Okay, and "What would you consider a genuine transfer of water rights? In the past, has anyone done it right?"

ERIN: So there's a kind of short and long answer there I think.

The short answer is a genuine transfer of water rights is when water rights are held by Traditional Owners or First Nations people, and they get to choose what they do with those water rights. So we are seeing some examples, so for instance, New South Wales has cultural water entitlements, but unfortunately to get access to those, you have to convince the New South Wales government that you are using them for cultural purposes, whatever that means, and that that does not include commercial uses of the water. So I would argue that in those circumstances, that's not water that's been handed back to Traditional Owners. That's water that the state is making available for Traditional Owners to use under very limited circumstances. So at the very least, you need a full transfer, that full beneficial decision-making power needs to go to Traditional Owners.

The longer answer around that is that what happens in those circumstances is that Traditional Owners are then entrapped within the settler-state system. So that may not be delivering what they need to have in place before they can use that water. So if they're not convinced that the settler state is caring for Country adequately, that may affect their ability to use that water for commercial purposes, for instance. So this is where it needs to start being integrated with the power and agency of Traditional Owners in the way that water itself is managed and cared for so that those water rights can be a genuine return rather than just, yeah, requiring them to operate as settler-state water users.

JULIA: Okay, and similar question now, "What does good implementation look like to you for 'Water is Life'?"

ERIN: So I can see that question came from Mel Kennedy. Mel, thank you so much for tuning in.

So good implementation for "Water is Life", we need urgent action. Like that seems to be the thing that's missing here. So the policy was launched last year in September. The very last targeted outcome, which I didn't get a chance to really talk about it when I put that screen up before, was that Traditional Owners should have oversight of that implementation process and the ability to hold government to account. So we're now six months in, the policy came out on the 28th of September last year. As far as I know, none of these processes have yet been created, although I know there is a meeting this week with Traditional Owners to start talking about that. And we are seeing very, very slow responses from the Victorian government when it comes to further water returns, for instance. So Traditional Owners have put in applications for water to be issued to them following all the right procedures.

And this is kind of being redebated on a first-principles basis every time this decision has to be made. So instead of saying, well, we now know how to do it, we've issued water licences for cultural use to Gunaikurnai, to Gunditjmara, so let's just keep doing that. People are starting to go back to first principles and re-interrogate, well is this really a take and use of water? And is this really the, just if it's, yeah, just get it done, I feel like. Like get out of the way and start, the state actually needs to invest in the implementation in an adequate way. And we are not seeing enough yet from the state in terms of the urgency of this issue. We know that Auntie Georgina was, couldn't be with us today because there was a funeral. It is completely appalling that Elders continue to have to wait and potentially pass away before we see significant action from the state. It's no good to keep delaying it.

JULIA: Okay, we've probably got a little bit more time for maybe one or two more questions. I have one from Zena, and it says, she's asked, "Given that all of our waterways "are interconnected, "are there any movements "for Aboriginal-run water justice collectives happening "in Australia now?" "We need to come--"

ERIN: Yeah, go ahead.

JULIA: Do you want me to keep going? "We need to come together to agitate and to be heard. "The people of the Barker are exhausted "and urgently need help. "But I see so often Aboriginal collectives are "region and state-based, not collectives across borders."

ERIN: So that's, yeah, that's a really good question. I am gonna acknowledge here as well my ongoing partnership with MLDRIN, the Murray Lower Darling Rivers Indigenous Nations. They're certainly not the only group, but they are a really strong voice for water justice, and they operate across state borders. So they bring nations together within the lower Murray-Darling Basin. So Nations from Victoria, from New South Wales, from South Australia, whose connection is to the river systems rather than to the state borders that have been imposed upon them. So that is certainly one really active space for collaborative and collective voices. I know that not every Traditional Owner group chooses to be members of MLDRIN. So this is, yeah, this is a decision for each Traditional Owner group to come to on their own, I think. But certainly there exists spaces for these things.

There's also the Committee on Aboriginal Water Interests, which has been assembled by the federal government in response to a review of the National Water Initiative by the Productivity Commission, which found, to no one's surprise, that we simply don't have the right mechanisms to drive an increase in Aboriginal power and agency over the way water is managed. So this committee brings together some of the leading thinkers from Aboriginal communities on water and water management across Australia. So there are a few different, I guess, strands to the collective management process.

There's also places like the Martuwarra, where we have the Martuwarra Fitzroy River Council, which brings together all of the native title holders and Traditional Owners along the Martuwarra Fitzroy River. They've just experienced their own extraordinarily devastating floods. So they are doing it tough right now, if anybody wants to jump on their website and give them a donation, that would be great. But so we have a few different strands to that. But love to follow up that conversation with you, Zena, and think about how we could amplify voices and maybe bring more people together.

ERIN: Oh, I think we've just lost Julia. So I'm gonna go and quickly do one more question before Julia comes back in again. If I'm just scrolling down here.

So there's a question about vulnerable groups, and particularly women and children. This is a really, really good one. So one of the projects that I did was the Cultural Water for Cultural Economies Project in partnership with MLDRIN. As part of this project, we did over 40 workshops with 20 different Traditional Owner groups. Only one of them was majority women. So like only one workshop out of the 40. So it is an issue. I know Traditional Owner groups are definitely working through that.

It's not an easy issue to resolve, but it's a really important one. It deserves a lot more attention to make sure that all of the voices are in the room. We know that water knowledge is often gendered, so making sure that both male and female identifying people are in the room for those conversations is the culturally safe way of making sure that water knowledge is being shared appropriately.

Just gonna keep going until we get people to come back. Oh no, here we go.

JULIA: Thank you Erin, so much for your time. I think we're just out of time for the moment, so we'll pause there. I wanna remind everyone that our next CPC seminar is on Tuesday, the 16th of May with Dr. Ngaree Blow, titled Health and Country. So once again, thank you so much for your wonderful presentation, breaking new ground, and great questions from everyone. Really fantastic to hear everyone's thoughts and critique. Thank you everyone and see you next time.