NAILSMA - TRaCK Project 6.2 Indigenous Rights in Water in Northern Australia

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March 2011

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Australian Government
Department of Sustainability, Environment, Water, Population and Communities
National Water Commission
Fisheries Research and Development Corporation

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TRaCK receives major funding for its research through the Australian Government's Commonwealth Environment Research Facilities initiative; the Australian Government's Raising National Water Standards Program; Land and Water Australia; the Fisheries Research and Development Corporation and the Queensland Government's Smart State Innovation Fund.

O'Donnell, Michael. Indigenous Rights in Water in northern Australia, John Toohey Chambers, Darwin, Northern Territory, Australia 2011.

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Or to find out more about TRaCK
Visit: http://www.track.gov.au/
Email: track@cdu.edu.au
Phone: 08 8946 7444
ISBN: 978-1-921576-50-8
Published by: Charles Darwin University
Printed by: Griffiths University

Acknowledgements

I would like to thank the North Australian Indigenous Land and Sea Management Alliance (NAILSMA) in particular Joe Morrison, Lorrae McArthur and Michael Storrs for the opportunity to undertake this task and their patience.

I am also appreciative of the thorough review of a draft of this work and assistance provided by Professor Lee Godden of the University of Melbourne.

In general terms I would also like to thank the many Indigenous people who over a number of years have enabled me to experience and to some extent understand their positions and thinking in relation to the important issues discussed in this report.

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Executive Summary

NAILSMA - TRaCK PROJECT 6.2 INDIGENOUS RIGHTS IN WATER IN NORTHERN AUSTRALIA

Major Findings

Introduction

1. The Indigenous worldview does not generally separate land and water in terms of rights and responsibilities. The legal recognition of the Indigenous relationship to country including water in Australian law fragments that worldview.
2. The traditional rights and interests of Indigenous peoples including in relation to water are not universally legally recognised in Australian law and when recognised at law it is of a limited nature.
3. Native title rights and land rights legislation recognise Indigenous rights in relation to water, but in different ways. For example, the NT Land Rights Act includes the land and waters of the inter-tidal zone within the freehold title. Whilst the *Native Title Act, 1993* excludes the inter-tidal zone from the definition of land. Thus there can be no right to control access by native title holders to the inter-tidal zone.
4. Natural waters are not the subject of ownership by government and land owners including native title holders. This includes the vesting of the right to the use and control of water in the Crown, government or relevant government agencies under water management legislation.
5. The control over access to water on or in the land subject to land rights or exclusive possession native title is significant and an important Indigenous right in relation to water.
6. The common law riparian rights of land owners to use water including under land rights legislation no longer exist but have been replaced by a limited form of statutory rights to access water for domestic purposes, watering of stock and the keeping of domestic vegetable gardens pursuant to local water management legislation.
7. The abolition of common law riparian rights does not affect native title rights to take and use water.
8. Native Title and Land rights constitute substantive property rights and are not only the recognition of customary rights of usage such as gathering water, hunting and fishing.

Native Title and Land Rights

9. Australian law currently recognises in certain circumstances Indigenous rights to take and use water for non-commercial purposes.
10. There is an emerging native title jurisprudence concerning a right to trade in natural resources, which potentially could include water in the future.
11. Native title law and land rights legislation recognises an Indigenous

right to control access to water but not the ownership of water.

Native Title

12. An Exclusive possession native title determination – includes an Indigenous right to control access to water but not the ownership of water and a right to make decisions about the use of the waters.
13. These rights to control access to water and to make decisions about how the waters are used are subject to three important qualifications. One, they can only exist and be legally recognised where exclusive possession native title is recognised. Secondly, are subject to existing rights of access and use of the waters conferred by or arising under a law of the Northern Territory, relevant State or Commonwealth at the time the determination or Court order recognizing native title is made. Thirdly, are subject to the grant of rights to use water by others under the *Native Title Act* 1993 in particular section 24HA.
14. Native Title with respect to water is commonly recognised as a right to access and take water, for the purposes of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs. It can include:
    - A right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters;
    - The right to have access to, maintain and protect places and areas of importance on or in the land and waters;
    - A right of access to take water for those purposes;

    These rights have been found to apply to flowing, surface and subterranean waters.

Specific impacts of *Native Title Act* 1993 (NTA)

15. The NTA makes specific provision in relation to native title rights to water in the following terms:
    - Confirms Crown or government rights to the use, control and regulation or management of water;
    - Provides for the validation of any water management legislation that was enacted between the 31 October 1975 and 1 July 1993 if it is invalid (because of the *Racial Discrimination Act* 1975);
    - Confirms "existing" public access to and enjoyment of waterways, the beds and banks or foreshores of waterways, coastal waters and beaches where native title exists;
    - The preservation of certain native title non-commercial activities in relation to water from some types of government regulation in section 211 of the Act;
    - The future act regime provides how native title rights to water can be affected or impacted upon by government and third parties - especially section 24 HA.

Section 211 of the Act - NTA

16. Section 211 of the NTA allows native title holders to access and take

and use water without the requirement for a licence and without committing an offence when conducted as part of the activities of: (a) hunting;(b) fishing;(c) gathering;(d) a cultural or spiritual activity;(e) any other kind of activity prescribed for the purpose of this paragraph.
The provision does not act as a general relief from the obligations of obtaining a licence when a native title right or activity is outside or unrelated to these listed activities. Some uncertainty exists about the full implications for the native title right to access and take water under this section.
To the extent that the provision includes "gathering" (one of the activities listed) it would include taking water for personal, social and domestic purposes and taking and using water for "a cultural or spiritual activity" then it's the case that in most native title determinations the provision will be applicable in a practical sense. This is so as the class of activity as described in section 211 must be carried out for "personal, domestic or non-commercial communal needs".

Future act regime - section 24 HA– how you affect or approve new developments where native title may exist - section 24 HA deals with rights to manage and use water

17. In relation to new water management legislation and the grant of rights to take and use water there are minimal procedural rights applicable to the holders of and claimants of native title rights and interests in water. These are:
    - Government is under a non-legally binding responsibility to provide notice and an opportunity to comment before the grant of a licence to take and use water is made to a third party;
    - The grant does not as a matter of law extinguish native title but the native title is effectively totally suspended during the term of the licence;
    - Just terms compensation is payable for any adverse effects upon the native title. Compensation and the native title must be separately proved and does not automatically follow the grant of the licence to take water.

Land Rights in Queensland and Northern Territory

Queensland

18. *The Aboriginal Land Act 1991*(Qld) (ALA) and its equivalent the *Torres Strait Island Land Act* 1991(Qld) provide for the grant of an inalienable freehold title or a perpetual or fixed term lease.
    - The rights to use water that come with the grant of title under the ALA are those statutory rights provided for under the Queensland Water Act that apply to an owner or occupier of land without the need for a licence or legal authority under that Act.
    - These are rights to take and use water by an owner of land adjoining a watercourse, lake or spring for watering stock and

domestic purposes. An owner of land includes an occupier of the land, which means a person in actual occupation. This therefore includes the residents of ALA land. Importantly, in addition an owner or occupier may take "overland flow water" generally and that collected in a dam for the same purposes.

- Other rights to take and use water must be granted under the *Water Act* 2000 and the owners of ALA land have a statutory preference in that regard to obtain a licence to take and use water from and on that land.

Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)

19. The ALRA provides for the grant of an inalienable freehold title held by an Aboriginal Land Trust. There are 4 aspects to the Indigenous rights to water that flow from the Act and the form of title: Firstly, statutory riparian type rights to use water:

    - for domestic purposes;
    - for drinking water for grazing stock on land; and for
    - irrigating a garden (not exceeding 0.5 ha – part of the land and used solely
    - in connection with a dwelling on that land.

    Secondly, to take and use water for all purposes consistent with Aboriginal tradition (without the need for a licence under the NT *Water Act 1992*).Thirdly, to control access to water on Aboriginal land via the permit system, and Fourthly, to approve water related developments via section 19 of the Act.
20. Amendments to the *Aboriginal Land Rights (Northern Territory) Act* 1976 in recent years have had little practical impact on Indigenous rights to water.
21. The Blue Mud Bay case in the Northern Territory provides for Indigenous control over access to the waters and land of the inter-tidal zone but only in relation to grants of freehold title made under the *Aboriginal Land Rights (Northern Territory) Act* 1976 in the Northern Territory. It does not apply in relation to determinations of native title.

Western Australia

22. There is no Land Rights legislation in Western Australia and rights to traditional land and water are available only through native title.
23. The *Aboriginal Affairs Planning Authority Act* 1972 and the *Land Administration Act* 1997 - provide for the creation and administration of Crown Reserves for the use and benefit of Aboriginal inhabitants. These Acts do not create or recognise rights in relation to water for or on behalf of Indigenous people. They do create legal mechanisms by which Indigenous inhabitants can seek to protect or regulate the management and use of water on these reserves.
24. All of the large reserves in the Kimberleys are Part III reserves under

the *Aboriginal Affairs Planning Authority Act* 1976. An entry permit to access the reserve and the water on that reserve is required. The entry permits are granted by the State Minister for Indigenous Affairs or his/her delegate. The actual grant of a license or authority to take water on such a reserve is subject to the approval of the Aboriginal Affairs Planning Authority (now the State Department of indigenous Affairs).

25. Aboriginal inhabitants of such a reserve are able use the water on the reserve and indirectly affect the use and management of water through the entry permit system (they are to be consulted concerning access) and the legal authority of the Department of Indigenous Affairs outlined above.

Part C - Legislation that recognises Indigenous usage or traditional usage of land and waters

26. These usage rights are:
    - The provision of access to and use of the resources of land and waters on pastoral leases (in WA and NT and other crown leases in the NT);
    - Access to waters for traditional use and fishing purposes (WA, NT & Qld);
    - Access to and use of land and waters for traditional purposes and taking of flora and fauna from certain crown lands including national parks (WA, NT).

    The characteristics of these usage rights are:

    - not dependent on the legal recognition or proof of native title or traditional ownership - they are freestanding statutory rights, as it were;
    - generally only recognised for "subsistence" and not for commercial purposes;
    - generally apply to those with an entitlement in accordance with Aboriginal tradition, except in Western Australia

Indigenous Heritage Protection Legislation

27. Indigenous specific heritage protection legislation applies to areas and sites of significance that includes water, although there is some doubt that an area or site can encompass subterranean water with no connection to the surface in all legislation. The statutory definitions and terms of such legislation are inadequate to protect Indigenous heritage that consists of water including the use of the words area and site. This should be remedied.
28. Indigenous heritage protection legislation doesn't generally create or recognise legal rights with respect to Indigenous people – except in Queensland, which doesn't relate to water.
29. Indigenous Heritage legislation applies to all forms of land tenure including water on and in that land in Australia regardless of who holds

or owns the title.

30. The Indigenous specific legislation at a Federal and provincial level is notable for one major difference. At a State and Territory level it is "blanket protection" legislation. That is, the relevant legislation makes it an offence to affect, destroy or desecrate an Indigenous site or area, although the definitions in each jurisdiction's legislation are different.
31. The Commonwealth Act - the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* (ATSIHP Act) allows the Federal Minister to make an order/declaration after an application is made to protect an area or object that is of significance to Indigenous people. It is generally known as "last resort" protection and is discretionary only.
32. The protection afforded in all Indigenous heritage specific legislation is ultimately discretionary in the sense that a responsible Minister can authorise destruction or desecration of a significant site or area that includes or consists of water.
33. The ATSHIP Act applies to an area of water or area of land including the water in or on that land that is significant in accordance with Aboriginal tradition. It only applies to protect such an area when the responsible Minister makes a declaration under the Act.
34. The EPBC Act heritage protection provisions provide that places of national heritage can include the protection of Indigenous heritage that includes water or areas of water. The application of the Act to water is broad as the definition of land includes any body of water, whether flowing or not and land includes the subsoil. This includes Indigenous heritage that consists of water on world heritage properties, national heritage places, commonwealth heritage places and wetlands of international importance under the Ramsar Convention.
35. The EPBC Act heritage protection provisions are a protective statutory measure for heritage conservation purposes controlled by the responsible Minister. Inclusion on the National Heritage list and other heritage registers and decision making about any significant impacts on that place is subject to the discretionary decision making powers of the Minister.
36. The Queensland legislation provides the most comprehensive protection at a state or Territory level as it is based on an area not site and includes both contemporary and traditional values. The Act provides for two different types of legal liability. Firstly, and uniquely it creates a general duty of care (and associated cultural heritage duty of care guidelines) to ensure that an activity does not harm Aboriginal cultural heritage and secondly makes it an offence to "harm" Aboriginal culture. A breach of the duty of care incurs a civil monetary penalty. A person who knowingly or ought to have reasonably known that it is Aboriginal cultural heritage and causes harm is subject to a monetary penalty and if the area is registered also subject to a maximum of two years imprisonment.
37. The NT Act is notable as it provides for a statutory right of access by Aboriginals to sacred sites in accordance with Aboriginal tradition regardless of the land tenure where the site is located; also a right to cross neighbouring property (after due notice to the owner) to access a

sacred site as permitted by Aboriginal tradition, to perform functions under the Act, to prepare an application for a declaration under the Federal ATSHIP Act or for the purposes of a land claim

38. ALRA prohibits any person from entering or remaining on land (which includes water on the land) that is an Aboriginal site anywhere in the Northern Territory, not only Aboriginal freehold land under the Act. The Act makes it an offence to do so.

Environmental legislation

39. General environmental legislation applies to Indigenous interests in water in two senses. One it acts as a protective measure to protect the quality of waters as part of the environment and secondly along with water legislation can affect the conditions upon which waters can be used in any development. One aspect seeks to protect water as part of the environment and preserves social, cultural and heritage values and the other to set conditions for economic development. Indigenous interests in water clearly extend to both areas.
40. Queensland is the only provincial jurisdiction in northern Australia that has a specific focus on Indigenous interests in its environmental protection legislation. In that it names and includes specifically Indigenous cultural and heritage values within the values that should be taken into account. This includes the cultural and spiritual values of water. The other jurisdictions do this generically but not specifically.
41. The *Coastal Protection and Management Act 1995* (Qld) - provides for coastal management plans – that recognize traditional associations and obligations to land and water and involvement of Indigenous people in management of their cultural resources on land and water. It applies to Queensland waters to the high water mark from the landward side and includes wetlands of a freshwater or saline nature and all areas to the landward side of coastal waters in which there are "physical features, ecological or natural processes or human activities that affect, or potentially affect, the coast or coastal resources".

42. The *Cape York Peninsula Heritage Act, 2007*

- provides for the protection of Indigenous cultural and heritage values in water where areas of international conservation significance are declared;
- establishes a process for approval of economic development activities being agriculture, animal husbandry, aquacultural or grazing activities which involve the use of water in approved community use areas; and
- establishes a requirement for an Indigenous water reserve in a wild river declaration or a water resource plan under the Water Act, 2000 for the purpose of helping indigenous communities in the area achieve their economic and social aspirations.

43. *Wild Rivers Act 2005* (Qld)

The primary purpose of the *Wild Rivers Act* (WRA) is stated to be "to

preserve the natural values of rivers that have all, or almost all, of their natural values intact. The Act is a particularly powerful piece of legislation in two broad senses. Firstly, that its over-riding purpose is to maintain a high level of environmental protection of the declared rivers, their catchments and surrounding areas. This protection is not subject to the normal balancing act involved between protecting the environment and approving developments that meet the general social and economic needs and aspirations of the community.
Secondly, the affect it has on other legislation in the state. The publication of a notice of intent by the Minister to declare a wild river area affects a freeze on applications under the *Water Act, 2000* for rights to take water and works involving the use of water; certain approvals under the *Vegetation Management Act, 1999* in a high preservation area; and some under the *Mineral Resources Act 1989*.

44. The effect that the WRA has on Indigenous interests and rights in relation to water are potentially threefold. Firstly, in relation to native title - there is no affect – the legislation says so (see the WRA and Acts Interpretation Act). Although if a native title holder wishes to seek development approval (like any other type of landholder) to undertake a commercial activity that is inconsistent with a wild rivers declaration then they will not be able to so. In this aspect their ability to develop their land and waters is restricted even though the native title rights and interests are not strictly affected.
45. Secondly, in relation to land rights – freehold titles held by Indigenous people for example under the *Aboriginal Land Act, 1991* is affected and restricted according to the WRA when a river is declared and thirdly it maintains the Indigenous water reserve for economic and social purposes mandated by the Cape York Peninsula Heritage Act 2007 but may limit the economic use of the water.

National Water Initiative (NWI)

46. Implementation of the National Water Initiative with respect to Indigenous interests is incomplete and not fully reflected in water management legislation in all jurisdictions.
47. At the legislative level there is a complete lack of implementation of the Indigenous provisions of the NWI in Western Australia and the Northern Territory and there is partial compliance in Queensland. By the "legislative level" I mean the main water management legislation in each jurisdiction. There are some encouraging signs in both the Northern Territory and Queensland in respect of recent statutory water plans.
48. Queensland's implementation is the most advanced as it provides for recognition of Indigenous interests in its water management legislation and partially implements the requirement to meet Indigenous economic needs from the consumptive pool, via the Cape York Peninsula Heritage Act 2007.
49. There is no recognition of native title rights to take and use water for non-commercial purposes in water plans or water management

legislation in any jurisdiction (contra clause 53 of the NWI).

50. There is no accounting for native title water use in water plans, although some plans include Indigenous subsistence use in the environmental allocation.
51. The NWI includes a requirement for an Indigenous allocation of water for commercial use and this is not widely recognised nor implemented (paragraph 25 ix) of the NWI.

Implementation of NWI

52. The most effective way to facilitate complete implementation of the NWI is to include the Indigenous access provisions within the terms of local water management legislation in a mandatory form.
53. The provision for guidelines or a local water agreement to be agreed between traditional owners and government as to the local rules in any water plan. This should include governance issues relevant to local circumstances and shared responsibility with government for the management of the water resource in a particular area if deemed appropriate. This approach maximizes the ability of water plans to reflect Indigenous recognition from an Indigenous viewpoint and not only the disaggregation of interests, water and land inherent in the COAG water reform process. It provides a specific strategy for achieving indigenous access to water that incorporates indigenous social, economic, spiritual and customary objectives.

Proposals for revision of water law in northern Australian jurisdictions

54. These are primarily the completion of the implementation of the NWI, the establishment of a Strategic Indigenous Reserve (SIR) and the recognition of the right to a cultural flow in water planning. The practical and legal details of an SIR and right to a cultural flow remain to be worked out which constitutes a significant barrier to the effective implementation of both concepts.

Strategic Indigenous Reserve (SIR) – consumptive pool

55. There is an emerging consensus concerning the need to establish an Indigenous specific allocation from the consumptive pool and this is a means of satisfying the NWI requirement to grant water access entitlements to address indigenous needs (clause 25 iv). Significant policy questions remain to be resolved including:
    - How will the allocation amount/percentage of the consumptive pool be calculated?
    - Who holds the water allocation and/or water access entitlement/s?
    - Should only legally recognised traditional owners under land rights legislation or native title receive the benefits of such an allocation?
    - Where systems are fully allocated, how can local Indigenous groups acquire an allocation from the consumptive pool? (Will

they, for example, need to buy licences in the market through an Indigenous water trust as proposed by some Indigenous groups?)

56. One method by which the amount of water for the reserve could be determined is to establish criteria in the Act that take into account in the water plan area:
    - the percentage of Indigenous land ownership/interests;
    - that land ownership is not the only criteria for access to a water entitlement and that a minimum amount apply in such circumstances;
    - the existing entitlements held by Traditional owner interests be taken into account;
    - the extent of Indigenous need and disadvantage in the area;
    - a cultural flow component to maximise Indigenous engagement in water management;
57. The reserve could be accessible by the grant of licenses (entitlements) at no charge that are saleable as a temporary trade only. This has the additional benefit of preserving the reserve for Indigenous benefit and allowing the government to apply a "use it or lose it" policy in the water trade market place if it wishes. Guidelines concerning the grant of the license/s should be developed with the local community and recognised in regulations. This would cover issues such as whether the licence is held communally and/or by individual and corporate entities.

Water Trust

58. The establishment of a Water Trust to ensure that Indigenous people in over allocated plan areas can purchase water access entitlements and hold them on trust if needs be pending the finalisation of local plans to use the water allocated. These can be created at the local community level and recognised in the regulations.

Right to a cultural flow in water planning.

59. The inclusion of a right to an Indigenous cultural flow as an integral part of water planning should be mandated in water management legislation and will facilitate compliance with the NWI.
60. An Indigenous cultural flow (given its clear relatedness to a truly sustainable environmental flow) should be primarily specified in water management legislation as a separate reserve in connection with the allocation to the environment and not subject to licensing. The Strategic Indigenous Reserve would be primarily for economic use but could also be used to support social and cultural values if thought appropriate by the Indigenous group concerned. This also provides "some" flexibility in terms of recognising the unity of the Indigenous view of country.

Legal Implications of water plans in NT and WA

61. Water Allocation plans do not affect native title rights to take and use water for non-commercial purposes nor the native title right to control access to water in exclusive possession determinations.

62. The legal implications of water allocation plans depend upon their legal status and the content of the plan itself. Water Allocation Plans are legally binding in the Northern Territory and Queensland but not in Western Australia. For example, the potential recognition of a Strategic Indigenous Reserve in the Katherine Tindall Aquifer plan is mandated by that legally binding plan, though not required by the NT water management legislation.
63. The water management legislation in Western Australia and the Northern Territory as it currently exists does not preclude the recognition of commercial and non-commercial Indigenous specific rights in a water allocation plan but essentially leaves its inclusion or not as a good will measure.

Water Markets

64. It has been estimated that approximately 30% of the land in northern Australian is "owned" by Indigenous peoples. The legal control over access to water on the land held by Indigenous peoples is a significant factor in the development and approval of water markets at a practical level in the future.

Terms of Reference

NAILSMA – TRaCK RESEARCH PROJECT 6.2 INDIGENOUS RIGHTS TO WATER

The aims of the project are to:

1. Review and analyse the manner in which existing State, Territory and Federal law treat Indigenous interests in water

2. Examine the compatibility of present State and Territory law to the National Water Initiative, particularly as it relates to Indigenous interests and rights in water or assets affected by water management.

3. So far as possible, consider implications of proposals for revision of water law in northern Australian jurisdictions, especially provisions under consideration for treating Indigenous interests and including potential for Indigenous allocations from the consumptive pool.

4. Consider implications of recent and proposed amendments to the Aboriginal Land Rights (Northern Territory) Act for Indigenous interests in water.

5. Where practicable and useful, illustrate analysis with at least one existing or emerging water allocation scenarios (e.g. the Katherine Water Allocation Plan) and their legal implications for owners of Indigenous lands and holders of native title interests within water allocation districts.

6. Examine implications of recent court decisions, including the High Court's (August 2008) decision on Blue Mud Bay.

7. In conjunction with economic studies of the role of markets in management of water entitlements, consider the legal implications of markets for Indigenous interests and rights.

Introduction

This Report consistent with the terms of reference only deals with the three provincial jurisdictions in northern Australia being Queensland, the Northern Territory and Western Australia. Federal law is also included to the extent that it is relevant. For example, the *Native Title Act, 1993*, which applies through out Australia.

The Northern Territory is self-governing although not a state within the Commonwealth of Australia. The Federal Parliament retains primary legislative power in relation to all areas of governance under the Australian Constitution. There are Federal laws that apply only in the Northern Territory that are of direct relevance to this Report such as the *Aboriginal Land Rights (Northern Territory) Act, 1976*.[1]

The report only deals with onshore waters and not the seas or marine waters. It is primarily concerned with water or "freshwater" on and in the land ; rivers, creeks, lakes, subterranean waters and the like.

As is appropriate in an introduction I have decided to make some preliminary comments that will hopefully assist in an understanding of the material I have written on each of the terms of reference in this Report.

These comments cover the following issues:

- the limitations of the recognition of Indigenous rights in the Australian legal system;
- relevant international standards;
- the difference between land rights and native title in Australia; and
- definitional issues in relation to water and this report; and
- a description of an Indigenous perspective in relation to water;

I have also included in a substantive and not preliminary manner a separate section I have entitled "The related issues of Ownership, Vesting of Natural Waters in the Crown and riparian rights". I have done this because an understanding of the legal position concerning the "ownership" of natural waters is fundamental to also understanding the legal recognition of Indigenous rights to water in the native title and land rights context. It also assists to understand the new Indigenous specific statutory rights to water that exist in some jurisdictions in water management and heritage legislation.[2]

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1 The Australian Constitution s122 – the Territories power.

2 For example, there is an emerging trend to recognise indigenous use of water for commercial purposes in water plans, which in the Northern Territory and Queensland is subsidiary legislation and therefore legally binding. In Queensland the *Cape York Peninsula Heritage Act, 2007* (s 27(2)) mandates that water plans and any wild river declaration in that region must provide for a reserve of water for the benefit of

Limitations upon the recognition of Indigenous rights in the Australian legal system

I am not an Aboriginal or Torres Strait Islander person but have a number of years of practical and policy development experience working with Indigenous people in Australia as a lawyer. I make this comment as the title of this research concerns Indigenous Rights in water in northern Australia. So I write from the perspective of a legal practitioner in the Australian legal system and with an understanding of those Indigenous rights currently recognised within that system.

In other words these are Indigenous rights in water as the Australian legal system has been prepared to recognise and conceptualise them to date. Necessarily therefore they are not rights in water as Indigenous people recognise, conceptualise and practice them in accordance with their own law.

The traditional laws and customs of Indigenous people continue to exist regardless of whether formal legal recognition takes place under Australian law.

As some commentators have now pointed out in relation to the law of native title in Australia a useful analogy to understand this proposition is the concept of a "recognition space" – a space where the two laws meet. This space is of a limited ambit to Indigenous peoples in the sense that the recognition of the laws and customs of Indigenous people is of a limited nature. Noel Pearson was the first to write about this concept in Australia in the following terms:

> Fundamentally, I proceed from the notion that native title is a 'recognition concept'. The High Court tells us in Mabo that native title is not a common law title but is instead a title recognised by the common law. What they failed to tell us, and something which we have failed to appreciate, is that neither is native title an Aboriginal law title. Because patently Aboriginal law will recognise title where the common law will not. Native title is therefore the space between the two systems, where there is recognition.
>
> Adopting this concept allows us to see two systems of law running in relation to land. This is a matter of fact. No matter what the common law might say about the existence of native title in respect of land which

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Indigenous communities for economic and social purposes. In NSW, there is provision for cultural licences to use water although the provision is not Indigenous specific (*Water Management Act, 2000* (NSW) s66 (3A) (k)). There is some Indigenous specific recognition in some water sharing plans in NSW for cultural and economic purposes. See Behrendt, J. and Thompson, P. 2004. The recognition and protection of Aboriginal and interests in New South Wales rivers. *Journal of Indigenous Policy,* 3: 37–140 at 101-107.

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> is subject to an inconsistent grant, the fact is that Aboriginal law still allocates entitlement to those traditionally connected with the land subject of the grant. Aboriginal law is not thereby extinguished because it survives as a social reality. It is fictitious to assume that Aboriginal law is extinguished where the common law is unable to recognise that law.[3]

The High Court in *Fejo v Northern Territory* one of the early cases to reach it after the *Mabo* decision recognising native title in Australia for the first time unambiguously made this clear when considering the effect of the grant of a fee simple (freehold) title on native title:

> Native Title is neither an institution of the common law nor a form of common law tenure but it is recognized by the common law. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title. And yet the argument that a grant in fee simple does not extinguish but merely suspends, native title is an argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection.[4]

The High Court jurisprudence in relation to the recognition of native title both in terms of the requirements of proof to establish legal recognition and the legal rights that constitute native title have become increasingly difficult, onerous, limited and restrictive. This has led to almost universal criticism from Indigenous people and commentators.[5] A simple example, being the lack of recognition of native title commercial rights although as will be discussed a native title right to trade has been recognised by the Courts but has not been considered by the High Court of Australia to date.

At this time there is no recognition of any native title rights to use water for commercial purposes with rights to water generally being in the following terms:

- A right to take water, for the purposes of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs;[6]
- A right to control access to water and make decisions about the use of natural resources including water where there is an exclusive possession determination of native title.

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3 Pearson, Noel "*The Concept of Native Title at Common Law*", 15 June 1996 accessed http://www.capeyorkpartnerships.com/downloads/noel-pearson-papers/concept-of-native-title-at-common-law-150696.pdf at 2.

4 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46].

5 For example, see Pearson, N "The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta" *7 Newcastle Law Review 1 2003-2004*.

6 *Mark Anderson on behalf of the Spinifex People v State of Western Australia* [2000] FCA 1717

Yet despite this because of the procedural rights in the *Native Title Act, 1993* (NTA) many commercially beneficial agreements have been negotiated that benefit those Indigenous people involved in native title proceedings. Although the specific procedural rights in relation to water in the NTA are basic.[7]

There is an emerging jurisprudence in relation to a native title right to trade in northern Australian cases and the recognition at a statutory and policy level of an Indigenous specific right to a share of the consumptive (commercial) pool of water in water planning processes in northern Australia.

There is also a significant increase in the generally non-proprietary rights based recognition of Indigenous cultural and heritage interests. This includes the potential protection of Indigenous interests in water in various forms of heritage and environmental protection legislation that has increasingly emerged since the recognition of native title in Australia.

Needless to say water is also an important economic commodity and will be increasingly recognised as such within the context of Indigenous rights both domestically and internationally.

The National Water Commission in 2009 recommended that Indigenous economic interests should be "more effectively" incorporated into water planning at a State and Territory level.[8] Specifically the Commission wrote:

> Jurisdictional processes should also make clear how Indigenous groups can pursue their legitimate economic objectives.[9]

In northern Australia this has begun to occur in the Northern Territory and Queensland.

International standards

The *United Nations Declaration on the Rights of Indigenous Peoples*[10] is the most recent and significant manifestation in international law of the modern trend to recognise Indigenous rights including in relation to water. It was originally adopted by the General Assembly of the United Nations on the 13 September 2007 and approved by the Australian Government in 2009.

The Declaration at this time is not legally binding. The following view expressed by Justice Kirby in *Wurridjal* a case concerned with the Northern Territory Emergency Response in the High Court in 2009 summarises this

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7 *Native Title Act, 1993* s 24 HA.

8 National Water Commission 2009, *Australian Water Reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative*, NWC, Canberra at vii.

9 Ibid recommendation 1.4 at page 27.

10 Available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

trend in international law:

> Relevant sources of international law recognise the general right to property. Specifically, there is a growing body of international law that recognises the entitlement of indigenous peoples, living as a minority in hitherto hostile legal environments, to enjoy respect for, and protection of, their particular property rights. There is also express recognition of the cultural, religious and linguistic rights of indigenous peoples, including in United Nations treaties of general application to which Australia is a party. Commonly, such cultural, religious and linguistic rights are directly connected to the land of indigenous peoples, warranting protection of their property rights.[11]

The *Declaration on the Rights of Indigenous Peoples* relevantly states with respect to Indigenous people and water that there is a right:

- to maintain and strengthen their spiritual relationship with their traditionally owned territories and waters (Article 25); and,

- to approve the commercial use and development of water on their traditional territories. (Article 32.2)

Specifically, in relation to water and Indigenous people the United Nations Committee on Economic, Social and Cultural rights that monitors the International Covenant on Economic, Social and Cultural Rights has observed:[12]

> 16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.
>
> In particular, States parties should take steps to ensure that:
>
> (d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water;

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[11] *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009) at [269] and fn 383.

[12] SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenanton Economic, Social and Cultural Rights) available at (accessed 14/7/10). http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?Opendocument

There are many other such references. Ultimately Indigenous rights to water are seen as an incident of the principle of self-determination of Indigenous peoples – a principle seemingly no longer part of domestic Australian policy yet still at the forefront of international law. For instance, the following clause is common to the Covenants on civil and political rights, economic, social and cultural rights and the UN *Declaration on the Rights of Indigenous Peoples*:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[13]

Adherence to these standards in relation to Indigenous peoples' and water within Australia in terms of government policy and legislation will increasingly constitute the benchmark in future years. The *National Water Initiative* and State and Territory water management legislation have a long way to go in this respect.

The difference between land rights and native title in Australia

The words "land rights" are often used in the literature and general public discussion to describe the rights and claims of Indigenous peoples to their traditional land and waters. Many commentators use the words native title and land rights interchangeably and without differentiation.

In Australia, that can be quite misleading in a legal sense. As land rights in the form of legislation at a Commonwealth or State or Territory level is the grant of rights under statute from the Crown - an inalienable freehold title (generally) with associated statutory rights to or for the benefit of traditional owners.

In the Northern Territory the name of the Act includes the word land rights - the *Aboriginal Land Rights (Northern Territory) Act, 1976* (Cth). Whereas, native title is not a tenure granted by the Crown but a form of title based on the laws and customs of the particular Indigenous society. It has been described as sui generis or unique and is legally *recognised* by a Court and *not granted* by government under the *Native Title Act, 1993*.

> Native Title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title.[14]

This is an important philosophical and political difference to some

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[13] Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, social and Cultural Rights (IESCR) and Article 3 Declaration on the Rights of Indigenous Peoples (subject to Article 46 concerning the territorial integrity of sovereign states).

[14] *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46].

Indigenous people. Despite the irony that land rights legislation is generally significantly a legally stronger position for traditional owners than a native title outcome.

The most useful example of the problem that can arise when this differentiation is not made can be seen in the Blue Mud Bay case - *Northern Territory of Australia v Arnhem Land Trust*, which is looked at in detail in section 6 of this report. The High Court confirmed that traditional owners had control over access to the waters of the inter tidal zone where a grant of freehold title had been made under the *Aboriginal Land Rights (Northern Territory) Act, 1976* (ALRA) over this area, that is to the land in the inter tidal zone.

These indigenous rights to water or more correctly control over access to this area and the waters therein arise solely because of the Land Rights Act provisions. The outcome in the Blue Mud Bay case it is not a precedent for native title outcomes within Australia.

Definitional issues in relation to water

This report is concerned with inland waters or "freshwater" if you like, although obviously not all waters inland are fresh in the sense of not saline. Clearly underground or subterranean waters are often not fresh or potable in this sense. This report is not dealing with the seas – the saltwater except where it forms part of the Terms of Reference, for example in Section 6 where an analysis of the Blue Mud Bay case is required. It is useful in my opinion to conceptualise where water exists in relation to land for the purposes of this report in the following categories – surface water, flowing waters and subterranean waters. To quote from Professor D.E. Fisher:

> Broadly speaking there are three relevant sets of circumstances for water. The first is where water happens to lie on the surface of land or flows across the surface of land in a haphazard and indiscriminate way. The second is where water flows across, or perhaps through, the surface of land in a relatively clearly defined and identifiable channel. The third circumstance is where water flows, or is located, underground.[15]

Again there is an important legal difference between native title law and land rights legislation in the Northern Territory, which also affects the current legal recognition of Indigenous rights to water. This revolves around the definitions of land and waters in the respective legislation. As mentioned the word land in the ALRA in the Northern Territory applies to the inter tidal zone "bounded by the low water mark."[16]

The *Native Title Act, 1993*[17] uses the following definitions of land and waters:

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15 Fisher, D.E. *Water Law* LBC Information Services 2000 at 64.

16 *Gumana v Northern Territory of Australia* [2007] FCAFC 23 at [87]. Also see *Risk v Northern Territory* 210 CLR 392.

17 *Native Title Act, 1993* s 253.

> *land* includes the airspace over, or subsoil under, land, but does not include waters.
>
> Note 1: Because of the definition of ***waters***, not only rivers and lakes etc., but also such things as the bed or subsoil under, and airspace over, rivers and lakes etc. will not be included in *land*.
>
> Note 2: Because of the definition of *waters*, the area between high water and low water will not be included in *land*.
>
> *waters* includes:
>
> (a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or
>
> (b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in paragraph (a)); or
>
> (c) the shore, or subsoil under or airspace over the shore, between high water and low water.

There are two important issues that arise here. Firstly, under native title law the "foreshore" or inter tidal zone are regarded as waters and not land for the purposes of the *Native Title Act, 1993*.[18] Secondly, in relation to inland or freshwater these natural waters are not regarded as part of the land for the purposes of the *Native Title Act, 1993.* This is different to the common law position in relation to land, which generally regards water that exists on or in the land as part of the land, even though it is not capable of ownership as part of the land.

These differences are not relevant in Western Australia where there is no land rights legislation and so the *Native Title Act* definitions are only relevant. In Queensland, Aboriginal land under the *Aboriginal Land Act,* 1991 can include the inter tidal zone if declared in a particular grant of title.

This raises an additional point. It will be apparent throughout the report that especially in older legislation water is generally not mentioned at all in a definitional sense as say part of an area of land or as a separate entity. This as will become apparent sometimes causes interpretational complexities in determining the application of an Act to water and hence Indigenous rights in water. This comment is particularly applicable to indigenous heritage protection legislation covered in section 1 of the report.

Indigenous perspective in relation to water

Finally, I would like to finish this introduction with a quote from the Kenbi Land Claim under the *Aboriginal Land Rights (Northern Territory) Act, 1976* which summarises the evidence of traditional owners in relation to water.

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[18] Ibid.

It is indicative of the holistic nature of the relationship between people, land and water in contemporary Australia.[19]It describes law and custom, connection to land and water, cultural practice and belief to an area that extends over the land including the sub-surface, waters and seas across to an island.

> The *Kenbi* dreaming has provided the name for this traditional land claim. It was described in evidence as a didgeridoo, a bamboo or a tunnel. The dreaming is essentially a subterranean passage, linking various sites, particularly those associated with sources of freshwater. Thus, *Belyuen* at which there is a waterhole is linked with *Buwambi* (site 42), *Ngarran.gudjuk* (site 22), *Kabarl* (site 26), *Bitirrnyini* (site 5), *Daminmirri* or *Wulmarr* (site 1) and *Moedranyini* (site 3).
>
> These sites are distinguished by the availability of fresh water, usually from springs. *Buwambi* (site 42) is on the west side of the Cox Peninsula and has a freshwater spring. *Ngarran.gudjuk* (site 22) is a beach on the east side of Indian Island, towards its northern extremity. *Kabarl* (site 26) is a long beach on the other side of the island. Between them is a freshwater spring, known as *Ngambarrngayitj* (site 23).
>
> Members of the Belyuen group have a strong belief that the *Kenbi* dreaming connects the various sources of freshwater, so that the water which comes from the springs to which I have referred is the same water as that which lies in the *Belyuen* (site 95) waterhole. A crucial part of the process of initiation of both boys and girls is bathing in the waterhole at *Belyuen* (site 95). This transmits the sweat of the initiate to freshwater sources throughout the land claimed, particularly those connected with the *Kenbi* dreaming. As a result, the dreamings at various sites will thenceforth know the person whose sweat has been so transmitted. The person will be able to move safely through the land claimed and be identified with it.
>
> *Belyuen* (site 95) has become a site of great significance, partly in consequence of its position on the *Kenbi* dreaming track and partly in consequence of the proximity of the Belyuen community. At certain times, tidal movement in Woods Inlet creates a sound which is held to be the sound of an old man playing the *Kenbi* didgeridoo. More importantly, the waterhole is considered to be inhabited by spirits, sometimes described as mermaids. A young woman who bathes in the waterhole is likely to become pregnant. Her child will be considered to have come from the waterhole itself. The members of the Belyuen

[19] THE KENBI (COX PENINSULA) LAND CLAIM No. 37 Report and recommendation of the former Aboriginal Land Commissioner, Justice Gray to the Minister for Aboriginal and Torres Strait Islander Affairs and to the Administrator of the Northern Territory December 2000 at [5.4.2 – 5.4.6]. Some unnecessary references for the purposes of this quote and names of individuals have been deleted from the full text of these paragraphs.

group have a strong belief that, except for the older ones who were born elsewhere, they and their children have been born from the waterhole at *Belyuen* (site 95). As appears from paras 4.14 and 4.17.1, this association with the waterhole is the major defining characteristic for membership of the Belyuen group.

The next section of the Report deals with the related issues of the ownership of natural waters, the vesting of natural waters in the Crown and riparian rights.

The related issues of ownership of natural waters, vesting of natural waters in the Crown and riparian rights

Introduction

As mentioned I have written this section as an introductory section of the report as it covers certain issues that constitute a foundational understanding of the law with respect to water in Australia. The issues covered in this section explain the legal background and context within which Indigenous rights to water are recognised or not within Australia.

These issues are:

- the "ownership" of natural water or can water in its naturally occurring state be owned?
- what is the correct characterisation of the Crown or Government's legal powers to control and regulate water - its "rights" with respect to water; what does the vesting of water in the Crown mean? and
- an understanding of riparian rights and their current legal status in Australia.

It is sometimes stated by commentators that the vesting of natural waters in the Crown or government means that government owns the waters. The wording generally used in water management legislation is that the right to the use, flow and control of water is vested in the Crown. So the question that arises is what does the vesting of these rights mean in water management legislation.

It is also an important issue as the vesting of the right to regulate, use and control water in the Crown or a government is the main means by which government manages and controls water as a resource. The vesting by Parliament of these rights in the Crown in water management legislation is also the source of power to grant rights to take and use water and therefore affect native title rights to use water.

The words "natural waters" mean in this context water that has not been lawfully taken, used or stored as of legal right that is taken into possession. For example, in accordance with a licence to take and use water, under water legislation.

Riparian rights are the right to use and enjoy surface water in a defined channel (a river for example) that come with or more correctly are an incident of the ownership and possession of land. This proposition should probably be more correctly be put in the past tense, as it would seem that common law riparian rights no longer exist in Australia today.

An understanding of these issues is important because firstly, the issue as to

whether natural waters are capable of legal ownership affects the extent to which the law of native title can recognise Indigenous rights to water. Secondly, Land Rights legislation which grants freehold titles to Indigenous groups over large areas of northern Australia would normally include as an incident of such a title riparian rights to access and use water.

The extent, if at all such riparian rights have survived the enactment of water legislation, which has significantly enhanced government control of water is therefore an important question.

This section also deals with water management legislation in each of the northern Australian jurisdictions, which goes to the first term of reference in this report concerning the manner in which existing State, Territory and Federal law treat Indigenous interests in water.

The Commonwealth Parliament has enacted the *Water Act, 2007, which* has no direct relevance to the subject matter of this report as it is primarily concerned with the Murray Darling River system in southeastern Australia.

Background – the common law

The common law position (that is, judge made law in court cases originally inherited from the United Kingdom) is that flowing water and water in general is not able to be owned and is not subject to private ownership.[20] Surface, flowing and groundwater are public and common resources. Water is not susceptible of ownership like land, as the High Court stated recently in 2009 in *ICM Agriculture Pty Ltd*:[21]

> "No one has, or can have, property in it until it is reduced to possession."

In other words, if you own land it does not mean that you own the water on or in that land.

Historically an owner of land – the holder of an estate in fee simple (a freehold title) is described as the riparian owner and "has a natural right to water where it flows naturally in a defined channel on, through or past his land." Such an owner "is entitled to the flow of the water and the enjoyment of it" and subject to the similar rights of all other riparian owners to "the reasonable enjoyment of the same gift of Providence".[22] A riparian owner does not mean the owner of water on the land but the owner of land who has rights to use the water on the land – those rights are an incident of that land ownership.

This riparian doctrine allowed landowners who had streams or rivers bordering or passing through their properties a right to take and use the water but it was subject to a principle of reasonable use to ensure the rights

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20 *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 261 ALR 653; [2009] HCA 51 at [57].
21 Ibid [145].
22 Gray, K & Gray, S *Elements of Land Law* 5th Edition Oxford University Press 2009 at 52.

of other users of the same stream were not unreasonably diminished.

The English case of *Embrey v Owen* settled the meaning of the common law "riparian doctrine regarding natural surface streams":[23]

> *Embrey v Owen* held that a riparian owner could make reasonable use of the water in a stream and that what was reasonable depended upon whether the natural flow of the stream was diminished (fn deleted).

There is no "natural right" to take and use water that percolates through the land in an undefined channel, what is commonly called in Australia groundwater. At common law any person "so far as he can" has a right to access such water.[24] In other words one had to have access to be able to use the groundwater.

The High Court in *ICM Agriculture Pty Ltd* described the common law position with respect to groundwater in these terms:[25]

> No limit was placed upon the use that a proprietor could make of groundwater.

This has meant that at common law there was no legally enforceable responsibility of a landowner to ensure there was no unreasonable diminution of the groundwater resource by a landowner.[26]

The effect of this position in relation to groundwater was that because the landowner can control access to the land then the owner controls access to the groundwater resource.

Consequently, there are no riparian common law rights to groundwater as such, as there is a distinction drawn with waters in a defined channel. In the case of *Chasemore v Richards* the common law position was determined to be that:[27]

> "the principles established with respect to flowing waters or streams were inapplicable to water percolating through underground strata and not forming a "known subterranean channel".

In any event, groundwater like surface waters is not susceptible of ownership until also appropriated or taken into possession.[28]

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23 *ICM Agriculture Pty Ltd* [109].
24 Ibid page 53.
25 Ibid [111]. The joint judgment of Justices Hayne, Kiefel and Bell.
26 Bradbrook, A *"The Relevance of the Cujus Est Solum Doctrine to the Surface Landowners Claims to Natural Resources located above and Beneath the Land"* 1988 11 Adelaide Law Review 469.
27 As quoted in *ICM Agriculture Pty Ltd* [110].
28 Ibid 470.

Riparian rights are "incidents"[29] of property, they are "attached to the land"- the right to use water, the water in a stream bordering or on one's property for example. This has been described (with reference to the common law) as "rights in relation to water in situ are rights of access and not rights of property".[30]

The position, in general terms at common law is usefully summarised by Professor Fisher:[31]

> While the common law recognizes rights of access to water, these rights of access are linked to the ownership, possession and use of land. So the owner of the surface of the land has rights of access in relation to water flowing across the surface of the land or percolating through the subsurface of the land. Similarly, the owner of the banks of a river has rights of access simply because of ownership of the banks of the river. The right of access is converted into a right of ownership or a right of property in the water once the right of access has been lawfully exercised. According to the common law, then, rights in relation to water are "public and common" in a very limited sense. Namely, "that all may reasonably use it who have a right of access to it". There is no "property in the water itself". But it is not an open access regime. Access is restricted to the owners and lawful occupiers of the surface of the land or of the banks of the river if it is a watercourse through which water flows in a defined channel. In either case a right of property in the water emerges only upon lawful abstraction of the water flowing over the surface of the land or indiscriminately below the surface of the land, this right is unrestricted. In the case of water flowing in a defined channel through a watercourse, the same right is available to each and every other riparian proprietor. Whatever the doctrinal foundations of the common law, there is no private property regime in water until the water has been successfully abstracted in exercise of these rights of access which have been inextricably linked to the ownership and occupation of land.

While a landowner may not own the waters on the land it is this right of access or control over access to the waters on the land that is important. This is a critical part of indigenous rights to water in native title law and land rights that will be discussed later in the report.

The legal situation, the common law position outlined here with respect to water has been substantially changed by water legislation in each provincial jurisdiction in Australia. So in most if not all respects the common law position with respect to water is now redundant. Yet the language and concepts of the common law involving riparian rights with respect to water are still used and referred to in Court cases and literature within Australia.

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29 *H Jones & Co Pty Ltd v Kingborough Corporation* (1950) 82 CLR 282 at 322.
30 Fisher, DE. *"Rights of Property in Water: Confusion or Clarity "* (2004) 21 EPLJ 200 at 204.
31 Ibid 214, 215.

The present situation is that generally riparian rights have been converted into statutory rights in water legislation. The current water management legislation is still informed by this common law background. Property owners with water on or adjoining their land now have statutory rights to take and use this water in a generally quite limited manner and these statutory rights are still commonly described as riparian rights.

Professor Peter Butt when referring to NSW water management legislation that commenced operation in 1896 states that the vesting of water management rights in the Crown at that time had the affect of ending common law riparian rights; " This has divested riparian owners of the common law riparian rights" and further that any remaining riparian rights are best described as remnant riparian rights; "These might for convenience be termed 'remnant' riparian rights, but they are purely statutory."[32]

I will now seek to explain the reasons for these conclusions concerning the ownership of natural waters and the termination of common law riparian rights.

In recent times theses issues have been dealt with directly and comprehensively in the landmark decision of the High Court of Australia with respect to water in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 261 ALR 653, already referred to in this section of the report. This case relevantly considered the implications of the vesting of rights to the use and control of water in the Crown and the ownership of surface water and groundwater in its natural state. The vesting of the rights to the use and control of water in the Crown has occurred within all three jurisdictions in northern Australia and elsewhere in the country. Consequently the case will be referred to extensively within this section of the Report.

As a result of this case it is clear in my opinion that common law riparian rights with respect to water have been abolished in Australia.[33] This is an issue of some contention and affects Indigenous rights to water to the extent that the existence of them is dependent upon the holding of a fee simple or freehold title. It is noted that the case *ICM Agriculture Pty Ltd* concerned water legislation in NSW and not northern Australia. There is no reason why a different conclusion will arise in northern Australia in my opinion with the possible exception of the Northern Territory. I will deal with that possibility in this section of the report.

Water management legislation

The "inherited" common law position from the United Kingdom with respect to water was first modified in Australia because of our unique climatic and geographic situation before federation in the 19th Century. They're being no recognition as a matter of law of the rights of the various Indigenous peoples

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32 Butt, Peter *"Land Law"* 5th Edition Lawbook Co. Sydney, 2006 at 25 [232].

33 *ICM Agriculture Pty Ltd* [116]. This occurred as early as 1896 in New South Wales. Also see commentary on the case by Peter Butt in a note concerning the case in the Australian Law Journal – (2010) 84 ALJ 215.

of Australia in any respect till the late 20th Century. The colonial Parliaments in Victoria and NSW first passed substantive water regulation legislation in 1886 and 1896, respectively.[34]

There is now general water management legislation in every State and Territory that vests the right to the use, flow and control of surface waters and groundwater in the Crown of the respective jurisdiction.

One author has described the water management legislation in the 19th Century as conferring on the Crown in each State the "rights of primary access to water." The substance of this right varied but it included the right to use and control water and the right to the flow of water in watercourses and lakes."[35]

The word "vesting" in the Crown used in the legislation generally does not mean ownership. Although the wording and object of each water management Act needs to be considered in its own right as will become apparent when I go to the Northern Territory *Water Act*. This type of legislation generally vests in the Crown or a government agency or Corporation on behalf of the Crown the rights to control the use and flow of the water. This vesting in the Crown is to be understood by the "statutory purposes" to be filled "in consequence of the vesting'" being to control access to a "public resource".[36]

Professor Sandford Clark described Australian water legislation in these terms:

> ..in order to confer sufficient administrative power on the State, it was not logically necessary to make the Crown the owner of all water – merely to ensure that it had supervising powers to control the use made of it. This point is fundamental to an understanding of the Australian structure of legislation.[37]

In relation to groundwater in NSW the High Court further said in *ICM Agriculture Pty Ltd* that:

> Although all sub-surface water is now, and since 1966 has been, vested in the State, it is not right to describe the consequence of that vesting as giving the State ownership of, or property in, the groundwater.[38]

The right to the use and control of water in rivers and lakes or surface water was vested in the Crown in Victoria and NSW in 1886 and 1896 respectively.

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34 *ICM Agriculture Pty Ltd* [50].

35 Lucy, Juliet Water Regulation – *The Laws of Australia*, Thomson Reuters Sydney 2008 at 15.

36 Ibid [146].

37 Clark, Sandford "*The Philosophy of Australian water Legislation- Part 1" Water* Part 2 Vol 7 1980 at page 17.

38 Ibid [153].

Relevantly this occurred in Queensland in 1910, Western Australia in 1914 and the Northern Territory in 1938.[39]

Similarly the right to the use, flow and control of ground and/or sub-surface water has vested in the Crown and is what has been called a "common resource".[40]

Common law type riparian rights of a limited nature have been enacted as statutory rights under the general water management legislation in each jurisdiction and generally apply without a requirement for a water licence.

> "Riparian proprietors were given the right to use water for domestic purposes, for watering stock, or for gardens not exceeding five acres used in connection with a dwelling house."[41]

The legal consequences of this vesting in the Crown in water management legislation on common law riparian rights has been in dispute for many decades. It has apparently not been in dispute that water in its natural state is incapable of ownership until lawfully taken into possession. That is, until it is taken into possession via a legal right of use which is now governed by water management legislation in each Australian jurisdiction. Commonly also under this legislation, there is a legal prohibition upon taking surface or groundwater unless it is taken or used in accordance with a licence and the conditions therein, apart from the exceptions just mentioned.

What has been in contention has been the continuance of common law riparian rights to water since the initial enactment of water management legislation. In some High Court cases it has been indicated that this vesting "impliedly divested the riparian owner of his common law rights".[42] Other cases have indicated that these words give "to the Crown new rights superior to those of the riparian owner but that the private rights will continue to exist until the new superior Crown rights are exercised."[43]

For instance, in *Thorpes Ltd v Grant Pastoral C. Pty Ltd* in 1954 Justice Fullagar of the High Court stated:[44]

> The view which I am disposed to take is that the Act does not directly affect any private rights, but gives to the Crown new rights-not riparian rights-which are superior to, and may be exercised in derogation of, private riparian rights, but that until those new and superior rights are exercised, private rights can and do co-exist with them.

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39 *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 261 ALR 653; [2009] HCA 51 at [54]. See the *Rights in Water and Water Conservation and Utilization Act* 1910 (Q); *Rights in Water and Irrigation Act* 1914 (WA); *Control of Waters Ordinance* 1938 (NT) respectively.

40 *ICM Agriculture Pty Ltd* ibid [73].

41 Ibid [120].

42 Bradbrook, above n 7 at 471.

43 Bradbrook, above n 7 at 471.

44 *Thorpes Ltd v Grant Pastoral C. Pty Ltd* 92 CLR 317 at 331.

This analysis has been further confused at times, as some commentators have described this position as the equivalent of, if not actual ownership of water by the Crown.[45]

In certain jurisdictions in Australia in more recent times the provincial legislature in the terms of its water legislation has made the position with respect to riparian rights quite clear and explicit in relation to surface water.

For example, in NSW the *Water Management Act, 2000* states that:[46]

> 393 Abolition of common law riparian rights
> Any right that the owner of riparian land would, but for this section, have at common law with respect to the flow of any river, estuary or lake through or past the land, or to the taking or using of water from any such river, estuary or lake, is hereby abolished.

There are similar provisions in South Australia and Tasmania.[47] No equivalent provisions exist in the three jurisdictions in northern Australia.

In the jurisdictions subject to analysis in this Report in northern Australia the old style vesting alone (that is, the right to the use, flow and control of surface waters and groundwater is vested in the Crown) is still used, subject to one important variation in the Northern Territory.

The High Court has clearly stated in *ICM Agriculture Pty Ltd* that even this type of vesting (even without the explicit terminology used in NSW) will wholly abolish common law riparian rights.[48] Chief Justice French and Justices Gummow and Crennan jointly stated that:

> Of significance for this case is that the vesting of rights to the "use" and "control" of water constituted an exercise of sovereignty in the sense that the rights so vested were based on the political power of the State. Accordingly, the reasoning of the Full Court of the Supreme Court of New South Wales in *Hanson v The Grassy Gully Gold Mining Co* (fn deleted), that the 1896 Act vested in the Crown the common law rights of riparian owners, is to be preferred to the slightly delphic observation of Fullagar J in *Thorpes Ltd v Grant Pastoral Co Pty Ltd* (fn deleted) suggesting that riparian rights survived those vesting provisions.

Further Justices Hayne, Kiefel and Bell in the same case *ICM Agriculture Pty Ltd* jointly stated:

> …there would seem to be much force in the view that *Hanson's Case* was

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45 Bradbrook above n 7 at 471.
46 *Water Management Act, 2000* s393.
47 Lucy, Juliet Water Regulation – The Laws of Australia, Thomson Reuters Sydney 2008 page 109.
48 *ICM Agriculture Pty Ltd* at [54], [71-73] and [116].

> rightly decided when it held (fn deleted) that common law riparian rights were abolished in New South Wales by the *Water Rights Act* 1896 (NSW).[49]

In addition, the Court stated that if any common law right to extract groundwater existed, it has been abolished by the vesting of groundwater in the Crown.[50]

These changes to common law riparian rights have been accompanied by other statutory changes to the common law with respect to landowners "rights" consistent with the changes just outlined. These changes concern the use of water when determining the boundaries of land and I'll briefly refer to them now for completeness.

Non Tidal rivers and land boundaries

In a situation where the boundary of adjoining properties is a non-tidal river then at common law the rule – *ad medium filum* generally applies. This means that the boundary of adjoining properties is down the middle of the river. This rule has been abrogated in the three northern Australian jurisdictions so that beds and banks of rivers forming boundaries of land are State property.[51] Access rights by adjoining landowners for certain purposes are provided for in the local water legislation, which is outlined below.

Land on the seashore

In relation to land, which abuts the seashore the general rule, subject to the boundaries in a particular title is that the boundary is the high water mark. Land in the intertidal zone or foreshore is generally deemed to belong to the Crown.[52] Although, as has occurred with the grant of a freehold title under the *Aboriginal Land Rights (Northern Territory) Act, 1976* private grants are sometimes made to the low water mark.

I shall now look at the specific situation in each northern jurisdiction the subject of this Report.

Queensland - *Water Act 2000*

In Queensland, the *Water Act, 2000* is the main water management legislation. It has a standard provision concerning the vesting of water and is in the following form:

> "All rights to the use, flow and control of all water in Queensland are vested in the State."[53]

The Explanatory Notes to the Bill explain that:

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49 Ibid at 42 [116]
50 Ibid [144].
51 Hepburn, S *Australian Property Law* Lexis Nexis Butterworths 2008 at 146.
52 Ibid 143,
53 *Water Act, 2000* section 19.

> Water is defined to include water in a watercourse, lake or spring or underground water or overland flow water or water from any of those sources collected in a dam. The definition of dam expressly excludes rainwater tanks. This means that the State is empowered with the responsibility for determining how water that flows, and is collected, in Queensland is either extracted, or stored or diverted or interfered with, or allowed to flow. If water is taken, the State's power also extends to managing how water may be used in Queensland.[54]

Riparian *type* rights are provided for in the Act, which allows for water from a watercourse, lake or spring to be taken without a "water entitlement" by an adjoining owner of land for stock and domestic purposes. In addition, any person may take water in an emergency situation.[55] Any person generally has the right to take water from a watercourse, lake or spring for camping purposes or watering travelling stock.[56]

Apart from the statutory rights just outlined the Act prohibits the taking or supply of water without authorization in accordance with a water allocation, interim water allocation, water licence, permit or contrary to a water plan.[57]

In addition, the beds, banks of all watercourses and lakes forming all or part of the boundary of land are declared to have always been the property of the state – the Act uses the words "are, and always have been, the property of the State".[58] An adjoining owner of land has access to these areas under the Act in order to be able to access the statutory riparian type rights just described.[59]

All land below the high water mark including the beds and banks of tidal navigable rivers is regarded as the property of the state. As usual, this is subject to the boundaries and terms of any particular grant.[60] *Aboriginal Land Act* land can be granted to the low water mark.

In *Beaudesert Shire Council v Smith* in 1966 the High Court of Australia decided that as *The Water Acts, 1926 to 1964* in Queensland vested the bed and banks and the right to the flow of a watercourse in the Crown via a statutory Commissioner and any riparian rights were only those now to be found in the legislation not the common law.[61]

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54 *Water Bill 2000* Explanatory Notes pp16-16. The definition of water in the Act is: ***water***— 1 Generally, *water* means all or any of the following— (a) water in a watercourse, lake or spring; (b) underground water;(c) overland flow water;(d) water that has been collected in a dam. Dictionary Schedule 4 to the Act.

55 Ibid in section 20.

56 Ibid s20 (5).

57 *Water Act, 2000* sections 808,809 respectively. See definition of water entitlement in Dictionary Schedule 4 of the Act.

58 Ibid section 21(1).

59 Ibid s 21 (3).

60 *Land Act, 1994* s9.

61 *Beaudesert Shire Council v Smith* 120 CLR145 at 151.

This position is supported by the Explanatory Notes to the current water management legislation – the *Water Act 2000* outlined above where is it written that:

> This makes it clear that a person does not acquire, except under the authority of the Bill, an entitlement to water.[62]

In relation to any native title that may exist as provided for in the Federal *Native Title Act, 1993* the *Native Title (Queensland) Act 1993* confirms existing Crown rights to the use, control and regulation of the flow of water and existing public access to waterways, beaches and coastal waters regardless of the existence of native title or the rights involved in that title.[63]

Western Australia - Rights in Water and Irrigation Act 1914

In the Miriuwung Gajerrong case – *Western Australia v Ward* which concerned land and water in the East Kimberly and the Ord River Irrigation Scheme the High Court stated that the vesting of waters in the Crown was inconsistent with "any native title right to possession of those waters to the exclusion of all others."

This means effectively, inconsistent with any native title right to the ownership of water. Thus there cannot be in Western Australia any native tile right to own water. To quote from that decision:

> Part III of the *Rights in Water and Irrigation Act* provides (in s 4(1)) that the "right to the use and flow and to the control of the water" in natural waters "shall, subject only to the restrictions hereinafter provided, and until appropriated under the sanction of this Act, or of some existing or future Act of Parliament, vest in the Crown". It deals with riparian rights and allows riparian owners to apply for special licences to divert and use water. The vesting of waters in the Crown was inconsistent with any native title right to possession of those waters to the exclusion of all others.[64] [footnotes deleted]

The Western Australian legislation – the *Rights in Water and Irrigation Act, 1914* has since this judgment was delivered in 2002 been amended to this affect:

> The right to the use and flow, and to the control, of the water at any time in any- (a) watercourse; (b) wetland; or (c) underground water source, vests in the Crown except as allocated under this Act or another written law.

According to a Report (51) of the Western Australian Legislative Council that inquired into the Bill that introduced this amendment the purpose was to ensure that all water is now vested in the Crown in that state:

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62 *Water Bill 2000* Explanatory Notes p 17.
63 *Native Title (Queensland) Act 1993* ss 17(2) and 18 respectively.
64 *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 [263].

> The Bill vests rights to use, flow and control of *all water* in the Crown. The impact of this change is that surface water in areas that are not subject to licensing becomes vested in the Crown.[65]

This potentially raises an interesting question if there is an area of the state where licensing and therefore the vesting of water in the Crown was not applicable, prior to the commencement of this amendment. I shall deal with this issue in section 1, Part A of this report dealing with native title.

The *Rights in Water and Irrigation Act, 1914* also prohibits the taking of water without a licence except where it provides for remnant style riparian rights, which are unusually broad in comparison with other jurisdictions.[66]

These riparian type rights are enacted in section 9 of the Act to provide "free of charge" water from any watercourse or wetland for domestic, stock or gardens to the owner or occupier of any land.[67]In addition, unusually in a national context water can be taken for any other purpose as long as the flow in the watercourse or amount of water in the wetland is not "sensibly diminished" in an unproclaimed area. This is subject to regulation by local by-laws.[68] This is reflective be it now in a statutory form of the full, unimpaired common law riparian right referred to earlier in this section of the report.

The bed of watercourses or wetlands that form the boundaries of a parcel of land shall "be deemed to be the property of the Crown" for the purposes of the *Rights in Water and Irrigation Act, 1914.*[69] Rights of access through these areas for riparian type use are also provided for in the Act.[70]

The *Land Administration Act, 1997* provides that all land "below high water mark, including the beds and banks of tidal waters, is Crown land",[71] unless otherwise specified.

Northern Territory – *Water Act, 1992*

The situation in the Northern Territory is similar in many respects but potentially different in one important respect, as the legislation uniquely purports to vest the "property" as well as the standard rights to the use, flow and control of water in the Crown.

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65 REPORT OF THE STANDING COMMITTEE ON LEGISLATION IN RELATION TO THE *Rights in Water and Irrigation Amendment Bill 1999* Report 51 at 14 [5.9].

66 *Rights in Water and Irrigation Act 1914* s.5C. This is subject to a number of exceptions such as the limited riparian rights recognised in section 9.

67 See ss 9 and 20 *Rights in Water and Irrigation Act 1914* which in terms of riparian type rights apply to proclaimed and unproclaimed areas respectively. These sections contain a number of qualifications and should be examined in detail.

68 Ibid s 20(1)(c).

69 *Rights in Water and Irrigation Act 1914* s.15.

70 *Rights in Water and Irrigation Act 1914* s.16.

71 *Land Administration Act, 1997* s3 (2).

The relevant provision in the *Water Act, 1992* [72] is in the following terms (s9 (2)):

> (2) Subject to this Act, **the property in and the rights to the use, flow and control of all water in the Territory is vested in the Territory** and those rights are exercisable by the Minister in the name of and on behalf of the Territory.[73] (emphasis added)

This provision if held to constitute ownership of water by the Crown in right of the Northern Territory would have significant implications with respect to native title law in the Territory and potentially Indigenous rights in water under the *Aboriginal Land Rights Act, 1976*. It is important as if the Crown owns all the water in the jurisdiction then that may preclude the recognition of any native title water rights given that the acquisition of the property in water would have occurred as early as 1938 under the *Control of Water Ordinance*, the predecessor legislation to the current Act in the Northern Territory.

It is therefore important to analyse this situation in more detail, which I shall do later in this section.

The Northern Territory *Water Act* defines water to mean both the water flowing or contained in a waterway or groundwater.[74] A waterway is widely defined to include a lake, lagoon and marsh and land declared by the Minister to be a waterway.[75] It may be that some surface waters are not included within the definition of water in section 9 of the Act but can be included by declaration by the Minister. If this is the case in a particular scenario then what is written here is subject to this exclusion if there is no declaration by the Minister.[76]

As with other jurisdictions riparian type rights are enacted in section 11 of the Act to provide for "the owner or occupier of land on or immediately adjacent to which there is a waterway may take water from that waterway" for domestic, grazing stock and domestic garden purposes. In addition, there is a similar limited statutory right of an owner or occupier to take groundwater for the same purposes[77] and to store surface waters without limitation as to purpose that is not in a waterway as long as the flow of water "is not materially diminished or increased thereby." [78]

The bed and banks of waterways as elsewhere that form the boundaries of

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[72] As in force at 16 September 2009.
[73] Section 9 (2) *Water Act, 1992* (NT).
[74] Ibid s 9(1) (a) and (b), respectively.
[75] Section 5(1).
[76] See s 9 of the Act, which defines water for the purposes of the Crowns rights in s9 (2) in relation to surface waters to be water flowing or contained in a waterway. Surface waters that are not flowing may not all come within the definition of waterway in s 4 of the Act.
[77] Section 14.
[78] Section 40 (2).

land are vested in the Territory.[79] Also a right of access for adjacent owners and occupiers is provided where such land has been vested in the Territory.[80]

Apart from the exceptions outlined above a person commits an offence unless they have a licence to take surface water.[81] Surface water in this context means water flowing or contained in a waterway.[82]There is no general prohibition on the taking of groundwater. A permit must be obtained to drill a bore in a Water Control District but most of the Territory is not included within such a district.[83]

The responsible Minister stated when introducing the *Water Act* into the Legislative Assembly that:[84]

> "In regard to groundwater, exemptions from application of the Act will be wide – ranging."

Water and Northern Territory freehold title

In relation to freehold title issued under Northern Territory law (which is not Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act, 1976*) there is a specific provision that states that there is no property in water that forms part of that title nor any right to the use, flow or control of water. The provision is in the following terms:

> The ownership of an estate in fee simple, whether acquired under this or any other Act, does not of itself confer on the owner any property in, or the right to the use or flow or to the control of, the water at any time in a lake, spring or watercourse on, in or under the land comprised in the estate or contained by, or forming part of, the boundaries of the land.[85]

This provision has application to those Aboriginal communities that hold Northern Territory freehold title on small community blocks, often excised from pastoral leases.[86]

Northern Territory - the property in and the rights to the use, flow and control of all water in the Territory is vested in the Territory

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79 Section 12 of the Act. Note this is subject to important exceptions.
80 Ibid s 13.
81 Ibid s44.
82 Ibid s 43.
83 http://www.nt.gov.au/nreta/water/manage/maps.html (accessed 5/3/10).
84 Water Bill (Serial 110) Second Reading Speech page 3492 NT Legislative Assembly Hansard Tuesday 19 November 1991.
85 *Crown Lands Act* (NT) s 22.
86 *Land Acquisition Act* (NT) s46 (1A) provides for an estate in fee simple for an Aboriginal community living area.

The remaining question I wish to address in this section is the issue of the meaning of the words "the property in" in conjunction with the other words normally used to vest waters in the Crown in the Northern Territory. The potential consequences with respect to Indigenous rights to water are significant.

Professor Sandford D. Clark has commented that:

> Only the Northern Territory still vests the property in such waters in the Crown (*Control of Waters Act* s3). In so doing it follows provisions of the *South Australian Control of Waters Act* 1919 which were repealed in 1976.[87]

The *Control of Waters Act* since this was written has been repealed and section 3 has been re-enacted in the new legislation in section 9(2) of the *Water Act*.

The responsible Minister when introducing the Water Bill into Parliament– now the *Water Act*, 1992 described the Crown's rights in relation to water in these terms:

> Another element is to restate, in clearer terms, the Crown's supervening rights in relation to water resources. Private common law rights will continue unabated but, when the need for some intervention or the exercise of administrative power arises, the Crown may assert its supervening rights and individual common law rights give way. The fundamental residual right of the Crown to control and protect water resources necessarily implies adequate power to enter on private lands, to give directions to landholders in relation to any activities or structures which are illegal and, in default of the landholder taking any necessary action, power to carry out any work at the cost of the landholder.[88]

The language used here is similar to that used in *Thorpes Ltd v Grant Pastoral Co. Pty Ltd* [89] a previously mentioned 1954 High Court case that cast doubt upon the proposition that all common law riparian rights were abolished by water management legislation that vested in the Crown rights to control the use and flow of water. The Queensland legislation considered in that case did not use the additional phrase "the property in" as in the Northern Territory. The Minister's statement to Parliament here is no doubt reflective of the understanding of the legal position at that time as indicated in *Thorpes Ltd*. But it is also quite interesting to note that the government of the day did not

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87 Consultants Report on Water Resources and the Notion of Detriment under section 50 of the Commonwealth Aboriginal Land Rights (Northern Territory) Act 1976 by Sandford D. Clark Harrison Moore Professor of Law University of Melbourne June 1983 (NT Library – Northern Australian Collection) at page 7.

88 Water Bill (Serial 110) Second Reading Speech page 3491 NT Legislative Assembly Hansard Tuesday 19 November 1991.

89 92 CLR 317 at 330-331.

think that the phrase "the property in" added to the Crown's rights in the new Act in terms of "ownership" of water nor the automatic abolition of common law riparian rights to use water.

This apparent intention expressed in the second reading speech though is not determinative of the issue legally it is merely an aid to the interpretation by a court of the legal affect and meaning of these words in the *Water Act*.[90]

The legal position indicated in *Thorpes Ltd*. has now been refuted recently by the High Court in *ICM Agriculture Pty Ltd* which has stated that common law riparian rights to water have ceased to exist since the introduction of the vesting of rights to the control, use and flow of water in the Crown in water management legislation.

In *Hayes v Northern Territory* [91] an Alice Springs case recognising the existence of native title the Federal Court found that this wording in section 9(2) of the *Water Act* was consistent with the recognition of native title rights to use water. In other words, the use of the phrase "the property in" being vested in the Crown was not such as to preclude the recognition of a right to use water emanating from outside the *Water Act*. Although the issue was not squarely addressed in the case this would clearly imply that the use of the phrase "the property in" should not be regarded as meaning the ownership of water in its natural state is held by the Crown in the Northern Territory.

Interestingly, also the *Validation (Native Title) Act* (NT) provides that with respect to any native title in the Northern Territory: "All existing rights of the Territory to use, control and regulate the flow of water are confirmed."[92] This Act performs the task of confirming the legal power of the Crown in certain areas in case there is any doubt arising from the recognition of native title. It obviously does not mention the phrase "the property in" presumably because the section in the *Native Title Act* 1993(Cth) authorising the States and Territories to pass such laws with respect to native title does not include an assertion as to Crown rights in the property in water.[93] In any event, in terms of any conclusions as to the final meaning of the addition of these words in the Northern Territory I don't think that provision takes the matter any further.

The jurisprudence of native title law in Australia states that whilst native title rights and interests are capable of recognition by the common law of Australia and the *Native Title Act* 1993 in certain circumstances; these native title rights and interests to use water are not common law rights.[94]

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90 *Interpretation Act* (NT) s 62B (2) (e).

91 *Hayes v Northern Territory* (1999) 97 FCR 32 [1999] FCA 1248 at [120].

92 *Validation (Native Title) Act* (NT) s12 (2).

93 *Native Title Act, 1992* section 212(1)(b) Subject to this Act, a law of the Commonwealth, a State of Territory may confirm: (b) any existing right of the Crown in that capacity, to use, control and regulate the flow of water.

94 *Fejo v NT* 195 CLR 96 at 128; *Yorta Yorta v Victoria & Others* 194 ALR 538 at 560 [75].

> Native Title is neither an institution of the common law nor a form of common law tenure but it is recognized by the common law.

The riparian rights as discussed in this section are common law rights. This may be a subtle but is none the less an important distinction, as it shields native title rights to use water from any extinguishment that may have occurred to common law riparian rights as a result of the universal vesting of water in the Crown in Australia in my opinion.

One author as previously mentioned has described the vesting provisions in Australia including the Northern Territory provision as a right of primary access held by the Crown which has the same legal effect throughout Australia.[95]

In my opinion, the better and correct view concerning this issue (the use of the words "the property in" in the Northern Territory legislation) is one that makes a distinction between private property and public "ownership" of common resources in the public interest. As Roscoe Pound has written:[96]

> …that while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns the furniture in the state house. *It does not own wild game as it owns the cash in the vaults of the treasury*. What is meant is that conservation of important social resources requires regulation of the use of *res communes* to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom *res nullius* may be acquired in order to prevent their extermination. *Our modern way of putting it is only an incident of the nineteenth-century dogma that everything must be owned*." (Emphasis added)

In *Yanner v Eaton* – a case concerning the native title right to hunt crocodiles, the High Court when considering the Queensland *Fauna Act* and the use of the word "property" being vested in the Crown in relation to fauna in that State held that that:[97]

> ..the statutory vesting of "property" in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource" (footnotes deleted)

Professor Fisher has relevantly described the outcome in this case in the

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95 Lucy op. cit page 100.

96 Pound, R "*An Introduction to the Philosophy of Law"* as quoted in *Yanner v Eaton* 166 ALR 258 at 267 [29].

97 *Yanner v Eaton* 166 ALR 258 at 267 [28].

following terms:[98]

> In effect the right of property conferred by the legislation upon the Crown was not a right of full beneficial ownership but a right to control activities affecting fauna.

In light of this distinction and the emphasis put by the High Court in the recent case of *ICM Agriculture Pty Ltd* that there cannot be any ownership of water in its natural state (outside of possession) then it seems clear that the language in section 9(2) of the Northern Territory *Water Act* and in particular the use of the phrase "the property in" does not constitute the acquisition of ownership of all water by the Crown in right of the Northern Territory of Australia. It is the vesting in the state – of statutory rights for the purpose of controlling access to a public resource.[99]

Nonetheless, despite native title not being a common law title nor the fact that the Crown may not own natural waters - the vesting of control of those waters in the Crown determines that native title cannot include ownership of waters. This has been confirmed by the High Court in Western Australia as mentioned and also in the Northern Territory: In *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia* [100] a Northern Territory case wherein the Federal Court stated:

> the common law does not recognise a claim to ownership of flowing water. In relation to water generally, the *Control of Waters Ordinance* 1938 (now replaced by the *Water Act* 1992) has established a regime in relation to water rights which is inconsistent with the continued existence of exclusive native title rights to the ownership and use of water.

It is important to note that water can be owned once it is legally taken into possession and in that sense it is not natural waters. For example, when one receives a right to take and use water in accordance with water management legislation it is then in the possession of someone. Similarly with respect to a native title right to access and take water for domestic or cultural purposes – it is then lawfully in possession.[101]

Conclusion

The issues examined here provide the following basis for an understanding of the legal framework in Australia in which Indigenous rights in water are recognised.

Firstly, that there is no ownership or property in natural waters. Secondly, that certain rights to use water come with the ownership of property. These

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98 Fisher, DE. "Rights of Property in Water: Confusion or Clarity " op. cit page 208.
99 *ICM Agriculture Pty Ltd* at [149].
100 [2000] FCA 923 at [126].
101 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland* (No 2) [2010] FCA 643 at [759]{760].

rights are now statutory and not common law rights. This is important as Aboriginal land under land rights legislation is generally a fee simple or freehold title and so is affected by these changes.

Thirdly, the abolition of common law riparian rights does not affect native title rights to take and use water. Fourthly, even though there is no ownership of natural waters recognised in Australian law the control over access to water on the land subject to ownership or exclusive possession native title is a significant right.

These issues are dealt with in more detail in relation to Indigenous rights to water in the appropriate parts of this Report.

1. Review and analyse the manner in which existing State, Territory and Federal law treat Indigenous interests in water

Part A - Native Title

The first major area that is relevant to identifying Indigenous interests in water is the law of native title, which recognises in a limited way the traditional laws and customs of Australian Indigenous peoples in relation to land and water/s.

Australian law on one level in the *Mabo (No 2)* decision in 1992 recognised the traditional laws and customs of Australia's Indigenous peoples in the law of native title. Australian law has also since recognised the inadequacies of this attempt. It has been said that the Aboriginal relationship to "country" (in the broad sense one that is inclusive of land, waters and the seas) is essentially a spiritual one and secondly that the *Native Title Act, 1993* (NTA) in its attempt to recognise that relationship within the Australian legal system "fragments" that relationship.

The High Court of Australia in the leading native title case of *Western Australia v Ward* reflected ten years after the *Mabo* judgment that:[102]

> As is now well recognised, the connection which Aboriginal peoples have with "country" is essentially spiritual.
>
> The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests, which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.[103]

There are two further aspects important to an understanding of the law of native title in Australia. One concerns the common law as determined by the Courts in Australia. The second concerns the *Native Title Act, 1993* (NTA) – a law of the Federal Parliament of Australia. The High Court has made it clear

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[102] 213 CLR 1 at 64 [14].

[103] Interestingly, in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 at [3] the trial judge found that there was not an "overarching spiritual connection with the waters" put forward and that "This has unusual ramifications in the application of accepted Native Title Act jurisprudence. No more is this so than in relation to the "connection" requirement of s 223(1)(b) of the *Native Title Act 1993* (Cth)."

that in terms of the recognition and interpretation of native title regard must be had firstly and predominantly to the Act and not the common law. The latter source of law is clearly still relevant. Again in *Western Australia v Ward* a majority of the High Court stated:

> Yet again it must be emphasised that it is to the terms of the NTA that primary regard must be had, and not the decisions in *Mabo [No 2]* or *Wik.* The only present relevance of those decisions is for whatever light they cast on the NTA.[104]

In this section of the Report I will firstly summarise the native title rights and interests with respect to water that have been recognised by the Courts to date in Australia. These rights are more fully explained in section 6 of this report, dealing with "recent" cases. I shall then in this section deal with the general proof and recognition of native title in broad terms and thirdly go to particular provisions of the *Native Title Act, 1993* that concern Indigenous interests in water.

Native title rights to water have been recognised in the following broad terms:

- A right to take and use water for non-commercial purposes; in particular the right to have access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.

- A right to control access to water where an exclusive possession native title determination has been found to exist with respect to an area of land and waters.

- The right to make decisions about the use and enjoyment of the waters where an exclusive possession native title determination has been found to exist with respect to an area of land and waters.

A Native Title right to take and use water for non-commercial purposes has been recognised for some time and is protected to some degree in section 211 of the *Native Title Act, 1993*.

Mabo v Queensland [No 2] – the Mabo Case

The leading judgment in Australia that recognised native title for the first time - the 1992 *Mabo [No 2]* High Court decision states:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those

[104] *Western Australia v Ward* 213 CLR 1 at 69 [25].

laws and customs."[105]

Native Title – in what circumstances is it recognised

In general terms native title is capable of legal recognition in limited circumstances in Australia. These circumstances are where:

- there has been no extinguishment of native title – for example, by the grant of inconsistent rights to a third party – the grant of a freehold title extinguishes native title for instance (this is regulated by the NTA);

- it can be proven by an Indigenous people or agreed by government that native title exists and the Federal Court is prepared to make an order that legally recognises the native title (again this is regulated by the NTA); and

- the particular native title or native title rights sought to be established are regarded by the Australian Courts as consistent with the principles of the common law of Australia;

Specifically, the NTA in section 223 requires proof of a group of Indigenous people who have rights and interests in accordance with their traditional laws and customs who thereby have a connection with land or waters in a particular area where the common law will recognise those rights and interests. To quote s223 directly:

> 223 Native title
> *Common law rights and interests*
>
> (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

The extinguishment of native title in relation to land or waters occurs where government has granted titles (such as a freehold title) that are inconsistent with the continued legal recognition of any native title. As mentioned in the

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[105] *Mabo [No 2]* (1992) 175 CLR 1 at 58.

introduction that does not mean that the traditional laws and customs of the relevant Indigenous people have ceased to exist but that the Australian legal system will not provide legal recognition of the native title because of the legal effect of the "superior" title emanating from the Crown or government.

The proof of native title is a complex legal process. The requirement in section 223(1) (a) has been interpreted by the High Court to require proof of the existence of a society that has been essentially intact since the acquisition of sovereignty by the United Kingdom in the relevant part of Australia and a society that has substantially continued to practice its laws and customs uninterrupted since the acquisition of sovereignty. It is only the traditional rights or interests in relation to land or waters that existed at the time of the change in sovereignty that will be recognised. The Court will allow some change or adaptation to have taken place but only in the context of the continued observance of traditional law and customs.

In *Yorta Yorta*[106] the major High Court case dealing with this question, the leading judgment stated:

> …acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty.
>
> [C]ontinuity in acknowledgment and observance of the normative rules in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title.

There is little doubt that this interpretation has made it more difficult to prove native title and the dissenting judgments in the same case were not as onerous in terms of the legal requirements.[107] Indeed Justice Mc Hugh commented that it was clear that the High Court in this and previous cases had interpreted the "recognition" of native title in a narrower fashion than Parliament had intended when it included section 223 within the Act.[108]

To quote from his judgment in *Yorta Yorta* at [129] and [134] respectively:

> However, I remain unconvinced that the construction that this court has placed on s223 accords with what the parliament intended. … the parliament believed that, under the Native Title Act, the content of native title would depend on the developing common law.
>
> But this Court has now given the concept of "recognition" a narrower

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[106] *Members of the Yorta Yorta Aboriginal Community v Victoria and* Others 214 CLR 422 at 456 [87] and [88].

[107] For example, Justices Gaudron and Kirby did not require the "substantial" maintenance of a traditional connexion with the land and waters ibid [123], [124].

[108] Ibid [127], [128]. The other cases are the High court cases of Yarmiirr and Ward.

> scope than I think the Parliament intended, and this court's interpretation of s223 must now be accepted as settling the law.

The High Court in Australia has also determined that whilst the common law will recognise native title based as it is on the traditional laws and customs of Australia's Indigenous peoples it will not recognise laws and customs that are inconsistent with what have been described as the "skeletal principles" of the common law of Australia.[109] That is, the Courts will not interpret the common law of Australia to provide for the recognition of native title rights and interests that are fundamentally inconsistent with the principles of the common law.[110] Similarly, the High Court has determined that native title rights and interests even if proven to exist will not be recognised if those rights and interests are inconsistent with the common law or common law rights.

This latter notion has had particular application to native title and water. For example, in *Commonwealth v Yarmirr* [111] the High Court decided that in relation to the seas an asserted native title right of exclusive possession was fundamentally inconsistent with common law public rights of fishing and navigation and the international right of ships to innocent passage through the territorial seas of a nation state. To quote:

> …there is a fundamental inconsistency between the asserted native title rights and interests and the common law public rights of navigation and fishing, as well as the right of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights.[112]

Similarly, although not explicitly put in these terms cases to date (outlined in section 6 of the report) have decided that inland waters or freshwater, in its natural state is not capable of ownership, that is an exclusive possession determination of native title. The only High Court decision to date has stated the proposition on alternative grounds being one of extinguishment and that there is no native title right of exclusive possession applicable to water because of extinguishment of such a right by water management legislation when the Parliament has vested the right to the control of and use of water in the Crown.[113] In *Western Australia v Ward* the High Court stated:

> Part III of the *Rights in Water and Irrigation Act* provides (in s 4(1)) that the "right to the use and flow and to the control of the water" in natural waters "shall, subject only to the restrictions hereinafter provided, and until appropriated under the sanction of this Act, or of some existing or future Act of Parliament, vest in the Crown". It deals with riparian

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[109] *Mabo [No 2]* (1992) 175 CLR 1 at 43.
[110] *Commonwealth v Yarmirr (2001)* 208 CLR 1 at [97], [98].
[111] *Commonwealth v Yarmirr (2001)* 208 CLR 1.
[112] Ibid at [98].
[113] *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at 152 [263].

> rights and allows riparian owners to apply for special licences to divert and use water. The vesting of waters in the Crown was inconsistent with any native title right to possession of those waters to the exclusion of all others.

To summarise, native title rights to water in this context will not be recognised when there is inconsistency with existing third party rights, the common law or water management legislation.

As I mentioned in the introductory section on the ownership of natural waters in relation to the Western Australian water management legislation the Courts reliance upon extinguishment raises an interesting question in relation to the situation in Western Australia. It would appear that not all water was "vested" in the crown prior to the commencement of the new section 5A in the *Rights in Water and Irrigation Act, 1914* in 2000. It was not vested in relation to surface water in areas in Western Australia that were not subject to licensing under the Act. This therefore potentially raises an interesting question as to whether native title may consist of a right of ownership of water in an area of the state where licensing did not apply prior to the commencement of this amendment.

Certainly as a matter of logic if the sole principle applicable to this question is in relation to extinguishment it would appear it is open for a native title group to establish in a particular case exclusive possession or ownership of the water. But I suspect quite strongly that the principles expounded in the 2009 High Court case of *ICM Agriculture*[114] would still preclude such an outcome for the reason being that generally natural waters are incapable of ownership as a matter of law.

Federal Court cases to date (which I have discussed in section 6 of this report) have also expressed the view that the common law per se, as a matter of principle if you like cannot recognise a native title right to exclusive possession of water. In relation to the Northern Territory *Water Act* the following has been stated in *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia* in 2000:

> .. the common law does not recognise a claim to ownership of flowing water. In relation to water generally, the *Control of Waters Ordinance* 1938 (now replaced by the *Water Act* 1992) has established a regime in relation to water rights which is inconsistent with the continued existence of exclusive native title rights to the ownership and use of water.[115]

Whilst this refers only to flowing water and not other forms of surface water the principle appears to be the same.

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[114] See the detailed discussion of the case entitled *ICM Agriculture* in the introductory (part two) section on ownership of water.

[115] *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia* [2000] FCA 923 at [126].

The difference between the Indigenous view of rights and interests in relation to water in accordance with traditional laws and customs and what the common law of Australia as interpreted by the Courts is prepared to recognise was explicitly acknowledged by the native title holders and the Northern Territory Government in the Full Federal Court decision of *Attorney-General of the Northern Territory v Ward* in a recital to the Court orders wherein it is written:[116]

> H. Those parties referred to in Recital F acknowledge that the rights and interests of the native title holders in the land and waters of the NT claim area, possessed under their traditional laws and customs, but not all of which may be recognised by the common law, are:
>
> (a) ownership of the land and waters;

This area is more fully explored in the introductory section on the ownership and vesting of water in the Crown in this report.

Native Title rights to access, take and use water for non-commercial purposes

In general terms as discussed in section 6 of this report native title rights and interests in relation to water have been legally recognised in the following manner:

- A right to take water, for the purposes of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs;[117]

- a right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters.[118]

- the right to have access to, maintain and protect places and areas of importance on or in the land and waters.[119]

- A right of access to take water for those purposes;[120]

These rights have been found to apply to both flowing and subterranean

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116 [2003] FCAFC 283. A recital is a non-legally binding part of the Court orders.

117 *Mark Anderson on behalf of the Spinifex People v State of Western Australia* [2000] FCA 1717.

118 *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at 1 New paragraph 3 (c) (iii).

119 Ibid Annexure B to the judgment at page 2. Clause 3 (d) of the determination recognizing native title reported *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135.

120 *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 clause 9 of the WA determination.

waters.[121]

There are a number of variations on this wording in determinations in the various jurisdictions but in essence the same concepts are covered. For example, in *Rubibi Community v State of Western Australia* [122] concerning *Rubibi Native Title Determination No.2* the Court made the following orders:

> (a) except in relation to flowing and subterranean water - the right of possession and occupation as against the whole world; and
>
> (b) the right to take flowing and subterranean water for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

It needs to be emphasised that whilst there is generally a great degree of commonality concerning the type of rights recognised in respect of water, each case depends on its own particular facts and proof of traditional laws and customs in relation to water.

These aspects are illustrated by the following quote from the Alice Springs native title case *Hayes v Northern Territory of Australia* in 2000:[123]

> On the evidence which has been adduced in support of the applicants' case it is not open to find that the members of the claimant groups have, in accordance with their traditional laws and customs, the right to the exclusive possession, occupation, use and enjoyment of the claimed land. The evidence does however establish that members of the claimant groups and their forebears have by Aboriginal traditional law and custom lived on the land of their respective groups, hunted wild life and gathered food found thereon and made use of the surface water resources. The advent of non-Aboriginal occupation of the land has clearly had an effect on the claimants' ability to continue to exercise these traditional rights to the same extent that their forebears were able to but nevertheless they continue to use the land in the manner described and they do so in accordance with their traditional laws and customs.

It is also common for the outcome in one case to include both a determination of native title for exclusive possession over certain areas and for the remaining parts to be non – exclusive and therefore less comprehensive rights found to be applying to that area.

A Native Title right to trade

I have canvassed in section 6 the emerging recognition in native title

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[121] *Ngalpil v State of Western Australia* [2001] FCA 1140 (the Tjurabalan case), and see generally O'Donnell, M *Background Briefing Papers Indigenous Rights to Waters* Lingiari Foundation February 2002 at 95.

[122] *(No 7)* [2006] FCA 459.

[123] [2000] FCA 671 at [47].

jurisprudence of a right to trade in the resources of the land and waters and the potential for water to be regarded as a resource and therefore an object of such trade.[124] As mentioned, no one has proved the existence of such a right,that is to trade water in a particular case to date.

The existence of a native title right to trade in marine resources has been recently further confirmed in the Torres Strait Seas claim in June 2010. In *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland*[125] the Federal Court decided on the facts of that case that in particular a native title right to take fish for commercial purposes existed and should be recognised:

> I have found that the right to take resources includes the right to take marine resources for trading or commercial purposes and that such use of them would be recognised by the common law. I have rejected the contentions of the State and of the Commonwealth that the ever-expanding regulatory controls placed upon commercial fishing by legislation extinguished any native title right to take fish for commercial purposes. Those legislative controls were not directed at the underlying rights of the native titleholders who were obliged to comply with the regulatory measures imposed on them if they were to enjoy their native title rights. The various Acts severally or together did not, and do not, evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes in the Part A Claim Area. Having said this, it needs to be emphasised that, to the extent that those legislative regimes regulate the manner in which, and the conditions subject to which, commercial fishing can be conducted in a fishery in the native title holders' marine estates, or prohibits qualifiedly or absolutely particular activities in relation to commercial fishing in the fishery in those estates, the native title holders must, in enjoying their native title rights, observe the law of the land. This is their obligation as Australian citizens. Complying with those regimes provides them with the opportunity – qualified it may be – to exercise their native title rights.

Significantly such a right is subject to regulation by government including potentially the total banning of the activity for conservation purposes. This is consistent with the position in Canada and New Zealand. This is also consistent with two further points concerning native title made later in this section concerning the fact that native title is generally subject to pre-existing rights and laws and that section 211 of the *Native Title Act, 1993* that lifts licensing requirements for certain native title activities does not work or apply in relation to any commercial native title rights.

Native Title right to control access to waters

In a situation where the native title is determined to include a right to

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[124] See pages 15, 16 section 6 of the report.
[125] (No 2) [2010] FCA 643 at [13].

exclusive possession of the land and waters this also includes a right to control access to the waters within the determination area. As mentioned elsewhere (see the section 6 of this report) this does not equate to ownership of the waters but is obviously a valuable right. In *Gawirrin Gumana v Northern Territory of Australia (No 2)* a single judge of the Federal Court described it in these terms:

> that the native title rights and interests over the land and *inland waters* (my emphasis), should be expressed so as to include the exclusive right to control access to water on that part of the claim area (it being contained within the claim area over which there is such an exclusive right) and to use and enjoy that water.[126]

In relation to exclusive possession determinations this has also been expressed as:

- a right to make decisions about access by people to the use of the waters;[127] and

- the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources in and on that area.[128]

In summary, these rights to control access to water and to make decisions about how the waters are used are subject to two important qualifications. One, they can only exist and be legally recognised where exclusive possession native title is recognised and secondly are subject to existing rights of access and use of the waters conferred by or arising under a law of the Northern Territory, relevant State or Commonwealth.

As I have written in section 6:

> The significant point to be made here is that this case confirms and makes explicit that whilst it is not possible for native title holders to have the exclusive right to use and access water they can determine access by others to the water that exist in or on the land if they hold an exclusive possession determination to that land.

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[126] *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425 at [42].

[127] *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at Amended paragraph 3(e) of the determination is in the following terms: 3 (e) in respect of the Hatches Creek town site only, the right to make decisions about access to the land by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters;

[128] Ibid amended paragraph 3(f) of the determination is in the following terms:3 (f) in respect of the Hatches Creek town site only, the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters;

> The second point raises the real question as to whether the existence of these other non native title rights makes the native title right to control access to the waters effectively illusory only.

To quote from a particular determination so that this point is more readily understood in the case of *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* in 2005 the Court found rights with respect to the control of access in the part of the claim where exclusive possession was found to exist but also stated that this was subject to a person exercising pre-existing rights to the use of the waters. The following caveat to the determination of this right was therefore made:

> …the right to make decisions about access to the land by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters.[129]

In the 2001 Tjurabalan (*Ngalpil v State Of Western Australia*) determination[130] in the south - east Kimberley in Western Australia this point was expressed in these terms:

> Other rights and interests
>
> (k) Any other rights and interests validly granted by the Crown pursuant to statute or by any valid executive or legislative act, which are current at the date of this determination.
>
> (l) Any other rights or interests held by or under the Crown by the force and operation of the laws of the State or the Commonwealth as may be current at the date of this determination, including the force and operation of the Rights in Water and Irrigation Act 1914.

These quotes direct from native title determinations – that is, Court orders recognising native title show the form and content of the exceptions to an exclusive possession determination and the limitations to the right to control access to water in such determinations.

If there is a pre-existing right to take water from the area under the water management legislation in a particular jurisdiction then the native title will be subject to this right of access to and use of the water. The extent to which these native title rights to control access will apply, practically speaking will depend upon the amount of pre-existing rights that exist in a particular area.

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[129] *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia* [2000] FCA 923 at [126].

[130] *Ngalpil v State Of Western Australia* [2001] FCA 1140 Schedule 2 of the Court orders paragraphs (k) and (l).

Native Title Act 1993

The *Native Title Act, 1993* (NTA) provides a framework through which native title is legally recognised or not and in certain circumstances protected. It also provides the legal rules as to the manner in which native title can be affected, extinguished or compulsorily acquired by government in the future. This is generally known as the future act regime in the NTA, which is found in Part 2 Division 3 of the Act. The future act regime consists of a number of different legal processes or rules by which in essence future developments and land and waters uses may be approved that affect native title.

These processes range from the provision of procedural rights to native title holders to be notified and have an opportunity to comment upon a new act or development that may affect their native title to a right to negotiate process that must be complied with to validly affect the native title. The type of process that applies depends on the type of development or water use involved, the native title rights affected and the proposed location in which it will take place. For example, if the development is within the boundaries of a town or city. The Indigenous Land Use Agreement provisions are also another mechanism under the Act in the future act regime by which native title may be affected but in this case by agreement with the native title holders.

Through out this section of the report the words "affect" or "affected" the native title, are often used. Whilst there are provisions in the NTA that define the word "affect"[131] essentially it deals with the following situation - when government or a third party *wishes* to do something that extinguishes (means the native title can't be exercised anymore) or is wholly or partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests then it "affects" native title. The type of affect it has on the native title or the type of development or activity that is sought to be approved determines which rule or part of the future act regime applies to it.

As an example, at a practical level what are the rules that apply to approve a new licence to take water by a third party where native title rights exist to take and use that water for non-commercial purposes. In this instance, it would be the procedural rights of prior notice and an opportunity to comment prior to the grant of the new licence under s 24 HA. The details of this section are canvassed later in this section of the report.

Another example - what rules apply where there is a native title right to control access to water which government wants to set aside for a new irrigation scheme. This may involve the extinguishment of the native title and the termination of the right to control access to the waters. Then, the Indigenous Land Use Agreement provisions or a compulsory acquisition of native title rights and interests may be used by government. If compulsory acquisition is used then the right to negotiate provisions of the future act regime generally apply. The right to negotiate process is a period of

[131] NTA s 227.

negotiation under the Act and if no agreement is reached then an independent tribunal decides whether the development should proceed with certain final ministerial override powers.[132]

There are also provisions in the Act that deal with the grant of titles and land and waters uses that occurred in the past that are validated or made legal under the NTA. These come under the heading of past acts, intermediate period acts and the confirmation of past extinguishment. I do not deal with them in detail in this report.[133] All of these provisions in general terms deal in a complicated way with the consequences of the belated recognition of native title in Australia in 1992, and governments need to provide for the validity of the grant of land and water titles and uses as a result of the *Mabo [No 2]* and *Wik* High Court decisions. The consequences of these provisions are often to extinguish native title including in relation to water in a particular case.

All of these provisions generally described can apply to water. I will now outline the effect of the major provisions in the Act concerning water. There are some 7 broad areas that I will discuss where the NTA affects native title in relation to native title and water.

These are:

- The legal recognition of native title in relation to water;
- The "confirmation" of Crown or government rights to the use, control and regulation or management of water;
- The validation of any water management legislation that was enacted between the 31 October 1975 and 1 July 1993 if it is invalid (because of the Racial Discrimination Act, 1975);
- The confirmation of "existing" public access to and enjoyment of waterways, the beds and banks or foreshores of waterways, coastal waters and beaches;
- The preservation of certain native title non-commercial activities in relation to water from some types of government regulation in section 211 of the Act;
- The future act regime which provides how native title rights to water can be affected or impacted upon by government and third parties especially section 24 HA;
- The Indigenous Land Use Agreements (ILUA's) provisions in the future act regime.

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[132] See s25 and Part 2, Division 3 Subdivision P of the NTA.
[133] See Part 2 Divisions 1-2B of the NTA.

The recognition of native title

Firstly, as mentioned the NTA provides a statutory process by which native title rights to water may be recognised or not in Australian law. The recognition of native title rights is in accordance with a Court order or determination as it is called under the NTA in accordance with Part 4 of the Act. Importantly, a determination in relation to native title may be made "in relation to a particular area of land or waters".[134] The words "Native Title" are defined in the Act as the rights or interests "in relation to land or waters".[135] The definition of waters includes inland, surface and subterranean waters.[136]

I have discussed the definitions of land and waters in the introduction to the report. Generally a determination that native title exists is made in relation to both land and waters as defined.

It is important to understand that there are the two basic types of native title determinations, which recognise native title. The word determination comes from the *Native Title Act* and simply refers to a Court order as to "whether or not native title exists in relation to a particular area "of land or waters."[137] The determination must address five issues:

1. The identity of the native title holders;
2. The nature and extent of the native title right and interests;
3. The nature and extent of any other interests in the area;
4. The relationship between the native title rights and interests and the other interests in the area; and
5. Whether the native title includes include the right to possession, occupation, use and enjoyment to the exclusion of all others.

In general terms, the first type of determination is what is called an exclusive possession determination and the second a non-exclusive determination.

Exclusive possession determination

An exclusive possession determination involves a Court order that there is a right to possession, occupation, use and enjoyment to the exclusion of all others.[138] This is sometimes also written as a right or entitlement to possession, occupation, use and enjoyment of the land as against the whole world. This latter wording comes directly from the final court order made in the *Mabo* case by the High Court of Australia in 1992 and is used in some of the Kimberley cases analysed in section 6 of this Report.[139]

It is an exclusive possession determination that includes a right to control

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[134] NTA s 225.
[135] NTA s 223.
[136] Generally on the issues discussed in this paragraph see Bartlett, R.H *Native Title in Australia* 2nd Edition Butterworths 2004 at 235 [12.64].
[137] Section 225 of the *Native Title Act, 1993*.
[138] Ibid Section 225(e).
[139] *Mabo v Queensland [N0. 2]* 175 CLR 1 at 217.

access to the land and waters that exist in that area. Any exclusive possession determination is subject to the non - native title rights that may exist at the time of the determination, which generally will constitute an exception to the native title right to control access.

It is also important to note there cannot be an exclusive possession determination over the seas or inter-tidal zone only over the land, that is the area above the high water mark.

A non-exclusive determination

A non-exclusive determination recognizes individual and separate native title rights only and involves no control over access. For example, in the recent *Western Yalanji* determination[140] in Queensland the following rights were recognised:

(a) be present on, use and enjoy the Determination Area by:

(i) hunting, fishing and gathering on, in and from the Determination Area for personal, domestic or non-commercial communal purposes;

(ii) conducting ceremonies on the Determination Area;

(iii) being buried on, and burying Native Title Holders on, the Determination Area;

(iv) maintaining Springs and wells in the Determination Area where underground water rises naturally, for the sole purpose of ensuring the free flow of Water;

(v) taking, using and enjoying the Natural Resources found on, or within, the Determination Area for personal, domestic or non-commercial communal purposes;

(vi) maintaining and protecting from physical harm, by lawful means, those places of importance and areas of significance to the Native Title Holders under their traditional laws and customs in the Determination Area; and

(b) inherit and succeed to the native title rights and interests.

Such a determination generally occurs where a land title has been issued such as a pastoral lease over an area, which does not totally extinguish the native title. So that you have a situation where there are co-existing land titles/interests, that is the pastoral lease and some native title rights and interests. The effect of this for native title holders is that because of the co-

[140] *Riley v State of Queensland* [2006] FCA 72 at page 2 clause 3 of the Determination.

existing pastoral lease the right to exclusive possession or to control access to the land and waters of that area is extinguished or lost and the rights of the co-existing title holder - a pastoral lease in this example prevail over the native title rights. To use the *Western Yalanji* case[141] again as an example:

> …any activity that is permitted by or under, and done in accordance with, the other rights and interests or any activity that is associated with or incidental to, such activity, ***prevails over the native title rights and interests*** (my emphasis) and any exercise of the native title rights and interests, but does not extinguish them.

Confirmation of Crown or Government's existing rights to the use, control and regulation of water

Secondly, the Act allows the Commonwealth, States and Territories to "confirm" the Crown or government's existing rights to the use, control and regulation of water.[142] For example the "confirmation" in the Northern Territory legislation - the *Validation (Native Title) Act* (NT) is in the following terms:

> "All existing rights of the Territory to use, control and regulate the flow of water are confirmed."**[143]**

I have dealt with the vesting of these rights in the Crown and the legal consequences of this in the introduction to this report and the fact that it does not constitute ownership of water by the Crown. This confirmation of the existing Crown rights in the *Native Title Act, 1993* has no further or new effect upon native title rights to water. I have discussed how the vesting of these rights in the Crown was held in the High Court case of *Ward* to extinguish any native title right to own water if such a right could be found to exist in any event as it is inconsistent with the common law position that natural waters are incapable of ownership.[144]

The provision has no utility. As Professor Bartlett has written the purpose is to address unfounded fears about the affect of native title.

> The provision is effective only to quiet unfounded concerns that such legislation could be rendered wholly invalid by the Racial Discrimination Act, 1975 (Cth).[145]

That being so the vesting of the right to regulate, use and control water in the Crown or a government is the main means by which government manages and controls water as a resource. The water management legislation is the

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[141] Ibid at page 5 clause 9(b) of the Determination.
[142] See s 212 NTA and also the Validation (Native Title) Act NT s12; Native Title (Queensland) Act s17 and Titles (Validation) and Native Title (Effect of Past Acts) Act, 1995 (WA) s13.
[143] *Validation (Native Title) Act* (NT) s 12 (2).
[144] See Introduction – part two of this report generally concerning ownership of natural waters.
[145] Bartlett, R.H *Native Title in Australia* 2nd Edition Butterworths 2004 at 635 [26.5].

source of power to grant rights to take and use water and therefore affect native title rights to use water.

Validation of water management legislation

Thirdly, the NTA also validates any water management legislation that was enacted between the 31 October 1975 and 1 July 1993 if it is invalid because of any discriminatory impact the legislation may have had on native title rights in relation to water. This potentially arises because native title at common law was not recognised in Australia until 1992 in the *Mabo [No 2]* decision and the legal recognition is retrospective. That is the native title if legally recognised will have existed from the date of the acquisition of sovereignty, subject to any subsequent extinguishment or break in connection with the land or waters. That being so the commencement of the *Racial Discrimination Act* in October 1975 may have the legal consequence that water management legislation is invalid because of its discriminatory impact in not taking into account the existence of native title.[146]

The only water management legislation that potentially fits within this category is the Northern Territory Legislation – the *Water Act, 1992.* The legislation in the other northern Australian jurisdictions either pre or post dates the relevant period here.

Confirmation of public access to water

Fourthly, the Act allows the Commonwealth, States and Territories to "confirm" "existing" public access to and enjoyment of waterways, the beds and banks or foreshores of waterways, coastal waters and beaches.[147] All three northern Australian jurisdictions have passed legislation to this effect. The use of the word "existing" is indicative of the fact that the public access would have had to exist at the time of the commencement of the NTA on the 1 January 1994.[148] This confirmation of public access and enjoyment, that is the public right to access and use the listed named places (such as the foreshore of waterways) does not extinguish or impair any native title rights or interests.[149]

At a practical level this means that if the native title in the particular area where the place exists consists of an exclusive possession native title determination then the right to control access by the native titleholders is not affected as a matter of law. It is though, subject to the existing rights of public access - that is the native title right to control access does not authorise the stopping of any existing public access to the waterway for example.

Section 211 of the Act

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[146] Ibid 635.

[147] See s 212 NTA and also the Validation (Native Title) Act NT s12; Native Title (Queensland) Act s17 and Titles (Validation) and Native Title (Effect of Past Acts) Act, 1995 (WA) s13.

[148] Perry, Melissa & Lloyd, Stephen *"Australian Native Title Law"* Lawbook Co. Sydney 2003 at 747, 748. [13.150].

[149] NTA section 212 (3) and as an example in provincial jurisdiction see s13 (2) *Validation (Native Title) Act* NT.

Fifthly, the NTA preserves certain native title activities in relation to water from some types of government regulation in section 211 of the Act. The section is headed "Preservation of certain native title rights and interests" in the Act. In particular, it relieves or lifts general prohibitions on a listed activity, without a licence. These activities are hunting, fishing, gathering and conducting cultural or spiritual activities, and gaining access to land or waters for such purposes. This exemption is qualified by the requirement that the activity or practice must be for the purpose of satisfying personal, domestic or non-commercial communal needs only. As such it doesn't apply to any commercial native title right to fish such as that found to exist in the recent *Akiba* - Torres Strait seas case. The full provision is as follows:

211 Preservation of certain native title rights and interests

Removal of prohibition etc. on native titleholders

(2) If this subsection applies, the law does not prohibit or restrict the native titleholders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

(a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and

(b) in exercise or enjoyment of their native title rights and interests.

Note: In carrying on the class of activity, or gaining the access, the native titleholders are subject to laws of general application.

Definition of class of activity

(3) Each of the following is a separate class of activity:

(a) hunting;
(b) fishing;
(c) gathering;
(d) a cultural or spiritual activity;
(e) any other kind of activity prescribed for the purpose of this paragraph.[150]

The stated purpose of this provision is to enable certain non-commercial native title activities to continue to take place where other people in the community are only able to undertake similar activities subject to a licensing requirement. So for example, an Indigenous person undertaking these type of activities may do so without a licence such as a hunting or fishing licence or may for example undertake the hunting even though it may be a 'closed' hunting season in general licence terms.

[150] NTA s 211 (2) (3).

The Hansard of the Federal Parliament during the debate concerning the *Native Title Bill* in 1993 records that the purpose of section 211 was described as:

> ….to ensure that Aboriginal people are not prevented from exercising their inherent native title rights and interests in circumstances where State and Commonwealth laws allow others to engage in those activities. The amendment does not prevent a State or the Commonwealth from prohibiting a native title activity where it is necessary…..[151]

This section of the Act relevantly applies where States and Territories prohibit the taking and using of water without a license or permit in water management legislation. This provision allows native titleholders to access and take and use water without the requirement for a licence and without committing an offence as part of the conduct of the activities listed. However, these exemptions from licensing and the offence provisions only occur when indigenous persons *are undertaking the listed activities*. The provision does not act as a general relief from the obligations of obtaining a licence when a native title right or activity is outside or unrelated to these listed activities. To quote from Ms. Katie O'Bryan in her article on native title and inland waters:

> The specific effect of this section in relation to inland water rights is that it preserves the right of native titleholders to access waters for these types of activities. It would also encompass the taking and use of the waters if that taking and use was in carrying on these activities, where it is being done in exercise of native title rights and interests. Following the decision in *Yanner v Eaton* and according to at least one commentator, it would appear that it is not necessary for there to have been a determination of native title in favor of that person's native title holding group in order to take advantage of s211.[152]

It is therefore important to determine to what extent the listed activities apply to the native title rights and interests to water that are normally recognised. As mentioned, typically native title rights to water are a right to access, take and use water for personal, social, domestic and cultural purposes.

To the extent that the provision includes "gathering" (one of the activities listed) it would include taking water for personal, social and domestic purposes and taking and using water for "a cultural or spiritual activity" then it's probably the case that in most native title determinations the provision

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[151] Commonwealth Parliamentary Debates (16 December 1993) pp 5440-5441 as quoted in Perry, Melissa & Lloyd, Stephen *"Australian Native Title Law"* Lawbook Co. Sydney 2003 at 742.

[152] O'Bryan, Katie *Issues in Natural Resource Management Inland Water Resources implications of Native title and the future of Indigenous control and Management of Inland Waters* Murdoch University E Law Journal, Vol. 14, N0. 2 (2007) 280 at 293.

will be applicable in a practical sense. This is so in my opinion especially as the class of activity as described in section 211 must be carried out for "personal, domestic or non-commercial communal needs".[153]

I note that section 211 (3)(e) provides for the approval by regulation of other kinds of activities and it may well be that consideration could be given to approving the general taking of water for non-commercial purposes to resolve the difficulties of interpretation that currently apply to ensure the beneficial intent of this provision is applicable to native title holders.

As mentioned the provision does not apply where there is a complete prohibition on the doing of an activity in an area (generally for conservation purposes). For example, in Western Australia, by-laws, which prohibited any taking of flora and fauna, within a certain distance from a water reservoir in the Ord Scheme were not affected by section 211 of the NTA and so the general prohibition also applied to native titleholders.[154]

Native Title rights to water and the future act regime

Sixthly, the NTA in the future act regime provides how native title rights to water can be affected or impacted upon by government and third parties. It also provides for certain procedural rights for native titleholders and claimants. This statutory scheme also provides an opportunity (not a legal right) for native titleholders to negotiate about the protection of their interests and any possible involvement in the development being proposed. In general terms, the negotiating position is not a strong one in relation to water as the procedural rights afforded by the Act in provisions such as 24 HA (7) are minimal. I will firstly summarise the provisions and then explain each in detail.

In summary, the future act regime in relation to water includes:

- In relation to *new water management* legislation that affects native title the application of the non-extinguishment principle and a right to claim compensation;

- In relation to the grant by government of third party rights to take and use water or conduct activities related to water - prior notice and an opportunity to comment concerning the proposed grant, the application of the non-extinguishment principle and a right to claim compensation;

- In relation to any third party right to take and use water once granted that affects native title rights then the native title cannot prevent the doing of activities authorised by that right;

The main provisions concerning the management and regulation of water involving native title interests in water are to be found in section 24 HA of the

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[153] NTA s 211 (2) (a).
[154] *Western Australia v Ward* 213 CLR 1 at 152 [265].

Act. This covers water management legislation and the grant of rights to others –third parties (via license or permits for example) to take and use water. Native titleholders do not have the legal right to grant, refuse or negotiate about the grant of such a licence under the *Native Title Act, 1993*.

The Act does provide in relation to water for certain procedural rights to native title holders and registered native title claimants, a right to claim compensation for the adverse affect upon those rights and further that the non-extinguishment principle applies in that situation. I shall discuss each of these items in turn. The relevant provisions of the Act are:

> Subdivision H—Management of water and airspace
>
> 24HA Management or regulation of water and airspace
>
> *Legislative acts*
>
> (1) This section applies to a future act consisting of the making, amendment or repeal of legislation in relation to the management or regulation of:
>
> (a) surface and subterranean water; or
> (b) living aquatic resources; or
> (c) airspace.
>
> In this subsection, *water* means water in all its forms and *management or regulation* of water includes granting access to water, or taking water.
>
> *Leases, licenses etc.*
>
> (2) This section also applies to a future act consisting of the grant of a lease, license, permit or authority under legislation that:
>
> (a) is valid (including because of this Act); and
> (b) relates to the management or regulation of:
>
> (i) surface and subterranean water; or
> (ii) living aquatic resources; or
> (iii) airspace.
>
> In this paragraph, ***water*** means water in all its forms and ***management or regulation*** of water includes granting access to water, or taking water.
>
> *Validity of act*
>
> (3) The act is valid.
>
> *Non-extinguishment principle*

(4) The non-extinguishment principle applies to the act.

Compensation

(5) The native titleholders concerned are entitled to compensation for the act in accordance with Division 5.

Who pays compensation

(6) The compensation is payable by:

(a) if the act is attributable to the Commonwealth—the Crown in right of the Commonwealth; or
(b) if the act is attributable to a State or Territory—the Crown in right of the State or Territory.

Notification

(7) Before an act covered by subsection (2) is done, the person proposing to do the act must:

(a) notify, in the way determined, by legislative instrument, by the Commonwealth Minister, any representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants in relation to the land or waters that will be affected by the act, or acts of that class, that the act, or acts of that class, are to be done; and

(b) give them an opportunity to comment on the act or class of acts.

This provision applies to both surface and subsurface (subterranean) waters.[155] It should be noted that this section refers only to "water" and not "waters". Waters is defined to also include the seas, seabed and subsoil.[156]It is the "intention" that section 24HA will only apply to water in its ordinary meaning. Future acts concerning the bed or subsoil of waters are dealt with elsewhere in the Act in subdivisions M and N of Division 3.[157]

Section 24HA provides that any new or changes (amendments) to water management legislation can take place and validly affect native title. In relation to such legislation the non-extinguishment principle and a right to apply for compensation applies if native title is affected in the particular case.

In addition, in relation to any proposed legal authority (licence/permit) for a

[155] It also applies to water in all its forms – s24 HA (1).
[156] See section 253 NTA
[157] *Lardil Peoples v Queensland* 185 ALR 513 at [94]. Also see Perry & Lloyd, *Australian Native Title Law* at 248.

third party to take and use water for example procedural rights consisting of prior notice and an opportunity to comment are also to be provided to the native title holders or claimants. Prior to the grant of such an authority notice of the intention to grant is to be given to the native titleholders or any registered native title claimants. An opportunity to comment about the grant is to be provided. As with water management legislation the grant of any authority to take and use water is subject to the non-extinguishment principle and a right to claim compensation for the affect upon native title is provided.

The leading case about the content of these procedural rights is *Harris v Great Barrier Reef Marine Park Authority*. The case involved permission to carry out tourist activities, fishing, snorkelling, and research and establish moorings in the marine park. It is discussed in detail in Perry & Lloyd's *Australian Native Title Law*[158]and I have used the analysis in that reference work. In relation to the notification requirement for permission to carry out these activities it was held that only general information is required:

> It is understandable that the notification obligation imposed and the opportunity to comment given by s 24HA(7) (and the corresponding provisions of Subdivisions G, I and J) can be fulfilled by the decision-maker providing to the designated recipient only general information: those recipients have no right to veto the future act or acts. The act or acts, if done under Subdivision H, cannot extinguish any native title rights that may exist and native titleholders able to establish their claims have a right to compensation for such detrimental impacts as the future act may have on their native title rights.[159]

The "opportunity to comment" is considered by the Courts in this statutory context to be "simply precautionary".[160]

> The whole object of s24HA (7), which is of general application to all persons and entities with power under Commonwealth or State laws to grant leases, licences, permits or authorities in relation to the management or regulation of water and airspace that may affect native title rights, is precautionary only. It is intended to ensure that the possible impact of the grant of the permit on native title rights, whether curially established rights, formally claimed rights or rights that might be thought by an informed person possibly to exist, is not overlooked when the decision-maker makes its final decision to issue the permit.[161]

Further the Court was of the view that the opportunity to comment was only a right of native title holders to give information to the decision maker who may or may not take it into account – it is not a right to take part in the

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[158] Perry, Melissa & Lloyd, Stephen *"Australian Native Title Law"* Lawbook Co. Sydney 2003 at 252 and 253.
[159] *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603 at [49].
[160] Perry & Lloyd at 251.
[161] *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603 at [52].

decision making process.[162]

> The opportunity "to comment" on a proposed act provided for by s 24HA(7)(b) in terms suggests that those with that right have only an entitlement to explain why, in their opinion, the act should not be done at all or only on conditions and to draw to the attention of the decision-maker information which they possess and which they consider the decision-maker should know about before doing the act. The right under s 24HA(7)(b) is, we think, a right to proffer information and argument to the decision-maker that it can make such use of as it considers appropriate. The sub-section does not confer any greater right on the native title interests. It is not a right to participate in the decision whether to issue the permit or a right that entitles the recipients to seek information from the decision-maker necessary to satisfy those interests about matters of concern to them. That this is the narrow scope of the right conferred by s 24HA(7)(b) is, we think, confirmed by comparing this right with the rights conferred on native title interests by some of the other provisions of Div 3.

The non-extinguishment principle in this instance means that that there is no extinguishment of the native title rights to water caused by the legislation or grant of the authority to take and use the water.[163] The application of this principle also means that the native title has no legal effect in relation to the legislation or authority in question whilst it remains in existence.[164]

Any failure to provide the prior notice or opportunity to comment by government does not affect the validity of the grant of the authority to take and use the water.[165] Indigenous Heritage Protection laws still apply to areas or sites of significance that consist of water as discussed in section 1 Part D of this report.

Section 24 HA and the application of the non-extinguishment principle must also be seen in conjunction with section 44H of the Act. Section 44H provides that native title cannot prevent the doing of activities authorised by any third party right to take and use water once granted.

More specifically the section provides that the grant of any licence, permit or authority (as referred to in section 24 HA (2)) that relates to the management or regulation of water that authorises any activity then the authority (the rights conferred under a third party water licence for example) and doing of the activity under that licence prevail over any native title rights and interests.[166] The native title cannot prevent the doing of the activity.[167] The

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[162] Ibid [38].
[163] NTA s 238 (2).
[164] NTA s 238 (3), (4).
[165] Perry, Melissa & Lloyd, Stephen *"Australian Native Title Law"* Lawbook Co. Sydney 2003 at 252 and 253.
[166] NTA s44 H (c).
[167] NTA s 44H (d).

full provision is as follows:

44H Rights conferred by valid leases etc.

To avoid doubt, if:

(a) the grant, issue or creation of a lease, licence, permit or authority is valid (including because of any provision of this Act); and

(b) the lease, licence, permit or authority requires or permits the doing of any activity (whether or not subject to any conditions); and

(ba) an activity is done in accordance with the lease, licence, permit or authority and any such conditions; then:

(c) the requirement or permission, and the doing of the activity, prevail over any native title rights and interests and any exercise of those rights and interests, but do not extinguish them; and

(d) the existence and exercise of the native title rights and interests do not prevent the doing of the activity; and

(e) native titleholders are not entitled to compensation under this Act for the doing of the activity.

Conclusion - water management legislation and native title procedural rights in relation to water – section 24HA

In relation to water management legislation and the grant of rights to take and use water there are minimal procedural rights applicable to the holders of and claimants of native title rights and interests in water in that area. In essence, government is under a non-legally binding responsibility to provide notice and an opportunity to comment before the grant of the licence is made to the third party. The grant does not as a matter of law extinguish native title but the native title is effectively suspended during the term of the licence.

Just terms compensation is payable for any adverse effects upon the native title if an application for compensation is made and granted under the NTA. The quantum of compensation and the existence of native title must be proved. Thus compensation does not automatically follow the grant of the third party rights to take and use water or the new water management legislation.

The conduct of other activities related to water

There are also a number of other provisions in the NTA future act regime, that provide a legal mechanism for the authorisation of legal rights for third parties or governments that can affect native title rights in relation to water. Generally the same procedural rights as outlined in relation to section 24HA apply in these circumstances. These include what are described as:

- primary production activities (involving the taking and using of water);[168]
- off-farm activities that are directly connected to primary production activities (involving the taking and using of water);[169]
- renewals and extensions (such as water licenses);[170]
- reservations and leases (such as a reserve for watering);[171]
- facilities for services to the public (such as a well or bore for obtaining water);[172]

To take these in turn the provisions concerning primary production activities apply to native title where it co-exists with an agricultural or pastoral lease on the same area of land and waters. Primary production activities are a range of activities that may be approved to occur on the lease area in the future. These activities include:[173]

(a) cultivating land;
(b) maintaining, breeding or agisting animals;
(c) taking or catching fish or shellfish;
(d) forest operations;[174]
(e) horticultural activities;[175]
(f) aquacultural activities;
(g) leaving fallow or de-stocking any land in connection with the doing of any thing that is a primary production activity.

Clearly the approval of aquaculture may have an affect on native title rights and interests in water. In addition, the associated provisions concerning activities that are directly connected to primary production and renewals can mean that for example a right to take water off farm if directly connected to the primary production activity on farm and the renewal of such an interest can take place with the aforementioned (similar to s24HA) minimal procedural rights applicable to native title holders.[176]

The provision concerning reservations provides for example that where government has created a crown reserve for the supply of water (and associated water storage- a dam or tank for example) before the date of the *Wik* decision on 23 December 2006 then any act that takes place afterwards

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[168] NTA Part 2 Division 3 ss 24GA – GC.
[169] Ibid s24GD.
[170] Ibid s 24IA.
[171] Ibid s24JA.
[172] Ibid s 24KA.
[173] Ibid s 24GA.
[174] Defined in s 253 of the NTA.
[175] Ibid.
[176] See Example 2 given in section 24GD for example which is in the following terms:
Example 2: Another example is the conferral of rights to take water from an area near that covered by an agricultural lease or pastoral lease, if the water is for use in carrying on primary production activities in the area covered by the lease. Note: For the renewal, re-grant, re-making or extension of certain acts covered by this section, see Subdivision I.

for example such as a plan of management or licence to use the water is valid as long as the later uses are consistent with the earlier purpose of the reserve. If the later act is a public works then the native title is extinguished.[177] Apart from that situation then the rights that apply in s24HA also apply in this situation.

In relation to what are described as facilities for services to the public such as a well or bore to supply water, a pipeline or "other water supply", a drainage facility or other device for managing water flows or an irrigation channel then the same procedural rights apply as already mentioned in relation to s24HA. There is a complex exception to this where if there is a co-existing titleholder that has additional rights then those additional rights also apply to the native titleholder. For example, if there is a co-existing pastoral lease with the native title on the same area that has additional rights under Crown land legislation then those rights also apply to the native titleholder.[178]

There are a number of pre-conditions for this provision to operate as described in the relevant section. The facility must be for the benefit of the general public and reasonable access be provided to the land and waters for native title holders except when health and safety reasons apply to preclude access during maintenance or construction.[179]

The Indigenous Land Use Agreements (ILUA's) provisions

The ILUA or agreement provisions in the future act regime of the NTA are the only mechanism in the Act that require the consent of native title holders and other parties for the approval of developments that affect native title including water.

They provide a legally secure means by which native title can be validly affected by agreement with the parties to the agreement. There is no legal obligation to use such agreements and they are only one legal mechanism in the future act regime by which native title rights to water and land may be affected.[180]

They are an important mechanism and allow for a wide-ranging and flexible approach to the approval of developments and the recognition of Indigenous interests. The implementation of ILUA'S or reaching agreement with native titleholders was the main policy approach by Indigenous interests when faced with the proposals of government to substantially amend the NTA in the 10 Point Pan proposals to amend the Act following on from the *Wik* decision in 1996.[181]

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[177] NTA s 24JB(2).

[178] NTA s 24KA(7)(7A). "Ordinary" title is generally freehold title see section 253.

[179] NTA s 24KA(1).

[180] Perry, Melissa & Lloyd, Stephen *"Australian Native Title Law"* Lawbook Co. Sydney 2003 at 178

[181] National indigenous Working Group on Native Title *"Co-Existence Negotiation & Certainty"* Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act, (1993) – APRIL 1997 at 23 Agreements. Available at http://www.faira.org.au/niwg/coexistence.html (accessed 18/3/11).

Agreement making is of course generally regarded as the preferred course in the resolution of disputes as ideally it allows for the "establishment of ongoing and respectful relationships between those with interests in land" and water and mutually beneficial outcomes.[182] As indicated before these provisions are only one means by which native title can be affected and developments approved - the use of them is optional. The other mechanisms such as 24HA in relation to water since their introduction in 1998 have significantly reduced on one view the "bargaining" position of native titleholders and to that extent weakened the effectiveness of ILUA'S as a beneficial tool.[183]

Nonetheless, ILUA's are the main means by which a comprehensive agreement can be reached settling Indigenous claims including to native title and water if a government consents to such an approach. By comprehensive I mean one that allows for wider outcomes including social, economic and employment benefits and is not only confined to the proof and recognition of native title.

For example, the Ord Final Agreement Indigenous Land Use Agreement registered on the 16 August 2006 between the State of Western Australia and the Miriuwung Gajerrong peoples which "provides the necessary native title consents and heritage clearances over 65,000 hectares of land in the far north of Western Australia to make way for Australia's largest irrigation scheme." It also provides for compensation to native title holders for the Ord Stage 1 irrigation development commenced in the 1960's prior to the recognition of native title and for future development of the irrigation scheme, the transfer of a number of freehold titles to the native title holders, joint management of a number of conservation areas and involvement in future economic development, amongst other things.[184]

The Indigenous Land Use Agreement provisions are an important means by which agreement with native title holders can be struck and also allows for small or large scale developments to take place, for example new irrigation schemes or dams. If agreement is not reached (it is an optional process) then government can use its compulsory acquisition powers and simply pay compensation if it wishes to take that course of action.

Conclusion

Professor Bartlett in his reference work *Native Title In Australia* puts forward the following propositions with respect to native title rights to water:[185]

> If the relationship of an Aboriginal society to a territory is exclusive it may give rise to the right to use and enjoy water for all purposes.

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[182] Bartlett, R.H *Native Title in Australia* 2nd Edition Butterworths 2004 at 522 [22.1]
[183] Ibid 524 [22.6].
[184] http://www.atns.net.au/agreement.asp?EntityID=2654 (accessed 18/3/11)
[185] Ibid 631 [26.1].

Certainly if an Indigenous society is able to achieve an exclusive possession determination it can control access to the water within that area. Subject to the exceptions I have mentioned this part of native title law is clear. In cases such as *Sampi v Western Australia (No 3)* [186] an exclusive possession determination has been further explained to include:

> the right to have access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.

Whether it can be said that this includes a right to use and enjoy the water for *all* purposes is less clear in my opinion. There has been no recognition to date of a commercial right to use water. The right to make a decision about access to water and the use and enjoyment of the water are clearly significant. But the latter is somewhat diminished by the imposition in the NTA of the "minimal" procedural rights in such provisions as s24HA. There have been no Court decisions yet about the interaction of these native title rights and the future act regime in the NTA and provisions such as 24 HA.

The practical and significant point here is that while a licence to take water may be granted to a third party by government (pursuant to s24HA) that does not authorise access to the land where the water exists. What is sometimes called the "key" value is an important negotiating or bargaining position held by an exclusive possession determination holder over access to the water. The water resource might not be owned by the native titleholders but the control over access is "the key to the treasure chest".[187]

Secondly, Professor Bartlett also writes:

> If native title to water is limited to traditional uses, albeit extending to modern methods, its significance should not be discounted. Such a native title right to use water at common law is a substantial restraint on water developments projects. Any water development project is likely to infringe on the native title right, whether by flooding, appropriation of water, disturbance of flow or water quality, or impact on habitat.

If government is considering a new large water related development such as a dam or irrigation area, which require the compulsory acquisition of land and native title rights to use water or the use of an ILUA then native title holders have a significant negotiating position. As a compulsory acquisition in most cases would trigger the right to negotiate provision of the NTA and any ILUA requires the consent of the native titleholders. As discussed the use of an ILUA as a means to approve a development by government is optional only.

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[186] [2005] FCA 1716.
[187] *Star Energy Weald Basin Ltd and another v Bocardo SA* [2010] UKSC 35 at [64]

There is slowly developing an increased recognition of native title rights to use water as case law concentrates more on particular rights and the activities involved in the use of water by Indigenous peoples (again discussed in section 6). Much of this recognition though is diminished as mentioned by the limited procedural rights within the NTA to protect those rights in water. The major exception to this being the non-commercial activities related to the use of water such as hunting, fishing, and gathering and for cultural purposes protected from most forms of regulation in s211 of the NTA.

A right to compensation under the NTA for the affect upon Indigenous rights to water also constitutes the legal recognition of Indigenous interests and rights to water. Indigenous interests in water are also capable of protection in Indigenous heritage protection laws, which are dealt with in section 1 part D of this report.

Part B – Land Rights

In northern Australia two of the three jurisdictions have land rights legislation. In Queensland, there is the *Aboriginal Land Act, 1991* (ALA) and its Torres Strait equivalent the *Torres Strait Island Land Act, 1991*. I have included associated legislation in the section on Queensland.

In the Northern Territory, Commonwealth legislation the *Aboriginal Land Rights (Northern Territory) Act, 1976* (ALRA) applies in the Northern Territory of Australia only. The *Aboriginal Land Act* (NT) is Territory legislation associated with the implementation of the Commonwealth Act especially in terms of the application of the permit system – the requirement for a written permit to access Aboriginal land and water in the Northern Territory.

There are two other sections of this report that deal with issues arising under ALRA because of the manner in which the terms of reference or questions in this Report have been framed. These are sections 4 dealing with recent and proposed amendments to the *Aboriginal Land Rights (Northern Territory) Act, 1976* and section 6 dealing with the 2008 Blue Mud Bay case - *Northern Territory of Australia v Arnhem Land Trust*, respectively.

There is no land rights legislation in Western Australia. Native Title under the Commonwealth *Native Title Act, 1993* (NTA) is the only mechanism by which Indigenous people in that State can "claim" their traditional land and waters. There does exist in Western Australia an extensive Crown Reserves system where reserves have been set aside for the "use and benefit" of Aborigines or Aboriginal inhabitants.

There are large areas, which include rivers, waters and lakes and the coastline in the Kimberleys in northern Western Australia set aside in such reserves. These reserves are established and managed under the *Land Administration Act, 1997 and* the *Aboriginal Affairs Planning Authority Act, 1972*. Native title has been found to co-exist on many of these Crown reserves and the native title determinations are subject to the interests created under these laws. As such, the Aboriginal reserve system will only be covered briefly as it consists of Crown or government reserves.

Normally the control of access to land as an owner under Land Rights legislation is an important measure of control over access to and the use of water on that land. This is regardless of who holds the right or licence to take and use water under relevant water management legislation, as the licence does not come with an automatic right to access the land and water.

The applicability of this statement varies between the three jurisdictions in northern Australia. In Queensland[188] and Western Australia[189] owners of

[188] *Water Act 2000 (Qld)* s 206.

land have a statutory right or preference to apply for a licence to take water and use water from their land under the relevant water management legislation. As there is no land rights legislation in Western Australia then this preference does not apply there although control over access to the land and water is held by government on Aboriginal reserves on behalf of Aboriginal inhabitants and therefore may regulate the access by a third person who holds a water licence to access water on the reserve.

In the Northern Territory, there is not a statutory preference for the owner of the land to apply for a licence to take and use water and so the ability to control access is in reality more important. An application for a licence to take and use water can be made by any person in the Northern Territory.[190] This is considered in further detail later in this section of the Report.

Queensland

The Indigenous land holding – land tenure situation in Queensland is particularly complex and includes the following legislation:

- *Aboriginal Land Act, 1991* (ALA);
- *Torres Strait Island Land Act, 1991;*
- *Aborigines and Torres Strait Islanders (Land Holding) Act, 1985* which provides a freehold title to Community Councils and Aboriginal Land Trusts under ALA and provides for leases for residential and commercial purposes to Indigenous residents;
- *Land Act, 1984* which provides for Crown reserves for the benefit of Aboriginal people and freehold title – Deed of Grant in Trust (DOGITs);
- *Cape York Peninsula Heritage Act 2007* -Traditional Owners hold Aboriginal freehold title and the land is jointly managed as a national park (CYPAL) Cape York Peninsula Aboriginal land) under the *Nature Conservation Act*, 1992;[191] and
- *Nature Conservation Act, 1992* – a perpetual lease of Aboriginal land to the State for purposes of a national park;[192]

The main legislation is the *Aboriginal Land Act 1991* and its equivalent the *Torres Strait Island Land Act, 1991.* The latter is of the same order but applies only in the Torres Strait. I shall use the former Act for the purposes of discussion here. This is land rights legislation similar in some respects to the *Aboriginal Land Rights (Northern Territory) Act, 1976*.

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[189] *Rights in Water and Irrigation Act, 1914* (WA) Schedule 1 ss3.4.
[190] *Water Act, 1992* (NT) for example, ss 44, 45.
[191] http://www.derm.qld.gov.au/parks_and_forests/managing_parks_and_forests/joint_managementof_cape_york_peninsula_national_parks.html (accessed 4/7/10)
[192] *Aboriginal Land Act 1991* s132A; *Nature Conservation Act, 1992* s 40.

The stated purpose of the legislation in the Preamble includes the following:

> The Parliament is satisfied that Aboriginal interests and responsibilities in relation to land have not been adequately and appropriately recognised by the law and that this has contributed to a general failure of previous policies in relation to Aboriginal people.
>
> It is, therefore, the intention of the Parliament to make provision, by the special measures enacted by this Act, for the adequate and appropriate recognition of the interests and responsibilities of Aboriginal people in relation to land and thereby to foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland.[193]

The ALA provides for the grant of an inalienable freehold title or a perpetual or fixed term lease. A grant of land is made to Indigenous peoples on the basis of traditional affiliation or historical association in which case a fee simple (freehold) title is granted.[194] In the case of a claim established on "the ground of economic or cultural viability" a grant of a perpetual or fixed term lease can be made by the responsible Minister.[195]

Land has not been claimable under the Act since December 2006.[196] But various types of land tenure are classified as transferable land and can become Aboriginal land under the ALA. These include:[197]

- Deeds of Grant in Trust land (DOGITs);
- Aboriginal reserve land;
- Aurukun Shire lease land;
- Mornington Shire lease land;
- available State land and land declared by regulation to be transferable land;
- certain national parks in the Cape York Peninsula region.

The general laws of the State including the *Water Act, 2000* are applicable to Aboriginal land under the ALA in the normal way as if the land were not Aboriginal land.[198] If an area of coast becomes Aboriginal land any existing right of access continues in force in relation to any body of water within 400

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[193] *Aboriginal Land Act 1991* Preamble paragraphs 8 and 10 respectively.
[194] *Aboriginal Land Act 1991* ss30, 60(1)(a), 66(a).
[195] *Aboriginal Land Act 1991* ss 60(1)(b), 66(b).
[196] *Aboriginal Land Act 1991* s48.
[197] Ibid ss 16A, 40 ZH
http://www.derm.qld.gov.au/nativetitle/land/land_transfers_claims.html
(accessed 5/7/10)
[198] *Aboriginal Land Act 1991* s26 Application of laws;(1) To allay any doubt, it is declared that, except as provided by this Act or any other Act, the laws of the State apply to Aboriginal land, persons and things on Aboriginal land, and acts and things done on Aboriginal land, to the same extent, and in the same way, as if the land were not Aboriginal land. (2) Without limiting subsection (1), to allay any doubt it is declared that this Act has effect subject to the *Fisheries Act 1994*.

metres above the high water mark along the coast.[199] The *Mineral Resources Act, 1989* makes it clear that water is not regarded as a mineral[200] unlike the complex situation outlined later in this section with respect to water and minerals in the Northern Territory.

In relation to water the ALA states that land subject to one of these grants, which is described as "available land" can include a watercourse or lake within the external boundaries of the land.[201] Available State land is generally where no person other than the State has an interest in that land.[202] It also includes the inter tidal zone where that particular area of land is declared to be available State land under the regulations to the Act.[203]

Both a watercourse and lake are defined in accordance with the definitions under the *Water, Act 2000*.[204] A lake is defined to include the water and the bed and banks of the lake.

> *lake* includes:
>
> (a) a lagoon, swamp or other natural collection of water, whether permanent or intermittent; and
>
> (b) the bed and banks and any other element confining or containing the water.

A watercourse means a river, creek or stream in which water flows permanently or intermittently and in a natural channel, whether artificially improved or not. It includes the beds and banks of a river, creek or stream.[205]

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[199] Ibid s82 Rights of access preserved (1) If— (a) land that is an area of coast becomes Aboriginal land because of a claim under this Act; and (b) a right of access to or across the area (whether by persons generally or particular persons) existed immediately before the land became claimable land; the right of access continues in force as if the land had not become Aboriginal land. (2) In this section—*coast* means all land, including the bed and banks of any river, stream, watercourse, lake or other body of water, that is— (a) above the highest astronomical tide mark and within 400m, measured by the shortest distance, of that mark; or (b) below the highest astronomical tide mark.

[200] *Mineral Resources Act, 1989* s6 (3)(d)(iii).

[201] Ibid s 20 Watercourses and lakes; Available State land includes a watercourse or lake only to the extent the watercourse or lake is—(a) within the external boundaries of land that is otherwise available State land; and (b) capable of being owned in fee simple by a person other than the State.

[202] Ibid s19 and s25.

[203] Ibid s21 and *Aboriginal Land Regulation 1991* Reg 58 Tidal land that is available State land—Act, s 21 (1) The tidal land described in schedule 1 is declared to be available State land. Schedule 1 Tidal land that is available State land.

[204] Ibid Schedule- Dictionary and *Water, Act 2000* Schedule 4 Dictionary.

[205] The full definition is partly complex to deal with the issue of land title boundaries and is as follows: *watercourse*— 1 *Watercourse* means a river, creek or stream in which water flows permanently or intermittently— (a) in a natural channel, whether artificially improved or not; or (b) in an artificial channel that has changed the course of the watercourse; but, in any case, only—c) unless a regulation under paragraph (d), (e) or (f) declares otherwise—at every place upstream of the point (*point A*) to which the high spring tide ordinarily flows and reflows, whether due to a natural cause or to an artificial

In terms of *available land* for transfer to Aboriginal land under the ALA this is similar in certain respects to the *Aboriginal Land Rights (Northern Territory) Act, 1976* in the sense that the beds and banks of rivers and streams can be included in the fee simple title as can land in the inter tidal area if approved for transfer by the responsible Minister.

As discussed in the introduction there is no private ownership of natural waters and rights to use water that come with these titles under ALA are the standard statutory riparian type rights . These rights emanate from the Act not the common law but do not require a licence or permit to utilise them.

These are rights to take and use water by an owner of land adjoining a watercourse, lake or spring for watering stock and domestic purposes. An owner of land includes an occupier of the land, which means a person in actual occupation.[206] This therefore includes the residents of ALA land. Importantly, in addition an owner or occupier may take "overland flow water" generally and that collected in a dam for the same purposes.[207] The water from overland flow can be a substantial amount.

A landowner the trustees of ALA land also has a statutory preference to apply for a licence to take water from the land for other purposes.[208] Any such licence granted, "attaches to the licensee's land".[209] The licence allows the owner to take and use water on any of the land and to interfere with the flow of water on, under or adjoining any of the land. The licence may provide for the taking of water from any watercourse, lake or spring on or adjoining any of the land; an aquifer under any of the land; and water flowing across any of the land.

The owner of the land may also apply for and be granted permission to convey water from another property to use on their land subject to approval by the State and neighbouring landowners.[210] This applies to ALA land. The grant of such a license amongst other things is subject to any water resource plan, resource operations plan and wild river declaration that may apply in that water plan area.[211] These plans constitute quite substantial controls on the amount and manner of water used.

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barrier; or d) if a regulation has declared an upstream limit for the watercourse—the part of the river, creek or stream between the upstream limit and point A; or (e) if a regulation has declared a downstream limit for the watercourse—the part of the river, creek or stream upstream of the limit; or (f) if a regulation has declared an upstream and a downstream limit for the watercourse—the part of the river, creek or stream between the upstream and the downstream limits. 2 *Watercourse* includes the bed and banks and any other element of a river, creek or stream confining or containing water.

[206] *Water Act 2000* Schedule 4 Dictionary definition of occupier and owner.

[207] Ibid s 20 (4). *Overland flow water* means water, including floodwater, flowing over land, otherwise than in a watercourse or lake— (a) after having fallen as rain or in any other way; or (b) after rising to the surface naturally from underground.

[208] Ibid s 206.

[209] *Water Act 2000* s213 (e).

[210] Ibid s 206 (3).

[211] Ibid s 210 (c).

In relation to Aboriginal land managed as a national park in accordance with the *Nature Conservation Act 1992* land is defined to include waters and so management of that area includes the water.[212] In addition, a national park on Aboriginal land is to be managed as far as practicable consistent with any Aboriginal tradition applicable to the area, including any tradition relating to activities in the area.[213] This includes tradition and activities in relation to Indigenous interests in water in the relevant area.

In summary, the rights to use water that come with the grant of title under the ALA are those statutory rights provided for under the Queensland *Water Act* that apply to an owner or occupier of land without the need for a licence or legal authority under that Act. Other rights to take and use water must be granted under the *Water Act, 2000* and the owners of ALA land have a statutory preference in that regard to obtain a licence to take and use water from and on that land.

Northern Territory - *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth)

Introduction

Indigenous rights to water exist under the *Aboriginal Land Rights (Northern Territory) Act, 1976* (ALRA) on a number of bases. These are not native title rights with respect to water.[214] They are statutory rights under ALRA, that to some extent recognise Aboriginal tradition and rights that come with the grant of a fee simple (freehold title) in accordance with the Act. I have listed these rights in four categories.

Firstly, as an incident of the fee simple or freehold title granted to an Aboriginal Land Trust (ALT) under the Act – the riparian rights of an owner of land to use water, which are now in statutory form in accordance with the *Water Act, 1992* (NT).

Secondly, an Aboriginal or group of Aboriginals has rights of use and occupation of Aboriginal land in accordance with Aboriginal tradition, pursuant to section 71(1) of the Act – these are rights to use the natural resources of the land including water.

Thirdly, as a result of the right to control access to Aboriginal land via the permit system – rights can be exercised over whom can access and use water on and in Aboriginal land; and,

Fourthly, the right to control the use of and development of Aboriginal land, including water resources through the granting of leases/licences pursuant

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[212] *Nature Conservation Act 1992* Dictionary ***land*** includes— (a) the airspace above land; and (b) land that is, or is at any time, covered by waters; and (c) waters.

[213] *Nature Conservation Act 1992* ss 18, 19,19AA.

[214] Section 210 of the *Native Title Act* provides that nothing in that statute affects the rights or interests of any person under the Land Rights Act.

to section 19 of the Act.

It should also be noted that it is an offence under ALRA to enter or remain on land in the Northern Territory (not only Aboriginal land) that is a sacred site. Land includes the water on the land for this purpose.[215]

Background

The *Aboriginal Land Rights (Northern Territory) Act, 1976* (ALRA) is a Commonwealth Act that only applies in the Northern Territory.

The Act has a special legal status, not only because it is a Commonwealth law in a Territory but also because of certain provisions in the Act that affect and limit the legislative powers of the Territory Parliament – the Legislative Assembly[216] of the Northern Territory to make laws. Another Commonwealth Act, the *Northern Territory (Self-Government) Act, 1978* also limits Territory jurisdiction with respect to Aboriginal rights including rights with respect to water under ALRA.

The *Aboriginal Land Rights (Northern Territory) Act, 1976* provides that any law of the Northern Territory Parliament that is inconsistent with the rights granted under the Act are inoperative. The statute carves out certain areas where the Northern Territory Parliament may pass laws in relation to the subject matter covered by ALRA.

In particular, section 74 of ALRA is in the following terms:

> 74 Application of laws of Northern Territory to Aboriginal land
>
> This Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with this Act.

The task of statutory interpretation to determine whether a law of the Northern Territory is capable of operating concurrently with ALRA is determined by whether there is any direct inconsistency or not with the provisions of ALRA. The assessment of direct inconsistency is not necessarily an easy task, as the discussion of the application of the Northern Territory *Water Act* to ALRA and Aboriginal land later in this section of the report will show.

Section 73 provides specifically that the Northern Territory Parliament has power to make laws with respect to the protection of sacred sites; the entry of persons onto Aboriginal land-the permit system; the protection and conservation of wildlife on Aboriginal land; and laws regulating the entry of

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[215] See section 69 ALRA generally. The proposition that land includes the water may seem an odd one especially since natural waters are incapable of ownership. See Gray, Kevin & Gray, Susan "Elements of Land Law" 5th Edition Oxford University Press, Oxford 2009 at 51.

[216] The Northern Territory has a unicameral Parliament.

persons upon waters within 2 km of Aboriginal land; but again only to the extent that those laws are capable of operating concurrently (that is not inconsistently) with ALRA.

In relation to the *Northern Territory (Self-Government) Act, 1978* the Commonwealth has expressly reserved to itself executive authority (the powers of government) over rights in respect of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act, 1976*.[217] This means that the Commonwealth Government is the responsible government for the administration of the Act and not the Northern Territory Government.

The *Northern Territory Self-Government Regulations* of the Commonwealth further provide that Ministers of the Territory have executive authority for "Water resources".[218]

Aboriginal land cannot be compulsory acquired, resumed or forfeited by the Northern Territory. The Commonwealth itself does retain a power of compulsory acquisition of Aboriginal land as the recent Northern Territory Emergency Response (NTNER) – the Intervention demonstrates. The NTNER is dealt with in section 4 of this Report.

It is important to understand this context or legal background as it potentially affects the application of Northern Territory law such as the *Water Act, 1992* – the general Northern Territory water management legislation to Aboriginal land under ALRA and consequently the scope of Aboriginal rights to water arising and recognised under the Land Rights Act.

The main, though not the only area where this inconsistency may arise is section 71(1) of ALRA:

> 71 Traditional rights to use or occupation of Aboriginal land
>
> (1) Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.

Aboriginal tradition is defined in these terms under ALRA:[219]

> *Aboriginal tradition* means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or

[217] Sub regulation 4 (2) (b) of the *Northern Territory (Self-Government) Regulations 1978.*
[218] Sub regulation 4 (1) and s.35 of the *Northern Territory (Self-Government) Act, 1978.*
[219] *Aboriginal Land Rights (Northern Territory) Act, 1976* s3 (1).

relationships.

Aboriginal land granted pursuant to ALRA

The Northern Territory Land Rights Act provides for the grant of "an estate in fee simple" – a freehold title to an Aboriginal Land Trust (ALT). The words "Aboriginal land" has that particular meaning under the Act.[220]An ALT can only exercise its functions in relation to Aboriginal land under the direction of the Land Council for that area.[221] The ALT "must exercise its powers as owner of the land "for the benefit of the Aboriginals concerned".[222]

The Aboriginals concerned are those that are the beneficiaries of the title. Those Aboriginal persons are the traditional owners of the area where the title is granted and other Aborigines that in accordance with Aboriginal tradition have rights of access to use and occupation of the area.[223]

In particular, section 4(1) of the Act states:

> …Aboriginal Land Trusts to hold title for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission [224]

A distinction is made under the Act between the Aboriginal traditional owners (as defined) and a wider group of Aboriginal beneficiaries entitled to enter, use and occupy Aboriginal land in accordance with Aboriginal tradition. For example, one High Court Justice has stated in *Wurridjal* (the 2009 case concerning the Commonwealth Intervention in the Northern Territory) that:

> Persons entitled to enter upon, use or occupy the land constitute a wider group than the traditional Aboriginal owners on whose behalf the fee simple is held by the Land Trust.[225]

Arguably, a better interpretation is that the fee simple interest is held by the Land Trust for the benefit of both groups of beneficiaries. Similarly, in other leading High Court cases concerning ALRA Justice Brennan variously stated:

> Traditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or

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[220] *Aboriginal Land Rights (Northern Territory) Act, 1976* s3 (1).

[221] Ibid s5 (2) A Land Trust: (a) shall not exercise its functions in relation to land held by it except in accordance with a direction given to it by the Land Council for the area in which land is situated; and (b) where such a direction is given to it—shall take action in accordance with that direction.

[222] *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 at [4] and s5 ALRA.

[223] See the definition of "traditional Aboriginal owners" and "Aboriginal tradition" in section 3(1) of ALRA and the discussion of section 71(1) of ALRA later in this section.

[224] *Aboriginal Land Rights (Northern Territory) Act, 1976* s 4(1).

[225] *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 at [409] Crennan, J.

> Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it. [226] Aboriginal tradition provides for the use of the land by both traditional Aboriginal owners and other Aboriginals, all of whom would be benefited by a grant facilitating traditional use.[227]

Traditional Aboriginal owners is defined under the Act to mean:[228]

> a local descent group of Aboriginals who:
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> (b) are entitled by Aboriginal tradition to forage as of right over that land;

Thus, as the High Court has further stated the definition of traditional Aboriginal owners "has two elements-spiritual affiliation *and* entitlement by Aboriginal tradition to forage as of right over the land."[229]

The traditional owners have the right to determine what happens on Aboriginal Land as the relevant Land Council is required to ensure the informed consent of that class of person is given in relation to development activities and the grant of leases. The Land Council is also required to consult with the wider group concerning such matters.[230]

The nature of the fee simple interest that constitutes Aboriginal land under the Act has been described as the highest form of property interest known to Australian law, and unique and sui generis because of the particular and unusual features of the Act that affect the operation of that form of freehold title.[231] For example, the High Court has stated in various cases in relation to this title that:

> It is thus apparent that the interest granted under the Land Rights Act differed in some important ways from the interest ordinarily recorded under the Torrens system as an estate in fee simple. But despite these differences, because the interest granted under the Land Rights Act is described as a "fee simple", it must be understood as granting rights of

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[226] *The Queen v Toohey and Another; Ex Parte Meneling Station Pty Ltd and Others* 158 CLR 327 at 358.

[227] *Re Toohey and Another, Ex Parte Stanton and Others and Kenyon and Others* 44 ALR 94 at 104.

[228] ALRA s 3(1).

[229] *Risk v Northern Territory* 210 CLR 392 at 400.

[230] See ALRA ss 23(3) generally and specifically 19(5), 19A (2), 42(6), 77A.

[231] *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 at [417]; "It can be accepted that the Land Trust's fee simple, granted under, and subject to, the Land Rights Act, is a formidable property interest in the Maningrida land and that its *sui generis* nature does not diminish the fee simple's significance**."**

> ownership that "for almost all practical purposes, [are] the equivalent of full ownership" of what is granted. In particular, subject to any relevant common law qualification of the right, or statutory provision to the contrary, it is a grant of rights that include the right to exclude others from entering the area identified in the grant.[232]
>
> The Land Trust's rights of ownership have always been held subject to arrangements in the Land Rights Act of some complexity which provide for dealings between traditional Aboriginal owners and any Aboriginal person or group, Aboriginal persons entitled by Aboriginal tradition to use and occupation of Aboriginal land, Aboriginal Land Trusts, Aboriginal Land Councils and the Commonwealth. Each person or entity has different rights, duties, powers and obligations but all are interrelated and all are directed ultimately to the benefit of "the traditional Aboriginal owners" of the land.[233]
>
> Nonetheless, it may be observed that there is nothing in the Land Rights Act which appears to limit the rights of the holder of an estate in fee simple in land granted under the Act to rights over only the solid substance of the earths crust, as distinct from those parts of the superjacent fluid (be it liquid or gas) which can ordinarily be used by an owner.[234]

The latter point is important as it refers to the rights of use of water that come with an estate in fee simple in the land under the Act.

Water and Aboriginal freehold under ALRA

The Land Rights Act specifically provides that water is excluded from a grant of Aboriginal land in the sense that ownership of water is not included within the fee simple title. There is nothing unusual or remarkable about this, as natural water is generally not recognised as being part of a freehold title, nor capable of ownership as explained in the introduction to this Report.

Water is included within the definition of “minerals” in the Act. Minerals are reserved from, that is not included within the grant of a fee simple under the Act.[235] Minerals, as defined are specifically reserved from the grant of title and are vested in either the Commonwealth or the Territory.[236]

Justice Toohey in a review of the Land Rights Act in 1984 entitled *“Seven Years On”* stated:

> The common law does not recognise ownership of running water. The Control of Waters Act vests natural waters in the Crown. The Land

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[232] *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 at [50] – the Blue Mud Bay case. (footnotes from quote deleted)
[233] *Wurridjal* op cit [391]. (footnotes from quote deleted)
[234] *Risk v Northern Territory* 210 CLR 392 at 405 [32].
[235] *Aboriginal Land Rights (Northern Territory) Act, 1976* s3.
[236] Ibid s12.

> Rights Act reserves water from any grant. In consequence, there can be no claim to property under the Land Rights Act in the water in any lake, spring or watercourse. This has been acknowledged by Land Councils in several land claims.[237]
>
> The position with ground water is not so clear though sub-s 12(2) of the Land Rights Act, read with the definition of minerals, would seem to exclude those waters as well.[238]

As mentioned elsewhere, the *Control of Waters Act* is the immediate predecessor legislation to the current *Water Act, 1992* in the Northern Territory.

A grant of a fee simple title under the Land Rights Act can also include the beds and banks of watercourses, estuaries (tidal rivers), lakes and the inter-tidal zone. The actual boundaries of the grant of interests in land need to be checked in each particular grant to establish whether it is the case in that particular grant. As the ownership of the land covered by the water in those instances, is part of Aboriginal land then control over access to those waters above the land, is exercised by traditional owners.[239] In relation to the water in the inter tidal zone the High Court stated that there is no "proprietary interest…in respect of any particular column of water that might overlie the intertidal zone" that forms part of Aboriginal land under ALRA.[240]

As mentioned, the beds and banks of watercourses (rivers and creeks) and lakes can be the subject of ownership under ALRA. The beds and banks of watercourses or lakes that form the boundary or a part of a boundary of land are normally the property of the Crown. As a result of the effect of section 50 of ALRA, which provides for claims to unalienated Crown land - these beds and banks are available for claim and grant as Aboriginal land.[241] With respect to other freehold titles generally the beds and banks of rivers or watercourses are not included within the grant and are Crown land.[242]

There can be no grant of a fee simple title under ALRA to the seabed of bays or gulfs within the limits of the Northern Territory and the seabed below the low water mark could not be claimed under ALRA.[243]

The common law (riparian rights to use water as a landowner) and subsequent statutory law in Australia concerning water management and the

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[237] "Seven years On" Report by Mr. Justice Toohey to the Minister for Aboriginal Affairs on the *Aboriginal Land Rights (Northern Territory) Act, 1976* and Related Matters AGPS Canberra 1984 page 27 at [192].

[238] Ibid [193].

[239] See the analysis of the Blue Mud Bay case - *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 in section 6 of this Report.

[240] Ibid 1111 [52].

[241] Mr. Justice Toohey "Seven years On" Report page 28 [197].

[242] This is analysed in more detail in each jurisdiction in the introduction to this Report.

[243] *Risk* 210 CLR 392 as quoted in *Gumana v Northern Territory of Australia* [2007] FCAFC 23 [77].

vesting in the Crown of rights to the use, control and flow of water is outlined in the introduction of this Report. The legal effect of the vesting of rights to manage and control water resources in water management legislation has been to divest or extinguish common law water rights.

The common law position has always been that one obtains a right to use water as an incident of the ownership of land – the owner of land doesn't also own the natural water in or on it. Ownership of water only occurs when it is lawfully taken into possession.

This position pertains with respect to the fee simple title granted under ALRA in this general sense. This interpretation is aided by some of the statutory provisions in the Act outlined above in this section of the Report. The question that then arises is to what extent rights to use water are an incident of (that is, comes with) the fee simple title under ALRA.

The answer to this question involves the consideration of a number of reasonably complex legal issues.

These questions are as follows:

- To what extent have common law riparian rights survived in modern Australian law and in particular in relation to the fee simple title granted under ALRA? [244]; and

- To what extent does the Northern Territory *Water Act* apply to Aboriginal land under ALRA?

In order to answer these questions it is necessary to examine the history of water legislation in the Northern Territory and the relationship of that legislation with the Land Rights Act (ALRA).

ALRA and the Northern Territory Water Act

It has generally been accepted for some time by most commentators that the *Water Act, 1992* and its predecessor legislation the *Control of Waters Act*[245] in the Northern Territory may not fully apply to Aboriginal land under ALRA. This issue has been traversed in various Reviews of the Land Rights Act and Reports by Aboriginal Land Commissioners hearing land claims under the Act.[246] There are no known court cases that I am aware of, especially High Court cases concerning this issue.

For example, the Reeves Review of ALRA in 1998 when referring to the

[244] Note I have dealt with the general issue of the survival of common law rights to use water in the introduction to this Report under the heading of ownership, vesting and riparian rights.

[245] An Ordinance of the same name prior to self-government.

[246] "Seven years On" Report by Mr. Justice Toohey to the Minister for Aboriginal Affairs on the *Aboriginal Land Rights (Northern Territory) Act, 1976* and Related Matters AGPS Canberra 1984; and "Building on Land Rights for the Next Generation – The Review of the *Aboriginal Land Rights (Northern Territory) Act, 1976* Report" by John Reeves, QC 1998.

Northern Territory *Water Act* stated:

> While it is recognized that certain provisions under this legislation are capable of operating concurrently with the Land Rights Act doubts are expressed as to the power of the Northern Territory Government to carry out exploration drill bores and carry water to nearby towns.[247]

Justice Toohey in an earlier review expressed the issue in these terms:

> there is an area of uncertainty surrounding regulatory acts that require actual occupation of and interference with land by the Crown on a continuing basis.[248]

The regulatory acts referred to are in relation to the occupation of Aboriginal land that interferes with Aboriginal tradition and use of the land and waters.

Yet in ALRA Land Claim Report No. 47 Commissioner Gray wrote:

> In that event, the relevant provisions of the *Water Act* 1992 (NT) would appear to be laws of the Northern Territory capable of operating concurrently with the *Land Rights Act*, within the meaning of s. 74 of the Land Rights Act and therefore capable of operating. In addition, s. 6 of the *Aboriginal Land Act* (NT) empowers the appropriate Northern Territory Minister to issue a permit to a person employed under or by virtue of an Act who has a need in the performance of his duties to enter or remain on Aboriginal land. This would appear to provide ample authority for access by personnel of the Power and Water Authority for the purposes of carrying out their duties in the exercise of powers under the *Water Act*.

And in another Land Claim report Justice Kearney stated:[249]

> 157. The effect of s.74 of the *Land Rights Act* is that laws of the Northern Territory, such as the Control of *Waters Act*, apply to Aboriginal land 'to the
> extent that they are capable of operating concurrently' with the *Land Rights Act*. Many controls can operate concurrently; see paras 123-4 of the *Kaytej Report*. Many of the extensive powers necessary to control water resources, vested in the Northern Territory Government under the *Control of Waters Act*, may be exercised in such manner as to conflict with the provisions of the *Land Rights Act*, e.g. s.71 (1) relating to the use and occupation of the land by Aboriginals. It depends on how the Controller of Water Resources seeks to exercise his statutory

[247] Ibid pages 395,400,411 Reeves.
[248] Justice Toohey, *Seven Years On* at [204].
[249] Aboriginal Land Rights (Northern Territory) Act 1976 UPPER DALY LAND CLAIM Volumes 1,2 and 3 Report No 37 Report by the Aboriginal Land Commissioner, Justice Kearney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory Commonwealth of Australia 1991.

> powers in relation to Aboriginal land; the particular facts and circumstances of the case will determine the 'extent' to which those powers 'are capable of operating concurrently' with the *Land Rights Act*. That is the comment on the Northern Territory Government's request. I note that to carry out investigation drilling and its associated works, activities authorised by s.l6FA of the *Control of Waters Act* (N.T.), is consistent with s.74 of the *Land Rights Act*; see para.333 of the *Warlmanpa* Report and para.139 of the *Mount Allan Report*. Permits would be required in that case under s.6 of the *Aboriginal Land Act*. But an access track could not be constructed on Aboriginal land under s.l6FA(c) without the Land Council's consent under s.68 of the *Land Rights Act*.

As mentioned in the Background to this section of the Report this issue arises because of the status of ALRA as a Commonwealth Act and the restriction it imposes upon the legislative powers of the Territory Parliament – the Legislative Assembly of the Northern Territory. In particular, the interaction of ss 71 and section 74 of ALRA need to be considered. Section 71 recognises Aboriginal traditional rights to access, use and occupy Aboriginal land in accordance with Aboriginal tradition. The effect of section 74 is that it imposes a restriction upon Northern Territory laws that are inconsistent, that is can't operate concurrently with ALRA.

This means that a Northern Territory Act such as the *Water Act* that is inconsistent with traditional rights recognised under section 71(1) may be inoperative on Aboriginal land.

> Thus, where a specific measure of the Northern Territory Legislature comes into conflict with s.71 (1), it must give way to the traditional rights preserved by that section. The language adopted in s.74 (1) suggests that it is not intended to affect the validity of Northern Territory legislation, only its application to Aboriginal land, and then only the application of those parts which are inconsistent with the *Land Rights Act*.[250]

The High Court has stated with respect to these provisions that:

> In my view, it is impossible to doubt that the central concept around which the entire legislative scheme revolves is the concept of the special character attaching to Aboriginal land. The Act seriously curtails the application of laws of the Northern Territory to such land.[251]
>
> Section 74 declares that the Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that the

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[250] Warumungu Land Claim Aboriginal Land Rights (Northern Territory) Act 1976 Report No.31 Report by the Aboriginal Land Commissioner, Justice Maurice [43.1.11] page 187.

[251] R v Kearney; Ex parte Northern Land Council [1984] HCA 15; (1984) 158 CLR 365 Wilson, J at 387.

> law is capable of operating concurrently with the Act.[252]

Justice Brennan, in the context of analysing Northern Territory planning laws and these provisions further stated that:

> When land is or becomes Aboriginal land, the use or occupation to which an Aboriginal or a group of Aboriginals is entitled according to Aboriginal tradition is guaranteed by s. 71, and the laws of the Northern Territory - including planning laws - are incapable of interfering with that use or occupation: see ss. 73 and 74.[253]

Further that:

> It is beyond the capacity of a law of the Northern Territory or of the exercise of any power, which such a law confers to affect the operation of a law of the Commonwealth or to destroy or detract from a right thereby conferred unless a law of the Commonwealth so provides, expressly or by implication.[254]

The affect of this in relation to water is that primacy is given to the use and occupation of land and waters in accordance with Aboriginal tradition on Aboriginal land. The application of the Northern Territory *Water Act* is therefore limited to rights and actions under the legislation that are consistent with that occupation and use. This potentially includes the application of water allocation plans which are subsidiary legislation under the *Water Act.* As water allocation plans under the NT *Water Act* do not grant rights of use and occupation no inconsistency arises at this time.

In addition, the *Northern Territory (Self Government) Regulations 1978* explicitly preclude Territory Ministers from having executive authority in relation to rights in respect of Aboriginal Land under the *Aboriginal Land Rights (Northern Territory) Act 1976*.[255] Justice Wilson again in the High Court stated with respect to this regulation that:

> That regulation conferred executive authority on the Minister of the Northern Territory in relation, inter alia, to land and land use but expressly declared that such authority did not extend to "rights in respect of Aboriginal land" under the *Land Rights Act.*[256]

To overcome this situation in relation to water management following the original recommendations of Justice Toohey from the Report “Seven Years

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[252] Ibid 387.
[253] Ibid 393.
[254] *The Queen v Kearney Ex Parte Japanangka* 158 CLR 395 at 418; Brennan, J.
[255] Regulation 4 (2). Subject to subregulation (6), a matter specified in subregulation (1) shall not be construed as including or relating to: (a) the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* and regulations under that Act as in force from time to time; or (b) rights in respect of Aboriginal Land under the *Aboriginal Land Rights (Northern Territory) Act 1976*.
[256] *R v Kearney; Ex parte Northern Land Council* at 389.

On" in 1984[257] an amendment was made to s.74 of ALRA in 1987 to insert a new s. 74(2) that "was to make it clear that the *Control of Waters Ordinance* 1938 of the Northern Territory was capable of operating concurrently with the *Aboriginal Land Rights (Northern Territory) Act 1976*." [258]

As mentioned, the *Control of Waters Ordinance 1938* (later called an Act after self government in the Northern Territory) was the predecessor legislation to the *Water Act, 1992*. This amendment was never proclaimed, that is it never became operational and was repealed in 1989.[259]

The reason given by the Minister for not pursuing the implementation of the amendment was that:

> The section has not been proclaimed because of legal advice that the amendment may have the unintended effect of revesting the beds and banks of rivers, in respect of land vested in a Land Trust under the Act in the Crown in the right of the Northern Territory.[260]

Similarly, Justice Toohey made a recommendation that section 69 of the *Northern Territory Self-Government Act, 1978* be amended "to put beyond doubt that the property in and the right to the use, flow and control of all surface waters and ground water are vested in the Northern Territory".[261] This has never occurred. Section 69 of the Self-Government Act deals with the transfer of Commonwealth interests to the Northern Territory upon the commencement of self - government.

The latter point concerns the issue as to whether there is some uncertainty surrounding the transfer of Commonwealth powers to the Northern Territory in relation to its rights to regulate and control water under its own legislation the *Water Act*, (NT) , which I don't believe there is.

Water Act (NT) and inconsistency with ALRA

It remains therefore to comment upon the extent to which the *Water Act, 1992* (NT) may be inconsistent with ALRA and therefore inoperative on Aboriginal land. This potentially arises in two instances. Firstly, where there is direct inconsistency with the rights under a particular provision, for example 71(1) of ALRA as already outlined. Secondly, in the broader area of the extent to which the *Water Act* imposes a system of management on Aboriginal land that is inconsistent with ALRA.

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[257] Justice Toohey "Seven Years On" page 30 [212].

[258] Hansard House of Representatives Questions on Notice – Question No.2010 22 December 1989 page 3633.

[259] ALRA Act Notes page 348.
(i) Section 34 of the *Aboriginal Land Rights (Northern Territory) Amendment Act 1987* provided for the amendment of section 74 of the *Aboriginal Land Rights (Northern Territory) Act 1976*. The last-mentioned section was repealed by the *Aboriginal Land Rights (Northern Territory) Amendment Act 1989* before a date was fixed for the commencement of section 34.

[260] Hansard op cit 3633.

[261] Justice Toohey, "Seven Years On' op cit page 30 (Recommendation 212(a)).

Section 71(1) provides for the rights of Aboriginal people to occupy and use Aboriginal land in accordance with Aboriginal tradition. The extent to which the *Water Act* provides for actions that are inconsistent with these rights in accordance with Aboriginal tradition will mean that the actions under the *Water Act* will have to give way. For example, as stated by Justice Toohey to the extent that "actual occupation of and interference with land by the Crown on a continuing basis" is required under the *Water Act.*[262]Specifically, it has been said that the power to carry out exploration, drill bores and carry water to nearby towns is uncertain whether done by government or a third party utilising powers under the *Water Act.*[263]

To come to a final conclusion, about ALRA rights and inconsistency with the *Water Act* requires the understanding of a particular factual circumstance and assessment of the occupation, use and Aboriginal tradition involved and the power or function sought to be used under the *Water Act* to finally determine this issue in any particular case. However, as a general proposition there is no doubt that inconsistency can occur between Northern Territory legislation and Commonwealth legislation. In this particular case, in relation to s 71 (1) of ALRA.

Secondly, in relation to the management of Aboriginal land, ALRA establishes an inter-related scheme involving traditional Aboriginal owners, other Aboriginal persons, aboriginal land trusts, land councils and the responsible Federal Minister. Consent of a number of these parties is required, for example to issue a lease or interest in Aboriginal land to allow non-traditional uses and developments to occur.

One High Court judge has described ALRA and Aboriginal land under the Act as returning those areas "to Aboriginal control".[264] A Land Council is given the function of ascertaining and expressing the wishes and opinions of Aboriginal people "as to the management of Aboriginal land".[265] The landowner – an Aboriginal Land Trust is obliged to follow the directions of the local Land Council.[266]

A real question therefore arises as to whether the extent to which the *Water Act* NT involves an alternative scheme of land management on Aboriginal land, it is therefore inconsistent with this part of ALRA and consequently

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[262] See fn 33.

[263] See Reeves at page 395.

[264] *The Queen v Toohey and Another; Ex Parte Meneling Station Pty Ltd and Others* 158 CLR327 at 355.

[265] ALRA section 23 Functions of Land Council (1) The functions of a Land Council are:
(a) to ascertain and express the wishes and the opinion of Aboriginals living in the area of the Land Council as to the management of Aboriginal land in that area and as to appropriate legislation concerning that land;

[266] ALRA s 5(2) A Land Trust: (a) shall not exercise its functions in relation to land held by it except in accordance with a direction given to it by the Land Council for the area in which land is situated; and (b) where such a direction is given to it—shall take action in accordance with that direction.

inoperative. In the Northern Territory the responsible Minister *may* declare a water control district and a water allocation plan within that district.[267] Once a water allocation plan is declared, then water resource management in that area must be in accordance with that plan.[268] Both water control districts and water allocations plans have been declared over Aboriginal land.

At this general planning level there would appear to be no inconsistency. But to the extent as mentioned that actions approved under the *Water Act* require some form of permanent change or occupation of the land associated with water then it may well be inconsistent with ALRA. This is only to the extent that this interferes with traditional rights to use and occupy land and to take and use the water for purposes in accordance with Aboriginal tradition.

A water allocation plan that did not allow such traditional rights to take and use water on Aboriginal land would not be legally enforceable. Each plan would have to be analysed on its merits but given that the limited number of plans approved to date (three) in the Territory protect a large percentage of the water supply for environmental and cultural purposes (up to 80%) – this is unlikely.

Certainly, some of the provisions of the *Water Act* are directly inconsistent with rights under ALRA. For example, s 44 of the *Water Act* that make it an offence to take surface water without permission under the Act or pursuant to a licence would interfere directly with s 71 traditional rights to take and use water. To that extent the legislative provisions would be inconsistent and inoperative.[269] Similarly, any licence to a third party to take water in an area that interferes with such rights would be inoperative. In any event a licence holder would still need a permit to access the far majority of Aboriginal land in order to take water.

Indigenous rights to water and the fee simple (freehold title) granted to an Aboriginal Land Trust (ALT) - The riparian rights of an owner of land to use water

In light of analyses in the Introduction of this Report concerning the extinguishment of common law riparian rights to water, there seems no reason to conclude that the situation is any different in relation to the fee simple granted in accordance with ALRA.

That is, rights to use water, as an incident of the grant of the fee simple title under ALRA does not include common law riparian rights to use water. This is so because common law riparian rights ceased upon the vesting of the property in and the rights to the use, flow and control of all water in the Crown. This occurred in the Territory at least as early as 1938 with the

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[267] See http://www.nt.gov.au/nreta/water/manage/pdf/nt_wcd.pdf (accessed 20/45/10) for details of districts proclaimed to date.

[268] *Water Act,* (NT) s22B (4).

[269] That is to the extent that those rights are over and above what is permitted under the Act described as statutory riparian rights elsewhere in this report.

Control of Water Ordinance 1938. Relevantly, the wording is in the same terms as the current *Water Act*, 1992 with respect to this issue. Another way of putting it is that common law riparian rights were divested or extinguished and vested in the Crown.

The only rights to use water that comes as an incident of the grant of the fee simple title are those listed in the *Water Act, 1992* (NT). These "rights" do not require a licence to take and use water. They are probably best described as simply statutory rights to use water, although the common law language of riparian user is still generally used in commentary and the cases. These rights, which are better described as statutory entitlements are to take water from a waterway or ground water by the owner or occupier of land. They are generally called stock and domestic rights. Specifically these are statutory rights to take water:[270]

- for domestic purposes;
- for drinking water for grazing stock on land; and for
- irrigating a garden (not exceeding 0.5 ha) that is part of the land and used solely in connection with a dwelling on that land.

This conclusion is not totally beyond doubt, as indicated by the fact that Justice Toohey in his Report "Seven Years On" in 1983 noted that there was some doubt about whether the "property in and the right to the use, flow and control of all surface water and ground water are vested in the Territory".[271]

This uncertainty is said to arise because the transfer of all interests of the Commonwealth upon self -government in 1978 including with respect to minerals to the Northern Territory did not specifically include water. That is, the definition of minerals in the Self Government Act executing that transfer did not include water.[272] It will be recalled the definition of minerals under ALRA included water so as to reserve from the grant of title to a Land Trust minerals and water.

Be that as it may, that uncertainty only goes to whether the vesting of the control of water is in the Crown in right of the Commonwealth as opposed to the Northern Territory post self-government. Further, in my opinion, that issue is probably resolved by the fact that executive authority for water resources is held by the Territory Government, in accordance with the self-government legislation as outlined in the background section of this section of the Report concerning ALRA.

If the common law position was to apply which seems unlikely in my opinion then the following rights to take and use water would exist as an incident of the grant of the fee simple title under ALRA:[273]

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[270] *Water Act, 1992* (NT) ss11,14.
[271] Justice Toohey, "Seven Years On' op cit page 28.
[272] Ibid 27.
[273] Megarry, R and Wade, HWR "*The Law of Property*" 5th Edition London 1984 at 65, 66.

- In the case of flowing water through a defined channel an owner could take water for a variety of purposes subject to the principle of reasonable use to ensure there was not an unreasonably diminished amount of water to riparian users further down the water course, and

- In the case of "percolating water" (underground water) the landowner would have unlimited access to that water.

This position would still be subject to the application of the Northern Territory *Water Act* and the extent to which that Act is inconsistent with ALRA.

A case can be argued for this proposition, that is that common law riparian rights remain as an incident of the grant of the interests in land under ALRA. The reasoning behind this is that beds and banks of rivers and the inter-tidal zone are included within Aboriginal land. Unlike other forms of freehold title, which have had their boundaries - the river or high water mark removed from the area of the title. That is, the riparian nature of the title can be said to no longer exist because the land contiguous to the water is no longer part of the freehold title.[274] Whereas this has not occurred in relation to Aboriginal land.

> Only those whose land is in contact with the water can exercise riparian rights.[275]

In addition, as previously mentioned in the case of *Risk* the High Court did clearly state that there is nothing in the Land Rights Act that appears to limit the normal rights that come with the grant of a fee simple title to the "super adjacent fluid" – the waters on the land. This case though does not refer to or analyse the impact of the *Water Act*, in the Northern Territory and the predecessor Commonwealth water management legislation, as the quote only refers to the provisions of the Land Rights Act.

None the less, in my opinion the legal situation is quite clear that common law riparian rights have been divested by the vesting of rights to the use, control and flow of water in the Crown. The High Court's recent decision in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) seems quite unequivocal on this point.[276]

> The *Water Rights Act* 1896 (NSW) ("the 1896 Act") provided: "The right to the use and flow and to the control of the water in all rivers and lakes … shall … vest in the Crown."(fn deleted) Section 6 of the 1912 Act retained this language. Similar language was adopted in water legislation in other parts of Australia (fn deleted). Of significance for

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[274] For some further discussion of this argument see Clark, Sandford D. & Renard, Ian A. "*The Riparian Doctrine and Australian Legislation."* 7 Melbourne University Law Review 475 at 496.

[275] Butt, Peter "Land Law" 5th Edition Lawbook Co. Sydney, 2006 at 24 [230].

[276] (2009) 261 ALR 653.

> this case is that the vesting of rights to the "use" and "control" of water constituted an exercise of sovereignty in the sense that the rights so vested were based on the political power of the State. Accordingly, the reasoning of the Full Court of the Supreme Court of New South Wales in *Hanson v The Grassy Gully Gold Mining Co* (fn deleted), that the 1896 Act vested in the Crown the common law rights of riparian owners, is to be preferred to the slightly delphic observation of Fullagar J in *Thorpe's Ltd v Grant Pastoral Co Pty Ltd* (fn deleted) suggesting that riparian rights survived those vesting provisions.

Whilst the case does concern the water management legislation in NSW the vesting of water rights in the Crown pursuant to legislation is reasonably identical in Queensland and Western Australia and potentially the powers are even more extensive in the Northern Territory. I have further addressed the latter point also in the introduction concerning ownership of natural waters, vesting and riparian rights.

This situation does not affect the usufructuary rights to use water that form part of the traditional rights recognised and protected in section 71(1) of ALRA, which in some respects are analogous to riparian rights to use water. These are dealt with in the next section of this report.

Traditional rights to use or occupy land (s71 ALRA)

The second area where Indigenous rights to water exist is those rights that exist as a part of the statutory recognition to enter, use and occupy Aboriginal land in accordance with Aboriginal tradition in section 71(1) of the Act. Section 71 is in the following terms:

> 71 Traditional rights to use or occupation of Aboriginal land
>
> (1) Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.

These rights have been generally described as usufructuary rights. Usufructuary rights have been defined in the following terms:

> A usufruct is "a right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time": *Black's Law Dictionary* (8th ed), Thomson West at 1580.[277]

Although this definition was quoted in a major Australian native title case its

[277] As quoted in *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 [65].

utility in the context of Indigenous rights is limited in my opinion, as the following discussion indicates.[278]

Usufructuary rights in relation to the traditional rights of Indigenous Australians have generally been analysed in the courts in Australia in the context of native title. For example, individuals using land in the context of the native title being held by the larger group or society. In other words, the usufructuary rights of an individual say to use the land, to hunt and gather produce of the land are dependant or derivative upon the native title held by the society to possess, occupy, use and enjoy the land and waters. In the High Court decision of *Mabo No 2* Justice Brennan stated:

> Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title.[279]

It should also be emphasised that rights of a usufructuary nature have been found to exist as native title rights and interests without reference to a proprietary title being held by another or "an underlying fuller title".[280]

Thus, the words "usufructuary rights" have been used to describe rights of use of land and waters generally, as well as rights of use of another's property. It is also used and understood in another context in *Mabo No 2* when describing native title as a beneficial or dependant title to the Crowns radical title or sovereignty in Australia.

It has been commonly held that usufructuary rights in the context of native title in Australia include hunting and gathering and the conduct of traditional ceremonies. In the *Wik Peoples* case in 1996 Justice Gummow of the High Court stated:

> ..usufructuary rights involving access to the area of land in question to hunt for or gather food, or to perform traditional ceremonies..[281]

In the context of s 71(1) of ALRA the word "usufructuary" has been used to describe the rights of those whom are not traditional aboriginal owners (as defined in ALRA) but are also entitled to occupy and use Aboriginal land under ALRA in accordance with Aboriginal tradition. In *R v Toohey; Ex parte Meneling Station Pty Ltd* Justice Brennan stated:

> Traditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to

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[278] See for example the discussion in Young, Simon "The Trouble with Tradition-Native Title and Cultural Change" Federation Press, Sydney 2008 at 292 fn 10.
[279] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 52.
[280] Young, Simon *"The Trouble with Tradition-Native Title and Cultural Change"* Federation Press, Sydney 2008 at 253.
[281] Justice Gummow in *Wik Peoples v Queensland* (1996) 187 CLR 1 at 169.

it.[282]

> The Act thus protects the exercise of those usufructuary rights which Aboriginal tradition either required certain groups of Aboriginals to exercise or allowed certain groups to enjoy with respect to land.[283]

It may be therefore that s 71(1) rights are wider than usufructuary rights only and include rights arising from the holding of spiritual responsibility (not primary spiritual responsibility). Whether such rights in accordance with Aboriginal tradition would be greater than or in addition to what are generally described as usufructuary rights would depend on the facts of a particular Aboriginal groups traditions. As mentioned the performance of traditional ceremonies has been held to be a usufructuary right.

A right of occupation, which is provided for in s71 (1) would not be normally regarded as a usufructuary right unless it was qualified to be occupation of a temporary nature for the purpose of carrying out usufructuary activities. The statutory purpose of s 71(1) appears clearly to be firstly recognising that not only traditional owners as defined in the Act have rights in accordance with Aboriginal tradition to use and occupation of the land, and so in that sense the analogy of usufructuary rights is useful as it is recognising the rights of others to use the land "owned" by traditional owners. Secondly, one of recognising occupation and use in accordance with Aboriginal tradition and therefore not solely the exercise of usufructuary rights.

The use of the words usufructuary rights in this context is in my opinion a useful legal analogy but not determinative of the meaning and content of s71 (1). It should be understood that there is no definitive High Court case concerning the meaning of and content of the rights recognised in section 71 of ALRA. The Indigenous relationship to land has been generally described as a spiritual or religious one.

There is much commentary in the primary and secondary sources concerning the key concepts in ALRA such as Aboriginal tradition and traditional aboriginal owners and whether it is correct to describe the Aboriginal relationship to land as primarily a spiritual or religious one. It has been said, for instance that "economic relations" are the primary factor in a society's relationship to land.[284]

Graeme Neate[285] has described the following conclusions arising from the hearing of many traditional land rights claims under ALRA. Educational, custodial and protective responsibilities are part of the overall responsibility Indigenous people have for looking after country and that there is often not a distinction drawn between the spiritual, economic and secular as some non-

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[282] *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327 at 358.
[283] Ibid at 359.
[284] As quoted in Neate, Graeme "Looking After Country: Legal Recognition of Traditional Rights to and Responsibilities for Land" UNSWLJ 16(1) 161 at 189.
[285] The current President of the National Native Title Tribunal.

Indigenous peoples see the world.[286]

Whilst there is nothing novel about those observations, it does serve to highlight the different worldview and the inadequacy in my opinion of regarding s71 (1) rights as solely confined to what may be generally called usufructuary rights -when the occupation and use of land is to be understood in the context of the relevant local Aboriginal tradition. It is for the practitioners of that tradition to ultimately answer the question what is able to be done on the land and waters in accordance with that tradition.

The Australian case law to date clearly accepts the primary spiritual proposition as uncontroversial in both land rights (ALRA) and native title law. For example, in the leading High Court native title case of *Western Australia v Ward* in 2002 the Court stated:[287]

> As is now well recognised, the connection which Aboriginal peoples have with "country" is essentially spiritual. In *Milirrpum v Nabisco Pty Ltd*, Blackburn J said that (fn deleted):
>
> "the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole."

Similarly, Justice Brennan in *R v Toohey; Ex parte Meneling Station Pty Ltd* (a judgment concerning ALRA) whose opinion was written with an understanding of the work of the noted Australian anthropologist Professor W.E.H Stanner stated: “Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights”.[288]

In *Wurridjal* the High Court case in 2009 concerning the Northern Territory National Emergency Response legislation (NTNER) an indication of the type of rights included within s71 (1) were given to include a right to:

- participate in ceremonies in relation to sacred sites;
- to live;
- to forage as of right;
- to hunt, fish and gather;
- to take and use certain flora and minerals for medicinal purposes;
- to take and use certain flora and fauna from salt water and inland waters including creeks and billabongs;

Justice Crennan in that case stated in the context of the application of the

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[286] Ibid see generally 189-195.
[287] *Western Australia v Ward* 191 ALR 1 at 15 [14].
[288] *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 357-358.This reference also includes the reference by His Honour to Professors Stanner’s work.

NTNER laws that:

> all persons who presently hold s 71 rights under the Land Rights Act can continue to participate in ceremony on or in relation to the four sacred sites on the Maningrida land and continue to enter, use and occupy the Maningrida land for all the traditional purposes set out above, without any intrusion upon those rights.[289]

It has also been held that at least for the purposes of the application of the just terms acquisition of property provision of the Australian constitution that s71 ALRA rights are property rights.

> "It may be accepted also that the statutory entitlement constitutes property for the purposes of s 51(xxxi).[290]

The rights in relation to water therefore that exist under s71 (1), in my opinion are to take and use water for all purposes consistent with Aboriginal tradition as defined in the relevant definitions outlined earlier in this section of the Report.

The water is on and in the land and therefore can be taken and used in accordance with the local Aboriginal tradition. As has been said many times the Aboriginal relationship to land and waters is sui generis and is not therefore usefully described only in common law terms such as would be normally encompassed by usufructuary rights. Thus in my opinion s 71(1) rights are wider than the normal notion of usufructuary rights.

Professor Langton has described Aboriginal tradition and relationships to freshwater in these terms:[291]

> In the Aboriginal world, there is an established body of laws that allocate rights and interests among particular people to water sources such as lakes, rivers and springs. These laws derive from the sacred ancestral past that imbues the present, shaping and forming the world we inhabit with its distinctive features, and, notably, emplacing individual and group entities and polities in landscapes and water-scapes with jurally[292]– such as property-rights and responsibilities, according to religious principles. These property relations are then expressed metaphorically in the Aboriginal discourse of possession and stewardship symbolized in a variety of ways….
>
> These Aboriginal waterscapes are construed not only as physical domains, but also as spiritual, social and jural spaces, according to the

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[289] *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 at 155-156.
[290] Ibid at 43 [111].
[291] Langton, Marcia "Freshwater" Background briefing papers - Indigenous Rights to Waters Lingiari Foundation 2002 pp 43, 44.
[292] Jural – "of law" and "of rights and obligations"; The Australian Concise Oxford Dictionary Oxford University Press 2004.

> same fundamental principles as our affiliations to places in the landscapes. The dialogic relationship in indigenous thought between the ancestral past and its effect on human existence derives from the Aboriginal understanding of the transformative powers of the spiritual beings that inhabit those places. Their legacy to us is both the nature of our being and the nature of our relationship to place, be it a waterscape or a landscape.
>
> Personal identities, as well as a number of shared group identities from extremely localized to regionalized, are constructed around the idea of ancestral origins expressed in terms of precious water resources. The relationships between Aboriginal persons and their local and regional jurally entities and their land and water estates are symbolized as interdependent so that human and the natural worlds are represented as intertwined and coeval[293] states of being.[294]

Permit System (ss 70, 73(1) (b) and *Aboriginal Land Act* (NT)

The third category to be discussed, the permit system whilst not an Indigenous right to water per se is a significant legal power or authority exercised by traditional owners and Land Councils over whom can access Aboriginal land and therefore who can access the water on and in Aboriginal land.

As outlined in section 4 of this Report concerning recent amendments to ALRA, section 70 of the Act, generally speaking makes it an offence to be on Aboriginal land except in accordance with the Act or a law of the Northern Territory.[295] The Land Rights Act makes provision for the Northern Territory Legislative Assembly to make laws regulating or authorising access to Aboriginal land under ALRA.[296] This effectively has meant that one needs a written permit to access Aboriginal land. This system is generally administered by the Land Councils unless an area had been approved under section 11 of the *Aboriginal Land Act* (NT) as not requiring permission for access through the permit system. In addition, if a person holds a lease under section 19 of the ALRA then a permit is not required to access the land the subject of the lease.[297]

In large measure, until amendments brought in as a result of the Northern Territory Emergency Response the system was administered under Northern Territory law through the Northern Territory *Aboriginal Land Act.*[298] As a result of the NTNER the Commonwealth has taken a far more direct role in this area as with others under the Intervention.

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[293] Ibid "coeval" – having the age or date of origin.
[294] Ibid 50, 51.
[295] Section 70 and 73(1) (b) of the *Aboriginal Land Rights (Northern Territory) Act, 1976*.
[296] Section 73(1) (b) ALRA.
[297] Section 70(2) of ALRA. This now similarly applies to township leases under section 19A.
[298] Section 73 of the ALRA provides for the NT Legislative Assembly to make laws regulating or authorising entry onto Aboriginal land, but any such laws must provide for the right of Aboriginals to enter such land in accordance with Aboriginal tradition. See also section 4 of the NT *Aboriginal Land Act, which* creates the permit system.

There are now extensive new provisions in ALRA that provide for a defence to being on Aboriginal land without a permit, some of which are similar to the exceptions to the permit requirements already applying in the Northern Territory *Aboriginal Land Act*. These provisions are dealt with in section 4 of the Report.

The important point is that the permit system applies generally on all Aboriginal land except in some community areas as a result of the NTNER legislative changes. There are "limited public rights of access to common areas in 52 major communities" without the need for a permit, which commenced on the 17 February 2008.[299]

Aboriginal freehold under ALRA does not include ownership of natural waters but the permit system means that even if a person or corporation has a licence to extract water from a location on Aboriginal land under the Northern Territory *Water Act* that person will still require a permit to access the water.

It is stated by the High Court in the Blue Mud Bay case (*Northern Territory v Arnhem Land Trust*) in relation to Aboriginal land that:

> The expression "Aboriginal land" when used in section 70(1) should be understood as extending to so much of the fluid (water or atmosphere) as may lie above the land surface within the boundaries of the grant and is ordinarily capable of use by an owner of the land.[300]

The same principle applies to accessing surface, flowing and underground waters on Aboriginal land, subject to the now limited exceptions outlined above in the common areas of certain Aboriginal communities.

A permit is required to access those natural waters that exist on or in Aboriginal land.[301] The requirement to obtain a permit assists by providing a process to negotiate and set conditions concerning any proposed access or for access to be rejected altogether.

Permits and the *Water Act* (NT)

In accordance with the new amendments to ALRA (outlined in section 4) a Northern Territory officer when performing statutory functions or exercising powers, as such has a defence to the offence of being on Aboriginal land.

Accordingly, the Controller of Water Resources or that person's delegate may enter land (subject to the requirement to give prior notice in certain circumstances) to exercise the Crowns rights to the use, flow and control of

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299 http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/housing_land_reform/Pages/permit_system.aspx (accessed 15/4/10).

300 *Northern Territory v Arnhem Land Trust* 82 ALJR 1099 at 1112 [58].

301 Ibid 1111 [55] and 1112 [61].

water and to conduct water resource investigations. The extent to which such investigations are inconsistent with Aboriginal rights of use and occupation under s71 (1) would determine the ability of the Controller to undertake these activities authorised by the Act.[302]

Leases/Licences granted over Aboriginal land (s19 ALRA)

This provision as with the requirement for a permit to access Aboriginal land is not an Indigenous right to water per se. Section 19 is the main means by which traditional owners can authorise development on Aboriginal land by means of the grant of a lease or other interest such as a licence. For example, if government or a private developer wanted to build a dam on Aboriginal land then a long term lease could be granted to the proponent to enable this to occur. Sacred site protection, rent and other beneficial conditions could be negotiated for the benefit of traditional owners and others affected by the development.

As indicated by Justice Brennan s 19 of ALRA empowers traditional owners to use and authorise use of Aboriginal land for non-traditional purposes.

> The Aboriginal people connected with the tract of country were thus made competent to use their country in a non-traditional way if and when an Aboriginal consensus to do so should be established.[303]

An analogous position in relation to development proposals on Aboriginal land and the waters that regularly occurs is with respect to mining. The Aboriginal Land Trust and traditional owners do not own the minerals in the land but control access to them and so are enabled to negotiate agreements with respect to the grant of mining tenements on Aboriginal land for their benefit.

Conclusion

The Commonwealth Land Rights Act in the Northern Territory recognises and provides for Indigenous rights to water in the following respects.

Firstly, statutory "riparian" type rights to use water:

- for domestic purposes;
- for drinking water for grazing stock on land; and for
- irrigating a garden (not exceeding 0.5 ha – part of the land and used solely in connection with a dwelling on that land.

Secondly, to take and use water for all purposes consistent with Aboriginal tradition. Thirdly, to control access to water on Aboriginal land via the permit system. Fourthly, to approve water related developments via section 19 of the Act.

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[302] See section 20 and 34 of the *Water Act, NT*. For example, in some circumstances the construction, operation and maintenance of gauging stations.

[303] *R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327 at 358*

The Northern Territory *Water Act* to the extent that is inconsistent with traditional rights recognised under section 71(1) of ALRA is inoperative on Aboriginal land.

Western Australia

The two relevant pieces of legislation in Western Australia are the *Aboriginal Affairs Planning Authority Act, 1972* and the *Land Administration Act, 1997*. As mentioned in the introduction to this section this legislation provides for the creation and administration of Crown Reserves for the use and benefit of Aboriginal inhabitants. These Acts do not create or recognise rights in relation to water for or on behalf of Indigenous people. Although, they do create legal mechanisms by which Indigenous inhabitants can seek to protect or regulate the management and use of water on these reserves.

Crown Reserves for the use and benefit of Aboriginal inhabitants are created under the *Land Administration Act, 1997*.[304] Some of these Reserves are Class A reserves which require the approval of Parliament to substantially change the size of the reserve, the purpose of the reserve or to cancel the reserve.[305]

This land is generally vested in the Aboriginal Lands Trust (ALT), a state wide statutory body appointed by the responsible Minister.[306] The ALT is legally the manager of the land on behalf of the Aboriginal inhabitants of the reserve. The functions of the ALT amongst other things are to:

> to ensure that the use and management of the land held by the Trust, or for which the Trust is in any manner responsible, shall accord with the wish of the Aboriginal inhabitants of the area so far as that can be ascertained and is practicable;[307]

Any land subject to a proclamation to which Part III of the AAPA Act applies is also subject to an entry permit system by those whom are not inhabitants of the reserve. The entry permits are granted by the State Minister for Indigenous Affairs or his/her delegate. It is an offence to enter such a reserve without an entry permit. All of the large reserves in the Kimberleys are Part III reserves.[308] These reserves include the rivers, streams, creeks and lakes within the area of the reserve and the water on and in the land.

Consequently any permit, licence or authority granted to take and use water under the *Rights in Water and Irrigation Act 1914* in a reserve proclaimed under Part III of the AAPA Act in Western Australia is subject to this requirement. That is, one needs an entry permit to access that water as well

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[304] *Land Administration Act, 1997* s41

[305] Ibid ss 42,43.

[306] *Aboriginal Affairs Planning Authority Act, 1972* ss20, 21.

[307] Ibid s 23 (c).

[308] http://www.dia.wa.gov.au/Documents/Land/ALT%20Estate%20Property%20List%20July%22009.pdf (accessed 3/7/10) and the map at http://www.dia.wa.gov.au/Documents/Maps/Maps%20June10/PartIII.pdf (accessed 3/7/10).

as the licence or legal authority under the water management legislation. Normally when it comes to a development or profit making activity an access agreement is negotiated which provides benefits to the inhabitants of the resident community.

Also the actual grant of a license or authority to take water on such a reserve is subject to the approval of the Aboriginal Affairs Planning Authority (now the State Department of indigenous Affairs[309]) also established under the Act.[310]

The *Land Administration Act, 1997* also makes it an offence without Ministerial permission or reasonable excuse to take, store or collect water on any Crown land, which includes an Aboriginal reserve.[311] No doubt, the taking and use of water in accordance with a native title determination would constitute a reasonable excuse.

Conclusion

In summary, relevantly in relation to water the Aboriginal inhabitants of such a reserve are able to use the water on the reserve. Further, the reserve inhabitants can indirectly affect the use and management of water through the entry permit system and by virtue of the legal authority of the Department of Indigenous Affairs outlined above.

[309] http://www.dia.wa.gov.au/en/Boards-And-Committees/ALT/ (accessed 4/7/10)
[310] Ibid s 30.
[311] *Land Administration Act, 1997* s 267(2)(e) and definition of Crown land s 3.

Part C - Legislation that recognises Indigenous usage or traditional usage of land and waters

There are a number of pieces of legislation that recognise Indigenous and traditional usage of land and waters in Northern Australia. This is so particularly in relation to the large areas of pastoral and other crown lands including national parks that exist in the north. These forms of land tenure such as pastoral leases and national parks generally may co-exist with native title, but not in all circumstances due to inconsistency at law between native title and the tenure.

To a large extent these provisions are about access to land and waters for the purpose of the carrying out of traditional activities and not about the taking and use of water per se. Given the inextricable linkage between these usage rights and access to and use of water, the subject mater should none the less be included.

The statutory recognition of these usage rights has a long historical lineage in Australian terms. The use of the terminology of "rights" needs to be clearly understood in this context. There is a level of complexity and confusion surrounding the use of such words as "statutory rights", "statutory entitlements" and "property rights." As these words are often used interchangeably. For example, in *Wurridjal* the High Court[312] described the Aboriginal traditional right to occupy and use the land in s71 of the *Aboriginal Land Rights (Northern Territory) Act, 1976* as a statutory entitlement and as a property right for the purpose of deciding whether there was a compulsory acquisition of property.

Applying such variable interpretation, the "rights" of access to waters and use of resources provided for in the legislation described in this section are enforceable, in the sense that they can be enforced in a court of law and are therefore rights in this general sense of the word. Further though as a statutory right or entitlement only, they can therefore be recognised at one time in legislation but subsequently taken away by Parliament by later legislative amendment or repeal.

The important points to be noted is that these rights of usage are:

- not dependent on the legal recognition or proof of native title or traditional ownership - they are freestanding statutory rights, as it were;

- generally only recognised for "subsistence" and not for commercial purposes;

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[312] *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 [24]. [111].

- generally apply to those with an entitlement in accordance with Aboriginal tradition, except in Western Australia;

I use the word generally as these provisions are not all the same and are subject to jurisdictional variations.

Most of the provisions outlined in this section in one form or another predate the recognition of native title and land rights in Australia. Historically they are a long standing statutory recognition of the reality of Indigenous peoples use and occupation of their traditional land and waters without the explicit "rights based" recognition that is inherent to native title and land rights.

The discourse about traditional usage rights involving as it does access to land and waters by Indigenous peoples for the purpose of hunting, fishing and harvesting the resources generally of the land and waters continues to today. This debate includes such issues as whether it should be based on tradition alone; what is traditional usage in the modern age; and how do these usage rights fit in with modern conservation measures.

More recent statutory provisions that recognise such rights are ss 44B [313] and 221[314] of the *Native Title Act, 1993* and the Traditional Use of Marine Resources Agreement (TUMRA) provisions in the *Great Barrier Reef Marine Park Regulations, 1983*.[315] These Commonwealth laws are described later in this section of the Report.

The ongoing dispossession of Indigenous people that accompanied the expanding settlement of Australia by non-indigenous people was characterised by a denial of access to traditional land and waters, and denial of access to and the use of natural resources including water, flora and fauna. This had obvious consequences for the Indigenous economy and the ability of people to feed and support themselves both through harvesting the land and waters and through trade. As the High Court stated in the *Native Title Act Case* in 1995 when discussing the history of British settlement in Western Australia:

> "[T] hose involved in establishing the British Colony of Western Australia knew that there were Aborigines who, by their law and customs, were entitled to possession of land within the territory to be acquired by the Crown and settled as a Colony. But the acquisition of the territory of Western Australia was effected for the purpose of creating a colony to be populated by British settlers to whom land would be granted. The policy of the British Government was that Western Australia should be fully surveyed and, subject to reserves which might be created for specific purposes, the whole of the land within the territory should be available for sale. This policy was to be (and was) implemented by the exercise of sovereign power backed, if

[313] Introduced in 1998.
[314] Introduced in 1993.
[315] Introduced in 2003 through the Great Barrier Reef Marine Park Zoning Plan 2003.

> need be, by force."[316]

The legislation described in this section was, and is, an attempt to ameliorate the consequences of such dispossession without explicitly recognising legal rights to land and waters in the sense of property rights held by Indigenous peoples in Australia.

To quote from the Australian Law Reform Commission's (ALRC) landmark 1986 Report on the *Recognition of Aboriginal Customary Laws*:[317]

> As early as 1848, the question had been raised of 'such free access to land, trees and water as will enable [the Aborigines] to procure the animals, birds and fish, etc, on which they subsist', and of the possibility of securing such access by inserting conditions in Crown leases. Between 1867 and 1900, legislation recognising Aboriginal rights to forage was enacted in Western Australia, Queensland, Victoria and South Australia.
>
> The intervening years have seen many amendments to the early legislation, with the rights of Aboriginal people to gather food very often reduced considerably (if not abrogated all together) in the process.

The legislation of this type as it currently exists is as follows:

- *Land Administration Act, 1997* (WA);
- *Wildlife Conservation Act, 1950* (WA);
- *Fish Resources Management Act, 1994* (WA);
- *Pastoral Land Act* (NT);
- *Territory Parks and Wildlife Conservation Act* (NT);
- *Crown Lands Act* (NT);
- *Fisheries Act* (NT);
- *Fisheries Act, 1994* (Qsld)

The legislation falls into the following categories:

- The provision of access to and use of the resources of land and waters on pastoral leases (and other crown leases in the NT);

- Access to waters for traditional use and fishing purposes;

- Access to and use of land and waters for traditional purposes and taking of flora and fauna from certain crown lands including national parks;

Access to and use of pastoral lease land and waters

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316 *Western Australia v Commonwealth* (*Native Title Act Case)* (1995) 183 CLR 373 at 431.

317 The Law Reform Commission Report No. 31 " The Recognition of Aboriginal Customary Laws' Australian Government Publishing Service Canberra, 1986 Volume 2 at 139.

In Western Australia a limited reservation in pastoral leases is mandated by the *Land Administration Act* to provide access for Aboriginal persons generally to "unenclosed and unimproved" parts of a pastoral lease "to seek their sustenance in their accustomed manner."[318] This right of access is not limited to the traditional owners of the relevant land or waters, so applies to Aboriginal persons generally.

In addition, any native titleholders are able to exercise any native title rights determined by a Court unrestricted by the words "unenclosed and unimproved" parts of the pastoral lease. This position with respect to native titleholders applies to pastoral leases in all northern Australian jurisdictions regardless of whether there is a reservation or the terms of that reservation.

This differential position arises from the law of extinguishment with respect to the recognition of native title when a Court decides what native title rights and interests survive the grant of a co-existing pastoral lease on the same area of land and waters. In *Western Australia v Ward* a decision of the High Court a majority of judges stated in relation to this issue that:

> It follows that upon the happening of the contingency of enclosure or improvement contemplated by the reservation or provision, those who would enter or use the land as native titleholders could continue to do so. Those who could no longer do so were those Aboriginal persons who, although within the terms of the reservation, were not native titleholders.[319]

The use of the word "sustenance" in the Western Australian reservation generally means the taking of food, water and nourishment. The word may also have a broader meaning - the means of living, subsistence or livelihood.[320] The ALRC suggest that it may also include taking of food for ceremonial use.[321]

This means that Aboriginal persons generally in Western Australia have a statutory entitlement to access, use and take water, flora and fauna "in their accustomed manner" from areas of unenclosed and unimproved land and waters covered by pastoral leases. There have been no Court decisions concerning the meaning of, "in their accustomed manner" that I am aware of, but based on the interpretation of similar terminology there is little doubt a Court would interpret those words to mean only for subsistence and non-commercial purposes.

In the Northern Territory the terms of the reservation are much broader but the class of Aboriginal person that may benefit is narrower than in Western

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[318] *Land Administration Act, 1997* (WA) s104. Reservation in favour of Aboriginal persons: Aboriginal persons may at all times enter upon any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner.

[319] *Western Australia v Ward* [2002] HCA 28 213 CLR 1 [186]

[320] The Oxford English Dictionary, Oxford University Press, Oxford 1970 at 264.

[321] ALRC Report at 158 [940].

Australia. There is also a reservation in the same terms in relation to Crown leases generally in the Northern Territory.[322] The Northern Territory *Crown Lands Act* also provides for the resumption and reservation of Crown land for the purpose of "the use and benefit of the Aboriginal inhabitants of the Territory." A particular use is defined to include the use of waters and springs by Aboriginal people and the taking of food from those waters and springs.[323]

The Northern Territory *Pastoral Act* provides that one of its objects is to "to recognise the right of Aborigines to follow traditional pursuits on pastoral land."[324] That recognition is granted in the form of a reservation in the pastoral lease in favour of the Aboriginal inhabitants of the Territory."[325]

The terms of the reservation provide that Aborigines who ordinarily reside on the land subject to the pastoral lease and who by Aboriginal tradition are entitled to use and occupy the pastoral lease area can "take and use the water from the natural waters and springs on the leased land;" [326] and subject to the general law of the Northern Territory can take or kill both wild animals and vegetable matter growing naturally and for ceremonial purposes from the land and waters of the pastoral lease.[327]

This access and the activities outlined are protected by the statutory enactment of a prohibition upon interference with those activities without just cause. A breach of the prohibition can incur a monetary penalty.[328] There is a limitation on these activities within 2 kilometres of any homestead on the pastoral lease.[329]

Importantly the right to take and use water is prefaced by the words "notwithstanding any other law of the Territory" in the Act. This ensures that the right is not limited by such legislation as the *Water Act* in the Northern Territory, which generally requires a licence to take and use water. Although given the other limitations that apply to the right it is probably similar to the statutory riparian type rights that allow for domestic use of water with out a licence under the *Water Act* in any event.

The reservation and the residence requirement in particular functions on the basis that there are Indigenous communities living within the boundaries of the pastoral lease, which is common in the Northern Territory. Many

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[322] There is a reservation in relation to leases provided under the *Crown Lands Act* (s37) in the Northern Territory in the same terms as for pastoral leases.

[323] *Crown Lands Act* s76 (1)(a) the use by Aborigines of the natural waters and springs on unleased land within the reserved land; (b) subject to any other law of the Territory, the taking or killing for food by Aborigines of fish, birds and animals ferae naturae on such unleased land or in those waters or springs; and (c) the taking by Aborigines for food of vegetable matter growing naturally on such unleased land or in those waters or springs.

[324] *Pastoral Land Act* s 4 Objects.

[325] Ibid s 38(n) Conditions of Pastoral Leases.

[326] Ibid s 38(2) (e).

[327] Ibid s 38(2) (f).

[328] Ibid s 38(5) provides for a maximum penalty of $5,000.00.

[329] Ibid s 38(3), (4). This is subject to some exceptions.

Northern Territory Indigenous communities have a separate block of land within the boundaries of a pastoral lease which is not Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act, 1976*.

The requirement for local residence under Northern Territory legislation is a significant restriction. This restriction is clearly inappropriate in my opinion, as Indigenous people in the 21st Century seek to obtain an education and employment, yet are denied access to their traditional country if they move away from the pastoral lease area to obtain an education or work, not available on their traditional country. Also it means that those that have no permission to reside on the area are also denied the benefit of these rights. By contrast, the reservation in Western Australia and the law of native title do not require residence on the pastoral lease to be able to access and use the respective rights involved.

There is also a general public right of access in the Northern Territory to waters on a pastoral lease, which does not require the consent of the pastoral leaseholder.[330]

There is no reservation in relation to pastoral leases in Queensland. In all three jurisdictions native title co-exists with a pastoral lease and where recognised (that is, native title is proven and not extinguished) it provides for access to the land and water on such leases, subject to a superior right of use by the pastoral leaseholder.

Access to waters for traditional use and fishing purposes

In Western Australia, an Aboriginal person is entitled to fish "from any waters in accordance with continuing Aboriginal tradition" without the general mandatory requirement for a recreational fishing licence. The fish must be taken only "for the purposes of the person or his or her family and not for a commercial purpose."[331]

In the Northern Territory, the local *Fisheries Act* does not restrict "the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner."[332] This provision does not authorise any commercial

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[330] Ibid s 79.

[331] *Fish Resources Management Act 1994* WA; s6 Application of Act to Aboriginal persons
An Aboriginal person is not required to hold a recreational fishing licence to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition if the fish are taken for the purposes of the person or his or her family and not for a commercial purpose.

[332] *Fisheries Act* (NT) s53 Aboriginals (1) Unless and to the extent to which it is expressed to do so but without derogating from any other law in force in the Territory, nothing in a provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner.
(2) Nothing in subsection (1) shall authorize a person to enter any area used for aquaculture, to interfere with or remove fish or aquatic life from fishing gear that is the property of another person, or to engage in a commercial activity.

activities.[333]

In Queensland, it is a defence to an offence concerning the taking, using or keeping of fisheries resources, or the using of fish habitats (water) if the person is Aboriginal or a Torres Strait Islander acting under Aboriginal tradition or Island custom and is satisfying a personal, domestic or non-commercial communal need. This is subject to regulation and prohibition under the Queensland fisheries regulations.[334]

An interesting modern "agreement" model, has been developed in the Great Barrier Reef Marine Park, which provides for the traditional use of marine resources by a traditional owner group without the need for proof of traditional ownership or native title.[335] A Traditional Use of Marine Resources Agreement (TUMRA) may be accredited by the Great Barrier Reef Marine Park Authority in accordance with Part 2B of the *Great Barrier Reef Marine Park Regulations 1983* – a Commonwealth law.

The activities that constitute traditional use that can be recognised include fishing, collecting (shellfish), hunting and care of cultural and heritage sites. Traditional use of marine resources is defined to mean the "undertaking of activities, in accordance with Aboriginal or Torres Strait Islander custom or tradition, for the purposes of satisfying personal, domestic or communal needs."[336]

This type of agreement according to the Great Barrier Reef Marine Park Authority is it provide for a "formal level of cooperative management….for the sustainable traditional use of marine resources, in the first instance dugongs and green turtles, in accordance with Traditional Owner custom for the sea country areas, and to support those agreements with a negotiated implementation arrangements and a targeted compliance program."[337]

To the extent such an agreement can include access to and use of the resources of Commonwealth islands within the Great Barrier Reef Marine Park then it may include use of freshwater.

These agreements (TUMRA) are primarily concerned with providing for the traditional use of marine resources and conservation of threatened species and so are somewhat tangential to the subject matter of this report but

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[333] Ibid s 53 (2).

[334] See s 14 *Fisheries Act 1994* (Qld).

[335] "The accreditation of a TUMRA is not a Native Title determination and is not intended to affect the operation of the *Native Title Act 1993*." A quote from Dobbs, Kirstin "A Reef-wide framework for managing traditional use of marine resources in the Great Barrier Reef Marine Park " Great Barrier Reef Marine Park Authority, Commonwealth of Australia, 2007 at page 18.Available at http://www.gbrmpa.gov.au/__data/assets/pdf_file/0006/21885/reef-wide_framework_for_managing_tumra.pdf (accessed 14/6/10).

[336] For example, see the definition in the Great Barrier Reef Marine Park Zoning Plan 2003 – Dictionary.

[337] Ibid 17.

illustrate an interesting modern approach to the recognition of traditional usage. This form of agreement obviously falls far short of the recognition that comes from native title or land rights law. In some measure, it would appear to have been constructed because of the need for the Commonwealth and the Great Barrier Reef Marine Park Authority to deal with the implications of s.211 of the *Native Title Act, 1993* and the restrictions placed upon traditional owners use (the requirement for a permit) of the Great Barrier Reef Marine Park historically.[338]

Access to and use of land and waters for traditional purposes and taking of flora and fauna from certain crown lands

There are also general statutory entitlements to take and use the fauna and flora on certain Crown lands apart from pastoral leases. In Western Australia in relation to land and waters on all Crown land except a nature reserve, wildlife sanctuary or freehold and leasehold land.[339] This is provided for under the *Wildlife Conservation Act,1950* which states that an Aboriginal person can take "sufficient only for food for himself and his family, but not for sale" and if the land is occupied the consent of the occupier is required.[340]

In the Northern Territory, the *Territory Parks and Wildlife Conservation Act* specifically provides that it does not restrict the "right of Aboriginals who have traditionally used an area of land or water from continuing to use that area in accordance with Aboriginal tradition for hunting, food gathering (otherwise than for the purpose of sale) and for ceremonial and religious purposes."[341]

Conclusion

It has been acknowledged for some time that the adequacy and consistency of these types of provisions needs addressing. For instance, the Australian Law Reform Commission's report on Customary Law includes a significant section on Indigenous Hunting, Fishing and Gathering Rights.[342] Whilst much of it is about harvesting flora and fauna – the linkage with access to, and use of, waters is obvious.

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[338] Ibid 8.

[339] *Wildlife Conservation Act 1950* s6 see definitions of Crown land and private land respectively.

[340] *Wildlife Conservation Act 1950* s23. Exemption in certain cases (1) Notwithstanding any other provisions of this Act, a person — who is "a person of Aboriginal descent" as that term is defined in section 4 of the *Aboriginal Affairs Planning Authority Act 1972*, may take fauna or flora — upon Crown land or upon any other land, not being a nature reserve or wildlife sanctuary, but where occupied, with the consent of the occupier of that land, sufficient only for food for himself and his family, but not for sale — and the Governor may, if he is satisfied that the provisions of this section are being abused or that any species of fauna or flora which is being taken under the authority of this section is likely to become unduly depleted, by regulation suspend or restrict the operation of this section in such manner and for such period and in such part or parts of the State as he thinks proper.

[341] *Territory Parks and Wildlife Conservation Act*; s122-Traditional use of land and water by Aboriginals.

[342] The Law Reform Commission Report No. 31 *" The Recognition of Aboriginal Customary Laws'* Australian Government Publishing Service Canberra, 1986 Volume 2 Part VII.

To some extent this deficiency was addressed in the *Native Title Act, 1993* when the Keating Government agreed to Senate amendments to include section 211 of the *Native Title Act*. This provision is dealt with in more detail in section 1 Part A of this Report. In short, section 211 of the NTA provides that if a law prohibits or restricts a person exercising native title rights that consist of carrying out certain activities – hunting, fishing, gathering, a cultural or spiritual activity by such means as a licence, permit or legal permission (which is not a general ban applying to everyone) then there is no prohibition or restriction for native title holders carrying out the class of activity or for gaining access to the land or waters for carrying out that activity.

In other words, it overrides the need for licence or permit requirements for native titleholders carrying out these activities but only for personal, domestic or non-commercial communal needs.

This requires some level of proof of the existence of native title, which is not available to many Indigenous Australians and so belies the benefits of the provisions outlined in this section of the Report, which don't require proof of traditional ownership or native title.

The need to review usage rights as I have called them in this section was recognised by the Keating Government when introducing the *Native Title Bill* in 1993 when the then Prime Minister stated that:

> The Commonwealth will, over the next two years, review our laws to better recognise native title hunting, fishing and gathering rights. We will be asking the states and territories to do the same.[343]

This statement led to consideration of these issues in the third Part of the Keating Government's response to the *Mabo* decision recognising native title in Australia – the Social Justice package, which was never implemented. In two significant Reports to the Federal Government on outstanding Social Justice issues both the Council for Aboriginal Reconciliation (CAR) and Aboriginal and Torres Strait Islander Commission (ATSIC) made major recommendations for reform of these issues.

CAR made recommendations[344] that the Commonwealth legislate to create a framework for access by Aboriginal and Torres Strait Islander people to public lands for camping, ceremonial activities, hunting or harvesting for personal or family consumption. In relation to private lands such as freehold or leasehold the Council recommended a 5 year program be funded to permit the reestablishment of these rights by purchasing such rights in perpetuity under State and Territory real property laws.

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[343] *Native Title Bill, 1993* Second Reading Speech Tuesday, 16 November 1993 House of Representatives Hansard 2882.

[344] *Going Forward Social Justice for the First Australians* - A Submission to the Commonwealth Council for Aboriginal Reconciliation, 1995 at pages 76 and 78.

The latter innovative recommendation involved the purchase of access rights to carry out such activities and such rights would "run" with the title of the land. That is, any subsequent holder would acquire that title with notice of this right and the title would be subject to the access right on a continuing basis. The access rights would be similar to an easement or covenant for conservation of the land, which are now more common in Australia.

ATSIC in its Report supported the addressing of the ALRC Customary law recommendations including those with respect to hunting, fishing and gathering rights.[345]

The ALRC recommendations in general terms were that:

- there be a legislative requirement for consultation at a provincial and national level when these rights may be affected;[346]

- an agreed statement of principles to ensure consistency between all laws at a national and provincial level be established;

- the content of the rights should be broadened and not just based on food gathering and consumption but to include ceremonial and kin obligations;

- that access be provided to traditional lands for the carrying out of these rights to all Crown land and that there be provision for negotiated access provisions on other lands;[347]

The ALRC also commented that any usage rights should be subject to reasonable conservation measures.

As with indigenous heritage issues (covered in Section 1 Part D of this Report) access to land and waters is critical for Indigenous people. The most recent legislative development was in the 1998 amendments[348] to the *Native Title Act, 1993*. This involved the inclusion of statutory rights of access to non-exclusive agricultural and pastoral leases for registered native title claimants. Similar to s211 (to which they are subject) the rights of access are in relation to certain traditional activities namely hunting, fishing, gathering or camping, performing rites or other ceremonies and visiting sites of significance.[349] This type of provision was included at the urging of Indigenous representatives, who were concerned about the denial of access to land and waters by leaseholders.

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[345] *Recognition, Rights and Reform* – A Report to Government on Native Title Social Justice Measures, ATSIC 1995 at pages 112,115,116.
[346] ALRC Report at page 202.
[347] Ibid summary of recommendations at pp224, 225.
[348] *Native Title Amendment Act, 1998.*
[349] NTA Part 2, Division 3, Subdivision Q.

These usage rights outlined in this section (that are not within the *Native Title Act, 1993*) are an important part of the framework of laws that apply to Indigenous interests in relation to water. The key benefit of these rights and the differentiating factor to the native title regime is that these rights apply without the need for proof of native title or traditional ownership.

Whilst these laws are in many respects an historical remnant of an era when Indigenous rights to traditional land and waters were not legally recognised (the terra nullius era) they still perform a valuable role today. Pursuant to these rights, Indigenous groups are able to access and use the resources of the land and waters of their traditional country where they have no existing land title. This situation assists in the maintenance of subsistence economies and Indigenous law and custom.

The critical questions that remain unresolved in my opinion are:

- Indigenous involvement in the commercial sector and access to the land and waters for those purposes;

- whether Indigenous people other than traditional owners should have these rights; and

- the methods by which reasonable conservation measure impact upon these rights.

These issues should be the subject of negotiations between Indigenous people and Government.

Importantly, there is a clear need in my opinion as with other laws analysed in this report to clarify the application of the laws to water per se - to include not only access to and rights to use the resources of the land and waters but also to the water itself. For example, the reservation in pastoral leases in the Northern Territory provides access to take and use the water from the natural waters and springs on the leased land.

Part D - Heritage Protection Legislation

The meaning of the word heritage usually includes a broad range of a society's cultural knowledge and values. The word incorporates both the tangible and intangible. Erica Daes, a former Special Rapporteur and Chairperson of the Working Group on Indigenous Populations in the United Nations in her landmark report on the *"Protection of the Heritage of Indigenous People"* described the word heritage in an indigenous context in these terms:[350]

[350] Daes, Erica a Special Rapporteur and Chairperson – Rapporteur of the Working Group on Indigenous Populations "Protection of the Heritage of Indigenous People" Human Rights Studies Series United Nations New York and Geneva, 1997 at iii.

> Indigenous peoples regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land, their kinship with the other creatures that share the land and with the spiritual world.
>
> "Heritage" is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which contemporary international law regards as the creative production of human thought and craftsmanship, such as songs, music, dances, literature, artworks, scientific research and knowledge. It also includes inheritance from the past and from nature, such as human remains, the natural features of the landscapes, and naturally occurring species of plants and animals with which a peoples has long been connected.
>
> Heritage is, ordinarily, a communal right and is associated with a family, clan, tribe or other kinship group.

In northern Australia the understanding that traditional land and water are the essence of Indigenous heritage, was eloquently expressed by an Aboriginal traditional owner in the *Finniss River Land Claim* made pursuant to the Northern Territory Land Rights Act in 1981:

> We belong to this special place. We do not think to possess the earth, the trees, rocks and waters of our traditional home, because it is the other part of us. It brought us forth and has taken many of us back… There are the sacred places of the dreaming. There are the special places for food gathering, water to drink and where we once hunted for game to feed us. This land is our heritage, our home; it is our history. This land is our very life. Separate us from it and we are nothing.[351]

The Indigenous specific heritage legislation described in this Report attempts to protect this broad notion of heritage. Generally speaking the legislation seeks to recognise and protect the link between if you like the intangible - the cultural knowledge, including the songs, the dance, the ceremony; which are manifestations of the relationship or connection to natural features of the landscape that includes water and the tangible the physical or natural features.

Thus it is most common to describe a site or area as significant because of its status in accordance with Aboriginal tradition; which focuses on traditions, observances, customs or beliefs relating to particular areas of land and

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[351] Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory: *Finniss River Land Claim* (1981) paragraph 28 as quoted in Toohey, J *Aboriginal Land* 15 Federal Law Review 159 at 162.

water.[352] As is often the case when relationships between people and land are discussed, the concept also includes the water that exists on and in the land and features like rivers and lakes, even though this reference may not be explicit at times.

Of critical importance to the maintenance of this cultural knowledge or heritage is access to traditional lands and waters and security of title. As the late Nugget Coombs and others stated in an important study concerned with Aboriginal people and development in the East Kimberley:

> At issue are the means by which…[Aboriginal people] can maintain those aspects of their cultural heritage and identity which they choose to preserve, to have access to and to protect locations of religious and traditional significance, to perform ceremonies, to exercise artistic creativity and to maintain their languages through formal and informal instruction. Most of these can be achieved effectively only if security of land tenure and access to traditional lands and sites is guaranteed.[353]

This emphasises the importance of the application of Indigenous Heritage legislation to all forms of land tenure in Australia regardless of who holds or owns the property interest. The link with land rights or native title is also critical as it recognises a property right, which assists in the maintenance of connection with heritage sites. The protection of those sites may include control over the use of that area.

It is important to note that in most instances in Australia Indigenous people do not hold a legally recognised form of land title or property interest under land rights or native title in relation to their traditional country including water. In these circumstances the statutory provision of access to land and water in some heritage protection legislation and the protection of heritage sites is critical to assist in the survival and maintenance of this heritage.

There is a range of legislation at both Federal and provincial level in Australia dealing with the protection of Indigenous heritage. Some is Indigenous specific legislation and some not.[354]

The Indigenous specific legislation relevantly seeks to protect areas of significance and/or what are more commonly called sacred sites. A useful

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[352] See the definition of Aboriginal tradition in the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* section 3 for example.

[353] Coombs H.C., McCann M, Ross, H & Williams NM. (eds) (1989), Land of Promises: Aborigines and Development in the East Kimberley, Centre for Resource and Environmental Studies, ANU/ Aboriginal Studies Press AIATSIS, Canberra, p48 as quoted in Boer, B & Wiffen, G "Heritage Law in Australia" Oxford University Press 2006 at 262.

[354] I have not dealt with the general Heritage protection legislation at a provincial level in each northern Australian jurisdiction being the *Queensland Heritage Act, Heritage Conservation Act* (NT) and the *Heritage of Western Australia Act.* None specifically refer to Indigenous cultural heritage. Although, some protection to Indigenous historical and cultural sites is afforded in this type of legislation. See Boer,B & Wiffen, G "Heritage Law in Australia" Oxford University Press 2006 at 186,187.

description of sacred sites taken from the Aboriginal Areas Protection Authority in the Northern Territory is:

> Sacred sites are places within the landscape that have a special significance under Aboriginal tradition. Hills, rocks, waterholes, trees, plains and other natural features may be sacred sites. In coastal and sea areas, sacred sites may include features, which lie both above and below the water. Sometimes sacred sites are obvious, such as ochre deposits, rock art galleries, or spectacular natural features. In other instances sacred sites may be unremarkable to an outside observer. They can range in size from a single stone or plant, to an entire mountain range.[355]
>
> Sacred sites are irreplaceable heritage places for Aboriginal custodians and all Australians. They are an intrinsic part of a continuing body of practices and beliefs emanating from Aboriginal laws and traditions. Sacred sites give meaning to the natural landscape. They anchor cultural values, spiritual and kin-based relationships in the land.[356]

The Indigenous specific legislation at a Federal and provincial level is notable for one major difference. At a State and Territory level it has generally been described as "blanket protection" legislation. That is, the relevant legislation makes it an offence to affect, destroy or desecrate an Indigenous site or area, although the definitions in each jurisdiction's legislation are different. Governments in all State and Territory jurisdictions retain a discretionary power to approve the destruction of Indigenous sites or areas.

> Blanket protection means that all areas and sites which fall within the legal definition of heritage are automatically protected by sanctions which make it an offence to cause damage or desecration to the site or area, whether or not the site has been assessed or recorded.[357]

The Commonwealth Act - the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* (ATSIHP Act) allows the Federal Minister to make an order after an application is made protecting an area or object that is of significance to Indigenous people.[358] It is generally known as "last resort" protection and is discretionary only. The Minister can make an order or

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[355] http://www.aapant.org.au/ (accessed 14/5/10).

[356] http://www.aapant.org.au/ (accessed 14/5/10).

[357] Evatt, Elizabeth *"Overview of State and Territory Aboriginal Heritage Legislation"* (1998) 4(16) Indigenous Law Bulletin 4 at 2.

[358] The *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* has been under review for a number of years. The latest discussion paper is available at http://www.environment.gov.au/heritage/laws/indigenous/lawreform/index.html (accessed 10/5/10). Interestingly, it has been suggested that the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* be incorporated in to a new *Australian Environment Act*. See the review of the Act and also The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 October 2009 by Mr. Allan Hawke at paragraph 18.22.

declaration to protect the area or not.[359] It is then an offence to breach such a declaration.[360]

Justice French (as he then was) said in the Federal Court case of *Tickner v Bropho* [361] in relation to the ATSHIP Act that:

> Informing its enactment however, was the idea that it would be used as a protective mechanism of last resort where State or Territory legislation was ineffective or inadequate to protect heritage areas or objects.

Importantly, the Indigenous specific heritage laws both at a Federal and provincial level apply across any form of land tenure throughout Australia.[362] Indigenous specific heritage legislation has been subject to the criticism that it does not provide for the ownership and management by Indigenous people "of their own cultural heritage".[363]

In this context, it should be remembered that the ATSIHP Act was originally interim legislation pending the finalisation of National Land Rights Legislation, which never eventuated.[364] The Federal ATSIHP legislation is also currently subject to review.

The *Aboriginal Land Rights (Northern Territory) Act, 1976,* which primarily deals with land rights and ownership of traditional land in the Northern Territory also includes a linkage with places of Indigenous cultural heritage. The later point is dealt with later in this section of the Report. The link between "land rights" and Indigenous cultural heritage protection is "being strengthened" with more modern legislation like that enacted in Queensland in 2003, which recognises the status of native title holders in cultural heritage protection,[365]although this doesn't resolve the ownership issue.

The Working Group on Indigenous Populations at the United Nations has

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[359] A declaration to protect can be made by the Minister on a short-term emergency basis under s9 or on a long term basis under section 10 of the Act.

[360] See Part III of the Act.

[361] *Tickner v Bropho* 40 FCR 183 at 211.

[362] Evatt, Elizabeth Hon. "Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984"* 1996 at page 6,with respect to the Federal Act. Also for example, see s21 *Aboriginal Cultural Heritage Act 2003*(Qld) 21 Continued use of surface (1) This section applies if Aboriginal cultural heritage is located on the surface of land, and— under the tenure on which the land is held, the owner or occupier of the land is entitled to the use and enjoyment of the surface of the land; or (b) a person is otherwise entitled to the use and enjoyment of the surface of the land. (2) Despite the existence of the Aboriginal cultural heritage, the owner or occupier or other person is entitled to the use and enjoyment of the land to the extent that the person does not unlawfully harm the cultural heritage.

[363] Fourmile, H 'Aboriginal Heritage Legislation and Self-determination", 7 Australian-Canadian Studies 45 as quoted in Boer,B & Wiffen, G "Heritage Law in Australia" Oxford University Press 2006 at 265.

[364] *Tickner v Bropho* 40 FCR 183 at 222.

[365] Boer,B & Wiffen, G "Heritage Law in Australia" Oxford University Press 2006 at 259.

considered Draft Guidelines on the Protection of the Cultural Heritage of Indigenous Peoples in 2006[366] with a view to the eventual finalisation of an International Covenant on this subject matter. One of the principles of that draft document is:

> (g) Recognize further that indigenous peoples' cultural heritage is intrinsically linked and connected to their traditional territories, lands, waters and natural resources. Indigenous peoples' control over traditional territories and resources is thus essential to the protection of their cultural heritage and its transmission to future generations;

The *Aboriginal Cultural Heritage Act 2003* (Qld) does recognise Indigenous ownership of some forms of Indigenous cultural heritage, that is with respect to human remains and Indigenous objects. These provisions mark an important advance on the situation in other jurisdictions. The ownership provisions do not apply in relation to land and water.[367]This report does not deal with human remains and Indigenous objects, which also form an important part of Indigenous cultural heritage. Some legislation in northern Australia also provides protection to "historical" areas or sites and this will be included in this section of the report to the extent that it has an application to Indigenous interests in water.

The Federal legislation is examined first and then the relevant State and Northern Territory legislation.

Federal Heritage Protection Legislation

The relevant legislation at a Federal level is:

- *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984.*
- *Environmental Protection and Biodiversity Conservation Act, 1999.*
- *Aboriginal Land Rights (Northern Territory) Act, 1976.*

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act)

The purposes of the Act are described in the following terms:

> The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian

[366] At page 3 of the DRAFT GUIDELINES ON THE PROTECTION OF THE CULTURAL HERITAGE OF INDIGENOUS PEOPLES STANDARD-SETTING: FUTURE PRIORITIES FOR STANDARD-SETTING ACTIVITIES; Review of the draft principles and guidelines on the heritage of indigenous peoples Working paper submitted by Yozo Yokota and the Saami Council; E/CN.4/Sub.2/AC.4/2006/5; 16 June 2006; Economic and Social Council COMMISSION ON HUMAN RIGHTS Sub-Commission on the Promotion and Protection of Human Rights; Working Group on Indigenous Populations; Twenty-fourth session 31 July-4 August 2006;Item 5 (a) of the provisional agenda.

[367] See ss 15 and 19 respectively of the *Aboriginal Cultural Heritage Act 2003* (Qld).

> waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.[368]

In summary, the Act relevantly provides for:

- an application to be made to the responsible Commonwealth Minister;
- an order to protect a significant Aboriginal area from injury or desecration described as a declaration;
- the Minister has a wide discretion to grant or refuse the making of such an order;
- the Minister can make an emergency order to protect a significant area (s9);
- the Minister can make a "permanent" order protecting an area for a period the Minister determines;(s10)
- there are offences and penalties provided for breaching a declaration or protection order;
- a declaration can be reviewed by Parliament;
- a declaration can apply anywhere in Australia regardless of the form of land title that exists on the area;

This legislation provides the Minister with a "political" discretion to protect a significant area– the discretion is subject to what may be one or a number of other competing public interests, the protection of Indigenous heritage being only one of those public interests. The Act was enacted:

> for the benefit of the whole community to preserve what remains of a beautiful and intricate culture and mythology. Its protection is a matter of public interest. There will, however be occasions on which that objective will conflict with other public interests.(next sentence deleted)
>
> The question whether a declaration should be made which would adversely affect public or private interests is a matter within the discretion of the Minister who is required to evaluate the competing considerations and make a decision accordingly. It follows that the statutory purpose does not extend to unqualified protection for areas of significance to Aboriginals.[369]
>
> The decision of the Commonwealth Minister in such a case, while made

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[368] *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984,* s4.
[369] *Tickner v Bropho* 40 FCR 183 at 223,224.

> within a statutory framework, is of a political character and, subject to compliance with the requirements of lawfulness, fairness and rationality, is not amenable to judicial intervention.[370]

The Minister can make a declaration in relation to a significant Aboriginal area, which is defined under the Act to be an area of particular significance to Aboriginals in accordance with Aboriginal tradition. An area under the Act is defined to include a site,[371] and Aboriginal is defined under the Act to include Torres Strait Islander people so that the Act also applies to Torres Strait Islander people and areas of significance in accordance with Torres Strait Islander tradition. The terms of the definition of "significant Aboriginal area" are:

> *significant Aboriginal area* means:
>
> (a) an area of land in Australia or in or beneath Australian waters;
> (b) an area of water in Australia; or
> (c) an area of Australian waters;

being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.[372]

Aboriginal tradition is defined to mean:

> *Aboriginal tradition* means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.[373]

It is for the Minister to be satisfied that an area is significant in accordance with Aboriginal tradition when considering whether to make a declaration.
A significant area under the legislation therefore may include an area of water such as water holes, springs, rivers, lagoons and lakes. Declarations have been made in relation to the Murray River, a lagoon and a waterhole.[374]A significant area can also include an area of land and any

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[370] Ibid 224.
[371] Ibid s3 Interpretation.
[372] Section 3 of the Act - Interpretation.
[373] Ibid.
[374] See, for example *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337; 152 ALR 540; 72 ALJR 722 the Hindmarsh Island Bridge Case where it was not disputed that the Act potentially applies to the waters in the Murray River. *Toomelah Boggabilla Local Aboriginal Land Council v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] FCA 924 where it was clear that the Act could apply to a lagoon in an attempt to stop water skiing on that lagoon. The Junction Waterhole Aboriginal area near Alice Springs, which includes waterholes is both a protected area subject to a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* and on the Register of the National Estate. (see accessed 10/5/10) http://www.environment.gov.au/cgibin/ahdb/search.pl?mode=place_detail;place_id=18839

component water on and in that land, where such water falls within the definition of an area of water under the Act. As normally understood an area applies to the surface of the land or water.[375] To what depth would it therefore apply?

An interesting question arises as to whether an aquifer for example could be regarded as a significant area in these circumstances. This consideration may occur where say a drill was bored – the surface area not being significant but the aquifer underground that is drilled into is significant in accordance with Aboriginal tradition. The question arises: is the underground aquifer an area under the Act capable of protection by a Ministerial declaration? The definition of a significant Aboriginal area as it includes an area of water would seem clearly applicable to this situation.[376]

There are no provisions in the Act that ensure access to a significant area by Indigenous custodians if the Minister does make a declaration protecting the area. This means that despite the fact that the area may be legally protected under this Act it doesn't ensure that access to the land or waters involved is provided for the relevant Indigenous people. It is a feature of the Northern Territory legislation that access is provided for in the terms of the *Aboriginal Sacred Sites Act 1989* (NT).

The notions of injury and desecration under the Act are very wide and include mere presence in an area if that presence is inconsistent with the relevant Aboriginal tradition. Injury or desecration in relation to an area is taken to have occurred when the area is used or treated in a manner inconsistent with Aboriginal tradition; when anything done on or near the area adversely affects the use or significance of the area in accordance with Aboriginal tradition or where entry onto the area is inconsistent with Aboriginal traditional. In addition, the definition of "under threat of injury or desecration" includes where the area is likely to be, injured or desecrated.[377]

It is important to understand that as with all the heritage legislation discussed here, the ATSIHP Act does not provide or recognise an Indigenous right to water in the sense of a property right. The Act does provide for the protection of Indigenous interests in water –the heritage or cultural interest in relation to a significant area if the Minister chooses to make a declaration.

In this regard, it is a strong legal mechanism to protect Indigenous cultural heritage when a declaration is made by the Federal Minister. It is a criminal offence punishable by imprisonment to contravene a declaration. For example, a declaration for 20 years was made under section 10 of the Act in relation to the complex of Aboriginal sites at Niltye/Tnyere-Akerte (Junction Waterhole) near Alice Springs in 1992.[378]

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[375] For example, see Concise Macquarie Dictionary Doubleday Australia Pty Ltd 1982.
[376] I would like to acknowledge Professor Lee Godden for pointing this out to me.
[377] Ibid s3 (2), (3).
[378] Kelly, Anne "Two Laws Meet: The Significance of Junction Waterhole"[1992] Aboriginal LB 29 available at http://www.austlii.edu.au/au/journals/AboriginalLB/1992/29.html

In an application under s10 of the Act for long term protection of Boobera Lagoon near Toomelah in northern NSW from water skiing and erosion of the banks of the lagoon, an application which proceeded for many years eventually resulted in a protection order being made. A companion grant of funding was also made to construct water skiing facilities in another nearby body of water as a means of dealing with other community interests.[379]

According to the authors of the recent (August 2009) Australian Government Discussion Paper entitled "Indigenous heritage law reform" the Act has "not been effective in meeting its purpose"[380]. To quote from that Paper:

> The ATSIHP Act has not been effective in meeting its purpose, which was to provide a direct and immediate means for the Commonwealth to protect traditional areas and objects when there are gaps in state and territory legislation. Instead it has created uncertainty about decisions made under other laws, provoked disputes and led to duplication of decisions, with increased costs for all parties involved.
>
> The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects. Few declarations have been made: 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations. Also Federal Court decisions overturned two of the five long term declarations that have been made for areas.

The conclusion that the ATSIHP Act has not been effective in meeting its purpose and the reasons proffered for that conclusion are no doubt a matter for debate. That debate is outside the scope of this paper. A comprehensive set of recommendations to amend the Act were made by the Hon. Elizabeth Evatt, in the review entitled "Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984"* in 1996.The review recommendations received widespread support by Indigenous interests. No Federal Government since has sought to fully implement the review recommendations.

The extent of protection afforded under the Act largely turns on the fact that the Minister has a discretionary power to make a declaration or not. This decision is generally made in the face of a decision by a State or Territory

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[379] Wootten, Hal ; "Resolving disputes over Aboriginal sacred sites: Some experiences in the 1990s" Chapter 16 in Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society public=shed by ANU E press available at http://epress.anu.edu.au/nts/mobile_devices/ch16s06.html (accessed 11/5/10). Also see Quiggin, Robynne "Boobera Lagoon " [2001] Indig Law B 9; (2001) 5(6) Indigenous Law Bulletin 4. Available at http://www.austlii.edu.au/au/journals/ILB/2001/9.html (accessed 11/5/10).

[380] Australian Government Department of the Environment,Water,Heritage and the Arts, Discussion Paper August 2009 "Indigenous heritage law reform" available at http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/pubs/discussion-paper.pdf (accessed 10/5/10).

Government to authorise desecration or destruction of a site.

That is the nature of a last resort power held by a national government in a Federal system where there are concurrent legal jurisdictions applicable to Indigenous heritage protection. The Federal Parliament has decided not to exercise it constitutional power to legislate exclusively in relation to Indigenous Heritage protection and has allowed the States and Territories to occupy the main role in this area. This has been a long-standing policy of Federal Governments of both political persuasions.

To quote further from Justice French:

> The cultural heritage of any country extends to the language, traditions, customs, stories and religions of its peoples past and present. The drive to preserve that heritage sometimes conflicts with other perceived public interests, which involve its destruction or impairment. In Australia these conflicts in respect of Aboriginal heritage are complicated by the existence of State and Commonwealth Governments, which may have differing perspectives and priorities in their resolution. Each of the States and the Northern Territory has its own Aboriginal Heritage legislation.
>
> It seems that the Commonwealth law is likely to be applied when the assessment by the Commonwealth Government of competing public interests involved in the protection of Aboriginal heritage differs from that of a State or Territory.[381]

To summarise, the ATSHIP Act applies to an area of water or area of land including the water in or on that land that is significant in accordance with Aboriginal tradition. It only applies to protect such an area when the responsible Minister makes a declaration under the Act.

Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)

This Act is the primary Federal legislation dealing with the protection of the environment, biodiversity and heritage in Australia. The Act relevantly provides for the assessment and approval of developments including mining and areas of environmental and heritage significance.

The Act protects matters of national environmental significance, which relevantly includes world heritage properties, national heritage places, commonwealth heritage places and wetlands of international importance under the Ramsar Convention.[382] There are some five (5) Ramsar listed

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[381] *Tickner v Bropho* at 211.

[382] s 528 EPBC Act; " *Ramsar Convention* means the Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971, as amended and in force for Australia from time to time. Note: The English Text of the Convention is set out in Australian Treaty Series 1975 No. 48."

wetlands in northern Australia.[383] An action that will have or is likely to have a significant impact on a matter of national environmental significance requires approval by the Minister.[384] There are eight matters of national environmental significance.[385]

The Act also governs Commonwealth national parks established on Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act, 1976* (ALRA). They are Commonwealth reserves for the purposes of the EPBC Act leased from and jointly managed with Aboriginal traditional owners.[386] A conservation agreement may also be entered into with Indigenous persons or Indigenous legal entities that own or hold land and or usage rights to achieve the various purposes of the Act.[387] The Indigenous Protected areas program funded by the Commonwealth is also an important means by which indigenous interest in water can be protected by agreement.

The EPBC Act includes a number of provisions dealing with Indigenous heritage. Further it includes provisions that specifically state that the Act does not affect the operation of either, the *Aboriginal Land Rights (Northern Territory) Act, 1976* or the *Native Title Act, 1993.* Nor, does it affect specifically the operation of section 211 of the NTA, (which is covered in Part A of this section of the Report).[388]In relation to section 71 traditional rights to use and occupy Aboriginal land under ALRA the EPBC Act ensures general access to Commonwealth National Parks in the Northern Territory.[389] As mentioned, these are parks that are Aboriginal land under ALRA but subject to joint management and leasing arrangements with the Commonwealth.

There is also a general provision (as with some State and Territory legislation described in Section One Part C) of this Report that allows an indigenous person to continue the traditional use of an area in a Commonwealth reserve for:[390]

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[383] http://www.environment.gov.au/water/topics/wetlands/database/maps/pubs/ramsar-sites-australia.pdf (accessed 11/5/10)

[384] For example, see the requirement for significant impact in relation to a national heritage place s15B.

[385] See Part 3 Division 1, Subdivisions A- FA respectively EPBC Act.

[386] See s 344 EPBC Act and with respect to water and a Commonwealth Reserve declared under the Act see s 345 which is in the following terms: 345 Extent of Commonwealth reserve (1) A Commonwealth reserve includes:(a) land or seabed to the depth stated in the Proclamation declaring the Commonwealth reserve; and (b) the waters and seabed under any sea in the area declared as a Commonwealth reserve.(2) In this Act: *land* includes subsoil of land and any body of water (whether flowing or not) except the sea.

[387] EPBC Act s305 (5) Under subsection (1), the Minister may enter into a conservation agreement covering land with one of the following persons who has a usage right relating to the land: an indigenous person;(b) a body corporate wholly owned by indigenous persons; (c) a body corporate established by or under an Act for the purposes of holding for the benefit of indigenous persons land vested in it by or under that Act;(d) the trustee of a trust that holds land for the benefit of indigenous persons.

[388] EPBC Act; s 8 (2).

[389] Ibid s9.

[390] EPBC Act s359A ; Traditional use of Commonwealth reserves by indigenous persons. (2) However, regulations made for the purposes of this Division do affect an indigenous person's traditional use of an area in a Commonwealth reserve if they:(a) are made for

(a) hunting or food-gathering (except for purposes of sale); or
(b) ceremonial and religious purposes.

An Indigenous person's traditional use of an area including waters may be restricted through regulations under the Act that are made for the purpose of conserving biodiversity in the area of the Park.

The EPBC Act lists National Heritage places as matters of national environmental significance. This includes Indigenous places. The Commonwealth Heritage List also includes Indigenous places being land and waters owned or controlled by the Commonwealth. It is an offence to take an action that will have a significant impact on a place registered on either List without Commonwealth approval, unless Ministerial approval is granted.[391] Approval is often given on a conditional basis. The National Heritage list includes places of importance because of Indigenous heritage, which is one of the criteria for national heritage listing.[392]The same applies to the Commonwealth Heritage List.[393]Indigenous heritage values are also defined as national heritage values.[394]

Indigenous heritage values are defined in the following manner:

> *indigenous heritage value* of a place means a heritage value of the place that is of significance to indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history.[395]

The nomination of a place for inclusion on the National Heritage list provides for notification of, and an opportunity to comment by relevant Indigenous persons or representative organisations if indigenous heritage values are involved.[396]

The management of these various categories of places and properties varies in terms of the extent that it takes into account the role of Indigenous people in the management of their cultural heritage that includes water. In relation to the management of National and Commonwealth Heritage places a management plan must include a provision for access to the area for Indigenous people to maintain cultural traditions and indigenous participation in the management process.[397]

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the purpose of conserving biodiversity in the area; and (b) expressly affect the traditional use of the area by indigenous persons.

[391] Ibid ss15B,C & 27A for Commonwealth land generally.

[392] *Environment Protection and Biodiversity Conservation Regulations, 2000* 10.01A - National Heritage Criteria;(i) the place has outstanding heritage value to the nation because of the place's importance as part of indigenous tradition.

[393] EPBC Act; s 341D.

[394] EPBC Act ss 324D,

[395] Ibid s528.

[396] Ibid s324JH.

[397] *Environment Protection and Biodiversity Conservation Regulations 2000* Schedule 5A

In addition, the management principles recognise that in relation to indigenous heritage values Indigenous people are the "primary source of information":

> Indigenous people are the primary source of information on the value of their heritage and the active participation of indigenous people in identification, assessment and management is integral to the effective protection of indigenous heritage values.[398]

These management requirements are not mandated in relation to World Heritage properties or Ramsar wetlands of international importance.[399] At a practical level this may not be such a problem as at the time of writing those places in northern Australia that are on the World Heritage List are also registered on the National Heritage List.[400]

The relevance of the heritage protection provisions of the EPBC Act are that places of national heritage can include the protection of Indigenous heritage that includes water or areas of water.[401] The application of the Act to water is broad as the definition of land includes any body of water, whether flowing or not and land includes the subsoil. In northern Australia areas on the National Heritage List include Purnululu National Park in the Kimberley, Kakadu National Park in the Northern Territory and the Wet Tropics of Queensland area located in the Daintree River Valley, fringe coral reefs and rainforest on the coastline of Cape Tribulation.[402] The rivers, lakes, creeks and springs within these areas are included within these listings and thus protected and managed under the EPBC Act as outlined above.

As with a declaration made by the relevant Minister in accordance with the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* heritage protection of a place of significance to Indigenous persons under the EPBC Act does not constitute an Indigenous right to water. It is a protective statutory measure for heritage conservation purposes controlled by the responsible Minister in the sense that inclusion on the National Heritage list and other heritage registers mentioned in this section and decision making about any significant impacts on that place is subject to the discretionary

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Management plans for National Heritage places,(h)(ii),(iv); Schedule 7A Management plans for Commonwealth Heritage places (regulation 10.03B).

398 Ibid Schedule 5B 6 (regulation 10.01E); Schedule 7 B Commonwealth Heritage management principles (regulation 10.03D).

399 *Environment Protection and Biodiversity Conservation Regulations 2000* Schedules 5 and 6, respectively.

400 http://www.environment.gov.au/heritage/places/world/index.html

401 A national heritage place can be listed anywhere within the Australian jurisdiction (s324C) and a "place" is defined to include a location, area or region (s528). Australian jurisdiction is defined to include land, waters, seabed and airspace in, under or above Australia. s 345(2) ***land*** includes subsoil of land and any body of water (whether flowing or not) except the sea.

402 http://www.environment.gov.au/heritage/places/national/index.html (accessed 12/4/10).

decision making powers of the Minister in accordance with the provisions of the EPBC Act.

In other words, final decision making authority rests with the responsible Minister as to the management of a heritage place under the Act. This is subject to the joint management arrangements in the Northern Territory for Commonwealth National Parks on Aboriginal land.

EPBC assessment and approvals process

The other important aspect of the EPBC Act deals with the assessment and approvals process for new developments including mining. An action that may have a "significant impact" on a matter of national environmental significance will require assessment by either Commonwealth or State/Territory authorities. These assessments can also be done at the state and territory level through bilateral agreements between the different levels of government in an attempt to avoid duplication of assessment and approval processes.[403]

To give a practical example, Kakadu National Park in the Northern Territory is also listed as a World Heritage property and therefore comes within the definition of a matter of national environmental significance. It includes freshwater wetlands, which are also important Indigenous cultural areas.[404] An action includes the extraction and diversion of water[405] and the assessment of whether the impact is significant or not includes both "indirect" and "offsite" impacts including on a downstream wetlands from the actual development location.[406] It can also include the reduction of ground water levels or the "substantial alteration of surface water drainage patterns".[407] As such any development proposal that has this level of impact would need to be assessed under the EPBC Act.

These approval processes can have a major impact on Indigenous interests in relation to water depending upon the level of protection given to those interests in any particular decision by the Federal Environment Minister. For example, the Federal Minister approved the diversion of a river in relation to the McArthur River mine in the Northern Territory in February 2009 under the EPBC Act.[408]

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[403] EPBC Act s 45.

[404] Australian Government, Department of the Environment, Water, Heritage and the Arts "Matters of National Environmental Significance Significant Impact Guidelines" *Environment Protection and Biodiversity Conservation Act, 1999* available at http://www.environment.gov.au/epbc/publications/pubs/nes-guidelines.pdf (accessed 27/3/11) at 16.

[405] Departmental Significant Impact Guidelines available at http://www.environment.gov.au/epbc/publications/pubs/nes-guidelines.pdf (accessed 27/3/11)

[406] Ibid 6.

[407] Ibid12.

[408] MEDIA RELEASE The Hon Peter Garrett MP *Minister for the Environment, Heritage and the Arts* 20 February 2009 http://www.environment.gov.au/minister/archive/env/2009/pubs/mr20090220.pdf (Accessed 27/3/11)

Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)

The Land Rights Act which is applicable only in the Northern Territory prohibits any person from entering or remaining on land that is an Aboriginal site anywhere in the Northern Territory, not only Aboriginal freehold land under the Act. The Act makes it an offence to do so.[409] Land includes the water on the land for this purpose.[410]

This provision does not prevent an Aboriginal person from entering an Aboriginal site in accordance with Aboriginal tradition[411] and it is a defence if a person enters the area of the sacred site when performing functions under this Act or a law of the Northern Territory.[412]

The ALRA brings together the ownership of traditional land with Indigenous heritage protection that was originally envisaged with the connection between Federal Indigenous specific heritage legislation and national land rights legislation in the 1980's mentioned at the start of this section of the Report.

> In addition to giving statutory recognition to Indigenous land rights, the *Aboriginal Land Rights (Northern Territory) Act, 1976* can also be categorized as heritage legislation. It provides for the granting of title to traditional Aboriginal land, on the basis of the relationship of Aboriginal people to that land, the nature and quality of which is primarily determined by the cultural connections of Aboriginal people in the Northern Territory with their land. The definitions of 'Aboriginal tradition' and 'sacred site" incorporate a broad concept of heritage consistent with that under the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984.*[413]

This conveniently leads in to a discussion about the *Northern Territory Aboriginal Sacred Sites Act (NT)* as ALRA provides for the power of the Northern Territory Parliament to make "laws providing for the protection of and prevention of the desecration of, sacred sites in the Northern Territory". Such a law can only operate to the extent that it operates concurrently and not inconsistently with ALRA (section 1 Part B of this report concerning).

State and Territory Indigenous Heritage Protection Legislation

The relevant legislation in northern Australia is the:

- *Aboriginal Sacred Sites Act*, *1989* (NT)

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[409] *Aboriginal Land Rights (Northern Territory) Act, 1976* s 69(1).

[410] See section 69 ALRA generally. The proposition that land includes the water may seem an odd one especially since natural waters are incapable of ownership. See Gray, Kevin & Gray, Susan "*Elements of Land Law*" 5th Edition Oxford University Press, Oxford 2009 at 51.

[411] *Aboriginal Land Rights (Northern Territory) Act, 1976* s 69 (2).

[412] Ibid s 69 (2A).

[413] Boer,B & Wiffen, G "*Heritage Law in Australia"* Oxford University Press 2006 at 267.

- *Aboriginal Cultural Heritage Act, 2003* (Qld)
- *Torres Strait Islander Cultural Heritage Act 2003* (Qld); and
- *Aboriginal Heritage Act*, *1972* (WA);

State and Territory Indigenous heritage protection laws provide "blanket protection" the creation of an offence to destroy or affect a site or area of significance. All three jurisdictions provide for a register of Indigenous heritage sites. The register does not include all sites within that jurisdiction but does enhance the protection of a site so registered. Some Aboriginal people are reluctant to register sites because that may require them to disclose secret and sometime sacred information to the non initiated.

As with the Federal ATSHIP Act, the Western Australian and Northern Territory legislation has been enacted generally for the benefit of the whole community, and not only Indigenous people. This is in one sense an acknowledgement of the importance and benefit of the maintenance of Indigenous heritage to the whole community. In another sense, it is reflective of the fact that protection of Indigenous heritage is not mandatory under the legislation. A Minister is entitled to take into account other community interests in approving a development which may adversely affect Indigenous heritage.

It is also reflective of the fact that Indigenous heritage protection legislation doesn't generally create or recognise property rights held by Indigenous people. Although, importantly the provisions relating to heritage protection are enforceable in the Courts by Indigenous people.

There is one notable exception to this point being the legislation in Queensland. Interestingly, it does not include as an object of the legislation that the protection of Indigenous heritage is for the benefit of the whole community. By contrast it does provide for the recognition of ownership of certain Indigenous heritage by Indigenous people. One of the objects and stated "intent" of the Queensland legislation is:

> A supporting intent is that, as far as practicable, Aboriginal cultural heritage should be owned and protected by Aboriginal people with traditional or familial links to the cultural heritage if it is comprised of any of the following—
>
> (a) Aboriginal human remains;
> (b) secret or sacred objects;
> (c) Aboriginal cultural heritage lawfully taken away from an area.[414]

Whilst this doesn't apply to areas or sites that consist partly or wholly of water it is an important change in this type of legislation in favour of the recognition of property rights for Indigenous people as being an appropriate means of recognising and protecting Indigenous heritage.

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[414] *Aboriginal Cultural Heritage Act 2003* (Qld) s 14 (3).

There are a number of features that determine the effectiveness of this type of legislation in protecting Indigenous interests in water. These include:

- Application to all areas of land and water regardless of land title;
- Provision of rights of access to significant areas or sites for those with rights in accordance with tradition to access those areas or sites;
- Provision of access to historical areas/sites;
- Recognition of Indigenous rights to determine significance of areas and sites;
- The independence and qualifications of bodies that determine significance;
- The extent of Indigenous involvement in heritage protection processes under the relevant Act;
- Level of protection to Indigenous heritage afforded under the Act;
- Adequacy of statutory definitions and terms to protect Indigenous heritage that consists of water including the use of the words area and site;

I have included a table at the end of this section to indicate the fulfilment of these criteria in the various jurisdictions.

Northern Territory- *Aboriginal Sacred Sites Act 1989*

The object or purpose of the legislation is described by the Northern Territory Parliament in the Act in these terms:[415]

> An Act to effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement, by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land and establishing an Authority for the purposes of the Act and a procedure for the review of decisions of the Authority by the Minister, and for related purposes.

This object clause illustrates the point I made earlier concerning the varied purposes of Indigenous Heritage protection legislation and the role of the Minister in taking into account other public interests as well as the protection

[415] See the preamble at the beginning of the Act.

of Indigenous Heritage. The responsible Minister has ultimate legal power to approve a development or action that may adversely affect a site.[416]

The *Aboriginal Sacred Sites Act 1989* (NT) until the enactment of the modern Indigenous cultural heritage legislation in Queensland in 2003 was the most advanced provincial legislation in northern Australia. In some respects this is still the case, especially in relation to the access provisions.

The advanced nature of the Act is reflected in the following features:

The definition of sacred site is broad and it cross references definitions from the *Aboriginal Land Rights (Northern Territory) Act, 1976.*[417]

> *sacred site* means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition. [418]

The Act applies to protect a site as opposed to an area. A site by definition would normally be understood to be a smaller place than an area. The question arises as to whether the use of the word site is in any way restrictive in its protective capacity in terms of, for example its application to dreaming tracks or complexes of sites which would normally cover an area of land or water.

The legislation will be interpreted beneficially to try and ensure the purpose of the legislation is fulfilled although it is generally accepted that the use of the word area as in the ATSHIP Act has a broader application and therefore will lessen any restrictions that the use of the word site may import.

The word "area" was deliberately chosen in the ATSHIP Act instead of site because of its greater flexibility in terms of Indigenous Heritage protection. Senator Ryan introducing the ATSHIP Bill stated that:

> The Bill speaks of significant Aboriginal areas and defines 'area' to include a site. The use of the word 'area' rather than site will allow flexibility in recognizing what Aboriginals believe to be significant. It will save a narrow and artificial approach being taken to sites, for example, to discrete geological formations. Where a site is particularly secret and sacred there may be an area immediately adjacent to it where people ought not to go. Transgression of that space may be as offensive as entry to the site. It may also be thought to place people going there in physical danger. This Bill is worded to enable those

[416] Section 32 of the Act.
[417] Ibid s3.
[418] Section 3 *Aboriginal Land Rights (Northern Territory) Act, 1976.*

situations to be accommodated.[419]

The application of the word site to water is not without difficulty in understanding its application either. The word land is defined in the following terms:

> "land" includes land covered by water (including such land in the Territorial sea) and the water covering land;

This definition is not used in the definition of a sacred site it is when the grant of an Authority Certificate is being considered under the Act in relation to the approval of work on land (so that the work does not affect a site). Under the above definition it would include water on land.[420]

The preferable view is that a site that is sacred or significant according to Aboriginal tradition would clearly involve a place or location of water that fits those criteria. It doesn't resolve the issue as to whether an underground aquifer is included. There needs to be a more general and extensive definition of water to ensure the comprehensive protection of water in all Indigenous specific heritage legislation.

The offence provisions in the Act are of broad import in that it is separately an offence to enter, remain, work on, use or desecrate a sacred site.[421] This applies regardless of whether the site is registered.[422] There is a statutory requirement to take into account "the wishes of Aboriginals relating to the extent to which the sacred site should be protected."[423]In addition, it is an offence to breach the conditions or substance of an Authority Certificate to do work and avoid sites.[424]

There is a clear and transparent statutory system of obtaining clearance for land use to ensure the protection or avoidance of sites – a process of assessing proposals and the grant of an authority certificate. This enhances the protection of sites as it incorporates their protection more readily within the planning process. The relevant provision for issuing an Authority Certificate is as follows:

> 22. Authority Certificate
> (1) The Authority shall, where it is satisfied that, in relation to an application under section 19B –
>
> (a) the work or use of the land could proceed or be made

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[419] Second Reading Speech *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Bill* - 6 June 1984 as reproduced in Evatt, Elizabeth Hon. "Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984"* 1996
at page 242.
[420] Ibid s 19 B .
[421] *Aboriginal Sacred Sites Act 1989* (NT) ss 33,34,35 respectively.
[422] Ibid ss27-29 establish a register of sites.
[423] Ibid s42.
[424] Ibid s 37.

without there being a substantive risk of damage to or interference with a sacred site on or in the vicinity of the land; or

(b) an agreement has been reached between the custodians and the applicant,

The grant of such a certificate by the Aboriginal Areas Protection Authority provides a defence to the provisions that make it an offence to work on or use a sacred site.[425]

A governing Board – the Aboriginal Areas Protection Authority that administers the Act issues Authority Certificates. The Board is required to consist of 10 out of 12 members who are Aboriginal custodians of sacred sites.[426]There is no equivalent provision in any other northern Australian jurisdiction.

There is a statutory right of access by Aboriginals to sacred sites in accordance with Aboriginal tradition regardless of the land tenure where the site is located.[427] To supplement this statutory right there is a right to cross neighbouring property (after due notice to the owner) to access a sacred site as permitted by Aboriginal tradition; to perform functions under the Act; to prepare an application for a declaration under the Federal ATSHIP Act or for the purposes of a land claim.[428]

Information that is secret in accordance with Aboriginal tradition and which is acquired for the purposes of the Act is sought to be protected by making it an offence to communicate or record such information except as provided for under the Act.[429]

The general Heritage legislation in the Northern Territory – the *Heritage Conservation Act, 1991* provides for the declaration of heritage places by the responsible Minister. These places include historic sites and Aboriginal archaeological places and can be listed for their natural or cultural history and for being of significance for social, cultural and spiritual reasons. Thus a wide range of places of importance for Aboriginal people can be declared as heritage places.[430] If the heritage place is also a sacred site that shall be recorded on the register under the Act[431] but the provisions governing the protection of a sacred site shall only be those under the *Northern Territory Aboriginal Sacred Sites Act.* The protective and Ministerial approvals provisions in the *Heritage Conservation Act, 1991* in that circumstance are not applicable.[432]

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[425] Ibid s34 (2).
[426] Ibid s6.
[427] Ibid s 46.
[428] Ibid s47.
[429] Ibid s38.
[430] See Heritage assessment criteria in section 18 of the *Heritage Conservation Act, 1991* Act.
[431] Ibid s27 (5).
[432] Ibid s 6(2).

A heritage place is defined to be:

> *heritage place* means a place in the Territory (whether or not covered by water) declared under section 26 to be a heritage place.[433]

It is an offence punishable by a fine or imprisonment to carry out work on or damage a heritage place without the consent of the Minister.

Queensland - *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*

The *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* are the relevant Indigenous specific heritage legislation in this jurisdiction. Both Acts are currently under review.[434]Both pieces of legislation are virtually identical except that the words "Island custom, known in the Torres Strait as Ailan Kastom" are used in the *Torres Strait Islander Cultural Heritage Act 2003* instead of Aboriginal tradition.[435]

National Parks legislation in Queensland also provides for the preservation of cultural resources and values, which includes places of historical, spiritual or sociological significance or value "including such significance or value under Aboriginal tradition or Island custom."[436]

The object or main purpose of the Cultural Heritage Acts are "to provide effective recognition, protection and conservation" of Aboriginal/Torres Strait Islander cultural heritage.[437] The Acts also recognise Aboriginal and Torres Strait Islander people as the primary authority on Aboriginal and Torres Strait Islander cultural heritage in the principles of the Act.

> Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;[438]

Importantly, the Act provides for or recognizes Indigenous ownership to certain types of cultural heritage by confirming that any existing rights of ownership of cultural heritage by Aboriginal people or under native title are not affected by this Act. As mentioned in the introduction to this section of the Report there is also provision for Aboriginal ownership of human remains, sacred and secret materials or objects. This doesn't impact directly upon an area of significance including water under the Act and doesn't affect land title in any way. It does indicate though an important recognition of

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[433] Ibid s4 Interpretation.

[434] http://www.derm.qld.gov.au/cultural_heritage/legislation/index.html (accessed 10/5/10).

[435] See s9 *Torres Strait Islander Cultural Heritage Act 2003* and fn 1 in that Act.

[436] See s17 *Nature Conservation Act 1992* (Management principles) and definition of cultural resources in the Act's Dictionary. See also the management principles for Future Conservation Reserves in the Land Act, 1994 (s198A).

[437] Section 4 both Acts, *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*

[438] Section 5(b) of the Act.

Aboriginal ownership and change of principles in more modern Indigenous Heritage legislation.[439]

Aboriginal cultural heritage, amongst other things is defined to include a *significant Aboriginal area* in Queensland which is an area of "particular significance to Aboriginal people because of either or both of the following (a) Aboriginal tradition; (b) the history, including contemporary history, of any Aboriginal party for the area."[440]

In this sense, the legislation has broader application than the Northern Territory legislation as it includes an area that has importance to the general history of Indigenous people. Accordingly this concept may include includes sites or areas that do not have religious or spiritual significance but which are the site of an important event; for example, a protest or massacre site.[441]

The definition of an area includes water to the following extent:

> *area* means—
>
> (a) an area of land; or
> (b) an expanse of water; or
> (c) an area of land under water; or
> (d) any combination of 2 or more of paragraphs (a) to (c).[442]

This means that rivers, lakes, billabongs - an expanse of water is included within the definition of an area of particular significance. Dictionary definitions of "expanse" include- "a wide continuous area" or "that, which is spread out, especially over a large area".[443]

At first blush this would seem to preclude springs, smaller water holes etc and water in itself as a separate entity from the land from the definition of an area of particular significance. As an analogy the common law of ownership of land employs the latin maxim "cuius est solum" to describe the rights of an owner. This means that the rights of the person who owns land extends to the air above the land and the earth below including the water on and in the land.[444] That interpretation may not accord with the definition of an area of land in a Heritage Act. Although it may be argued that inland waters are "merely 'a species of land', in that the common law may treat such areas of

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[439] I have referred to this issue of ownership again here for completeness in terms of this section on Queensland legislation and relevant sections of the Act are footnoted earlier in this section of the report where I discuss this issue. Importantly, the State's assertion of property rights in cultural and natural resources in national parks are subject to the Cultural Heritage Act legislation (see s61 *Nature Conservation Act, 1992* (Qld)).

[440] Ibid ss 8,9 of both Acts.

[441] Although such matters are covered in the NT in the general heritage legislation - the *Heritage Conservation Act, 1991*

[442] Schedule 2 Dictionary

[443] The Australian Concise Oxford Dictionary 4th Edition Oxford University Press 2004 at 486 and the concise Macquarie Dictionary Doubleday 1982 at 426.

[444] Butt, Peter *"Land Law"* 5th Edition Lawbook Co. Sydney 2006 at 11.

water as simply areas of 'land covered with water'.[445] If a court was to interpret the Act in this sense then a more inclusive definition of water would prevail, that is that an area of land would also include all forms of water on, below or in it. This interpretation is to be preferred.

The first place, entered on the register of the Act in Queensland was constituted by springs. To quote from the Queensland government's website:

> Ban Ban Springs Dreaming Place is of great significance to the Wakka Wakka people. Formed by the Creator Spirits who brought the water to the springs, it is the home of the Rainbow Serpent, a ceremonial site relating to birth, rites of passage and initiation, and was the first site to be entered on the register of the Aboriginal Cultural Heritage Act 2003.[446]

The guidelines approved under section 23 of the Act with respect to the Cultural heritage duty of care (discussed further below) appear to include all types of water as being within the purview of the Act. For example, the guidelines under section 23(1) of the Act to minimize or avoid harm to Aboriginal Cultural heritage define surface disturbance to include "land or waters".[447] In addition, natural wetlands, wells,[448] permanent and semi-permanent waterholes and natural springs[449] are listed as "features" or "landscape features" likely to have cultural significance.

However there is still a lack of clarity here in terms of the application of the Act to protect cultural heritage that consists of water. The Act, out of an abundance of caution, should be amended in this respect.

There are also limited access provisions for Indigenous people to areas of particular significance or of historical importance. These provisions enhance already existing access provisions to allow a cultural heritage management plan to be undertaken but only if access is already provided for under another law; for example, in relation to a development or mining

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[445] Gray, Kevin & Gray, Susan "*Elements of Land Law*" 5th Edition Oxford University Press, Oxford 2009 at 51.

[446] http://www.derm.qld.gov.au/cultural_heritage/significant_places/pdf/ch_map_qld_info2.pdf (accessed 15/5/10)

[447] PART 2 – Guidelines under section 23(1) of the *Aboriginal Cultural Heritage Act 2003*: Reasonable and Practicable Measures for Ensuring Activities are Managed to Avoid or Minimise Harm to Aboriginal Cultural Heritage; *Aboriginal Cultural Heritage Act 2003* Section 28 – Duty of Care Guidelines Gazettal Date: 16 April 2004 ;Definitions 3.2 "Surface Disturbance" means any disturbance of an area which causes a lasting impact to the land or waters during the activity or after the activity has ceased.

[448] Ibid 6.0 The nature of the Aboriginal cultural heritage likely to be harmed by the activity - Section 23(2)(b) ; Wells: Rock wells are reliable water sources that have been altered by Indigenous people for the storage of water. The presence of wells often indicates the location of routes frequently travelled by Indigenous people in the past.

[449] 6.2 Landscape features, which may also have cultural heritage significance include: • Areas of bio geographical significance, such as natural wetlands; • Permanent and semi-permanent waterholes, natural springs.

project.[450]There are no free standing access provisions in the Act to ensure Indigenous access to land and waters in accordance with Aboriginal tradition, as exist in the Northern Territory.

There is a prohibition against including knowledge or information of a secret or sacred nature in a report or other document under the Act to the chief executive officer or Minister without the consent of the relevant Aboriginal people.[451]

The protective measures in the Act for indigenous cultural heritage including an area of water that is of particular significance in accordance with Aboriginal tradition or history are extensive and threefold. Firstly, the Act creates both criminal and civil liabilities in relation to causing harm to Indigenous heritage. Secondly, the Minister has a power of direct intervention (emergency 30 days orders) to stop work, where such work, will harm Aboriginal cultural heritage. Thirdly, the Act provides for a number of statutory processes of an agreement based and planning nature that ensure the inclusion of Indigenous people in the recording and protection of cultural heritage.

The Act provides for two different types of legal liability in an attempt to protect indigenous cultural heritage. Firstly, and uniquely it creates a general duty of care[452] (and associated cultural heritage duty of care guidelines) to ensure that an activity does not harm Aboriginal cultural heritage. Secondly it makes it an offence to "harm" Aboriginal culture. A breach of the duty of care incurs a civil monetary penalty. A person who knowingly or ought to have reasonably known that it is Aboriginal cultural heritage and causes harm is subject to a monetary penalty. If the area is registered also, then the person may be subject to a maximum of two years imprisonment.[453]

> *harm*, to Aboriginal cultural heritage, means damage or injury to, or desecration or destruction of, the cultural heritage.[454]

The responsible Minister has a power to issue orders - a "stop order" to cease work or an activity that will harm Aboriginal cultural heritage or will have a significant adverse impact on the cultural heritage value of Aboriginal cultural heritage.[455] An order can be made for a maximum of 30 days and in

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[450] s 153.

[451] s 29.

[452] s 23 Cultural heritage duty of care (1) A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the *cultural heritage duty of care*).Maximum penalty—(a) for an individual—1000 penalty units;(b) for a corporation—10000 penalty units.

[453] s 24 *Aboriginal Cultural Heritage Act 2003*.

[454] Schedule 2 Dictionary.

[455] s. 32 Stop orders (1) This section applies if the Minister is satisfied there are **r**easonable grounds for concluding— (a) a person is carrying out or is about to carry out an activity; and (b) either or both of the following apply— (i) in carrying out the activity, the person is or will be harming Aboriginal cultural heritage; (ii) the carrying out of the activity is having or will have a significant adverse impact on the cultural heritage value of

addition one further such order can be made. This is a discretionary power vested in the responsible Minister whom is not obliged to issue such an order.

There is also statutory provision for a range of agreements and plans to try and ensure the recognition, protection and involvement of Indigenous people in the recording and protection of Indigenous cultural heritage.

These include:

- native title agreements (made under the *Native Title Act, 1993)*[456];
- cultural heritage management plans;[457]
- cultural heritage studies;[458]
- the recognition of Aboriginal native title parties and Aboriginal cultural heritage bodies;[459] and
- registration of significant areas through the Aboriginal Cultural Heritage Register.[460]

A Cultural Heritage Management Plan is the main means by which Aboriginal Cultural heritage is to be protected in the context of new developments. It is not mandatory for a plan to be done in all circumstances but any activity undertaken in accordance with such a plan will satisfy the duty of care outlined above.[461] The Explanatory Notes to the original Aboriginal Cultural Heritage Bill 2003 state:

> *Clause 83* allows a person to develop and gain approval of a voluntary cultural heritage management plan. This is an important feature of the legislation intended to encourage industry to adopt best practice in circumstances where the legislation does not automatically require a mandatory cultural heritage management plan. The incentive for industry to do so is that any activity undertaken in accordance with a cultural heritage management plan approved under the legislation satisfies the duty of care under the legislation.[462]

A cultural heritage management plan is required if a project is to be approved

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Aboriginal cultural heritage. (2) The Minister may give the person a stop order for the activity.

[456] Various sections of the Act recognise that a native title agreement can give permission to do activities and therefore not breach provisions of the Act. See definition of native title agreement in Schedule 2.

[457] Part 7 of the Act.

[458] Part 6 of the Act.

[459] s36.

[460] ss 46,47.

[461] s 83.

[462] *Aboriginal Cultural Heritage Bill 2003* Explanatory Notes page 18.

that requires an Environmental Impact Assessment.[463] A plan may be required under the Planning Act in relation to a development application.[464]

If there is a dispute and no agreement about such a plan, then there is a statutory review process involving an independent Tribunal, which can make recommendations to the responsible Minister. Any recommendations are to indicate:

> in particular about how the project is to be managed to avoid or, to the extent to which damage cannot reasonably be avoided, minimise harm to Aboriginal cultural heritage.[465]

The process thus works on the basis that approval by the Minister may be given where there are disagreements about the protection of Aboriginal cultural heritage in a proposed Cultural Heritage Management Plan. This may mean that that approval of harm to heritage will take place as there is no agreement about the necessary protection measures.[466] The Explanatory notes to the Bill further state in this regard that:

> Where agreement cannot be reached between the parties, the Land and Resources Tribunal can assist with the provision of mediation or a recommendation about the terms of the cultural heritage management plan.
>
> Importantly, in light of the need to protect cultural heritage at both a State and national level, the final decision on the terms of a cultural heritage management plan rests with the State.[467]

This is consistent with the statutory basis for decision-making in all other jurisdictions that provide a discretion to approve or not approve damage or destruction to Aboriginal cultural heritage in the context of approving new developments. However in Queensland the discretion would appear to be not as broad as in other jurisdictions examined.

Western Australia - *Aboriginal Heritage Act 1972*

The *Aboriginal Heritage Act 1972* is the oldest of the four provincial pieces of legislation that applies in northern Australia. As with the other Indigenous specific heritage legislation (except where noted in relation to the Queensland legislation) it is protective legislation that does not recognise any Indigenous property rights or rights to water.

The long title to the Act states:

> An Act to make provision for the preservation on behalf of the

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[463] s 87.
[464] s 89.
[465] Ibid clause 118 at page 22.
[466] s 118(1)(a)(b) of the Act.
[467] *Aboriginal Cultural Heritage Bill 2003* Explanatory notes at page 4.

> community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto.

Importantly, this indicates that the purpose of the Act is to protect Indigenous Heritage "on behalf of the community." The Aboriginal interest is thus recognised as a part of the wider general community in Western Australia and not separately in its own right. This situation is reinforced by the fact that the Minister also has a statutory duty that all places under the Act are to be recorded on behalf of the community.[468]

The Act relevantly applies to "places" which are defined to include (s 5):

(b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;[469]

(c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

The Department of Indigenous Affairs in Western Australia that administers the Act lists a water source as being an Aboriginal site under the Act in the following sense:

> Water source
> A source of water, (e.g., gnamma holes, soaks, springs, rockholes), with ethnographic evidence of its use or modification for use by Aboriginal people in connection with traditional cultural life past or present.[470]

There are no explicit references to water in the Act especially in a definitional sense, a factor outlined also with respect to the other legislation. There are numerous references to Aboriginal sites on land in the Act where land is generally defined in Western Australian to include land covered with water.[471] There is therefore no reason to suggest that places where water exists can't be described as sites. If those sites are a sacred, ritual or ceremonial site, which is of importance and of special significance it is also an

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[468] 10. Duty of the Minister (1) It is the duty of the Minister to ensure that so far as is reasonably practicable all places in Western Australia that are of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent should be recorded on behalf of the community, and their relative importance evaluated so that the resources available from time to time for the preservation and protection of such places may be coordinated and made effective.
(2) The duty of the Minister extends to Aboriginal cultural material of traditional or current sacred, ritual or ceremonial significance whether such material is now located at or associated with any particular place, or otherwise.

[469] Section 4 of the Act includes this definition " ***Aboriginal site*** means a place to which this Act applies by the operation of section 5;"

[470] http://www.dia.wa.gov.au/Heritage-and-Culture/Aboriginal-heritage/Aboriginal-sites/Aboriginal-site-types.aspx (accessed 17/5/10).

[471] *Interpretation Act, 1984* (WA) s 5.Definitions applicable to written laws.

Aboriginal site and therefore protected under the Act.

Underground aquifers that are significant in accordance with Aboriginal tradition may present difficulties in this definitional framework. Older legislation like this does not tend to adequately refer to and define its application to water. This should be addressed.

It is illegal to excavate, destroy, damage, conceal or in any way alter an Aboriginal site. A person commits an offence if they do so without the authorisation of the Registrar or consent of the responsible Minister.[472] The question arises as to whether only the taking of water from a spring in breach of relevant Aboriginal tradition would be caught under the scope of the offence. The relevant provision is as follows:

> A person who —
>
> (a) excavates, destroys, damages, conceals or in any way alters any Aboriginal site;
>
> commits an offence unless he is acting with the authorisation of the Registrar under section 16 or the consent of the Minister under section 18.

There is a clear focus on physical damage or alteration in this provision. It is arguable that the taking of water in breach of relevant tradition is altering a site, although it is an interpretation with some difficulty.

The fact that the word "site" is used instead of area may limit the protection otherwise provided for under the Act (see discussion with respect to the Northern Territory legislation). A broad definition of the "site" would be expected and was used in litigation concerning the Noonkanbah dispute and the application of the Act in 1979. With respect to the word "site" a report of the Court judgement stated:

> It was declared to include all land within a specific radius of an identified point, on the basis of evidence of Aboriginal people regarding the traditional significance of that land, rather than on any non-Aboriginal records of relics or archaeological evidence.[473]

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[472] 17.Offences relating to Aboriginal sites A person who —(a) excavates, destroys, damages, conceals or in any way alters any Aboriginal site; or (b) in any way alters, damages, removes, destroys, conceals, or who deals with in a manner not sanctioned by relevant custom, or assumes the possession, custody or control of, any object on or under an Aboriginal site, commits an offence unless he is acting with the authorisation of the Registrar under section 16 or the consent of the Minister under section 18.

[473] *Noonkanbah Pastoral Co Pty Ltd v Amax Iron Ore Corporation* unreported judgement SC, WA Brinsden, J. 27/6/79,1558 of 1979 as reported in Boer,B & Wiffen, G "*Heritage Law in Australia*" Oxford University Press 2006 at 302.Although section 5 of the Act has been amended since this judgement, having examined the original wording of section these comments are still relevant in my opinion.

It should be noted that the site is protected only because it is essentially of religious or spiritual significance. Therefore the "blanket protection" that applies to an Aboriginal site only applies to one that is of special significance for spiritual reasons in Western Australia. It excludes sites of historical or other significance.

A general statutory obligation exists to report the knowledge of the existence of Aboriginal sites to the Minister,[474] and subject to section 18, (discussed below) the Registrar of Aboriginal Sites can authorise excavation of an Aboriginal site.[475]

The Registrar is obliged to maintain a register of all protected areas; all Aboriginal cultural material; and all other places and objects to which this Act applies. This includes sacred sites including water, defined as places under the Act.[476]

There is also a provision in the Act that provides the Minister with a discretion to declare a protected area where an Aboriginal site is "of outstanding importance".[477]A protected area "may be declared to be a protected area whether or not it is on land that is in the ownership or possession of any person or is reserved for any public purpose."[478] There is also provision for a temporary protected area.[479] The exclusive right to use and occupy a protected area is vested in the Minister.[480]

The protected area provisions are far broader than the definition of an Aboriginal site as they include areas of importance because of "historical, anthropological, archaeological or ethnographical interest". The overriding test for this protection status is "because of its importance and significance to the cultural heritage of the State".

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[474] s.15. Report of findings: Any person who has knowledge of the existence of any thing in the nature of Aboriginal burial grounds, symbols or objects of sacred, ritual or ceremonial significance, cave or rock paintings or engravings, stone structures or arranged stones, carved trees, or of any other place or thing to which this Act applies or to which this Act might reasonably be suspected to apply shall report its existence to the Registrar, or to a police officer, unless he has reasonable cause to believe the existence of the thing or place in question to be already known to the Registrar.

[475] s.16. Excavation of Aboriginal sites (1) Subject to section 18, the right to excavate or to remove any thing from an Aboriginal site is reserved to the Registrar. (2) The Registrar, on the advice of the Committee, may authorise the entry upon and excavation of an Aboriginal site and the examination or removal of any thing on or under the site in such manner and subject to such conditions as the Committee may advise.

[476] s 38 of the Act.

[477]Section 4 of the Act " *protected area* means an area that has been declared to be such under section 19, and includes a temporarily protected area;"

[478] s 19(6) of the Act. The *Aboriginal Heritage Regulations 1974* grant the Minister power to control the management and use of the protected area.

[479] s 20 of the Act.

[480] s 22(1) Subject to subsection (2), the exclusive right to the occupation and use of every place that is declared to be a protected area is vested in the Minister on behalf of the Crown for so long as the Order remains in force.

The Act establishes the Aboriginal Cultural Materials Committee (ACMC) as an advisory body to evaluate Aboriginal sites and to make recommendations to the responsible Minister. While generally there is a majority of Aboriginal persons as members of the ACMC there is no statutory requirement for Aboriginal membership.[481]

The ACMC makes recommendations to the Minister for the purpose of the Minister's consideration of a section 18 application. The relevant decisions are whether a site exists and if so whether it should continue to be protected under the Act or approval to affect or destroy the site should be given to allow a development to proceed on that site. The Minister makes this decision "having regard to the general interest of the community".[482]

Where the owner of land on which the Aboriginal site is located has made an application under section 18 to the Minister, and that person is "aggrieved" by the Minister's decision he/she may apply to the State Administrative Tribunal for a review of the decision.[483] No such review under the Act is available to Aboriginal custodians "aggrieved" by a Ministers decision.

As can be seen from this analysis of the *Aboriginal Heritage Act 1972*; the Act has a particular focus on Ministerial control and ownership of Aboriginal sites. This is subject to the important proviso that persons who live subject to customary law are not subject to restrictions under the Act upon any right or interests exercised in accordance with the Aboriginal tradition relevant to the place in question.[484] Although the Minister retains an overriding power to restrict traditional use of a site if he/she is of the opinion that it would be detrimental to the purposes of the Act.[485]

In summary, the Western Australian legislation provides "blanket protection" for Aboriginal sites that have ceremonial and spiritual significance, which includes places of water. Importantly those who live subject to customary law are not subject to restrictions under the Act. There are no provisions providing access for Aboriginal people to an Aboriginal site, nor recognition of Aboriginal ownership of cultural heritage and no explicit linkages with native title law and rights.

Conclusion

The *United Nations Declaration on the Rights of Indigenous Peoples*,[486] which is now supported by the Australian Government,[487] includes the following

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[481] ss 28,29 of the Act
[482] s 18(3).
[483] s 18(5).
[484] s 7(1).
[485] s 7(2).
[486] The full text is available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 14/5/10).
[487] See text of Ministers Statement on 3/4/09 at http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm (accessed 14/5/10).

clauses on Indigenous Heritage:

Article 12

> 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

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, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 31

> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
>
> 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

The effective realisation of these rights under the Declaration with respect to Indigenous interests in water in northern Australia could be assisted if the following issues were addressed in Indigenous heritage legislation:

- Indigenous heritage interests in water in accordance with Indigenous tradition are clearly and unambiguously recognised in the terms and definitions of the legislation including the definition of water itself;

- The later point should also unambiguously include coastal waters within a jurisdiction as the Northern Territory legislation does specifically;

- Indigenous heritage interests in water should include (as it does explicitly in Queensland) an historical association with an area including the contemporary history of Indigenous people;

- Access by relevant Indigenous people to areas and sites of significance was provided for in the same manner as the legislation in the Northern

Territory;

- Independent bodies of Indigenous people who are custodians of Aboriginal sites administer the legislation and determine issues of significance;

- Primary recognition and authority on Aboriginal and Torres Strait Islander cultural heritage is recognised as vested in relevant Indigenous people;

- Recognition of linkages between heritage and land rights and native title;

- Recognition of Indigenous ownership of Indigenous cultural heritage;

I have deliberately not entered the fray as it were in relation to the Evatt review recommendations to amend the ATSHIP Act and the setting of standards for State and Territory heritage protection legislation. This debate and consequent Bills and Discussion papers have been ongoing since 1998. Some of the issues I have traversed here come within the debate about the implementation of that review.

The important political issue as to whether Ministers of State should have the legal authority to approve the destruction of areas of significance or deliberately infringe Indigenous tradition involving the breach of sacred law is a fundamental question outside the scope of this Report. No doubt at some stage this issue will be further debated at a political level and litigated in the High Court of Australia with respect to freedom of religion and section 116 of the Australian Constitution.

Importantly, all the legislation considered in this section of the Report applies to all areas of land including water subject to the uncertainties mentioned; regardless of the form of land title including freehold title.

It is important to frame Indigenous heritage legislation be it so called “last resort” protection or “blanket “ protection to include the significance of water in Indigenous terms in accordance with Indigenous tradition. The various Acts that were examined do not achieve this in a comprehensive manner as discussed. This proposition is probably best explained by reference to the following points:

- that until recent times heritage legislation generally has not adequately included and defined the application of an Act to water;

- the Indigenous viewpoint in relation to water is not well understood; and

- there is a reluctance in some cases to address the full consequences of seeking to protect in a holistic manner the Indigenous relationship to,

knowledge of and understanding of water.

The simplest but at the same time most complex example of this for non-Indigenous people to understand is the notion that water in itself can be "living" and sacred. Thus, for example the existence of and movement of water in a river or in and through an aquifer can be sacred, alive and a manifestation of a creation being.

This is well described by Ms. Sarah Yu in her Report entitled: "Ngapa Kunangkul: Living Water, Report on the Aboriginal Cultural Values of Groundwater in the La Grange sub-basin" which refers to some aspects of the traditional law of Kimberley Aboriginal groups as follows (Ngurrara meaning the extent of one's own country and *pukarrikarra* being the local word for the Dreaming):

> *Ngurrara* is given and determined from *pukarrikarra*. Thus *ngurrara*, on one level, is a physical expression of *pukarrikarra*, in which the features of the landscape were formed long ago. These features are not just surface phenomena, such as hills, trees, animals, creeks, bays and so on. They also include subterranean features and activities, for example groundwater and its flow, or rock formations and associated activity such as earth tremors.
>
> As *pukarrikarra* created and named places, they endow them with meaning and significance. The associated narratives and rituals recount their activities that link people to particular areas for all time. These narratives ascribe metaphysical meaning to all aspects of physical reality—the landscape, under the ground, the sky, the water. People are born with a predetermined connection to place and set of responsibilities to the country. Thus *ngurrara* refers not only to the physical horizons of one's country, both surface and subterranean, but also to the cultural knowledge and responsibilities, expressed in stories, songs and ritual, that bind people to place.[488]

The notion that water in itself is of significance and should be protected does not fit comfortably with the definitions of land and water, site and areas used in the legislation examined in this section of the report.

The access to, use and taking of water in such circumstances in accordance with Indigenous tradition can be particularly challenging in terms of the framing of the protection of this form of Indigenous cultural heritage in legislation. It is something no doubt, in accordance with the rights outlined in the *United Nations Declaration on the Rights of Indigenous Peoples*,[489] best

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[488] Yu, Sarah "Ngapa Kunangkul: Living Water Report on the Aboriginal Cultural Values of Groundwater in the La Grange sub-basin" Prepared by The Centre for Anthropological Research, University of Western Australia, for The Water and Rivers Commission of Western Australia December 1999 at 4.2 page 17.

[489] The full text is available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 14/5/10).

determined by the relevant Indigenous peoples themselves, in a particular local or regional situation.

There are a number of features that determine the effectiveness of Indigenous heritage legislation in protecting Indigenous interests in water, as described at the start of this section. I have therefore concluded with a table as a means of summarizing these issues and the way in which each jurisdiction deals with it in the legislation analysed in this section.

	Northern Territory	**Queensland**	**Western Australia**	**Federal**
Application to all areas of land and water regardless of land title	√	√	√	√
Provision of rights of access to significant areas or sites for those with rights in accordance with tradition to access those areas or sites	√	√ but limited	X	X
Provision of access to historical areas/sites	X	√ but limited	X	X
Recognition of Indigenous rights to determine significance of areas and sites	√	√ but limited	X	X
The independence and qualifications of bodies that determine significance	√	X	X	X
The extent of Indigenous involvement in heritage protection processes under the relevant Act	√	X	X	X
Level of protection to Indigenous heritage afforded under the Act	√ but subject to Ministerial override	√ but subject to Ministerial override	√ but subject to Ministerial override	Solely Ministerial discretion
Adequacy of statutory definitions and terms to protect Indigenous heritage that consists of water including the use of the words area and site	Requires improvement	Requires improvement	Requires improvement	Adequate

Part E - Environmental legislation

Introduction

In a fundamental sense all environmental and natural resource management legislation has an affect on Indigenous interests in water. The environment in the general sense of the word includes all its components one being water. It is not trite, nor new, to state that all aspects of our environment the water, air and land are inter-related and all are affected to a greater or lesser extent depending upon the action taken.

This reality is generally reflected in the various definitions of the word "environment" in environmental impact or assessment legislation, which includes land, air, water, organisms and ecosystems. Modern environmental legislation is also generally based upon the elusive concept of environmental or ecologically sustainable development.

There is a great diversity of laws and associated management plans that act upon one component of the environment like water or the preservation of native vegetation, for example. Although, the need for holistic responses and planning and whole of government approaches are widely acknowledged the reality of the legal system is that it is in large measure not organised in this manner.[490]

Having said that in some jurisdictions, natural resource management plans seek to achieve this outcome. For example, the Wet Tropical Coast Regional Coastal Management Plan in Queensland established under the *Coastal Protection and Management Act 1995* (Qld) seeks to recognise and "coordinate" with some 34 local and regional plans that span water management, fisheries, catchment management plans, marine park plans, world heritage management plans, national park plans, infrastructure development and natural resource management strategies.[491]

I have included general environmental legislation briefly in this Report as it clearly applies to Indigenous interests in water in two senses. One it acts as a protective measure to protect the quality of waters as part of the environment and secondly along with water legislation can affect the conditions upon which waters can be used in any development. One aspect seeks to protect water as part of the environment and preserves social, cultural and heritage values and the other to set conditions for economic development. Indigenous interests in water clearly extend to both areas. There is currently a debate that is outside the scope of this report as to what

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[490] Bates, Gerry *Environmental Law in Australia* 6th Edition LexisNexis Butterworths Australia 2006 at 114 [4.42].

[491] Queensland Government Environmental Protection Agency, Queensland Parks and Wildlife Service Wet Tropical Coast Regional Coastal Management Plan December 2003 pp 102,103. Available at http://www.derm.qld.gov.au/environmental_management/coast_and_oceans/coastal_management/regional_coastal_management_plans/wet_tropical_coast.html (accessed 12/7/10).

the correct balance is when it comes to environmental protection and Indigenous economic aspirations and needs. At the time of writing this debate is focused in Queensland on the *Wild Rivers Act, 2005*, which is examined in this section of the Report.

The legislation examined in this part includes the:

- *Environmental Protection and Biodiversity Conservation Act, 1999* (Cth);
- *Environmental Assessment Act* (NT);
- *Environmental Protection Act, 1994* (Qld); and the
- *Environmental Protection Act, 1986* (WA).

In Queensland, there is also environmental legislation that is geographic specific. These Acts are the:

- *Coastal Protection and Management Act, 1995;*
- *Cape York Peninsula Heritage Act, 2007*;
- *Wild Rivers Act, 2005*.

Queensland is the only provincial jurisdiction in northern Australia that has a specific focus on Indigenous interests in its environmental protection legislation. The Queensland legislation names and includes specifically Indigenous cultural and heritage values within the values that should be taken into account. The other jurisdictions do this generically but not specifically.

Environmental Protection and Biodiversity Conservation Act 1999 (Cth)

The Federal Act the *Environmental Protection and Biodiversity Conservation Act, 1999* (EPBC Act) applies in each northern Australian jurisdiction. The EPBC Act mainly deals with the eight areas described as of national environmental significance being:

- World heritage properties;
- wetlands of international importance under the Ramsar Convention;
- National Heritage places;
- Listed threatened species and communities;
- Listed migratory species;
- Nuclear actions;
- Commonwealth Marine Environment & the Great Barrier Reef Marine Park;
- Other actions listed by regulation;

I have dealt with the Indigenous heritage aspects of the EPBC in section A part D. In addition, there are bilateral agreements with each jurisdiction in northern Australian so that some of the environmental assessment processes

involving these matters are done at the provincial level.[492]

Environmental Assessment is required under this Act for what are called controlled actions which have a "significant impact" upon the eight areas of national environmental significance listed above and actions on Commonwealth land that have a significant impact upon the environment. Examples of Commonwealth land in Northern Australia are the large defence reserves at Bradshaw in the Northern Territory and Yampi Sound in the West Kimberley in Western Australia.

The Federal Minister for the Environment makes approvals under the Act and sets any conditions of such an approval.

The environment is widely defined and clearly includes water and the social, cultural, economic and heritage values or aspects of water as part of the environment. Indigenous social, cultural, economic and heritage values also come within this definition. The definition of environment in the Act is as follows:[493]

> *environment* includes:
>
> (a) ecosystems and their constituent parts, including people and communities; and
> (b) natural and physical resources; and
> (c) the qualities and characteristics of locations, places and areas; and
> (d) heritage values of places; and
> (e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).

The definition of ecosystem is:

> *ecosystem* means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

A decision as to what is a "significant impact", which is a largely discretionary decision of the Minister, has been broadly defined by the Courts. It also includes the "indirect consequences of an action and impacts occasioned by persons other than the proponent and that were not within the control of the proponent."[494]

To give an example, in the *Nathan Dam Case* in Queensland in 2004 the Court found that the proposed construction of a dam several hundred kilometres upstream from the Great Barrier Reef Heritage Area should have been included when considering the meaning of impact by the Minister. As the discharge of contaminated water from irrigated farms that would use the

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[492] EPBC Act s45.
[493] EPBC Act s 528.
[494] Bates at 324.

water from the dam was an impact upon the Reef Area.[495]

The assessment and approvals process under the EPBC includes water and the social, cultural, economic and heritage values or aspects of water are part of the environment. Indigenous social, cultural, economic and heritage values also come within this definition and therefore are subject to protection or development approval depending on the Minister's decision. These decisions are reviewable in the Courts.

Northern Territory

In the Northern Territory there is no comprehensive environment and biodiversity conservation and protection legislation similar to the EPBC Act at the Federal level.[496]

The relevant legislation is:

- *Environmental Assessment Act* (EVA);
- *Environment Protection Authority Act;*
- *Waste Management and Pollution Control Act*; and the
- *National Environment Protection Council (Northern Territory) Act*.

I shall only refer to the main legislation being the *Environmental Assessment Act* and the *Waste Management and Pollution Control Act*. The former is the main legislation regulating development proposals, their impact on the environment and for the protection of the environment in the Northern Territory. Assessment is required when there is a significant effect on the environment. [497] Whilst the *Waste Management and Pollution Control Act,* regulates pollution including water pollution. These Acts apply to water. The environment is widely defined in the EVA to mean:

> *environment* means all aspects of the surroundings of man including the physical, biological, economic, cultural and social aspects.[498]

The objectives of the *Waste Management and Pollution Control Act* are to:

> (a) to protect, and where practicable to restore and enhance the quality of, the Territory environment by:
>
> (i) preventing pollution;
> (ii) reducing the likelihood of pollution occurring;
> (iii) effectively responding to pollution;
> (iv) avoiding and reducing the generation of waste;
> (v) increasing the re-use and re-cycling of waste; and
> (vi) effectively managing waste disposal;

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[495] Ibid 324.
[496] The Law Handbook 4th ed. NT Legal Aid Commission and Darwin Community Legal Service Inc. 2008 at 1138.
[497] *Environmental Assessment Act* section 4.
[498] *Environmental Assessment Act* section 3.

(b) to encourage ecologically sustainable development; and

(c) to facilitate the implementation of national environment protection measures made under the *National Environment Protection Council (Northern Territory) Act*.

The Act imposes a duty to prevent and minimise pollution or environment harm and to reduce waste.

12 General environmental duty
(1) A person who:
(a) conducts an activity that causes or is likely to cause pollution resulting in environmental harm or that generates or is likely to generate waste; or
(b) performs an action that causes or is likely to cause pollution resulting in environmental harm or that generates or is likely to generate waste, must take all measures that are reasonable and practicable to:
(c) prevent or minimise the pollution or environmental harm; and
(d) reduce the amount of the waste.

The key definitions of "activity" and "environmental harm" in the wording of this duty are:

activity means a current or proposed activity and includes a current or proposed process, operation, project, venture or business.[499]

environmental harm means:

(a) any harm to or adverse effect on the environment; or
(b) any potential harm (including the risk of harm and future harm) to or potential adverse effect on the environment, of any degree or duration and includes environmental nuisance.

A conditional licensing system exists to control pollution and impacts on the environment including water.[500]

This Act has a separate definition of the environment to the EVA, which includes human economic, cultural and social conditions and thus includes the impact upon Indigenous specific values in this sense in relation to water:

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[499] *Waste Management and Pollution Control Act* s4.
[500] Ibid s 31 Application for approvals and licences
(1) A person may apply to the Chief Executive Officer for the grant of:
(a) an environment protection approval;
(b) an environment protection licence; or
(c) a best practice licence.

> *environment* means land, air, water, organisms and ecosystems and includes:
> (a) the well-being of humans;
> (b) structures made or modified by humans;
> (c) the amenity values of an area; and
> (d) economic, cultural and social conditions. [501]

Further water is broadly defined to include water on and in land:

> *land* includes water and air on, above or under land. [502]

The Act specifically states that water includes:

> *water* includes:
> (a) surface water, ground water and tidal waters;
> (b) coastal waters of the Territory, within the meaning of the *Coastal Waters (Northern Territory Powers) Act 1980* of the Commonwealth; and
> (c) water containing an impurity.[503]

The processes of the Act are specifically linked to the *Water Act, 1992* (NT), which sets the standards of water quality and environmental and cultural use as an environmental objective for this Act.[504]

The Act takes into account Indigenous values with respect to water although only under the generic inclusion of economic, social and cultural conditions. Again the level of protection and development activity in relation to water is dependent upon Ministerial decisions. These are reviewable in the Courts.

Western Australia

In Western Australia the relevant legislation is the *Environmental Protection Act, 1986.* There are no Indigenous specific provisions in this legislation. There also exists in this jurisdiction further water related conservation legislation the *Waterways Conservation Act 1976*; that is, specifically applicable to rivers or waterways and associated land. Waterways Management Areas can be declared under the Act by the Governor on the recommendation of the Environment Protection Authority. There are no Waterways Management Areas declared in the Kimberleys in northern Western Australia and so I have not examined this legislation further.

The environment is again widely defined to include water in all its aspects.

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[501] *Waste Management and Pollution Control Act* s4.
[502] Ibid s4.
[503] Ibid s 4.
[504] *Waste Management and Pollution Control Act* Schedule 2 Activities that require approval or licence Basically waste: 18 Beneficial uses, &c., under *Water Act* are environment protection objectives. A beneficial use, quality standard, criteria or objective declared under section 73 of the *Water Act* and in force is an environment protection objective for the purposes of this Act.

Water and its interrelationship with other features of the environment is also broadly defined. The relevant definitions are:

> *environment*, subject to subsection (2), means living things, their physical, biological and social surroundings, and interactions between all of these;
>
> (2) For the purposes of the definition of "environment" in subsection (1), the social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.[505]
>
> *waters* means any waters whatsoever, whether in the sea or on or under the surface of the land;
>
> (2aa) A reference in this Act to the discharge, emission or transmission of anything (whether accompanied by the expression "into the environment" or not) —
>
> (a) is a reference to discharge, emission or transmission onto or into land, water, the atmosphere or living things;

The definition of environment clearly includes Indigenous values with the inclusion of social surroundings within the definition of environment being "the social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings."

There are different levels of assessment of environmental impact and Indigenous people can be involved in that impact assessment process to the extent that anyone else in the community is able to participate. These are described in this legislation as significant and strategic proposals that in essence have a "significant effect" upon the environment.[506]

Again Indigenous values in relation to water can be protected and water related developments approved by the Minister. The level of protection and development activity in relation to water is dependent upon Ministerial decisions. These are reviewable in the Courts.

Queensland

In Queensland the *Environmental Protection Act, 1994* is the main legislation, which regulates environmental impacts and assessment. This Act also regulates pollution and water quality.

Uniquely, in northern Australia the Act recognises the status of native titleholders and other Aboriginal and Torres Strait Islander land holders for the purposes of environmental impact assessment. They are specifically recognised as an affected person for a project and therefore have Indigenous

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[505] *Environmental Protection Act, 1986* s3.
[506] Ibid Part IV of Act and see s37B.

specific rights to be involved in the process of environmental impact assessment.[507]

As is the norm the definition of environment is wide and includes water and the relationship with the social, economic, aesthetic and cultural conditions that are part of human relationships with the environment. This is so as the definition includes ecosystems and their constituent parts (water), and natural and physical resources, which includes water. The definition is as follows:

> Environment includes—
> (a) ecosystems and their constituent parts, including people and communities; and
> (b) all natural and physical resources; and
> (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
> (d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).[508]

Water is relevantly defined in the Act in the following terms:[509]

> *land* includes—
> (a) the airspace above land; and
> (b) land that is, or is at any time, covered by waters; and
> (c) waters.
>
> *waters* means Queensland waters.

The Minister is also empowered to make official policy statements under the Act. The declaration of environmental policies is to implement environmental protection standards, which have status as subordinate legislation and therefore have the force of law like other provisions of the Act.[510] Relevantly the *Environmental Protection (Water) Policy 2009* has been declared which lists the environmental values of water that are to be enhanced and protected under the policy in terms of the management of water quality and "contaminants". These include the cultural and spiritual values of water, including such Indigenous values.[511]

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[507] *Environmental Protection Act, 1994* s38.
[508] Ibid s8.
[509] Ibid Schedule 4 Dictionary.
[510] Ibid s26 Minister may make policies: The Minister may make environmental protection policies to enhance or protect Queensland's environment. s33 Policies are subordinate legislation An environmental protection policy is subordinate legislation.
[511] Environmental Protection (Water) Policy 2009; water quality and management of contaminants: Part 3 Basic concepts: 6 Environmental values to be enhanced or protected (1) The environmental values of waters to be enhanced or protected under this policy are—
(a) for water mentioned in schedule 1, column 1—the environmental values stated in the document opposite the water in schedule 1, column 2; or (b) for other water—the

This policy and subsidiary documents set water quality objectives. Specific documents are produced within the Framework of this Policy Statement in relation to specific areas and waterways.[512] For example, the Daintree River Environmental Values and Water Quality Objectives published in March 2007 covers fresh, estuarine, marine and ground waters in the catchment of the Daintree river in north Queensland. It includes as an Environmental value[513] the "Protection of cultural and spiritual values, including Traditional Owner values of water".[514]Indigenous cultural, heritage and spiritual values are defined to the following extent:[515]

> Cultural and spiritual values:
>
> Indigenous and non-indigenous cultural heritage — for example:
> - custodial, spiritual, cultural and traditional heritage, hunting, gathering and ritual responsibilities;
> - symbols, landmarks and icons (such as waterways, turtles and frogs); and
> - lifestyles (such as agriculture and fishing).

There are also values that provide for the assessment of industrial, agricultural and farm use for example. Water systems are categorised from high ecological values to highly disturbed water and evaluated in terms of human use values.[516] Levels of protection and water quality objectives are set accordingly.

The rights of native titleholders and Indigenous specific values in relation to water are included within relevant definitions and the environmental planning and approvals process in Queensland.

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environmental values stated in subsection (2). (2) For subsection (1)(b), the environmental values are as follows— (i) the cultural and spiritual values of the water. (3) In this section— *cultural and spiritual values*, of water, means its aesthetic, historical, scientific, social or other significance, to the present generation or past or future generations.

[512] *Environmental Protection (Water) Policy 1997;*Daintree River Environmental Values and Water Quality Objectives Basin No. 108 (part) including all tributaries of the Daintree River Environmental Protection Agency March 2007 at page 25. Water ways are defined in the following manner in this document to include: "Waterways include perennial and intermittent surface waters, ground waters, tidal and non-tidal waters, lakes, storages, reservoirs, dams, wetlands, swamps, marshes, lagoons, canals, natural and artificial channels and the bed and banks of waterways."

[513] Ibid this is defined in the Dictionary at 24." Environmental value (EV) means: (a) a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or (b) another quality of the environment identified and declared to be an environmental value under an Environmental Protection Policy or Regulation (e.g. water suitable for swimming in or drinking). The EVs for water that can be identified for protection are outlined in Table 13."

[514] Ibid 2.

[515] Ibid Table 13 – Suite of environmental values that can be chosen for protection at 26.

[516] Ibid 2.

Queensland also has a number of pieces of geographic specific legislation that regulates water and thus, Indigenous interests and rights to water. As with other jurisdictions the level of protection and development activity in relation to water in the environmental assessment legislation is dependent upon Ministerial decisions. These are reviewable in the Courts.

The other relevant legislation in Queensland is:

- the *Coastal Protection and Management Act 1995;*
- the *Cape York Peninsula Heritage Act 2007*; and the
- *Wild Rivers Act, 2005* (WRA).

Coastal Protection and Management Act 1995 (Qld)

The *Coastal Protection and Management Act 1995* applies to Queensland waters to the high water mark from the landward side and includes wetlands of a freshwater or saline nature and all areas to the landward side of coastal waters in which there are "physical features, ecological or natural processes or human activities that affect, or potentially affect, the coast or coastal resources."[517]

A coastal management plan may be declared within a declared coastal management district. Coastal management plans " identify key coastal sites and coastal resources in the coastal zone and planning for their long term protection or management." [518]

The connection between the management of water resources and the coastal zone is acknowledged in the coastal zone planning process whilst recognising that water plans and environmental flows are dealt with under the *Water Act 2000*.[519]

This Act comprises a detailed planning framework that sets objectives, identifies priorities in the context of a detailed listing of current land and water uses for a variety of purposes - social, conservation, economic and cultural. Aboriginal interests are specifically recognised within this framework, as one of a number of important values to be recognised and protected if possible within the overall goals of the planning framework. These plans under the Act are required to have regard to the Indigenous traditions[520] of traditional owners in the general sense of the word and

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[517] *Coastal Protection and Management Act 1995* s13. *Coastal waters* means Queensland waters to the limit of the highest astronomical tide; and s14 *Coastal wetlands* include tidal wetlands, estuaries, salt marshes, melaleuca swamps (and any other coastal swamps), mangrove areas, marshes, lakes or minor coastal streams regardless of whether they are of a saline, freshwater or brackish nature; s 15 The *coastal zone* means— (a) coastal waters; or (b) all areas to the landward side of coastal waters in which there are physical features, ecological or natural processes or human activities that affect, or potentially affect, the coast or coastal resources.

[518] Ibid s4.

[519] *Wet Tropical Coast Regional Coastal Management Plan* at 43.

[520] Ibid s4 (1) and s56 The following things must be considered before an area is declared as

Indigenous residents, those that live on and use the land in the plan area or neighbouring land.[521]

An example of this regime is the 2003 Wet Tropical Coast Coastal Management District in northern Queensland.[522]An overriding Coastal Management State policy determines areas of state significance (social and economic) that are protected from incompatible use of those areas. Areas of state significance declared in the *Wet Tropical Coast Regional Coastal Management Plan* are Cairns airport, port land at the Cairns Seaport, the Port of Mourilyan, Johnston River and Port Douglas Boat Harbours and the Port Douglas Marina.[523]

Areas of state significance can include Indigenous cultural resources and places, but there are none listed in this plan as it is noted that for cultural reasons Aboriginal people in the area do not wish to publicly disclose such information.[524]

It is further noted that areas of state significance should be managed in a culturally appropriate manner.[525]

The Plan emphasises the need for the recognition of Indigenous cultural resources being places of cultural value and economic use and importantly that Indigenous Traditional Owners have rights to land, air, water and sea country, and interests and cultural obligations with respect to these rights. Principles are included within the plan that recognise the:[526]

- Ecologically sustainable approach of Indigenous peoples;
- Traditional associations and obligations to land and water;
- Management of cultural resources on land and water over which Indigenous people have rights and interests;

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a coastal management district— (a) the area's vulnerability to erosion by the sea or to wind induced effects; (b) whether the area should be kept in an undeveloped state to maintain or enhance the coast or coastal resources; (c) public access to a foreshore in the area; (d) foreseeable human impacts and natural hazards in the area; (e) the existing tenure of, interests in, and rights to, land in the area;(f) Aboriginal tradition and Island custom of Aboriginal and Torres Strait Islander people particularly concerned with land in the area; (g) planning and development management of the area.

[521] Ibid s18 Aboriginal people and Torres Strait Islanders are particularly concerned with land if—
(a) they are members of a group that has a particular connection with land under Aboriginal tradition or Island custom; or (b) they live on or use the land or neighbouring land.

[522] This is declared under Part 3 of the Coastal Protection and Management (Coastal Management Districts) Regulation 2003 and extends from approximately Mission Beach in Johnson Shire to Wujal Wujal in Douglas Shire in the north and is dated December 2003.

[523] *Wet Tropical Coast Regional Coastal Management Plan* at 21.

[524] Ibid 77. Although, there is a suggestion to develop a cultural resource database.

[525] Ibid 76.

[526] Ibid 75.

It is clearly propounded in the Plan that it is essential that Indigenous people are "meaningfully involved in planning for and management of their cultural resources".[527]Indigenous interests in the plan are identified in most of the activities and concerns included within the plan. A range of examples include:

- The importance of cultural landscapes in tourism;[528]
- That natural water resources are of high cultural significance for traditional owners and are necessary to fulfill cultural obligations;[529]
- Fisheries;[530]
- that agencies where practicable are to negotiate access to State land on the coast for Indigenous Traditional owners to undertake management of "their cultural resources and to conduct culturally relevant traditional owner activities";[531]
- management of vehicles and access to beaches. An example is given of the fact that boat launching across the beach at Cow Bay has been the subject of negotiations in an Indigenous Land Use Agreement by the Kuku Yamani people and is indicative of potential conflict between existing cultural, social and environmental uses;[532]
- that in the management of water quality "the valuing of Indigenous Traditional Owner ways of managing fresh and salt water and involvement of Indigenous Traditional Owners in the planning and implementing of water quality management plans" should be included. Unfortunately, there is nothing then said as to how this is to be implemented or taken into account.[533]
- That groundwater is of cultural significance to Indigenous Traditional Owners and essential for fulfilling cultural obligations;[534]
- That coastal landscapes, scenic and cultural values are recognised and protected through the involvement of relevant Indigenous Traditional Owner communities;[535]
- That conserving nature and biological diversity and that traditional knowledge should be recognised;[536]

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[527] Ibid 76.
[528] Ibid 39.
[529] Ibid 44.
[530] Ibid 45, 46.
[531] Ibid 57.
[532] Ibid 62.
[533] Ibid 64.
[534] Ibid 73.
[535] Ibid 83.
[536] Ibid 87.

- The importance of the harvesting of native plant and animal species by Indigenous people to their economy and culture including the means by which Indigenous people manage biological diversity;[537]

- The recognition of native title and other Indigenous landownership;[538]

This is indicative in my opinion of an impressive level of recognition of Indigenous interests mostly of a non – commercial nature in this coastal planning and protection process. It is unique in the northern Australian jurisdictions. It should be noted that many of these acknowledgements of the importance of Indigenous interests in various respects appear stated as stand alone facts and are not integrated in the analysis concerning any particular subject matter in the plan. Without direct research with Indigenous groups and agencies on the ground it is not possible to state how effective these clear advances in the recognition of Indigenous interests with respect to water at a legislative policy and planning level have been to date.

Cape York Peninsula Heritage Act 2007

This legislation is unique in Australia in that it seeks to provide on a regional basis for the recognition and protection of the natural and cultural values of the region; cooperative management (through joint management of national parks) involving Indigenous interests; and recognition of "the economic, social and cultural needs and aspirations of indigenous communities in relation to land use in the Cape York Peninsula Region."[539]

It also has a primary objective of recognising the contribution of the pastoral industry to land management and the economy of the region.[540] The main focus is clearly on the preservation of the environment and heritage, especially Indigenous cultural values of the area. This is sought to be done primarily by the following means:[541]

(a) the declaration of areas of international conservation significance; and
(b) the cooperative involvement of landholders in the management of the natural and cultural values of Cape York Peninsula; and
(c) the continuance of an environmentally sustainable pastoral industry as a form of land use in the Cape York Peninsula Region; and
(d) the declaration of indigenous community use areas in which indigenous communities may undertake appropriate economic activities; and
(e) the establishment of committees to advise the environment Minister and vegetation management Minister about particular matters under this Act."

The relevance of this legislation to Indigenous interests in water are that it:

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[537] Ibid 91, 92.
[538] paragraph 2.9.4
[539] *Cape York Peninsula Heritage Act, 2007* s3 (c).
[540] *Cape York Peninsula Heritage Act 2007* Objects of the Act s3.
[541] Ibid s4.

- provides for the protection of Indigenous cultural and heritage values in water where areas of international conservation significance are declared;[542]

- establishes a process for approval of economic development activities being agriculture, animal husbandry, aquacultural or grazing activities which naturally involve the use of water in approved community use areas;[543] and

- establishes a requirement for an Indigenous water reserve in a wild river declaration or a water resource plan under the *Water Act, 2000* for the "purpose of helping indigenous communities in the area achieve economic and social aspirations".[544]

The *Cape York Peninsula Heritage Act 2007* (Qld) must also be seen in conjunction with the *Wild Rivers Act, 2005* (Qld). The *Wild Rivers Act, 2005* is not geographically specific to Cape York but declarations under the Act have a significant impact on the region because of the number of rivers that are located in the region that potentially come within its ambit. A Bill in the Federal Parliament to override this Act and effectively amend it to impose a requirement for indigenous consent to the making of a wild river declaration passed the Senate in June 2010. It is yet to be considered by the House of Representatives.[545]

Wild Rivers Act 2005

The primary purpose of the *Wild Rivers Act* (WRA) is stated to be "to preserve the natural values of rivers that have all, or almost all, of their natural values intact."[546] The Act provides for the declaration of wild river areas, which includes different categories of protection within the area. An area for the purposes of the Act is much wider than the river, the water, bed and banks as it includes the surrounds associated with the river. As of the 4 June 2010 there are some ten (10) Wild River declarations.[547]

The different categories of protection within a declared area are described as high preservation areas; preservation areas; floodplain management areas and sub-artesian management areas. These categories have the following features:[548]

- high preservation area—the area within and up to one kilometre each side of the wild river, its major tributaries and special off-stream

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[542] Part 2 of the Act.
[543] Parts 3 and 4 of the Act.
[544] *Cape York Peninsula Heritage Act 2007* s27.
[545] Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the *Wild Rivers (Environmental Management) Bill 2010 [No. 2].*
[546] *Wild Rivers Act, 2005* s3.
[547] http://www.derm.qld.gov.au/wildrivers/declared_areas.html (accessed 1/7/10).
[548] Ibid s41.

features, such as floodplain wetlands;

- preservation area—the wild river area outside a high preservation area;

- floodplain management area—a floodplain area with a strong hydrologic connection to the river system; may overlap a high preservation area or a preservation area;

- subartesian management area—aquifer area with a strong hydrologic connection to the river system; may overlap a high preservation area and/or a preservation area;

- designated urban area—area which includes any town or village in the wild river area. In these areas, certain types of development activity are exempt from wild river requirements;

The Act defines natural resources to include water[549] and a wild rivers declaration regulates the taking of water in a wild river area. I shall examine further this important aspect later in this section of the report.

As can be seen from the above description this regime is meant to regulate and protect all the interrelated aspects of a river system in a holistic manner. This fact is exemplified by the Government's stated intentions in relation to this Act:[550]

> Currently there is no legislation, process or mechanism to coordinate the management of key natural resources within a river system and its catchment. There are several Acts that independently manage land, water, vegetation and marine resources but no process to coordinate these powers for the purpose of preserving a wild river's natural values. It is essential that these natural resources be managed in a holistic and integrated fashion across the whole catchment to effectively preserve a river's natural values.

The Act is a particularly powerful piece of legislation in two broad senses. Firstly, that its over-riding purpose is to maintain a high level of environmental protection of the declared rivers, their catchments and surrounding areas. This protection is not subject to the normal balancing act involved between protecting the environment and approving developments that meet the general social and economic needs and aspirations of the community, as in the environmental assessment legislation examined earlier in this section of the report. The Government stated in the Explanatory Notes to the Bill when referring to such legislation as the *Environmental Protection Act, 1994* and the *Coastal Protection and Management Act 1995* that:

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[549] *natural resource* includes water, minerals, quarry material and native vegetation. Schedule – the Dictionary to the Act.

[550] *Wild Rivers Bill 2005* Explanatory Notes at 2.

> Those Acts that do set limits, generally do so under the principles of ecological sustainable development (ESD), which permits a loss in natural values to achieve economic and social benefits. The level of preservation sought for wild rivers, which have all or almost all of their natural values intact, is higher than for ESD but below that generally provided in a national park. Hence it is necessary to clearly specify limits on resource allocations and activities for the purpose of preserving the natural values of wild river systems.[551]

Secondly, the effect it has on other legislation in the state. The publication of a notice of intent by the Minister to declare a wild river area effects a freeze on applications under the *Water Act, 2000* for rights to take water and works involving the use of water; certain approvals under the *Vegetation Management Act, 1999* in a high preservation area; and some under the *Mineral Resources Act 1989*.[552]

The potential effect that the Act has on Indigenous interests and rights in relation to water are broadly threefold: Firstly, in relation to native title. Secondly, in relation to land held by Indigenous people, for example under the *Aboriginal Land Act, 1991* and thirdly arising from the Indigenous water reserve for economic and social purposes mandated by the *Cape York Peninsula Heritage Act 2007*. [553]

Queensland Wild Rivers and Native Title

Indigenous rights to water in the native title context (as currently recognised) are generally rights to take and use water for non-commercial purposes. In the case of an exclusive possession determination of native title there exists a right to control access to the water on and in the land subject to that determination. Natural waters are not the subject of ownership as a native title right and interest. The issue as to whether a declaration under the *Wild Rivers Act* (WRA) affects native title or somehow limits it is a matter of some contention and legal complexity. I have therefore gone to some length to address the issue given its potential affect upon native title rights to water.

It is said by the Queensland Government that a wild rivers declaration under the Act does not affect any native title rights and interests. For example, in a fact sheet published on the Department of Environment and Resource Management's website the following is written:

> In 2007, the Queensland Government in collaboration with the Cape York Land Council, inserted a specific section into the Wild Rivers Act to put beyond doubt that Native Title rights would not be affected by a wild river declaration, or the associated Wild Rivers Code.

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[551] *Wild Rivers Bill 2005* Explanatory Notes at 2.

[552] *Wild Rivers Act, 2005* s10.

[553] Three Declarations for the Archer, Lockhart and Stewart Rivers are currently subject to legal challenge by Indigenous people including native title holders on the grounds of breaches of the Act itself and the *Racial Discrimination Act 1975* and the *Native Title Act, 1993*. National Indigenous Times 10 June 2010 Issue 203, Vol 9 page 5.

> Native Title describes the rights of Aboriginal and Torres Strait Islander peoples to land and waters according to their traditional laws and customs.[554]

The relevant section referred to is subsections 44(2) and (3) in the *Wild Rivers Act, 2005* which was included within the Act by amendments in the *Cape York Peninsula Heritage Act, 2007*. The heading and subsection (1) in that section of the Act are in the original form in which they appeared in the Bill in 2005. The whole section now is in the following terms:

> 44 Relationship with other Acts
>
> (1) Other than as mentioned in sections 42 and 43, the prohibition and regulation in a wild river area of carrying out activities and taking natural resources are dealt with in the Acts that prohibit or regulate the activities or taking.
>
> (2) However, a wild rivers declaration or a wild rivers code, in applying for the purposes of any of those other Acts, can not have the direct or indirect effect under the other Act of limiting a person's right to the exercise or enjoyment of native title.
>
> (3) This section does not limit the *Acts Interpretation Act 1954*, section 13A in relation to any Act.

The Explanatory Notes in the Bill that introduced sub-sections 44(2) and (3) and added them to the *Wild Rivers Act, 2005* include the following statement:[555]

> Clause 63 inserts new subsections to clarify that the wild rivers declaration or a wild rivers code does not limit native title rights.

Section 13A of the *Acts Interpretation Act 1954* which is specifically referred to in section 44(3) is as follows:

> 13A Acts not to affect native title except by express provision
>
> (1) An Act enacted after the commencement of this section affects native title only so far as the Act expressly provides.
>
> (2) For the purposes of subsection (1), an Act affects native title if it

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[554] Frequently Asked Questions – Wild Rivers page 2. http://www.derm.qld.gov.au/wildrivers/pdf/wild_rivers_web_faqs.pdf (accessed 5/7/10).

[555] Explanatory Notes are a document tabled in Parliament to explain the meaning and/or purpose of a provision in an Act or Bill as it is called when still before the Parliament. In this case the Explanatory Notes to the Cape York Peninsula Heritage Bill 2007which amended the *Wild Rivers Act* to include this provision.

> extinguishes the native title rights and interests or it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

Despite the clear meaning of the Explanatory Note the interpretation of this provision is not without some difficulty in relation to native title in general and bearing in mind we are only concerned with Indigenous rights to water in this report.

Section 44(2) appears to apply only to the various *other* Acts which also implement a wild rivers declaration referred to in section 44(1). For example, section 210(c) of the *Water Act, 2000* makes the grant of a license under that Act on Aboriginal land under the *Aboriginal Land Act, 1991* subject to a Wild Rivers declaration. In other words the prohibition against limiting a persons right to the exercise or enjoyment of native title appears to only apply to the affect those other Acts that implement a wild rivers declaration have on native title and not the *Wild Rivers Act*, *2005* itself.

If correct this means section 44(2) which seeks to protect the exercise of native title rights and interests does not apply to the *Wild Rivers Act, 2005* and a declaration of a wild rivers area under the Act. This view is supported by some commentators. For example, in submissions to the Senate Legal and Constitutional Committee concerning the *Wild Rivers (Environmental Management) Bill 2010 [No 2]* in 2010 the following views have been put to the Australian Senate.

> 19. Section 44 of the WRA provides that 'a wild rivers declaration or a wild rivers code, in applying for the purposes' of any of the Acts that prohibit or regulate activities or taking of natural resources, cannot limit a person's right to the exercise or enjoyment of native title'. That statutory protection is limited to the prohibition of activities under legislation other than the WRA and does not apply to the effect on the native title right to decide use of land resulting from a declaration under the WRA.[556]

Similarly, the Cape York Land Council is of the same opinion.

> After obtaining legal advice, Cape York Land Council is of the view that native title is significantly affected not 'under the other Act[s]' but by the operation of the WRA itself. WRA ss.42 and 43 directly constrain native title holders where a wild river declaration is in place. WRA s. 42 imposes restrictions upon certain developments concerning agricultural or animal husbandry. WRA s43 (3) relates to subdivisions or operational works for residential, commercial or industrial development. The native title shield of WRA s.44 (2) does not apply because the constraint arises from the WRA itself. In this sense, the

[556] Greg McIntyre, SC Submission to Senate Legal and Constitutional Committee *Wild Rivers (Environmental Management) Bill 2010 [No 2]* paragraph 19.Submission No. 8.

> three Cape York wild river declarations are future acts under the NTA. WRA ss. 42 and 43 mean that the declarations directly affect the exercise of exclusive possession native title rights and interests and as such are required to be subject to the future acts regime of the NTA otherwise they are invalid.[557]

The view expressed by Cape York Land Council states that ss 42 and 43 of the *Wild Rivers Act* directly affect the exercise of exclusive possession native title rights. These sections are concerned with planning processes under the *Sustainable Planning Act, 2009*. It is not possible to comment upon that view without further information.

Leaving to one side the last issue, these comments as far as they go seem correct in my opinion but don't appear to take into account the effect of section 13A of the *Acts Interpretation Act 1954* (AIA) outlined above. This provision commenced operation in its current form on the 24 November 1994. [558]

As I read that provision it requires in effect that for the *Wild Rivers Act* to affect native title it must do so expressly within the words of the *Wild Rivers Act*. There are no such express provision/s or words in the Act. So whilst it may be correct to state that s44 (2) is "protecting" native title in relation to the operation of other Acts s13A of the AIA seems to have the clear effect that express wording is required in the WRA to affect native title. There are no such express words. If this is correct one doesn't need to decide whether a declaration under the WRA is a future act under the NTA, as the declaration to the extent that it does affect native title will not do so by force of the Acts Interpretation Act provision.

Section 44(3) of the WRA as outlined above expressly provides that the application of s13A is not limited by s44. Preferably for the sake of unambiguous clarity it should have stated "in relation to any Act including this Act." But it doesn't and it is in my opinion effective to protect native title from any limitations imposed by a WRA Declaration, as there is no express provision in the WRA that it affects native title in any form as required.

In this sense native title is not affected by the WRA. But clearly if a native title holder wishes to seek development approval (like any other type of landholder) to undertake a commercial activity that is inconsistent with a wild rivers declaration then they will not be able to so and in this sense their ability to develop their land and waters is restricted.

Obviously this is a matter of some complexity and a Court will determine the final outcome. I understand that legal proceedings have commenced to challenge certain Wild River declarations in the Cape York region.

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[557] Cape York Land Council Submission to Senate Legal and Constitutional Committee *Wild Rivers (Environmental Management) Bill 2010 [No 2]* at 6.

[558] *Acts Interpretation Act 1954* Endnotes at 88.

If my opinion is not correct there is some considerable merit in the view that a WRA declaration does adversely affect native title rights and interests. This is so because native title is not only or "simply" a collection of camping, hunting and fishing rights that are not subject to the restrictions of a wild river area declaration as they are not "development" as defined.[559]

Native title can include the right of exclusive possession of the land. This includes rights to control access to the waters on and in that land, to take and use the waters and to make decisions about the use and management of the water and natural resources. In relation to the taking of water licensing requirements under the *Water Act 2000* are imposed in a wild rivers area.[560] Access to and the taking of water under native title for social, domestic and ceremonial purposes is protected under s211 of the *Native Title Act, 1993* from such licencing restrictions. But the other native title rights would clearly be affected by a wild rivers declaration, if the opinion outlined is not upheld by a Court.

Native title generally includes a right to live on an area – a right of residence. Native titleholders will build houses where they have a right to live and clearly that may come within the scope of a development activity regulated or prohibited in a high preservation area under a WRA declaration. As mentioned by the Cape York Land Council submission quoted above this would make the declaration subject to the future act regime. In simple terms the future act regime in the *Native Title Act, 1993* (NTA) are the rules government needs to follow if they wish to validly affect native title.

A *Wild Rivers Act* declaration is concerned with the management and regulation of water. For example, section 37 of the WRA provides that in relation to the taking of a natural resource – water, the wild declaration applies instead of any water resource plan under the *Water Act, 2000.* This means that a wild rivers declaration can be validly made under the NTA. The NTA provides that the legal effect upon native title would be that there is no extinguishment of native title in relation to the making of the declaration and just terms compensation is payable by government for any affect upon native title. The native title would be permanently suspended during the term of the wild river declaration.[561]

Wild Rivers and Aboriginal Land – *Aboriginal Land Act* (ALA)

The WRA applies to Aboriginal land under this Act and so regulates and prohibits activities on the land and waters subject to that grant if a declaration under the Act is made over the same area. In the section on land

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[559] The relevant definition being in the *Sustainable Planning Act 2009* section 7.
7 Meaning of *development*: Development is any of the following— (a) carrying out building work; (b) carrying out plumbing or drainage work; (c) carrying out operational work; (d) reconfiguring a lot;

[560] For example, see s9 of the *Wenlock Basin Wild River Declaration 2010.* 9. Taking water
Subject to the provisions of the special agreement acts, water may only be taken in the wild river area under an authorisation in accordance with the *Water Act 2000*.

[561] *Native Title Act, 1993* s24 HA (1).

rights in Queensland in this report (Section 1 Part B) I refer to the statutory preference given to a landowner to apply for and receive a licence to take, use and transport water from neighbouring properties. This is also subject to a wild rivers declaration.

To quote from that section of the Report:

> A landowner the trustees of ALA land also has a statutory preference to apply for a licence to take water from the land for other purposes. Any such licence granted, "attaches to the licensee's land". The licence allows the owner to take and use water on any of the land and to interfere with the flow of water on, under or adjoining any of the land. The licence may provide for the taking of water from any watercourse, lake or spring on or adjoining any of the land; an aquifer under any of the land; and water flowing across any of the land.
>
> The owner of the land may also apply for and be granted permission to convey water from another property to use on their land subject to approval by the State and neighbouring landowners. This applies to ALA land. The grant of such a license amongst other things is subject to any water resource plan, resource operations plan and wild river declaration that may apply in that water plan area.

Thus a wild rivers declaration may restrict activities that would otherwise be permissible on Aboriginal Land Act land.

Indigenous water reserve for economic and social purposes

As mentioned in the section on the *Cape York Peninsula Heritage Act 2007* that Act establishes a requirement for an Indigenous water reserve in a wild river declaration or a water resource plan (pursuant to the *Water Act, 2000*) in the Cape York region for the "purpose of helping indigenous communities in the area achieve economic and social aspirations". This is not a native title right or interest but a statutory right for the benefit of Indigenous communities provided for in the Act.

The *Wild Rivers Act* provides that a declaration of a wild river area under the Act must include:[562]

- the matters that must be considered in deciding whether to allow the carrying out of an activity or the taking of a natural resource (including water) in the wild river area;

- information about "water available for future consumptive purposes and the priorities for use or reservation of the water";

To the extent that these requirements are inconsistent with a water resource plan or resource operations plan under the *Water Act, 2000* then they prevail

[562] *Wild Rivers Act, 1995* s14 (k) and (p), respectively.

over those water planning instruments.[563]These provisions clearly relate to any indigenous water reserve. I shall examine these issues at a practical level by examining the latest Wild River Declaration- the *Wenlock Basin Wild River Declaration 2010.*[564]

The Declaration provides that the Indigenous water reserve forms part of the unallocated water (from the consumptive pool) at the time of the declaration and is set in the amount of 5000 megalitres. This reserve is to be made "available only for the purpose of helping Indigenous communities in the wild river area achieve their economic and social aspirations."[565] This allocation is to be granted as a water licence as prescribed in the *Water Regulation 2000* and is subject to a modest fee.[566] The grant of a water licence to access this reserve is subject to the protection of the natural values for which the wild river declaration was made in the first place.[567]

This criterion for deciding the grant of a water licence to access this water reserve potentially limits access to this water for Indigenous communities that would not otherwise exist if the area were not subject to the wild rivers declaration. The power to make this decision is vested in the Chief Executive of the Department of Environment and Resource Management.[568]

Conclusion

Environmental protections laws in northern Australia clearly provide for the inclusion and assessment of Indigenous values and interests when developments are being assessed for approval. This also includes interests in water. Clearly Indigenous interests also include the need for taking into account economic development that benefits Indigenous communities. It is the responsible Minister or government, at the end of the day that has the legal power to make this decision in accordance with the relevant legislation and set the balance between protecting the environment and approving development in the interests of the community.

Queensland has an impressive array of Indigenous specific laws that seek to recognize and protect Indigenous interests in water from a conservation point of view. The statutory recognition of an Indigenous water reserve allocated for commercial purposes advances the recognition of Indigenous interests in water. The extent to which the *Wild Rivers Act* extends the conservation interest at the expense of the Indigenous commercial interest at a practical level remains to be seen. But the Queensland Government's intention is clear - it seeks to impose a level of environmental protection higher than the principle of ecological sustainable development. It is my view

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[563] Ibid s 37(1).
[564] http://www.derm.qld.gov.au/wildrivers/pdf/wenlock-wr-declaration.pdf (accessed 5/7/10).
[565] *Wenlock Basin Wild River Declaration 2010* s 15(3).
[566] *Water Regulation 2002* s14A.
[567] *Wild Rivers Act, 1995* ss 37, 14(1)(k) to (p).
[568] Ibid s 16(1). Notice of the decision must be given to the applicant within 10 business days. -*Water Regulation 2002* s15F.

that the *Wild Rivers Act, 2005* does not affect native title but does restrict the rights available to holders of Aboriginal Land Act titles and restricts the use of the Strategic Indigenous reserve in Cape York.

2. Examine the compatibility of present State and Territory law to the National Water Initiative, particularly as it relates to Indigenous interests and rights in water or assets affected by water management

The National Water Initiative (NWI) is an agreement between the Commonwealth and each State and Territory Government concerning the implementation of national agreed standards that seek to optimise "economic, social and environmental outcomes" in relation to Australia's water resources. It was finalised in 2004.[569]

The objectives of the NWI are:

> Objectives
>
> 23. Full implementation of this Agreement will result in a nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes by achieving the following:
>
> i) clear and nationally-compatible characteristics for secure *water access entitlements*;
> ii) transparent, statutory-based water planning;
> iii) statutory provision for *environmental and other public benefit outcomes*, and improved environmental management practices;
> iv) complete the return of all currently overallocated or overused systems to *environmentally-sustainable levels of extraction*;
> v) progressive removal of barriers to trade in water and meeting other requirements to facilitate the broadening and deepening of the water market, with an open trading market to be in place;
> vi) clarity around the assignment of risk arising from future changes in the availability of water for the *consumptive pool*;
> vii) water accounting which is able to meet the information needs of different water systems in respect to planning, monitoring, trading, environmental management and on-farm management;
> viii) policy settings which facilitate water use efficiency and innovation in urban and rural areas;
> ix) addressing future adjustment issues that may impact on water users and communities; and
> x) recognition of the connectivity between surface and groundwater resources and connected systems managed as a single

[569]NWI clause 23 full text of NWI available at http://www.nwc.gov.au/www/html/117-national-water-initiative.asp (accessed 5 /3/10).

resource.[570]

The parties to the Agreement committed to making "substantial progress towards implementation by 2010".[571] Schedule A to the NWI Agreement provides that implementation of the NWI paragraphs concerning Indigenous Access to water in paragraphs 52-54 should be immediate.[572] These paragraphs are not the only parts of the NWI that concern Indigenous interests.

The objectives of the NWI are to be achieved by the management of water resources through the implementation of water plans, the conservation of over allocated water systems and the management of new water trading rights. The agreement is not legally binding but is driven by Commonwealth funding incentives – financial arrangements which do have a legislative and constitutional basis. Each State and Territory has finalised its own implementation plan for the NWI. These plans have been accredited by the National Water Commission (NWC),[573] which advises the Council of Australian Governments (COAG) generally concerning water and particularly, on each jurisdictions compliance with the NWI.[574]

The three northern Australian jurisdictions have all finalised Implementation Plans, which have been accredited by the National Water Commission.[575] The three northern Australian jurisdictions have agreed to amend their water management legislation to fulfill the commitments made in accordance with the NWI. This is evidenced by the various references in the Agreement to statutory law for the achievement of objectives and outcomes for the NWI.[576] None of them have done so fully to date, in my opinion especially in relation to Indigenous interests.

In the rest of this section the report considers the relevant Indigenous specific paragraphs of the NWI and analyses each of them, reviews the specific reports on compliance with the NWI and looks in particular at the situation in each jurisdiction. This section concludes with an analysis of the relevant State and Territory legislation and its "compatibility" with the recognition of Indigenous interests under the NWI.

National Water Initiative and Indigenous interests

The NWI was negotiated and settled without the involvement or input of

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[570] Ibid 3,4.
[571] Ibid clause 8 at 2.
[572] Ibid at 24 Schedule A: Timeline for Implementation of Key Actions NWI paragraphs 52-54.
[573] A Commonwealth statutory body established by the Commonwealth as agreed per the NWI. (see http://www.nwc.gov.au/www/html/7-home-page.asp)
[574] Lucy, Juliet Water Regulation – The Laws of Australia, Thomson Reuters Sydney 2008 page 39.
[575] The dates of the respective Implementation plans are Queensland January 2006, Northern Territory June 2006, and Western Australia April 2007.
[576] For example Objective 23 (ii) - "transparent, statutory-based water planning" and (iii) statutory provision for environmental and other public benefit outcomes".

Indigenous organisations or representatives.[577] Despite this situation it has been observed that the NWI appears to take into account more broadly indigenous interests in water than any previous Australian government national water policy.[578]

In summary, the NWI recognises and involves Indigenous interests to the following extent:[579]

- Statutory recognition of "Indigenous and cultural values" in water planning;
- Indigenous allocation of water from the consumptive pool;
- Indigenous representation in water planning;
- Indigenous social, spiritual and customary interests included in water plans;
- Allocation of water to legally recognised native title holders; and
- Water Trading and Indigenous Cultural Heritage - provides for the restriction of water trading where it impacts upon "features of major indigenous cultural or spiritual heritage."[580]

The references to Indigenous interests in the NWI are found specifically in paragraphs 23(iii) as further explained in Schedule B (i); Schedule E (vi), (vii); paragraph 25(ix); Indigenous Access in paragraphs 52,53,54; and Schedule G of the Agreement concerning the principles of water trading.

In order to understand the commitment of governments to recognise Indigenous interests in the NWI it is necessary to understand that some of the references to Indigenous interests are direct and clear, if only generally described in the main body of the Agreement. Some are indirect and require the tracing of terms and meanings in the Glossary of Terms (Schedule B (i)) and in the various Schedules to the NWI to appreciate the full nature of the requirements to recognise Indigenous interests.

An important issue that needs to be considered is to what extent the provisions of the NWI relating to Indigenous interests in water are mandatory or discretionary in terms of recognition and implementation. By this I don't mean legally binding. This issue, has been raised by Dr Sue Jackson in her Report - Indigenous Interests and the National Water Initiative

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[577] Indigenous Interests and the National Water Initiative (NWI): Water Management, Reform and Implementation Background Paper and Literature Review for NAILSMA Dr. Sue Jackson CSIRO Sustainable Ecosystems October 2007 at 4,62. This review is available at http://www.nailsma.org.au/publications/indigenous_interests_nwi.html

[578] Ibid 62.

[579] See Jackson summary and comments Ibid 63.

[580] NWI Schedule G paragraph 3(v).

(NWI): Water Management, Reform and Implementation Background Paper and Literature Review for NAILSMA.[581]

In my opinion, all of these provisions are mandatory, in the sense that relevant paragraphs must be recognised and addressed, except where it is not possible to achieve or is not relevant to the local circumstance. For example, in the area of Indigenous representation in water planning the exact wording in the NWI is "inclusion of indigenous representation in water planning wherever possible." In other words, indigenous representation must be provided for in water planning but the wording allows for a situation where it may not be possible to obtain Indigenous representation in a particular instance.[582]

Similar considerations apply, in relation to the statutory recognition of "Indigenous and cultural values" in water planning. By statutory recognition is meant that the water management legislation should require these values to be included within water plans. The wording is included within the definition of "other public benefit outcomes" that must be included within water plans. The definition uses the words "may include a number of aspects, including,".. "indigenous and cultural values". This terminology does not indicate an absolute discretion to reject or include such an "aspect" but is merely indicative of the type of "aspects" that should be included if they are relevant to the local water plan as a public benefit outcome.[583]

I have also commented on each northern jurisdiction in this section of the report on the understanding that NWI commitments to statutory recognition relate to the water management legislation in each jurisdiction. I believe this is a reasonable understanding of the terms of the NWI.

In this regard, I note that often each jurisdiction when reporting upon compliance with the NWI will list pre-existing Indigenous heritage protection legislation that applies to sites or areas of significance constituted in whole or in part by water as meeting NWI commitments in relation to recognition and protection of Indigenous interests to water. The existence of such legislation, whilst important does not by itself constitute compliance with the relevant paragraphs of the NWI. These paragraphs in the NWI go further as they clearly relate to Indigenous involvement in water planning, recognition of Indigenous culture and values in water planning, and allocation of and recognition of water use rights for commercial and other purposes for Indigenous people. Indigenous heritage protection legislation (as explained in section one part D) are general laws concerning the protection of areas and/or sites of significance. Such legislation does not recognise rights to use water or for Indigenous people to be involved for example in water planning, which are clear requirements of the NWI.

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[581] Dr. Sue Jackson NAILSMA & CSIRO Sustainable Ecosystems October 2007 at 64.
[582] See paragraph 52.i) of the NWI.
[583] See Schedule B
(i) Glossary of Terms page 29 of NWI.

I will now go to each of the relevant paragraphs concerning Indigenous interests in the NWI. These paragraphs in detail are as follows:

National Water Initiative - Objective - Statutory recognition of Indigenous and cultural values

One of the objectives of the NWI in paragraph 23 is that the following be achieved:

> iii) statutory provision for *environmental and other public benefit outcomes*, and improved environmental management practices;

This objective is to be understood in conjunction with Schedule B (i) – the Glossary of Terms of the NWI which defines *"other public benefit outcomes"* to include "indigenous and cultural values".

The reference to Indigenous and cultural values in other public benefit outcomes therefore suggests that statutory recognition of "Indigenous and cultural values" is to be provided for in State and Territory legislation not only in water plans and policies in accordance with the NWI but in the relevant water management legislation of each jurisdiction.[584] "Indigenous and cultural values" appears to mean indigenous values which would include indigenous cultural values. In other words cultural values are not the only form of Indigenous values.

Indigenous water use to be included in Water Plans and Planning Processes

Schedule E of the NWI constitutes the guidelines for the characteristics and contents of Water Plans and Planning Processes. Schedule E includes the following paragraph:

> vi) the uses and users of the water including consideration of indigenous water use;
> vii) the *environmental and other public benefit outcomes* proposed during the life of the plan, and the water management arrangements required to meet those outcomes;

Schedule E thus requires the recognition of indigenous water use and values including cultural values in water plans and planning processes. There is no restriction here on the recognition of the Indigenous use of water, for example requiring the proof of native title before indigenous interests are recognised. It allows for a wide form of recognition in water plans, that is social, commercial and cultural.

Indigenous allocation from the consumptive pool

Paragraph 25 provides for the recognition of Indigenous needs in relation to water access entitlements and management. It is in the following terms:

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[584] It can be argued that as water allocation plans in Queensland are subsidiary legislation and therefore legally binding that is the equivalent of statutory recognition.

> 25. The Parties agree that, once initiated, their water access entitlements and planning frameworks will:
>
> (ix) recognise indigenous needs in relation to water access and management;[585]

This paragraph appears to have been generally overlooked when the northern Australian jurisdictions have assessed their compliance with the NWI.[586] There is no mention of it in any of the Implementation Plans or later reports by each jurisdiction concerning compliance with the NWI that I was able to discover in my examination of those documents in relation to indigenous interests.

This is important, as there seems little appreciation of the full import of paragraph 25. Significantly, it states that both the water access entitlements and planning frameworks will recognise indigenous needs in relation to water. This is not qualified by any requirement for the finalisation of native title claims, nor land ownership by Aboriginal groups, nor is it limited to the recognition of Indigenous cultural values only.

In particular, it appears to have been totally overlooked that this paragraph includes the phrase "Water access entitlements" as well as planning frameworks. "Water access entitlements" is defined to mean in the Glossary of Terms (schedule B (i)) an entitlement to exclusive access to water for commercial purposes in a particular water plan.[587]

In full the definition is in the following terms:

> *water access entitlement* – a perpetual or ongoing entitlement to exclusive access to a share of water from a specified *consumptive pool* as defined in the relevant *water plan*.

This is significant as it means that Indigenous interests should not only be included within the planning frameworks but also that indigenous needs in relation to the commercial use of water should be recognised and allocated. In my opinion, there is no ambiguity in relation to this given that the consumptive pool (as defined) is the water allocated in a water plan "for private benefit consumptive purposes including irrigation, industry, urban and stock and domestic use."[588]

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[585] NWI at page 5.

[586] For example, see Queensland's National Water Initiative State Implementation Plan, January 2006 at pp 26,27; and Western Australia's achievements in implementing the National Water Initiative Progress report Department of Water Government of Western Australia, November 2008 at pp 30- 32.

[587] Ibid NWI 30.

[588] See the definitions of "consumptive pool" and "consumptive use" in the Glossary of Terms – Schedule B (i) page 29 NWI. The nature of a water access entitlement is more specifically set out in the body of the NWI agreement at paragraphs 28-34.

The National Water Commission has highlighted the fact that there is an assumption that environmental flows will meet indigenous requirements and therefore Indigenous economic opportunities are not being provided for in terms of water access entitlements.[589] It has also recommended that Indigenous economic interests should be "more effectively" incorporated into planning.[590] Significantly the Commission has also recommended that:

> Jurisdictional processes should also make clear how Indigenous groups can pursue their legitimate economic objectives.[591]

This requirement should be mandated in water management legislation to ensure that it is put into effect.

Generally, the requirement that planning frameworks recognize indigenous needs in relation to water and management in paragraph 25 is not specifically recognised but is manifest in terms of the processes and contents of water plans in paragraph 52 of the NWI.

Indigenous representation in water planning

Paragraph 52 i) provides for Indigenous representation in water planning.

> Indigenous Access
>
> 52. The Parties will provide for indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, through planning processes that ensure:
>
> i) inclusion of indigenous representation in water planning wherever possible;

Indigenous social, spiritual and customary interests

Water Plans are to include objectives and strategies to recognise Indigenous social, spiritual and customary interests.

> 52 ii) *water plans* will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.

Allocation of water to legally recognised native title holders

> 53. Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth *Native Title Act 1993*.

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[589] National Water Commission 2009, *Australian Water Reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative*, NWC, Canberra at page121 paragraph 6.3.3.1

[590] Ibid vii.

[591] Ibid recommendation 1.4 at page 27.

> 54. Water allocated to native titleholders for traditional cultural purposes will be accounted for.

I have used the words "legally recognised" native title holders in the heading to this section[592] to highlight the point that not all local Indigenous groups (whom are the traditional owners of the particular area for that water plan) will be legally recognised under the native title process.

This is because the native title may have been extinguished for example, by the grant of a freehold title, by a nature reserve in Western Australia or because the group can't "satisfy" the stringent test for the proof of native title enunciated by the High Court of Australia in such cases as *Yorta Yorta.*[593]

In addition, prior to the hearing or determination of native title in the Federal Court many Indigenous groups are registered native title claimants, which gives them certain procedural rights.[594] Such procedural rights are not currently recognised in paragraphs 53 and 54 of the NWI. One interpretation may be that when drafting the NWI government took the view that it would only recognise legally recognised property interests in a water plan. This situation should be clarified to ensure such procedural rights are not infringed and broad recognition takes place.

This poses an important policy dilemma as whilst the recognition of native title rights to water in water planning and allocation is welcome and important it raises the question as to what basis there may be for a more broad ranging recognition of Indigenous interests in water beyond native title. This is an important matter to clarify as some Indigenous groups have not and will not (as the law currently stands) be recognised by Australian law as native titleholders or traditional owners under land rights legislation. Again, I note the fact that the guidelines only refer to Indigenous water use in Schedule E, which refers to Indigenous values without limitation.

This will mean that some Indigenous groups will be recognised as being entitled to an allocation of water under paragraph 53 if they achieve legal recognition of native title and some will not because they can't achieve for whatever reason that legal status as this paragraph is currently drafted.

This raises the important question as to whether there is some other way to ensure the equitable treatment of all Indigenous interests. I have examined this issue in section 5 of this report. It is also notable that the requirement to recognize "Indigenous social, spiritual and customary interests" in water plans is not stated as being dependent upon the legal recognition of native

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[592] These words are not used in the NWI but it is what is meant in paragraph 53.

[593] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

[594] The most obvious being s 24 HA of the *Native Title Act, 1993* in relation to the grant of water licenses. This provision and others that provide procedural rights in relation to registered claimants and native title holders is dealt with in more detail in section 1 of this Report.

title.

Water trading and Indigenous cultural heritage

In relation to the rules of water trading the NWI outlines the principles that are to be adhered to:

> Schedule G Principles for Water Trading
>
> Restrictions on extraction, diversion or use of water resulting from a trade can only be used to manage:
>
> 3. v) features of major indigenous, cultural heritage or spiritual significance.

This means that it is acceptable to restrict the trading of water licenses and permits, for example out of a particular catchment, if that trade will have an adverse affect upon Indigenous heritage. The use of the word "major" would appear to signify an intention that this restriction will only apply to important or significant areas or sites of significance. Therefore this requirement brings with it an assessment of importance that may not fit well within local Indigenous tradition and begs the question as to whom is to make such a qualitative judgment. For example, is it assessed in accordance with non-indigenous notions of importance or in accordance with the local custodians of that heritage place? A simple example being, whether importance may be related to an area such as Uluru- Ayers Rock an internationally and nationally listed and recognised heritage site on the one hand, or if it could apply where there is a site of significance to local Indigenous people but it is unlisted and unknown to non-indigenous people.

Guidelines for implementation of Indigenous provisions in the NWI

It is useful to note that the National Water Commission in its review of the NWI in 2009 commented that:

> While requiring that water access entitlements and planning frameworks recognise Indigenous needs in relation to water access and management, the NWI provides little guidance on how those needs should be addressed.[595]

At the time of writing there are no guidelines as to the meaning and implementation of the Indigenous provisions in the NWI. It would be a very valuable tool if such a document was prepared, especially given the apparent ambiguous and over-lapping nature of some of the requirements of the NWI.

Critique of adequacy of NWI with respect to Indigenous interests

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[595] National Water Commission 2009, *Australian Water Reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative*, NWC, Canberra at 121.

A review of the NWI and Indigenous Interests conducted by Dr. Sue Jackson in 2007 noted that the NWI provisions with respect to Indigenous interests focus on customary values to the exclusion of the recognition of property interests such as native title and economic involvement in the use of water resources. The author stated that:

> implementation emphasis is squarely placed on protecting Indigenous customary values (which are construed as non-market values) and meeting legal requirements to protect native title. The NWI actions reflect statutory frameworks for native title and interpretations of Indigenous resource interests that are, by numerous academic accounts, 'insufficiently inclusive in their definition of water property' ((Altman, 2004) p.33). The property rights conferred by the *Native Title Act 1993* are only partial, covering customary use rights. Furthermore, the wording in the NWI, where water allocated to native holders for traditional cultural purposes is to be accounted for (paragraph 54; emphasis added), suggests an intention to preclude commercial uses under the definition of native title rights, although the absence of definition leaves some doubt as to what is intended. In light of Australian government commitments to overcome Indigenous disadvantage, it is significant that no explicit obligation is placed on the parties to utilise this market–based policy framework to advance Indigenous people's economic standing.[596]

These assumptions appear to be correct that indigenous interests do not go beyond the recognition of cultural values. For example, it would appear the general discourse in state and Territory compliance reports surrounding this question do not recognise a requirement in the NWI for an Indigenous allocation of water for commercial use. This is not correct, as there is a requirement to meet Indigenous needs for commercial water allocations in paragraph 25 of the NWI. It has not been largely implemented by governments. Indeed, its existence does not seem to have been acknowledged by some governments.

Progress on implementation of Indigenous aspects of NWI – the National Water Commission (NWC)

To summarise, the NWC – the statutory national body with responsibility to monitor compliance with and implementation of the NWI (including with respect to Indigenous interests) has found in 2008 and 2009:

- A general lack of implementation of water plans (the main tool for recognizing indigenous interests) and the incorporation in them of Indigenous issues; and

- A lack of depth in the assessment of and needs of Indigenous interests in water plans when they are finalised and implemented;

[596] Ibid 64.

In a progress report concerning implementation of the NWI in February 2008 the NWC found that no jurisdiction in northern Australia had completed plans to address indigenous issues. By plans in that context the NWC is referring to Implementation plans not water plans at the local and regional level. In its opinion, Queensland and the Northern Territory had substantially completed these plans and Western Australia had commenced to do so.[597]

Despite this opinion, it found that in particular it was concerned that "some factors are reducing water user and stakeholder confidence in water access entitlements and in the security of water provided for the environment" and made a recommendation for:

> Improving water plans to incorporate indigenous issues more effectively."[598]

Similarly, in the most recent assessment of progress in 2009 in the *Australian Water Reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative* the NWC was particularly concerned about the lack of progress in implementing water plans.

In fact it found that "progress in the development and commencement of statutory water plans is now critically inadequate."[599] This has serious consequences for the recognition of indigenous interests under the current NWI. As outlined, water plans are fundamental to this recognition. Further it was commented in the 2009 report that:

> While consultation may occur, a deeper assessment of Indigenous water values and needs in water plans, is typically not undertaken. Indigenous knowledge is currently under-utilised in water resource assessments, and little guidance is given to water planners and managers seeking to meet the objectives relating to Indigenous access and involvement. It is common to see agencies rely on Indigenous representatives on plan development committees for Indigenous needs and values assessment. While important, such representative consultation does not necessarily provide the detailed input needed to underpin the specification of Indigenous requirements in water plans.[600]

The NWC further commented that "Water plans are fundamental to water management because they establish a balance between environmental and consumptive uses" and that in relation to Indigenous interests that these

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[597] National Water Commission Update of progress in water reform INPUT INTO THE WATER SUB GROUP (WSG) STOCKTAKE REPORT, 15 February 2008 - Attachment A page 10. .http://www.nwc.gov.au/www/html/692-coag-update-report-on-water-reform.asp?intSiteID=1

[598] Ibid at 4.

[599] National Water Commission 2009, *Australian Water Reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative*, NWC, Canberra at page 14 Finding 1.1

[600] Ibid 27.

plans can provide for the recognition of Indigenous needs in relation to water access and therefore specifically recommended that:[601]

> Indigenous economic, cultural and spiritual interests should be more effectively incorporated into planning.

The NWC made the following specific findings and recommendations in the 2009 compliance assessment:

> Finding 1.6 It is rare for Indigenous water requirements to be explicitly included in water plans, and most jurisdictions are not yet engaging Indigenous people effectively in water planning processes. The Commission notes that Indigenous groups are, at their own initiative, currently developing the capacity to participate more fully in water planning processes.
>
> Recommendation 1.4 The Commission recommends that all jurisdictions develop and publish processes for effective engagement of Indigenous people in water planning. Parties should ensure that all new water plans (including statutory reviews of existing water plans) provide for Indigenous access to water resources by at least incorporating Indigenous social, spiritual and customary objectives and strategies for achieving those objectives. Jurisdictional processes should also make clear how Indigenous groups can pursue their legitimate economic objectives.
>
> Finding 6.7 Water to meet Indigenous social, spiritual and customary objectives is rarely clearly specified in water plans. It appears often to be implicitly assumed that these objectives, where considered at all, can be met by rules-based environmental water provisions.
>
> Recommendation 6.5 The Commission recommends further exploration of Indigenous needs in relation to water access and management, and mechanisms to meet those needs. The Commission proposes to initiate a national study on this matter.[602]

More generally in relation to water plans the NWC recommended that:[603]

> The Commission strongly urges the immediate acceleration of the development and commencement of water plans to allow water users to realise the full benefits of NWI reforms. The Commission considers it is now timely for parties to reset and publish realistic timeframes for the rollout of remaining water plans. However the Commission considers that accelerating the pace of water planning should be

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[601] National Water Commission 2009, *Australian Water Reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative*, NWC, Canberra at page vii.

[602] Ibid 106.

[603] Ibid Recommendation 1.1 at page 14.

> balanced against quality, and particularly the quality of community consultation.
>
> Indigenous participation in water planning is provided for in all jurisdictions. However, with the exception of New South Wales, no jurisdictions have an explicit requirement for Indigenous participation in planning.[604] *(by this is meant a legislative requirement)*[605]

In relation to the necessary legislative reform commitments under the NWI the NWC was directly critical of the Northern Territory and Western Australia.

> Finding 6.1 Most jurisdictions have undertaken significant legislative reforms to enable the implementation of NWI-consistent water access entitlements. However, Western Australia and the Northern Territory are notable cases where legislative reform has not been finalised.
>
> Recommendation 6.1 The Commission recommends that Western Australia and the Northern Territory finalise and introduce the remaining legislative reforms as soon as possible to enable implementation of their NWI commitments to NWI-consistent water access entitlements and the benefits that flow from them.[606]

I will now examine each northern Australian jurisdiction with respect to the NWI and Indigenous interests in water.

Western Australia

The *Rights in Water and Irrigation Act, 1914* is the main water management legislation in Western Australia.

The objects of Part III of the Act[607] are to manage water resources "in particular for their sustainable use and development to meet the needs of current and future users; and "for the protection of their ecosystems and the environment in which water resources are situated." The use and development of water in this context is described so as to include use and development for "domestic, commercial, recreational, cultural and navigational purposes."[608] These references clearly have a development focus but appear wide enough to include consideration of Indigenous cultural values, although with no emphasis on Indigenous specific recognition and protection.

The Act makes provision for the appointment of local water resources management committees,[609] which are to include persons who "have

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[604] Ibid 26.
[605] Authors comment in italics.
[606] Ibid 105.
[607] Part III of the Act is entitled the Control of water resources and does not include irrigation and water supply.
[608] *Rights in Water and Irrigation Act, 1914* s4(1)(a),(2).
[609] *Rights in Water and Irrigation Act, 1914* s26GK.

knowledge and experience relating to the water needs and practices of local communities, including Aboriginal communities".[610] This is the only indigenous specific reference in the Act. It doesn't prescribe the manner of Indigenous representation.

The Act also provides for regional or local water resource management plans.[611] The role of these plans is to provide guidance to the Minister only in the exercise of his/her statutory functions and powers in relation to the management of water resources.[612] These are not statutory water plans consistent with NWI requirements. In Western Australia, water management is not legally required to be conducted in accordance with the plan, unlike the Northern Territory and Queensland. If a local advisory committee in Western Australia does exist it is to be consulted in the development of the plan.[613]

In a recent Discussion paper (November 2009) concerning legislative reform of water management released by the WA Department of Water it was stated that:

The NWI has been adapted to Western Australian conditions by the *Blueprint for Water Reform in Western Australia* (and the government's response to the blueprint) and the 2007 State Water Plan.[614]

The 2007 State Water Plan has three parts:[615]

1. An overview of water resources availability and use;
2. Water policy and planning framework (which are incomplete);
3. More than 100 priority actions to progress water resources management in Western Australia by 2011.

In relation to the NWI, the Government of Western Australia committed to a timetable of action to implement the Indigenous access to water components of the NWI in April 2007, as part of its Implementation Plan. The Government at the time stated that:

> Water allocation planning processes in Western Australia provide for Indigenous access to water resources; specifically for non-consumptive cultural uses. Indigenous ecological knowledge is also sought to assist in making appropriate water allocations for the environment. Indigenous engagement is especially sought in the processes of

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[610] Ibid s. 26GL(b)(iii).
[611] Ibid s26 GU – GZ.
[612] Ibid ss 26 GW (2),GX(2),GY(2).
[613] Ibid s26GZ.
[614] Discussion Paper Water Resources Management Options, Department of Water Government of Western Australia, November 2009 at 2.
[615] Taken from the WA Department of Water website at http://www.water.wa.gov.au/Managing+our+water/State+water+resource+management+and+reform+program/default.aspx (accessed 28/4/10).

developing water management plans.[616]

The timetable of action committed the government to finalising policy in May 2007 and legislation and the commencement of implementation by December 2008.[617] There are no relevant performance indicators to monitor compliance with the NWI commitments in relation to Indigenous access to water.[618]

To date, there has been no legislative reform requiring the involvement or recognition of Indigenous interests described above. None of it is legally binding or mandatory at this stage. The WA Government further notes that "legislation exists to protect a number of water heritage sites" and that government action in the recent past has "primarily focused on informal partnerships and consultation with Indigenous groups to gain Indigenous perspectives on water governance arrangements."[619]

The legislation in respect of NWI requirements mentioned "includes the *National Parks and Wildlife Conservation Act 1975*, the *Environmental Protection and Biodiversity Conservation Act 1999* and the *Aboriginal Torres Strait Islander Heritage Protection Act 1984*"; (which are all Federal legislation[620]); and at a state level the *Aboriginal Heritage Act 1972* (WA) which "protects significant sites from destruction and allows for the continued use of those areas in accordance with Indigenous tradition." This legislation is dealt with in more detail in section 1 Part D of this report.

Interestingly, the Discussion Paper[621] released in November 2009 concerning legislative reform to implement the NWI makes no mention of the need for legislative change or statutory recognition of the Indigenous related requirements in the NWI. In relation to native title, there are brief references to the need to recognise native title holders rights to use water and that any water allocation plan should protect "basic" rights including native title rights,[622] to use water, and to take and use water for cultural and ceremonial purposes.[623]

The following are excerpts from that discussion paper:

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[616] Western Australia's Implementation Plan for the National Water Initiative, Department of Water, Government of Western Australia April 2007 at page 33.
[617] Ibid at page 35.
[618] Ibid at page 115.
[619] Western Australia's achievements in implementing the National Water Initiative Progress report Department of Water Government of Western Australia, November 2008 at page 30.
[620] The *National Parks and Wildlife Conservation Act 1975* (Cth) was in fact repealed in 1999 by the *Environmental Reform (Consequential Provisions) Act 1999* and replaced by the *Environmental Protection and Biodiversity Conservation Act 1999*.
[621] Discussion Paper Water Resources Management Options, Department of Water Government of Western Australia, November 2009.
[622] Ibid 29.
[623] Ibid 36.

Existing legislation

> Under current legislation, there is no specific provision for Native title holders' rights to water. While it would appear that Native title holders do not require a licence under the *Rights in Water and Irrigation Act 1914*, the situation is not entirely clear.

Legislative option

> Native title holders' rights to take and use water in accordance with traditional laws must be recognised. This would not include water for commercial purposes.[624]

In its most recent report in 2008[625] concerning compliance with the NWI the Western Australian Government reported that it was continuing to develop a policy paper concerning Indigenous access to water and that "The policy is exploring how allocation of water to native titleholders for traditional cultural and commercial purposes will be accounted for."

These aspirations in policy development don't seem to be reflected in the recent Discussion paper for legislative reform and implementation of the NWI discussed above. The Discussion Paper is to some extent a reflection of the current state of native title law which does not recognise an Indigenous right to commercial use of water. But it doesn't reflect the stated WA government position about policy development, which would account for cultural and commercial purposes nor importantly the requirement in paragraph 25 ix) of the NWI concerning an Indigenous commercial water entitlement. There is no mention of paragraph 25 in the WA Government progress Report in November 2008.[626]

The government is specifically aware of Indigenous aspirations in the commercial use of water in Western Australia as the Discussion Paper of October 2009 concerning the La Grange groundwater planning process in the West Kimberley indicates:

> One of the key outstanding issues recently identified by stakeholders has been Indigenous peoples' aspirations for water management and access to water for community activities including water supply and possible future economic activities.[627]

Unfortunately, as mentioned this is not reflected in contemporaneous

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[624] Ibid at 37.

[625] Western Australia's achievements in implementing the National Water Initiative Progress report Department of Water Government of Western Australia, November 2008 at page 32.

[626] Ibid 10-13.

[627] Department of Water, Government of Western Australia; La Grange sub region overview and future directions Kimberley regional water plan working discussion paper October 2009 at 6.

documents describing the NWI driven legislative water reform agenda in Western Australia as exemplified by the most recent Discussion Paper.

The La Grange Discussion paper was been followed by the finalised La Grange Groundwater allocation plan in February 2010.[628] Similarly it identifies the reservation of water for Indigenous commercial use as a key community issue,[629] but goes no further at this stage then stating:

> The Department will continue to work with other state agencies, through the Indigenous Implementation Steering Committee and with aboriginal communities to identify ways that good water management can assist with Aboriginal economic and social development.[630]

The Plan identifies the following concern of local traditional owners:

> Traditional owners are concerned that all the water in the region will be licensed for use by others before they have a chance to develop enterprises that might require water. Local Indigenous people want some certainty that water will be available if or when they seek water for commercial use in the future. The department understands the importance of this issue and is considering how to address traditional owners concerns[631].

It is unfortunate, that in light of these acknowledgements no recommendations or decisions were made to reserve a proportion of the consumptive pool in the final La Grange Groundwater Allocation plan for Indigenous interests. This is notable given the fact that well over 50% of the water available for licensing is unallocated,[632] and the Department has decided to allocate ground water licenses "on a first-in first served basis".[633]

Interestingly in the Plan there is also no accounting of or allocation of water to native title holders as per paragraph 53 of the NWI, despite the fact that there are Court determined "legally recognised" native title holders. The Karajarri, Nyangumarta and Rubibi native title determinations cover different parts of the plan area.

The Karajarri people have been recognised native title holders since 2002.[634] The recognised native title legal rights from that determination relevant to the plan area include:

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[628] Government of Western Australia Department of Water; Water resource allocation planning series Report no. 25 La Grange Groundwater allocation plan February 2010.
[629] Ibid 16.
[630] Ibid 29.
[631] Described as Action 5 in the Plan Ibid 19.
[632] Ibid 16.
[633] Ibid 1.4 Table 3 at page 22.
[634] There are also other native title holders in the plan area - Nyangumarta, Karajarri (No 2) and Rubibi native title determination areas. Also see page 11 of the La Grange Groundwater allocation plan.

> the right to take and use the waters and other resources accessed in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs;[635]

An advisory groundwater committee for this plan area - the La Grange Groundwater Committee, which included local indigenous representation existed between 1999 and 2001 and "informed" the final plan released in 2010.[636]

In relation to the maintenance of cultural values the plan states:

> The department has accounted for the water's ecological and cultural values by allowing approximately 50 per cent of the 105 GL/year to remain in the aquifer to support those values. This results in an allocation limit of 50 GL/year in the Broome Sandstone aquifer in La Grange subareas.[637]

Conclusion – Western Australia

Water allocation plans in Western Australia are not legally binding at this time in accordance with NWI requirements. The 2008 Western Australian NWI progress report states:

> Current water plans give consideration to environmental and public benefit matters but are not legally binding on water users or the Minister for Water. The legislative reform process will provide for legally binding water management plans.[638]

There is no existing policy commitment to enact in law measures that will meet the economic aspirations of Indigenous people in legislation in Western Australia with respect to water and in compliance with the NWI. The non legally binding water planning processes do not fully implement NWI Indigenous access requirements and those that do are firmly focused on Indigenous traditional cultural issues, which is important but not sufficient to satisfy the NWI.

For some time, consideration has been given to enacting new water management legislation in Western Australia entitled the *Water Resources Management Bill*. It is in the drafting stage at the time of writing.[639]

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[635] *Nangkiriny v State of Western Australia* [2002] FCA 660 Order 4(1)(iv).

[636] La Grange Groundwater allocation plan at ix.

[637] Ibid at 37. A more detailed analysis of the plan will be undertaken in section 5 of this Report.

[638] Western Australia's achievements in implementing the National Water Initiative Progress report Department of Water Government of Western Australia, November 2008 at page 13.

[639] http://www.water.wa.gov.au/Managing+our+water/Legislative+reform+program/default.aspx

At the same time the WA Department's position in relation to Indigenous specific commercial water allocation is:

> The Department of Water's established water licensing process, water allocation planning process and supporting policies provide clear pathways for access to water for commercial use by Indigenous water users as defined under the Rights in Water and Irrigation Act 1914.

and further that:

> DoW will continue to examine policy options for Indigenous access to water for commercial use.[640]

At a minimum the WA legislative reform agenda should include the requirements outlined in this section in paragraph 25 ix) of the NWI dealing with water access entitlements and planning frameworks that recognise Indigenous needs in relation to water access and management. One form in which this can occur is through the establishment of an Indigenous reserve in the consumptive pool in water plans as is starting to happen in the Northern Territory and Queensland.

Queensland

The *Water Act, 2000* in Queensland provides for general recognition of Indigenous interests in water management, unlike the other two northern Australian jurisdictions Western Australia and the Northern Territory. Chapter 2 of the Act headed Allocation and sustainable management defines sustainable management as amongst other things:

> (v) recognising the interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning;

Water plans in Queensland are what is known as subsidiary legislation and are therefore legally binding. A resource operation plan is completed after the water plan to implement the plan "on the ground". Queensland is significantly more advanced then the other two jurisdictions in implementing the NWI requirement for legally binding water plans.[641]

The Queensland NWI Implementation Plan dated January 2006 indicates a level of involvement of Indigenous representatives in the planning process of water plans which has continued to date. This is done via section 41 of the

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(accessed 19/3/10).There are two related Bills also called the *Water Services Bill* and *Water Corporation Amendment Bill.*

[640] Copied from the power point presentation of the Director, Strategic Policy and Water Services WA Department of Water to the Indigenous Water Policy Group meeting in Darwin, March 2010.

[641] See http://www.derm.qld.gov.au/wrp/timetable.html for the currents status of implementing water plans in the state.

Queensland *Water Act*, *2000* which requires a community reference panel to "provide input in to the development of a water resource plan" including "representatives of cultural, economic and environmental interests in the proposed plan area.[642]

It doesn't provide for Indigenous specific representation but is the vehicle by which Indigenous people are appointed and participate in water planning in Queensland.

Rather oddly, the Queensland Implementation Plan under the heading *Assumptions, Constraints and Exclusions* asserts the following:

> As native title rights to water have not been legally recognised, Queensland has not been able to make any specific legislative or WRP provisions. However, water allocated to protect ecosystem processes acts to protect traditional uses associated with water.[643]

This assumption is incorrect. Any number of Queensland native title determinations (Court orders recognising native title) have also included a native title right to use water up to and after 2006. As an example, the *Kaurareg Peoples* determination[644] in the Torres Strait in 2001 included a right to use and enjoy the natural resources of the area, which were defined to include water. The Court orders were as follows:

> (c) use and enjoy the Determination Area and the Natural Resources of the Determination Area for social, cultural, economic, religious, spiritual, traditional and customary purposes, including to:
>
> (i) hunt, fish and gather;
>
> "*Natural Resources*" means animal, plant, fish and bird life found on or in the Determination Area from time to time and all water, clays and soils found on or below the surface of the Determination Area but does not include Minerals or Petroleum;

The Implementation Plan then concludes that the existing legislative and administrative regimes in Queensland provide the necessary basis to meet the Indigenous access requirements of the NWI.[645] This is somewhat of an overstatement in my opinion as the legislative recognition that does exist goes only to the general recognition of Indigenous interests in water planning. This is important but there is no further specification to ensure that the broad range of social, cultural and economic interests are recognised in

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[642] Queensland's National Water Initiative State Implementation Plan, January 2006 at page 26.

[643] Ibid 27.

[644] *Kaurareg People v Queensland* [2001] FCA 657 (23 May 2001).

[645] Ibid at 27 and see Queensland State Implementation Plan No: 6 generally which is a part of the overall Implementation Plan.

water management and planning. Nonetheless, it should be noted that Queensland is the only northern Australian jurisdiction that has recognised Indigenous interests to this extent in its primary water management legislation.

In addition, there has been specific legislative recognition of indigenous interests with respect to water in the Cape York region of Queensland. The *Cape York Peninsula Heritage Act, 2007* makes provision for water allocations to assist indigenous communities to meet social and economic aspirations. Section 27 of the Act requires that a wild rivers declaration or a water resource plan "must provide for a reserve of water" "for the purpose of helping indigenous communities in the area achieve their economic and social aspirations." This only applies to the Cape York Peninsula region and not to the rest of Queensland.

This requirement has manifested in two water plans under the *Water Act, 2000* that cover Cape York – the Water Resource (Mitchell) Plan 2007 and the Gulf Water Plan – the Water Resource (Gulf) Plan 2007.The Mitchell Plan provides for an Indigenous reserve of 5000 ML out of a total of 70,000 ML of unallocated water.[646] The Gulf Plan provides for some 1000 ML out of a total of some 178,900 ML of unallocated water.

The Gulf Plan geographically extends from the Northern Territory border in the west to near the Staaten River in the north east, but the Indigenous reserve only applies to the Cape York area. The 1000 ML is set aside as an indigenous reserve in the Staaten Wild River area only.[647] As an example, the relevant terms of the Gulf Plan are:

> General Outcomes 13.
> (j) to make water available for helping indigenous communities in the Cape York Peninsula Region area to achieve their economic and social aspirations;
>
> (l) to support water-related cultural values of Aboriginal and Torres Strait Islander communities in the plan area; **[648]**
>
> 32 Purpose for which indigenous unallocated water may be granted
>
> Unallocated water held as an indigenous reserve (*indigenous unallocated water*) may be granted only for helping indigenous communities in the Cape York Peninsula Region area to achieve their economic and social aspirations.

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[646] This is in accordance with the Mitchell Resource Operations Plan (ROP),which was gazetted in November 2009. Per comms Tom Crothers, Queensland Department of Environment and Resource Management 24 March 2010 as presented to Indigenous Water Policy Group meeting in Darwin.

[647] Ibid. At the time of writing the Gulf Resource Operations Plan was still subject to final approval.

[648] Water Resource (Gulf) Plan 2007, Queensland at 12.

33 Volumetric limits for indigenous unallocated water

The total of the annual volumetric limits for all water licences to take indigenous unallocated water from the Cape York Peninsula Region area is 1000ML.

In addition, four Indigenous reserves of water have been set aside in Wild River areas as follows: Archer 6000 megalitres; Stewart 4000 megalitres; Lockhart 5000 megalitres and Wenlock (provisional) 5000 megalitres in accordance with the *Cape York Peninsula Heritage Act 2007* requirements.[649] The Queensland Wild Rivers legislation is discussed in section 1 Part E of this Report.

Conclusion - Queensland and the NWI Indigenous provisions

There exists in a basic general sense statutory recognition of Indigenous and cultural values in the *Water Act, 2000*, which operates in particular through water plans which are subsidiary legislation. Indigenous heritage protection legislation laws in Queensland- the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) have not been considered as these are laws of general application and the requirements of the NWI are obviously specific to water management and the required contents of water plans.

There exists an indigenous allocation of water from the consumptive pool but only in relation to the Cape York area. Indigenous representation occurs in water planning and is provided for in the Act but not in a manner specifically that requires Indigenous representation. Indigenous social, spiritual and customary interests are included in water plans. There is no allocation of water to legally recognised native title holders pursuant to paragraph 53 of the NWI in any of these water plans.

Queensland is currently developing a "Single Water Planning Process" that will lead to further legislative change, which is said will "align" with the National Water Initiative.[650] The specification of the requirements of the NWI concerning Indigenous interests including paragraph 25 ix) in the *Water Act, 2000* would help ensure that these requirements have to be met.

Northern Territory

The *Water Act, 1992* is the water management legislation in the Northern Territory. It does not directly currently implement any of the relevant commitments in relation to Indigenous interests in the NWI. The Act provides for a discretionary process of approving a water control district and a water

[649] Personal communication Tom Crothers, Queensland Department of Environment and Resource Management 24 March 2010 as presented to Indigenous Water Policy Group meeting in Darwin.

[650] Per comms Tom Crothers, Queensland Department of Environment and Resource Management 24 March 2010 as presented to Indigenous Water Policy Group meeting in Darwin.

allocation plan in respect of a water control district.[651]

If a water allocation plan has been declared then the Act stipulates that water resource management is to be conducted in accordance with that plan. A plan is to ensure that "water is allocated within the estimated sustainable yield to beneficial uses".[652] The phrase "beneficial uses" is a key term in the Act that includes a cultural component being – "to provide water to meet aesthetic, recreational and cultural needs".[653] To that extent, if a water plan is in operation it may be said that Indigenous cultural concerns have received some statutory recognition but there is a need to more discretely identify Indigenous specific cultural values.

In addition, some of the Indigenous provisions of the NWI have been implemented in recent NT water allocation plans (a plan is discussed briefly later in this section).

In relation to the National Water Initiative (NWI) in the context of the 2007 amendment to the NT *Water Act* (the most recent substantive amendments made to that Act) the responsible Minister in the Northern Territory said:

> While individually the amendments are not sufficient to fully address the Territory's National Water Initiative obligation, the improved transparency and accountability achieved through these amendments will meet some repeated concerns of the National Water Commission about processes for public engagement in water allocation in the Territory. In a climate in which the Australian government appears increasingly restless over water reform and implementation of the National Water Initiative, the proposed amendments represent a useful first step in demonstrating that the Territory is seriously addressing its National Water Initiative commitments.[654]

In the Northern Territory's Implementation Plan dated June 2006 it is stated that:

> "The Northern Territory intends to complete full implementation of the NWI, as initially detailed by 2010."[655]

Further, in the same document in relation to paragraph 52 the Indigenous access provisions of the NWI it is said that:

> "water allocation planning processes already provide for indigenous access to water resources; specifically for non-consumptive cultural

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[651] *Water Act, 1992* ss 22A, 22B.
[652] Ibid s22B (5)(a).
[653] Ibid s4(3)(e).
[654] Second Reading Speech Water Amendment Bill, 2007 [11].
[655] Northern Territory Implementation Plan for the Intergovernmental Agreement on a National Water Initiative – Northern Territory Government June 2006 at page 9 paragraph 3.

> beneficial uses and, as appropriate , for access to the consumptive pool for agriculture, aquaculture, public water supply, industry or rural stock and domestic uses."

It is also said that Indigenous engagement in water planning and representation on Water Advisory Committees is "especially sought."[656]

In relation to paragraph 53 of the NWI it is stated that the legal implications of native title rights "have not been considered or legally tested in the Northern Territory."[657]Further, concerning paragraph 54 of the NWI it is stated that as access to water resources in a Water Control District is controlled through permits and licensing that all the necessary data is available "to ensure that all non-consumptive environmental and other public benefit uses are maintained and protected, including indigenous cultural uses."[658]

A Northern Territory water plan

Water plans are the main mechanism by which NWI Indigenous access provisions are implemented. There are three finalised water plans in the Northern Territory. The Ti Tree Water Allocation Plan was the first and pre-dated the NWI. A revised plan was declared in 2009.[659]

The second is the Katherine Water Allocation Plan for the Tindall Limestone Aquifer, which was declared by the Minister on the 19 August 2009. [660]As I understand the water planning process in the Northern Territory this is the first attempt by the NT to grapple fully with the requirements of the NWI with respect to indigenous interests in a water plan. An implementation strategy is yet to be completed for the plan.

An advisory committee including Indigenous representatives has advised government on the contents and implementation of the plan.

The plan is said to be made:

> in accordance with the NT Government's commitment to implementing the National Water Initiative. The National Water Initiative requires that Water Allocation Plans are developed to ensure the equitable distribution of water resources between competing uses, including environmental and cultural water requirements.[661]

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[656] Ibid 29.
[657] Ibid 29.
[658] Ibid 29.
[659] http://www.nt.gov.au/nreta/water/plans/titree/planning.html (accessed 15/3/10).
[660] http://www.nt.gov.au/nreta/water/kwac/index.html (accessed 15/3/10).
[661] Department Of Natural Resources, Environment, The Arts And Sport, Northern Territory Government Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019 at page 3.

The plan appear to observe a deeper engagement with Indigenous people than other plans examined in northern Australia as it includes in its introduction the following acknowledgement and purposes of the Plan:

> This Water Allocation Plan acknowledges the traditional owners that live within the Plan area, and recognises a deep cultural connection to the many water features, which are interconnected with the Tindall Limestone Aquifer.[662]
>
> The purpose of this Plan is to initiate strategies for sustainably allocating and managing water from this water source. These strategies, as detailed in Clause 18 were created by assessing:
>
> (i) water availability in the context of climatic variability and community, environmental and Indigenous cultural needs;
>
> (ii) community response to the economic opportunities associated with the use of this water source, including consumptive uses such as agriculture, industry and public water supply and non consumptive uses such as tourism and recreation;
>
> (iii) opportunities and needs arising from growth in existing and emerging activities, including economic development opportunities for Indigenous landowners.[663]

Importantly, the plan acknowledges and seeks to take into account Indigenous cultural needs separately from the environment[664] and recognises and accounts for "economic development opportunities for Indigenous landowners."

It is proposed through "engagement and research" to identify sites of Indigenous cultural importance which are dependent on water from the aquifer" and to gain an understanding of the "essential water requirements" so that these are maintained.[665]

The economic development opportunities, are sought to be achieved by providing for up to 680ML for Indigenous commercial development if the local native title claim is finalised. This amount of water has been determined by the percentage of the plan area land under native title claim – some 2% approximately.

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[662] Ibid 12.

[663] Ibid 13.

[664] See page 18 of the Plan which states: (iii) This Plan assumes that provision of discharge for environmental protection will also maintain the condition of places that are valued by Indigenous people for cultural purposes; (iv) Despite sub clause (iii), it is recognised that cultural flow requirements may not align entirely with environmental requirements and any research that becomes available in this regard will be considered as part of the review process specified in Part 8.

[665] Ibid 21.

> 35. In accordance with section 22B of *the Act*, the Controller must ensure:
>
> vi. If the existence of Native Title (under application NTD6002/00) is recognised within five years of the commencement of this Plan, the Controller must amend the relevant Parts of the Plan to include 680ML for Indigenous commercial development,[666]

Access to this water for commercial purposes is dependent upon a successful native title claim.

As it has been decided that as part of this planning process, no new licences to take water should be granted then consequently there is no current Indigenous specific allocation. After review of the plan, if any excess water is found to exist then it will be applied to environmental and cultural flows; with Indigenous economic development as a third priority.[667]It should be noted that some Indigenous communities in the plan area already hold longstanding licences for consumptive purposes.

None of the requirements of the NWI concerning Indigenous issues have been specifically incorporated into water management legislation in the Northern Territory. Although, as mentioned "beneficial use" includes the maintenance of cultural values as one of the objects of a water allocation plan.

The most recent Water Allocation plan because of its statutory status constitutes the most advanced implementation of the NWI Indigenous provisions to date. Much will depend on the Implementation Strategy of this Plan and the capacity of Indigenous peoples to participate and successfully negotiate the possible outcomes that the Plan allows for to date.

In conclusion, the NT *Water Act* has still not been amended to make it conform to the NWI, although good progress has been made at the local planning level. The latest advice is that a draft amendment Bill for public comment may be due for release by mid calendar year 2011.[668]

Conclusion

The most comprehensive compliance with the Indigenous provisions of the NWI are not to be found in the three jurisdictions of northern Australia which is the subject of this Report but in New South Wales. The Parliament and Government of that State have recognised Indigenous interests at a number of levels. These include in the primary water management legislation - the *Water Resource Management Act 2000,* at a policy level and water planning and licensing level. The objects of the Act are specific and include the following:

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[666] Ibid 36.
[667] Ibid 10.
[668] Per comms with NT Director of Water Resources, February 2011.

> (iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,[669]

It is noticeable that in terms of the objects of the Act that Aboriginal interests are not subsumed under general environmental, culture and heritage objects,[670]and in relation to the principles of water management under the Act - Aboriginal heritage is also specifically and separately recognised:

> (e) geographical and other features of indigenous significance should be protected[671]

There is recognition of Indigenous water interests in the State Water Management Outcomes Plan, allocation of water for native title holders, specific licences for cultural and commercial purposes and the establishment of a Water Trust to "provide an increased level of Aboriginal participation in the water market and to assist water related enterprises."[672]

The NSW legislation and practice while advanced is not ideal, as there remain many practical problems discussed in the literature on the situation in NSW, which are beyond the scope of this report.[673]

The Northern Australia Land and Water Taskforce in its Final Report in December 2009 stated:

> In the National Water Initiative we have an effective and robust framework for the planning and sustainable management of water resources, but implementation across northern Australia has been too slow.[674]

In relation to Indigenous peoples rights and interests in water the Taskforce recommended:

> Recommendation 12: The allocation of water rights under statutory water plans should explicitly recognise Indigenous Peoples' rights and interests in water.[675]

To ensure this is achieved it will be necessary to make this a requirement for the content of water plans in the relevant water management legislation in

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669 *Water Resource Management Act 2000* s3(c)(iv).
670 These are all separately listed objects in section 3 of the Act.
671 *Water Resource Management Act 2000* s 5(2)(e).
672 Indigenous Interests and the National Water Initiative (NWI): Water Management, Reform and Implementation Background Paper and Literature Review for NAILSMA Dr. Sue Jackson NAILSMA & CSIRO Sustainable Ecosystems October 2007 at 76.
673 Ibid at 75-80 and generally see Behrendt, J. and Thompson, P. 2004. The recognition and protection of Aboriginal and interests in New South Wales rivers. Journal of Indigenous Policy, 3: 37–140.
674 Northern Australia Land and Water Taskforce Final Report December 2009 at iii. Preface by Chairperson.
675 Ibid 4.

each jurisdiction. It should also generally be a requirement in the legislation as it would appear that many areas will not be subject to a formal water plan in the foreseeable future in northern Australia.

Lastly, I note the views of two commentators in this area:

Firstly, the late Peter Cullen who observed that the NWI is also of relevance to Indigenous people as it is "based upon using the best available knowledge to manage Australia's water resources, and this includes Indigenous knowledge, as well as the knowledge from science and elsewhere".[676] Clearly, this opportunity hasn't been taken given the comments of the NWC concerning the lack of depth in engagement with Indigenous people in the water planning process. There are significant resourcing problems in ensuring the effective participation of Indigenous people in the water management planning process.

Secondly, as Dr Sue Jackson has stated the drafting and implementation of national guidelines would assist in understanding and achieving the outcomes delineated in the NWI.[677]

In summary, at the legislative level there is a complete lack of implementation of the Indigenous provisions of the NWI in Western Australia and the Northern Territory. There is partial compliance in Queensland. The "legislative level" refers to the main water management legislation in each jurisdiction. There are some encouraging signs in both the Northern Territory and Queensland in respect of recent statutory water plans. In Western Australia, it is apparent that government is very aware of the "informal" nature of its implementation of the NWI Indigenous provisions but none of the requirements are legally required under Western Australian law at this stage.

Recommendations

Finally, specific recommendations include that:

- national guidelines and standards for best practice to implement the Indigenous provisions of the NWI be devised by agreement between NAILSMA and the respective governments in northern Australia;

- that water management legislation in the northern jurisdictions be amended in accordance with those guidelines.

In particular it should be noted that:

- Queensland's implementation is the most advanced as it provides for recognition of Indigenous interests in its water management legislation and partially implements the requirement to meet Indigenous economic

[676] Indigenous Interests and the National Water Initiative op cit at 63.
[677] Indigenous Interests and the National Water Initiative op cit at 6.

needs from the consumptive pool, via the *Cape York Peninsula Heritage Act 2007.*

- There is no recognition of native title rights to take and use water for non-commercial purposes in water plans or water management legislation in any jurisdiction (contra clause 53 of the NWI).

- There is no accounting for native title water use in water plans, although some plans include Indigenous subsistence use in the environmental allocation.

- The NWI includes a requirement for an Indigenous allocation of water for commercial use and this is not widely recognised nor implemented (paragraph 25 of the NWI).

3. So far as possible, consider implications of proposals for revision of water law in northern Australian jurisdictions, especially provisions under consideration for treating Indigenous interests and including potential for Indigenous allocations from the consumptive pool

Introduction

This section describes the major proposals that have arisen recently for water law reform in the northern Australian jurisdictions. In broad terms

these arise from Indigenous peoples' aspirations and from the Council of Australian Governments' agreement to implement the *National Water Initiative* (NWI). Some Indigenous groups and other parties also seek full implementation of the Indigenous components of the *National Water Initiative*.

Indigenous groups have in particular sought the:

- the right to the recognition of a cultural flow in the context of water planning; and

- the establishment of what has been called a Strategic Indigenous Reserve of water especially in relation to the consumptive pool. The consumptive pool is that water allocated for commercial purposes in the context of the water planning framework under the *National Water Initiative*.

Some of the proposals effectively merge these two points. This reflects to some degree the critique that water legislation and policy promotes the disaggregation or separation of water from the broader notion of "country" in the Aboriginal world-view. Given this general criticism I thought it important to look at the general water planning framework with this in mind initially. Behrendt and Thompson also make this general criticism but do examine the adequacy of various components of the water planning framework with respect to Indigenous interests in NSW which I will look at later in this section of the report.[678]

At a meeting of Indigenous people in northern Australia in 2009 a statement concerning Indigenous interests in water was produced entitled the *Mary River Statement*, which included the following statement:[679]

> …the fundamental principle that water, land and Indigenous people are intrinsically entwined.

This reality or world-view has been described in any number of reports. It is also apparent in a number of international declarations concerning Indigenous rights to water – such as the *Indigenous Peoples Kyoto Water Declaration* made at the Third World Water Forum in March 2003.[680]

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[678] Behrendt, J. and Thompson, P. 2004. The recognition and protection of Aboriginal and interests in New South Wales rivers. *Journal of Indigenous Policy,* 3: 37–140. The authors examine the *Water Management Act, 2000* (NSW) which whilst it predates the *National Water Initiative* agreement captures all elements of the NWI in relation to Indigenous interests.

[679] *Mary River Statement 6th August 2009* at page 1. Available at http://www.nailsma.org.au/nailsma/forum/downloads/Mary-River-Statement.pdf (accessed 11/8/10).

[680] Available at http://portal.unesco.org/science/en/ev.phpURL_ID=3886&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 21/8/10).

> The Kyoto declaration also recognises the right of Indigenous peoples interests in water and for decisions about water to be made with the informed consent of Indigenous people obtained through culturally appropriate consultations.[681]

To quote from just one report concerning Indigenous people from Maningrida and freshwater in northern Australia in relation to Indigenous values and property rights:

> The notion of country from a regional Aboriginal perspective is inclusive of fresh water, a form of inclusiveness that goes well beyond the western notion of riparian right to include all surface and ground water. While from a western legal perspective land and water can be separated as distinct forms of property (as it is in the National Water Initiative), from a customary Aboriginal perspective the term 'country' actually incorporates water and land. In describing the life-saving virtues of running waters at the start of the wet season, Borsboom (1978a) highlights this interdependence in ceremonial contexts: song cycles shift seamlessly between land based and water Dreamings, beginning sometimes with land Dreamings, sometimes with water.[682]

> In particular, in marked contrast to the market focus of the dominant Australian framework for managing fresh water, there is no Indigenous distinction between land and water property rights. This places the dominant regional view about water at loggerheads with the current dominant view of the Australian state incorporated in formal laws governing water.[683]

The difficult situation that arises for Indigenous interests is then, having to deal with the reality of modern water planning in accordance with the *National Water Initiative* and this inherent disaggregation of water from the whole notion of country. Although it is correct to state that water planning as a method of resource assessment is holistic in the sense that it is premised upon ensuring sustainable environmental flows but then the framework separates water from land and culture and utilises it as a tradable commodity.[684] This is where the notions of cultural flows and an indigenous reserve of water deserve closer examination, especially in light of the requirement for northern Australian jurisdictions to amend water management legislation and policies to reflect the agreed requirements of the *National Water Initiative.*

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[681] Behrendt, J. and Thompson, P. 2004. The recognition and protection of Aboriginal and interests in New South Wales rivers. *Journal of Indigenous Policy,* 3: 37–140 at 65.

[682] J.C. Altman, J.C. & Branchut, V *Fresh Water in the Maningrida Region's hybrid Economy: Intercultural Contestation over Values and Property Rights* CAPER WORKING PAPER No. 46/2008 at 10. http://caepr.anu.edu.au/system/files/Publications/WP/CAEPRWP46_0.pdf (accessed 11/8/10).

[683] Ibid 34.

[684] Personal communications Professor Goddard November 2010.

The *National Water Initiative* also requires that water plans "will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed."[685] I have dealt with the NWI and Indigenous interests in more detail in section 2. The question arises as to whether it is possible to achieve this to any extent. I think it is, at least to the extent that any legal system with quite different values can recognise and accommodate to some extent another legal system based on a different world-view and values. I propose to deal with this question during the course of this section of the report, as I think it goes to the heart of any attempt to meet Indigenous proposals in relation to water reform and to fully implement the NWI with respect to Indigenous interests.

The key is to mandate in the water management legislation of the respective jurisdictions the two proposals for water reform raised by Indigenous interests, that is a right to a cultural flow and an indigenous reserve of water. The other key issue is to ensure that at a practical level effective engagement with Indigenous people takes place in drawing up and implementing water plans and that such plans do properly recognise and take into account Indigenous interests. This requires the provision of adequate resources and utilization of culturally effective and appropriate communication and negotiation to enhance the possibility of the effective involvement of Indigenous people in these processes.

At one level the NWI is clearly contradictory to the Indigenous world view. As it requires the separation of environmental flows from commercial allocations of water use in water planning and facilitates the 1994 Council of Australian Governments' (COAG) water reform framework, which entails the separation of water use from the ownership and occupation of land.

Generally, a water allocation plan seeks to protect cultural values as part of the maintenance of a sustainable environmental flow. This is despite the fact that environmental and other public benefit outcomes, the latter including indigenous and cultural values are separately defined within the *National Water Initiative.* To quote from the relevant part of the NWI Agreement:[686]

> *environmental and other public benefit outcomes* – environmental and other public benefit outcomes are defined as part of the water planning process, are specified in water plans and may include a number of aspects, including:
>
> - *environmental outcomes*: maintaining ecosystem function (eg. through

[685] Paragraph 52 (ii) of the *Intergovernmental Agreement on a National Water Initiative* is headed Indigenous Access and is in the following terms: 52. The Parties will provide for indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, 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.

[686] *National Water Initiative* Agreement at 29- Schedule B (i) Glossary of Terms.

periodic inundation of floodplain wetlands); biodiversity, water quality; river health targets;

- *other public benefits*: mitigating pollution, public health (eg. limiting noxious algal blooms), indigenous and cultural values, recreation, fisheries, tourism, navigation and amenity values.

At the same time the *National Water Initiative* water planning framework (if properly executed) provides for the maintenance of truly sustainable environmental water flows then this must go a significant way to ensuring the objective maintenance of the Indigenous world-view. As has been pointed out by the Indigenous Water Policy Group in northern Australia "Maintaining water flows is fundamental to ensuring the vitality and existence of Indigenous heritage and spirituality".[687]

To the extent that a water access entitlement can be allocated for Indigenous specific purposes from the consumptive pool if the environmental and cultural flow is properly safeguarded then such a water entitlement can then still in a practical sense at least partly meet Indigenous economic and cultural needs and aspirations, which are intertwined in any event according to the Indigenous world view.

On one view, there would appear to be no practical need to separately classify environmental flows from cultural flows in water planning given the obvious connections between the two concepts. In many respects, the two concepts are so inter-related as to not be capable of separation analytically certainly from an Indigenous perspective. But given the disaggregation inherent in the water planning process the recognition of a cultural flow has a particular significance and function.

The importance in a non-indigenous political and legal context lies in the clear and unambiguous recognition of the Indigenous specific cultural significance of water. If it is separately recognised and accounted for and clearly linked with the environment and Indigenous subsistence and more "modern" economic needs and aspirations then the sum of the parts goes some way to recognising the whole in my opinion– the Indigenous world view of the unity of country be it in the modern *National Water Initiative* water planning context.

This is seemingly not possible at a practical level in already over-allocated systems. The practical difficulties of the implementation of Aboriginal cultural access water licences in New South Wales appear to be evidence of this problem, until the rivers systems there are brought back to a properly

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[687] North Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group , November 2009 *A Policy Statement on North Australian Indigenous Water Rights* http://www.nailsma.org.au/nailsma/forum/downloads/Water-Policy-Statement-web-view.pdf (accessed 10/8/10)

sustainable flow of water.[688] That is, of course unless cultural licences are given priority and are ensured a minimum flow.[689]

The other potential practical benefit that may come from the full implementation of the NWI planning framework and the COAG water reforms lies in the fact that not all Indigenous peoples will achieve legal recognition of their land rights or native title in the foreseeable future. The separation of land from water in terms of commercial usage allows those dispossessed Indigenous groups an opportunity to obtain allocations for use and trading without land title. If the concept of an Indigenous reserve were extended to include using water access entitlements for cultural purposes as well then they could also have a role in the management of water to that extent for economic and cultural purposes.

To summarise, the recognition of a right to a cultural flow and the allocation of an Indigenous reserve from the consumptive pool, on the basis that the use of this water is determined by Indigenous people can contribute to the effective implementation of the NWI. It can also enable Indigenous people with no legally recognised land rights or native title to be involved in and benefit from water planning in the NWI framework.

I will now deal with the Indigenous proposals for water law reform, those from relevant governments including the NWI and the Northern Australia Land and Water Taskforce recommendations made in its Report in December 2009 which also concerned indigenous interests in water.[690]

Indigenous proposals for water law reform

The Indigenous groups that have advocated for change or "revision" to water law in northern Australia include the:

- The *Indigenous Water Policy Group* (IWPG) in its policy position entitled *"A Policy Statement on North Australian Indigenous Water Rights"* sponsored by the Northern Australian Indigenous Land & Sea Management Alliance (NAILSMA) released in March 2010;[691] and

- The *Mary River Statement* of August 2009 released by approximately 80 Indigenous water experts from northern Australia;[692] and

- *The Animater Story* –Provision for Cultural Values in Water

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[688] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2008* Australian Human Rights Commission 2009 at 189.

[689] Personal communication - Professor Goddard November 2010.

[690] A report to Government from the Northern Australia Land and Water Taskforce December 2009 *"Sustainable development of northern Australia*" http://www.nalwt.gov.au/files/337281_NLAW.pdf accessed 10/8/10)

[691] http://www.nailsma.org.au/nailsma/forum/downloads/Water-Policy-Statement-web-view.pdf (accessed 10/8/10)

[692] *Mary River Statement* available at http://www.nailsma.org.au/nailsma/forum/downloads/NAILSMA_Mary-River-Statement_Web.pdf (accessed 10/8/10).

> Management[693] by the Anmatyerr Water Project Team and released in 2008.

The IWPG Statement advocates for the separate allocation of a cultural flow to Indigenous interests and adopts the definition devised by the Murray and Lower Darling Rivers Indigenous Nations (MLDRN) in the 2008 Echuca Statement which is as follows:

> Cultural Flows are water entitlements that are legally and beneficially owned by Indigenous peoples and are of sufficient and adequate quantity and quality to maintain the spiritual, cultural, environmental, social and healthy livelihoods of Indigenous peoples of northern Australia ...[694]

In relation to the consumptive pool and the involvement of Indigenous people in commercial uses of water it further advocates for:[695]

- An Indigenous specific entitlement to water from the consumptive pool;
- A revenue stream from the use of water generally for commercial purposes that should go to traditional owners in recognition of their traditional ownership of such waters in accordance with Indigenous law;
- The establishment of an Indigenous Water Fund to allow the purchase of consumptive water for Indigenous groups that don't otherwise benefit from the proposals – such as in fully or over-allocated systems;
- That the planning and management of water resources be done jointly between traditional owners and government;
- The importance of including Indigenous knowledge in water planning;

The *Mary River Statement* is a broader document of principle consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (as is the IWPG Policy). It calls for the recognition of Indigenous values; the recognition of the right to self determination including the need for free and informed consent prior to the approval of developments that affect Indigenous interests in water and other natural resources.

The Anmatyerr Story – Provision for cultural values in water

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[693] Rea, N and the Anmatyerr Water Project Team (2008). Provision for Cultural Values in Water Management: The Anmatyerr Story. Land & Water Australia Final Report, February 2008. available at http://lwa.gov.au/files/products/social-and-institutional-research-program/pr081464/provision-cultural-valuesin-water-management-anmat.pdf (accessed 10/8/10).

[694] North Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group, November 2009 *A Policy Statement on North Australian Indigenous Water Rights*

[695] IWPG Policy Statement at paragraphs 3,4 and page 1.

management

The Anmatyerr people's traditional country is near Ti Tree in the Northern Territory. The Anmatyerr people have called for an agreement over water use with the Northern Territory Government – entitled the Anmatyerr Water Agreement. They propose that cultural values be provided for in water management plans by the inclusion of five (5) main categories:

- Water Allocation;
- Use of Anmatyerr Place Names, Protocols and Language;
- Anmatyerr Access, Input in Land Management and Co-existence;
- Culturally based Livelihoods and Skills Exchange;
- Anmatyerr Water Governance and Participation;

These categories it is said reflect the interdependence of cultural and economic values. The Anmatyerr people in this proposed agreement advocate for a water allocation to themselves as the traditional owners of the water for:

- Non-consumptive use to sustain the linked environmental and cultural values (unlicensed); and
- Consumptive use to support future Anmatyerr enterprises (licensed).

They note that with respect to the last point that:

> This banking of water so as not to preclude future options might be managed under an Indigenous Water License scheme. Those businesses all have a cultural basis and the water not only provides economic value but a range of other outcomes that support cultural values, health and well being.[696]

It is suggested that this is best delivered by the negotiation of an agreement with government and other land users as the best means of ensuring respect for and involvement of traditional owners consistent with their own laws and customs. To quote further from the Anmatyerr Report:

> an Anmatyerr Water Agreement that encapsulates the ways by which cultural provisions can be delivered:
>
> (1) arrangements for non-volumetric provisions (language, protocols, access and co-existence, livelihoods, reformed water governance);
>
> (2) a non-licensed volumetric surface water and groundwater allocation that will sustain water places and associated assets of cultural and environmental value;
>
> (3) and a licensed volumetric water allocation for Aboriginal

[696] *The Animater Story* –Provision for Cultural Values in Water Management at 70.

> enterprises within the assessed sustainable resource for future economic use.[697]

It is also recommended that this agreement based approach should incorporate appropriate protocols to ensure appropriate Indigenous decision - making:

> Protocols - Anmatyerr Law dictates that all decisions about land and water need to go through the senior Kwertengwerl and Merekartwey responsible for the place or places in question (see Section 3.2). Anmatyerr seek a process where the correct Kwertengwerl are involved in decisions, where the younger generation can be engaged to communicate between them and other people, and where all parties are operating on an equal level.[698]

An agreement based approach to natural resource management, environmental protection and cultural heritage protection is a well known practice in Australia. It occurs in a variety of forms such as in the Regional Forest Agreements process, the Indigenous Land Use Agreements framework in the *Native Title Act, 1993*; the Indigenous Protected Areas program; property agreements and covenants covering land and water use in the particular areas covered by such agreements.[699]

This proposal provides a model, some detail and direction to the general requirement in the *National Water Initiative* to ensure the incorporation of Indigenous "social, spiritual and customary objectives in water plans and strategies to achieve these objectives".[700]

Northern Australian Governments proposals to reform water law and the National Water Initiative

In large measure existing government proposals involve the completion of the implementation of the *National Water Initiative*. There are other government proposals such as the "Living Rivers Strategy" in the Northern Territory. After making some general comments concerning compliance with the *National Water Initiative* I will then discuss each provincial jurisdiction in turn.

The areas of commitment in the NWI to recognise Indigenous interests are:[701]

- Statutory recognition of "Indigenous and cultural values" in water planning;

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[697] Ibid 68.
[698] Ibid 72.
[699] For more detailed reference to some of these see Bates, Gerry *Environmental Law in Australia* 6th Edition LexisNexis Butterworths Australia 2006 at 111 [4.37]; 283 [10.45].
[700] Ibid 14.
[701] See section 2 of this report where these matters are explained in greater detail.

- Indigenous allocation of water from the consumptive pool;
- Indigenous representation in water planning;
- Indigenous social, spiritual and customary interests included in water plans;
- Allocation of water to legally recognized native title holders; and
- Water Trading and Indigenous Cultural Heritage - provides for the restriction of water trading where it impacts upon "features of major indigenous cultural or spiritual heritage."

The inter – governmental agreement the *National Water Initiative* forms an important baseline for an understanding of government "proposals" to change water law to better recognise Indigenous interests. This is despite the fact that agreement was struck without the involvement of Indigenous representatives.

In my opinion there is some contention surrounding the *National Water Initiative* and the extent and manner in which it requires Indigenous interests in relation to water to be recognised. In particular as I point out in section 2 there is a view that recognition is only about customary values, Indigenous rights to water are not recognised and there are no commercial Indigenous interests to be recognised. There is no doubt room for legitimate differences of opinion as to some of the obligations under the agreement because of the discretionary and somewhat ambiguous nature of some of the language used.[702] Unfortunately, even where the requirements are clear such as those in relation to the recognition of native title rights to water none have been recognised in any water plans in northern Australia to date. I will come back to this issue.

This contention in my opinion goes to three main issues.

Firstly, the extent to which the NWI requires actual recognition of Indigenous interests in water law, that is, in the respective water management legislation in each jurisdiction. Secondly, whether there is a requirement to recognise Indigenous *rights* to water at all and thirdly whether there is a requirement to recognise an allocation from the consumptive pool for Indigenous commercial purposes. I base these conclusions on my research, experiences and observations of Indigenous representatives and government officials during the course of this research project.

These points can be answered by reference to the actual terms of the *National Water Initiative* Agreement. In relation to the first point the NWI agreement requires "*statutory provision* (my emphasis) for *environmental*

[702] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2008* Australian Human Rights Commission 2009 at 182.

and other public benefit outcomes". Public benefit outcomes are defined to include "indigenous and cultural values". I read the words "Indigenous and cultural values" to mean indigenous values which include indigenous cultural values in the context in which is written.[703] The only other possible interpretation is that it means Indigenous values and other non-indigenous cultural values. This has the same meaning as first suggested as Indigenous values would include the cultural as well as social and economic. Only in the Queensland *Water Act, 2000* has such a concept been achieved to any extent in northern Australia, which whilst it doesn't define those Indigenous interests or values in a comprehensive manner it doesn't limit them either.[704]

In relation to the requirement to recognise Indigenous rights to water the *National Water Initiative* requires the accounting for and indeed the "need to allocate water to native title holders". There is no doubt that native title rights to take and use water legally determined in accordance with the *Native Title Act, 1993* are Indigenous rights to water. The relevant clauses of the NWI are as follows:

> 53. Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth *Native Title Act 1993*.
>
> 54. Water allocated to native titleholders for traditional cultural purposes will be accounted for.

There is no water plan in northern Australia that I have examined that has accounted for or included such an allocation to date. This is despite the fact that native title rights to water have been recognised in the Courts prior to and since the commencement of the *National Water Initiative* Agreement. There is a "potential" allocation to native titleholders in the Water Allocation Plan for the Tindal Limestone Aquifer, Katherine 2009 – 2019 in the Northern Territory described in section 5 of this report. Native title rights are Indigenous rights to water and the NWI requires recognition of them.

In relation to the third point I have made the *National Water Initiative* requires government signatories to recognize Indigenous needs in relation to water access entitlements and management. The relevant paragraph is in the following terms:

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[703] NWI Agreement paragraph 23 iii) and Schedule B (i) Glossary of Terms.

[704] See *Water Act, 2000* Chapter 2 of the Act headed Allocation and sustainable management defines sustainable management as amongst other things:(v) recognising the interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning;

> 25. The Parties agree that, once initiated, their water access entitlements and planning frameworks will:
>
> ix) recognise indigenous needs in relation to water access and management;[705]

Water access entitlements are defined in the Glossary of Terms in the NWI[706] as an entitlement to exclusive access to water for commercial purposes in a particular water plan.[707] In full the definition is in the following terms:

> *water access entitlement* – a perpetual or ongoing entitlement to exclusive access to a share of water from a specified *consumptive pool* as defined in the relevant *water plan*.

The consumptive pool (as defined) is the water allocated in a water plan "for private benefit consumptive purposes including irrigation, industry, urban and stock and domestic use."[708] In other words, this is the water allocated in a plan for commercial purposes.

The National Water Commission in 2009 highlighted the fact that there is an assumption that environmental flows will meet indigenous requirements and that economic opportunities are not being provided for in terms of water access entitlements.[709] It has recommended that Indigenous economic interests should be "more effectively" incorporated into planning.[710] Significantly, the National Water Commission has also recommended that:

> Jurisdictional processes should also make clear how Indigenous groups can pursue their legitimate economic objectives.[711]

It is correct that clause 25 of the NWI does not mandate the form in which indigenous needs are to be met in this regard except that a water access entitlement will issue. Thus creating an Indigenous specific reserve of a specified amount in a water plan in Cape York[712] is one means by which this can be achieved. One or more entitlements (licences to use the water) can then issue to Indigenous entities or individuals for economic purposes.[713]

Therefore there seems little reason to doubt that water from the

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[705] NWI Agreement at page 5.
[706] Schedule B (i) to the NWI Agreement.
[707] Ibid NWI 30.
[708] See the definitions of "consumptive pool" and "consumptive use" in the Glossary of Terms – Schedule B (i) page 29 NWI. The nature of a water access entitlement is more specifically set out in the body of the NWI agreement at paragraphs 28-34.
[709] National Water Commission 2009, *Australian Water Reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative*, NWC, Canberra at page121 paragraph 6.3.3.1
[710] Ibid vii.
[711] Ibid recommendation 1.4 at page 27.
[712] *Cape York Peninsula Heritage Act 2007* (Qld) s 27.
[713] For an example of this see *Water Resource (Mitchell) Plan 2007* Department of Environment and Resource Management, Queensland Government November 2009 sections 23,24,27,28.

consumptive pool for Indigenous needs is also a requirement of the NWI.

National Water Initiative and the *NSW Water Management Act 2000*

It is instructive to have regard to the analysis of the NSW *Water Management Act* by the previously mentioned authors Behrendt and Thompson. [714] This legislation represents the most advanced form of statutory recognition of Indigenous interests based on the principles of the NWI water planning framework.

The authors conclude that the content of water plans often "merely seek to equate Aboriginal interests in waters as being co-extensive with environmental strategies. Accordingly, no specific strategies are developed to protect those interests."[715] This occurs in northern Australia, except as discussed further below in relation to Queensland. The requirement for separate recognition of cultural and environmental matters is not yet recognized as a matter of law or policy in the north.

They also found that there was often no allocation of water flow for native title interests or the protection of Indigenous sites.[716] In addition importantly there are no performance indicators or benchmarks for achieving Indigenous outcomes in the plans examined in New South Wales.

Nonetheless some important achievements have taken place be it in the situation of mostly over-allocated systems and large numbers of pre-existing licences, which take priority over Indigenous interests. In one water plan some 50% of what are called unassigned Total Daily Extraction Limits were assigned to Indigenous interests for both economic and cultural purposes.[717]

The authors conclude with a salutary warning:

> The legislation itself does not clearly identify and recognise Aboriginal interests in the river systems concerned. That recognition is left to be determined in competition with other users who already have their own interests clearly identified. The protection of these interests is likewise not assured. They, too, are left to be accommodated in competition with other self- interested stakeholders. Such processes become a barrier if Aboriginal people are not adequately resourced to put forward their views. The end result is that despite grand statements and over arching objectives, these goals simply become illusory.[718]

This illustrates the need to ensure water legislation reform in northern Australia consists of specific statutory requirements in water management

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[714] Behrendt, J. and Thompson, P. 2004. The recognition and protection of Aboriginal and interests in New South Wales rivers. *Journal of Indigenous Policy,* 3: 37–140; 101,102.
[715] Ibid 103.
[716] Ibid 104,105.
[717] Ibid 101.
[718] Ibid 107.

legislation. These requirements must be mandated in the local water allocation plan to ensure Indigenous recognition across the range of indigenous interests, values and needs at the local water resource level. As opposed to *only* broad objects and principles going to Indigenous recognition in the legislation.

Water allocation to Indigenous interests from the consumptive pool

An Indigenous specific allocation from the consumptive pool is the main area where proposed changes to water law, remains to be undertaken in a comprehensive manner in each northern Australian jurisdiction.

In Western Australia and the Northern Territory there are current commitments to complete implementation of the *National Water Initiative* (NWI) in the respective NWI Implementation Plans of those jurisdictions. This will involve new legislation entitled the *Water Resources Management Act* (WA) in Western Australia and amendments to the *Water Act, 1992* (NT) respectively. The Queensland position is that existing regimes provide the necessary basis to meet the Indigenous access requirements of the NWI".[719]

Queensland is the only jurisdiction that has specific statutory recognition of Indigenous "interests" in relation to water planning in its primary water management legislation - the *Water Act, 2000* (Qld). A primary purpose of the Queensland *Water Act, 2000* is to establish a system for the "planning, allocation and use of water" that advances the "sustainable management and efficient use of water".[720] It is within this primary purpose that Indigenous interests are recognised in the Act as follows:

> (v) recognising the interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning;[721]

In addition in Queensland, there is statutory recognition in one geographic area – the Cape York Peninsula of the allocation of water from the consumptive pool to meet Indigenous economic aspirations. This is mandated as a requirement in each water resource plan or wild river declaration for that region pursuant to the *Cape York Peninsula Heritage Act, 2007* (Qld).[722] I have dealt with this Act in Section 1 Part E of the Report. It is notable that this requirement does not apply throughout Queensland.

At the level of subsidiary legislation – legally binding water plans in Queensland it is also common to mandate as an outcome for the water plan "support" for Indigenous cultural values.[723] The *Water Act, 2000* requires the

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[719] See page 19 of section 2 of this Report and Queensland's National Water Initiative State Implementation Plan, January 2006 at 27. This was noted in Section 2 of this Report.
[720] *Water Act, 2000* (Qld) s10 (1).
[721] Ibid section 10 (2)(c)(v).
[722] *Cape York Peninsula Heritage Act 2007* s27.
[723] As an example see *Water Resource (Mitchell) Plan 2007* s12 (j).

responsible Minister when preparing a draft water resource plan to consider:[724]

- the State's future water requirements, including cultural, economic, environmental and social requirements;
- cultural, economic and social values; and
- advice from the community reference panel;

Western Australia

Western Australian legislation does not yet provide for legally enforceable water allocation plans and does not provide for the concept of "water access entitlements in a consumptive pool" in its existing legislation. [725] Full implementation of the *National Water Initiative* has someway to go in Western Australia. This makes commentary somewhat artificial at this time.

There are three main documents concerning proposals to change water law in Western Australia. The most recent document is entitled *Discussion Paper Water Resources Management Options*, and was released by the incoming Western Australian government in November 2009.[726] The other two documents are the *National Water Initiative* and its associated Implementation plan. As mentioned in section 2 of the report as far as Indigenous interests are concerned Western Australia has a low level of compliance with the *National Water Initiative*.

The third is a policy position for water resources reform entitled *Blueprint for water reform*. Adoption of the *Blueprint for water reform* by government in February 2007 was the position of the former government,[727] which now may be superseded by the Discussion paper.

The *Blueprint for water reform* supports the concept of statutory water management plans. In respect of Indigenous interests it included the following:

- such plans "should take into account" what is described as Indigenous water entitlements through native title determinations "including cultural and economic values associated with water, that are documented in the planning process";[728]

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[724] *Water Act, 2000* (Qld) s47 (g), (h) and (i).

[725] *Discussion Paper Water Resources Management Options* Department of Water, Government of Western Australia at 7 and 29.

[726] *Discussion Paper Water Resources Management Options*, Department of Water Government of Western Australia, November 2009 available at http://www.water.wa.gov.au/Managing+our+water/State+water+resource+management+and+reform+program/Water+resources+management+options/default.aspx (accessed 2/8/10).

[727] *Government Response to A Blueprint for Water Reform in Western Australia* February 2007 available at http://www.water.wa.gov.au/firstdowPublic/DocViewer?id=38058 (accessed 2/8/10)

[728] Ibid at 6.

- water plans should include "economic, social, environmental and other public benefit outcomes" as described in the *National Water Initiative.* As previously mentioned public benefit outcomes in the NWI are defined to include "indigenous and cultural values".[729]

- water trading should be restricted where it infringes upon "Features of major indigenous, cultural heritage or spiritual significance as per Schedule G of the *National water Initiative*;[730]

- statutory water management plans not be the subject of any appeal process under any new Act.[731]

All items are consistent with implementation of the NWI except the latter point regarding appeal upon which the NWI is silent. The first point also mentions economic values with respect to native title recognition. In the NWI this aspect is not mentioned in the context of native title but is in terms of water access entitlements meeting Indigenous needs in clause 25 ix).

The first three of these items were to be achieved by inclusion within a statutory water management plans. The extent, to which this detail was to be reflected in any new legislation, is not clear. It is preferable, that requirements for water management plans are set out in sufficient detail in legislation to ensure those drafting and approving such statutory plans or subsidiary legislation, are required to meet these outcomes. This would also enhance the ability of Indigenous people to have legal remedies to ensure their interests are appropriately included in any water plan as the requirements would be legally binding in terms of inclusion within the plan.

For some time, consideration has been given to enacting the new water management legislation in Western Australia entitled the *Water Resources Management Act.* It is intended to abolish the *Rights in Water and Irrigation Act, 1914* (WA) and consolidate some seven pieces of legislation in the State concerning water into the above Act and an associated Act – the *Water Services Act*. Both Acts are in the drafting stage at the time of writing.[732] The Discussion Paper[733] concerning water law reform released in November 2009 in Western Australia stated in relation to the current legislation that:

> They are inconsistent and have outdated provisions, making them

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[729] See Schedule B (i) of the NWI Agreement at 29.
[730] Ibid No.48 at 22.
[731] *Government Response to A Blueprint for Water Reform in Western Australia* No. 14 at 11.
[732] http://www.water.wa.gov.au/Managing+our+water/Legislative+reform+program/default.aspx (accessed 19/3/10).There are two related Bills also called the *Water Services Bill* and *Water Corporation Amendment Bill.*
[733] Discussion Paper Water Resources Management Options, Department of Water Government of Western Australia, November 2009.

> difficult to understand.[734]

The Discussion paper concentrates on reforms to water planning which is essentially the implementation of the *National Water Initiative* requirements in that state.[735] It is acknowledged that legally binding water allocation plans are the main method, by which, water security for the environment and water allocations can be achieved.[736]

The paper does not include any reference to the need for legislative change or statutory recognition of the Indigenous related requirements in the *National Water Initiative*. In relation to native title, there are brief references to the need to recognise native title holders rights to use water and that any water allocation plan should protect "basic" rights including native title rights[737] to use water, and to take and use water for cultural and ceremonial purposes.[738] To quote from the discussion paper:

Existing legislation

> Under current legislation, there is no specific provision for Native titleholders' rights to water. While it would appear that Native titleholders do not require a licence under the *Rights in Water and Irrigation Act 1914*, the situation is not entirely clear.

Legislative option

> Native titleholders' rights to take and use water in accordance with traditional laws must be recognised. This would not include water for commercial purposes.[739]

The question whether native title holders need a licence to use water is covered in Section 1 Part A in relation to s 211 of the *Native Title Act, 1993*. A licence for taking and using water for subsistence and cultural purposes is not needed. The native title right to take and use water for non-commercial purposes has generally been of the following nature in Western Australia:

- A right to take water, for the purposes of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs;[740]

The Discussion paper also notes that:

> People should still be able to take water for their everyday needs

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[734] Ibid [1.1] at 1.
[735] Ibid at [1.3] commencing page 2.
[736] Ibid 28.
[737] Ibid 29.
[738] Ibid 36.
[739] Ibid 37.
[740] *Mark Anderson on behalf of the Spinier People v State of Western Australia* [2000] FACT 1717.

> without the need to get approval. Typically these uses include domestic use, stock watering and fire fighting. The volume of water taken for these purposes is normally minor and widely distributed, so impacts are negligible.[741]

It should be made clear in the legislation that the native title right for non-commercial purposes does not require a licence. Such a provision would function similarly to the existing rights of all owners and occupiers in Western Australia but adapted to the nature of the native title right. This change would ensure equal treatment of native title holders with owners or occupiers generally as native title holders are not included within the definitions generally of owners or occupiers that have statutory riparian type rights.

At the level of water allocation plans "cultural outcomes" are acknowledged along with environmental and recreational outcomes as being necessary to include within water allocation plans.[742] There is no mention of the concept of cultural flows as a means of maintaining Indigenous values or cultural outcomes nor for that matter the general NWI based definition of "environmental and other public benefit outcomes" that includes indigenous and cultural values. Although the Indigenous native title right to take and use water for cultural and ceremonial purposes is recognised.

Western Australia - Consumptive pool and Indigenous interests

The Western Australian position currently is not in support of an Indigenous specific reserve of water from the consumptive pool. To quote from the Western Australian Department of Water's advice:

> The Department of Water's established water licensing process, water allocation planning process and supporting policies provide clear pathways for access to water for commercial use by Indigenous water users as defined under the Rights in Water and Irrigation Act 1914.[743]

There are also existing legal constraints upon the grant of licences for the commercial use of water to Indigenous interests as those persons who can hold such licences are restricted to the owners and occupiers of land.[744] The definitions of these words do not include native title holders. This could be

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[741] Discussion Paper Water Resources Management Options at 35.

[742] Ibid 28.

[743] Copied from the power point presentation of the Director, Strategic Policy and Water Services Western Australia Department of Water to the Indigenous Water Policy Group meeting in Darwin, March 2010.

[744] *Rights in Water and Irrigation Act* (WA) s 26D Artesian/non-artesian well (in a proclaimed area need license)(3) A license shall be deemed to be held by, and shall operate for the benefit of, the lawful owner and the occupier, for the time being, of the land whereon the well is sunk or is proposed to be sunk. Schedule 1 — Licensing and related provisions [s. 5C(1)(d) and (3)]
3. Persons who are eligible to hold licenses A person is eligible to hold a licence if —
(a) the person is an owner or occupier of the land to which the licence relates;

subject to challenge under the *Racial Discrimination Act, 1975* (Cth). Equity would require that at least the water management legislation is amended to recognise native title holders as coming within the definition of owners or occupiers and thus be able to hold water licences for commercial purposes in the same manner as other landholders.

The 2009 Discussion Paper proposes that the notion of a consumptive pool is not necessary where water demand is low or where the nature of the water source is inappropriate.

> A consumptive pool is less suited to resources where the demand for water is low or the characteristics are unfavourable, such as for fractured rock aquifers. In these circumstances, licensing is more appropriate.[745]

This requires the consideration of alternative approaches to address indigenous economic needs such as commercial licences being simply reserved for Indigenous interests.[746]

Northern Territory

The Water Act, 1992 the primary water management legislation in the Northern Territory is currently being reviewed by the Northern Territory government. An exposure draft of proposed amendments to the Act is due to be released for public comment in the middle of 2011. At the time of writing proposed amendments are unknown.

A Discussion paper concerning a possible "Living Rivers" strategy to conserve rivers and their surrounds gives some indication as to government direction. It includes proposals to:

- enact new native vegetation management legislation and amendments to the *Water Act* to "link water allocation planning with vegetation management/retention planning and improve the water allocation planning processes in areas such as environmental flows";

- increase levels of protection "for significant aquatic systems and their values"; "better supporting conservation and land management on private lands";
- the declaration of "individual Living Rivers" under the *Water Act*; and

- to develop a Northern Territory Water Strategy "to set other parameters for review of the Water Act".[747]

The Northern Territory does not have a jurisdiction wide water management

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[745] Ibid 40.

[746] Personal communication Professor Goddard November 2010.

[747] *Living Rivers Sustaining landscapes, livelihoods and lifestyles* A discussion paper for framing a Living Rivers Strategy Department of Natural Resources, Environment, The Arts and Sport April 2009 at 3.

policy, unlike Western Australia and Queensland.

The current *Water Act* is acknowledged by the government to not fully comply with agreed *National Water Initiative* requirements. In the Northern Territory's Implementation Plan dated June 2006 it is stated that:

> "The Northern Territory intends to complete full implementation of the NWI, as initially detailed by 2010."[748]

None of the requirements of the NWI concerning Indigenous issues have been *specifically* incorporated into the water management legislation in the Northern Territory. Although, if there is a Water Plan in place then the concept of "beneficial use" in the Northern Territory *Water Act* includes the maintenance of cultural values as one of the objects of a water allocation plan.

A water plan is to ensure that "water is allocated within the estimated sustainable yield to beneficial uses".[749] The phrase "beneficial uses" is a key term in the Act that includes a cultural component being – "to provide water to meet aesthetic, recreational and cultural needs".[750] To that extent, if a water plan is in operation it may be said that Indigenous cultural concerns have received some statutory recognition, be it in a non-specific manner.

There is no current requirement in the *Water Act* that meets the obligations outlined in paragraph 25 of the NWI for an Indigenous allocation to meet Indigenous needs from the consumptive pool. As previously mentioned the NWI doesn't mention an Indigenous reserve per se being established from the consumptive pool but does clearly recognise the need to meet Indigenous economic needs. Importantly though, there has been an initial recognition of the concept of an Indigenous reserve in some recent Water Plans in the Northern Territory, be it in a limited manner. I have discussed the detail of this in section five of this report.

The only recent publicly available proposals for reform that relate to water are contained within the Northern Territory Government's Discussion Paper on "Living Rivers".

Living Rivers – Northern Territory

The 2009 *Living Rivers Sustaining landscapes, livelihoods and lifestyles* paper[751] proposes a "Living Rivers" Strategy to achieve 5 stated

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[748] Northern Territory Implementation Plan for the Intergovernmental Agreement on a National Water Initiative – Northern Territory Government June 2006 at page 9 paragraph 3.

[749] *Water Act* s22B (5)(a).

[750] Ibid s4 (3)(e).

[751] *Living Rivers Sustaining landscapes, livelihoods and lifestyles* A discussion paper for framing a Living Rivers Strategy Department of Natural Resources, Environment, The Arts and Sport April 2009. Available at **http://www.nt.gov.au/nreta/water/livingrivers/** (accessed 10/8/10).

"outcomes":[752]

- Territory rivers are healthy because they flow within healthy catchments.
- The Territory economy is viable and sustainable.
- The needs and aspirations of Indigenous Territorians are met.
- Territorians work together and collaborate with other interests as active stewards of river and catchment health.
- The Territory community responds effectively to climate change and other drivers of new challenges.

An agenda is proposed to achieve these outcomes which includes the following "approaches": improving catchment management; managing water for multiple objectives; special protection for aquatic systems; maintaining or rebuilding ecological connectivity; improving management of public lands for river health and promoting best practice management of private lands for river health.[753]

In relation to Indigenous interests the Discussion paper outlines another set of outcomes:

> OUTCOME 3: The needs and aspirations of Indigenous Territorians are met.
>
> Long term goal: To improve the well-being of Indigenous Territorians through access to the benefits of healthy rivers and catchments. To succeed we must ensure that:
>
> - the knowledge, skills and perspectives of Indigenous people are valued and inform land and water management decisions;
> - cultural flows are recognised and protected;
> - cultural and environmental flows in combination foster continued customary use of rivers and wetlands;
> - native title rights in waters and connected landscapes, including access for customary purposes, are protected; and
> - registered or otherwise recognised sacred sites are protected

[752] Ibid 2.
[753] Ibid 2,3.

from damage or unauthorised intrusion.[754]

The only new issue that arises in the Northern Territory legal and policy context is the specific recognition of the concept of cultural flows raised above in bullet point 2. Of significance is the terminology that cultural flows are "recognized and protected". This has occurred to a limited extent in the Katherine Tindall Aquifer Water Allocation Plan (see section 5 of this report).

The proposals that arise from the submissions received by government in response to the Discussion Paper by Indigenous interests can be summarised as follows:[755]

- That the implications of the Blue Mud Bay High Court decision in 2008 in relation to the inter-tidal zone and tidal rivers are not addressed;
- That the Paper lacks any definition or clarity of the rights of Indigenous people to their land and resources including native title;
- that Native Title rights require enhancement to provide for Indigenous rights to be recognized in the modern economy regardless of legal proof of native title;
- any water plans include an equitable Indigenous allocation from the consumptive pool for commercial purposes;
- an Indigenous guaranteed entitlement to the consumptive pool for commercial purposes that is temporarily tradable or, for any commercial use of water, a negotiated revenue stream for Indigenous people should be incorporated and an Indigenous Water Fund should be established;
- that water legislation and policy must include an allocated Cultural Flow;
- that any changes to water law and policy should recognise the United Nations Declaration on Indigenous Peoples Rights that requires negotiations in good faith and the informed consent to proposals that affect Indigenous people. [756]

The issues that arise from the implementation of the NWI are the general requirement for the recognition of Indigenous interests in the Territories

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[754] *Living Rivers Sustaining landscapes, livelihoods and lifestyles* A discussion paper for framing a Living Rivers Strategy Department of Natural Resources, Environment, The Arts and Sport April 2009 at 24.

[755] Northern Land Council & NAILSMA Submission to the Northern Territory Government - Response to the Living Rivers Strategy July 2009 available at http://www.nt.gov.au/nreta/water/livingrivers/pdf/living_rivers_submision_%20nlc_nailsma.pdf (accessed 3/10/10).

[756] Ibid 3,4.5.

water management legislation; the recognition of and accounting for of native title rights to use water; the allocation of water access entitlements to meet indigenous needs; and the recognition of indigenous specific cultural interests and Indigenous representation on water planning bodies. None of these are included as specific requirements in the *Water Act* (NT) at the moment.

In summary, the proposals in relation to water law that have arisen in the Northern Territory from Indigenous interests are for the recognition of an allocated cultural flow in water plans; an Indigenous reserve in the consumptive pool, a revenue stream for Indigenous people from the general commercial use of water, an Indigenous Water Fund to allow Indigenous people who don't otherwise benefit from the NWI or in fully or over-allocated systems access to water for commercial purposes and the incorporation of Indigenous knowledge in water planning.

Queensland

There are no planned amendments in relation to the Queensland water law – the *Water Act, 2000* with respect to Indigenous interests.

The major area where changes are being proposed to State water law is what is described as the Single Water Planning Process Project. This is meant to streamline the process of water planning to provide for the simultaneous development and release of Water Resource Plans and Resource Operation Plans. Currently there is a consecutive production of both documents. This does not deal with the contents of water plans or any requirements to address Indigenous interests.[757]

There are proposals by Indigenous groups from the Cape York region to amend the *Wild Rivers Act, 2005*(Qld) (see section 1 Part E of this Report).

Queensland is the only jurisdiction that has mandated in statute a requirement for water to be set aside for Indigenous economic development. The actual allocation or use of the water set aside occurs in some two water resource plans – the Mitchell and Gulf Plans and four Wild River declarations. The implementation of the use of this reserve has not yet proceeded as according to the Queensland Department of Environment and Resource Management:

> A process for evaluating the 'social and economic aspirations' is still to be developed. Efforts to secure a partner to develop this scope of work has been unsuccessful.[758]

There are no specific criteria for the determination of the size of the Indigenous reserve except that it must be consistent with the relevant

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[757] Crothers, T Queensland Department of Environment and Resource Management address to the Indigenous Water Policy Group entitled "Queensland Update on Water Planning and Wild Rivers Policy Development" 24 March 2010 power point presentation at 9.

[758] Ibid 14.

legislation being the *Water Act, 2000* and the *Wild Rivers Act, 2005*. The reserve is apparently 1% of the "mean annual flow". It is uncertain as to how this has been calculated but this amount is not prescribed in the water legislation or subsidiary legislation.[759]

The conditions for use of the reserve are set in a mixture of rules and documents of both general and specific application. Some of which are legally binding.[760] The Mitchell planning documents is an example. The conditions for the grant of any allocation from the Indigenous reserve are that it must be granted as a water licence. The person granting the licence under Queensland law must consider the effect upon the cultural values and social and economic well being of local Indigenous communities.[761] The chief executive of the Department has a discretion to grant a licence or licences without or with a purchase price (undetermined) which is to be done by way of what is described as a non-competitive process, that is not by tender or auction.[762]

Unallocated water may also be used "to support water-related cultural values of Aboriginal and Torres Strait Islander communities" in a plan area.[763]

The broad purpose of the reserve is "of helping indigenous communities in the area achieve their economic and social aspirations."[764] The area is the water plan area. Thus it would appear that any Indigenous group, legal entity or individual can seek the issuance of a licence to access the Indigenous reserve as long as it is within the scope of this purpose. Depending on the proposal that non-indigenous persons could access the reserve if it still came within the stated purpose. For example, if the water was temporarily traded.

As mentioned no licences have been issued to date. The relevant Queensland State Department is grappling with potential release rules and what are described as "key issues" in an attempt to decide upon some criteria or guidelines for the release of this water. The potential release rules have been

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[759] Nikolakis, WD & Grafton, RQ Analysis of institutional arrangements and constraints affecting the establishment of water markets across northern Australia November 2009 TRaCK c/- Charles Darwin University, Australia at 54.

[760] These are the *Water Regulation 2002*, the *Water Plan* and the Mitchell Resource Operations Plan. The first two are legally binding.

[761] For example see sections 26 & 27 of the Mitchell resource operations plan Department of Environment and Resource Management Queensland Government November 2009 26 Unallocated water product specification. Where the chief executive decides to grant unallocated water it must be as water licences. 27 Granting unallocated water (1) The process for granting unallocated water must be in accordance with the requirements prescribed in Part 2, Division 1C of the Water Regulation 2002. (2) When deciding an application for unallocated water from an unallocated water reserve, the chief executive must consider the effect of granting from the unallocated water reserves on Indigenous cultural values and the social economic wellbeing of local Indigenous communities.

[762] *Water Regulation 2002* sections 5I, J(c).

[763] For example, see the *Water Resource (Mitchell) Plan 2007* s 12(j) and the Mitchell Resource Operations Plan Attachment 4 - *Links between this plan and the Water Resource (Mitchell) Plan 2007* at page 23.

[764] *Cape York Peninsula Heritage Act, 2007* section 27(2).

described as either:[765]

- "On a case-by-case basis (proponents would need to apply); or
- Strategically to ensure the best outcomes for the use of this water."

Further that:

- "Applications will need to demonstrate that projects will assist the local Indigenous communities to achieve their social and economic aspirations; and
- Applications will need to conform to the *Water Act* criteria."

The "key issues" have been captured in the following questions;

- "How do we determine if an application will assist Indigenous communities to meet their social and economic aspirations?
- Can the State cancel an entitlement if the project ceases to benefit the Indigenous community?
- What process will lead to the best social and economic outcomes?
- Should water be reserved for identified projects/outcomes, or allow for entrepreneurial projects to apply?"

Issues raised by these statements and questions, are discussed below.

The implications of setting some rules as to how the reserve is to be accessed are not just legal questions but essentially involve a broader discussion about whom and on what basis a licence to use the reserve should issue. The ideology or philosophy of those determining the rules is important. It is important that such should be negotiated with the local community/s whilst the existence of the reserve is protected as a matter of law.

Guidelines could be negotiated with the relevant community/s in the water plan area where the reserve exists. This is the best way to facilitate the legislative object or purpose of helping indigenous communities in the area achieve their economic and social aspirations. The guidelines could be made legally binding under the regulations or water plan. The guidelines would establish licence conditions in a particular reserve consistent with the *Water Act, 2000.*

I am presuming for the purposes of the discussion that it is appropriate for government to require a licence to be issued, as given in the example above. If a fully tradeable water access entitlement is to be created then this is necessary.

These considerations at one level involve more complicated questions for the

[765] As presented by the General Manager of Water Allocation and Planning in the then Department Natural Resources & Water Queensland at an Indigenous Water Policy Group meeting in February 2008.

local Indigenous community/s than for government. For example, should there be a broad community benefit only, should individual or group entrepreneurial activity be allowed. Should it be possible to lease the water access entitlement? Should the licence also be able to be used for cultural maintenance purposes as well? The *Cape York Peninsula Heritage Act, 2007* provides that the reserve is to be established for both economic and social purposes. Should this be extended to cultural purposes as well to allow Indigenous communities a direct role in cultural heritage maintenance?

Other questions that a arise include:

Should the traditional owners or native titleholders, hold the licence as a group and be able to lease it to someone else? If the licence is granted to an Indigenous individual, or group isn't that sufficient to establish benefit and purpose. Why does government have a role in determining these issues in any event presuming the water management legislation is complied with?

Is a licence to access and use the water in the reserve to be granted without fees to Indigenous people? Fees could be a source of income for the holder of the rights to use the reserve. Is it able to be leased and tradeable – is that a disincentive to indigenous employment and economic activity but provides for income generation? Some Indigenous commentators are concerned about the impact of the effect of the distribution of money similar to a royalty in a local welfare based economy. The negative effect it has on entrepreneurial activity in the community. That is, if it is not earned but comes as of "right". One is receiving income solely as a beneficiary of the reserve without having to work for that income.

In summary, these are fundamentally issues that need to be decided by the relevant community – they know their own economic and social aspirations. The negotiation between the relevant community and government of guidelines concerning the issue of licences to access the reserve is a useful means of achieving this. This could be made legally binding in the water plan or regulations under the *Water Act, 2000* (Qsld). In the absence of the settlement of agreed community guidelines then the Indigenous reserve could be accessible by Indigenous entrepreneurs that can show some benefit to the relevant community in the broadest sense without government being prescriptive. This may be as simple as local employment.

Existing policy in Queensland (outside the Indigenous reserve area) concerning the issuance of entitlements for the use of unallocated water provides that it may be released to meet "specific economic or social objectives". The method of release may be through either tradable or non-tradable licences and sold through open tender or at auction. In general terms the policy states that tradable water licences will only be issued where water entitlements can be clearly defined through the water planning process.[766]

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[766] "*Unallocated Water and water resource planning"* Queensland Government October 2004.

There is also no recognition in water planning of native title rights to use water to date in Queensland. Rather the Queensland NWI Implementation Plan of January 2006 asserts that no such rights have yet been legally recognised. I have dealt with this issue in section 2 of the Report, as well as the other NWI compliance issues. It is simply not correct that native title rights to water in Queensland have not been legally recognised. The relevant section of the Implementation Plan is in the following terms:

> As native title rights to water have not been legally recognised, Queensland has not been able to make any specific legislative or WRP provisions. However, water allocated to protect ecosystem processes acts to protect traditional uses associated with water.[767]

Northern Australia Land and Water Taskforce

The Taskforce finalised its report in December 2009. It reported primarily to the Federal Government but also to all governments in northern Australia. It supported the *National Water Initiative* as an appropriate framework "for the planning and sustainable management of water resources." [768]

The main recommendations concerning Indigenous interests are 12 and 13,which are as follows:[769]

12. The allocation of water rights under statutory water plans should explicitly recognise Indigenous Peoples' rights and interests in water and ensure that:

    - Cultural allocations are made from the non-consumptive pool as water entitlements that are legally and beneficially owned by Indigenous Peoples; these allocations should be sufficient and adequate in quantity and quality to maintain the spiritual, cultural and social livelihoods of Indigenous Peoples of northern Australia;

    - An equitable allocation from the consumptive pool is made available as an Indigenous reserve to the Indigenous Peoples of northern Australia;

    - An Indigenous Water Fund is established to underwrite Indigenous purchases of water allocations from existing (fully allocated) consumptive pools.

With respect to native title rights to take and use water for non-commercial

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http://www.derm.qld.gov.au/wrp/pdf/general/unallocated_water_brochure.pdf (accessed 20/8/10).

[767] Queensland's National Water Initiative State Implementation Plan, January 2006 at page 27.

[768] Northern Australia Land and Water Taskforce *Final Report* December 2009 at iii.

[769] Ibid 32.

purposes this is a requirement of the *National Water Initiative*, which has not been fulfilled in any water plan to date.

> Recommendation 13: Australian governments should invest in communication, social marketing, education and knowledge brokering to improve public understanding of Indigenous rights and interests and sustainable water resource management, and deepen commitment to the principles of ecologically sustainable development, as they apply in northern Australia.

Indigenous reserve of water from the consumptive pool

There is an emerging if not established consensus, in northern Australia especially in Queensland and the Northern Territory that it is appropriate to allocate a reserve of water from the consumptive pool for Indigenous economic development. In Queensland the existing Indigenous reserve is for both economic and social purposes.

In Queensland it is a statutory requirement to provide such a reserve in the Cape York Region.[770] It is now to be provided in one, water allocation plan – the Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019 in the Northern Territory but only if native title is legally recognised in the plan area.[771] In Western Australia, the position is not supported by government, at this stage.[772] Indeed in Western Australia at this stage there is no legally recognised concept of a consumptive pool nor legally binding water plans.

Further any Indigenous group or individual can apply for a water licence like anyone else in a particular jurisdiction subject to the legal limitations already discussed. A major practical limitation is the availability of finance and business opportunity to be involved in the commercial use of water. This is one of the major driving factors in the call for an Indigenous reserve to ensure that people do not miss out on this current economic opportunity in northern Australia where many systems are not yet fully allocated and water planning under the *National Water Initiative* framework is still at an early stage.

The issue has been raised directly by traditional owners in the La Grange water planning process in the West Kimberley of Western Australia (see section 5 of the report). This point was also emphasised by the Northern Territory Government in its *Living Rivers Discussion Paper*:

> But there are also important risks in setting limits and establishing markets in access to natural resources. Late entrants may find it difficult or impossible to meet the initial costs of accessing resources that have been fully allocated so that access is only available through trade. Land rich but capital poor Indigenous people are likely to be

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[770] *Cape York Peninsula Heritage Act 2007* s 27.
[771] http://www.nt.gov.au/nreta/water/kwac/index.html (accessed 15/3/10).
[772] See pages 28 -30 of section five of this report.

> particularly affected.[773]

Hence the significance of the establishment of a Strategic Indigenous Reserve and making it a requirement for the water law of each jurisdiction, as occurs now for the Cape York region of Queensland. The allocation of water for Indigenous economic development in a reserve allows two important things to occur. Firstly, if Indigenous peoples are so called late entrants into the market they have assured access to water for commercial purposes. Secondly, it allows those Indigenous people without land rights or native title guaranteed access to water for development purposes.

In the same Northern Territory Government Discussion paper it is written that:

> In framing measures to promote the health of Territory rivers, it will be important to avoid steps that excessively compromise Indigenous opportunity to engage in either orthodox or novel forms of enterprise dependent on ownership and use of land.[774]
>
> Government is committed to support Indigenous people with accessible high quality information and analysis and also to ensure that access to economic opportunity is not inadvertently or unnecessarily compromised.[775]

If necessary, the Federal Parliament has the clear constitutional power to mandate the requirement for an Indigenous specific reserve in both the States and the Northern Territory. One way in which this could be achieved if thought appropriate is through an amendment to the Commonwealth *Water Act, 2007*.[776] I have not considered this Act to any extent in this report because of its overwhelming application to the Murray Darling system in the south east of Australia.

An Indigenous Water Holder

An interesting model exists under that legislation – being the establishment of the Commonwealth Environment Water Holder and associated Environmental Water Holdings Special Account. The functions of this position are to purchase rights to use water for release to protect or restore the Murray Darling Basin and other areas to give effect to international agreements.[777] An example of the latter is the Ramsar convention concerning

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[773] *Living Rivers Sustaining landscapes, livelihoods and lifestyles* A discussion paper for framing a Living Rivers Strategy Department of Natural Resources, Environment, The Arts and Sport April 2009 at 6.

[774] Ibid 16.

[775] Ibid 50.

[776] The Australian Constitution (s.51 (xxvi) provides for the Australian Parliament to pass special laws that it decides are necessary for the people of any race including Indigenous peoples. This applies in both the States and Territories. There is no limit to the subject matter of such laws. The Federal Parliament can also use the Territories power (s.122) to pass such laws in the Northern Territory.

[777] *Water Act, 2007* ss104, 105, 111-113.

the protection of internationally important wetlands, some of which exist in northern Australia.

There also exists a provision that provides for the dis-application of certain State laws that would inhibit the Commonwealth Environment Water Holder in relation to water declared Ramsar wetlands, water dependent eco-systems that support listed threatened species, listed threatened ecological communities and water sites specified in the regulations for the Federal Act.[778]

In other words the Federal Government could establish an Indigenous equivalent, that is an Indigenous Water Holder that could buy water access entitlements for Indigenous purposes especially in fully allocated or over-allocated systems and transfer them to Indigenous interests or individuals.[779] The only potential downside with such a proposal is the potential for government to set overly prescriptive rules that undermine Indigenous decision-making.

The existing proposals for the inclusion of an Indigenous Strategic Reserve are easily met on one level in the sense that government agrees to their establishment or not and amends the relevant Water Act to make them a requirement for any water plan. There is also much detail to be worked out to ensure that the amount of water set aside and the rules for accessing the reserve are equitable and meet the stated goals for the reserve. Many of the issues that affect the latter point are not really questions that should be determined by the imposition of legal rules but be the subject of agreement that is then legally enforceable. Some of the following critical questions have not yet been resolved:

- How will the allocation amount/percentage of the consumptive pool be calculated?
- Who holds the water access entitlement?
- Should only legally recognised traditional owners under land rights legislation or native title receive such an allocation?
- Where systems are fully allocated, how can local Indigenous groups acquire an allocation from the consumptive pool? (Will they, for example, need to buy licences in the market through an Indigenous water trust as proposed by some Indigenous groups)

The consideration of these questions also brings into play the proposals by some Indigenous interests for the establishment of a water trust and a payment to traditional owners for the use of water for commercial purposes.

The former, a water trust would allow for water entitlements that have been issued to be held on trust until they can be used or leased out for a period to generate income. A Trust could also hold money for the purchase of

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[778] Ibid s110.

[779] It is noted that this would require some variation of the existing Commonwealth model.

entitlements for Indigenous benefit on the open market, especially where a system is fully allocated. The latter could create an income stream based on the recognition of traditional ownership of the water plan area.

I also note the arguments against what I perceive to be broad or "statutory" water trusts of some commentators and Indigenous groups. There is no reason why a trust can't be a locally or regionally based one – directly controlled locally. This can also ensure that local traditionally based governance and decision - making protocols are adhered to in this scenario.[780]

The only formula used to date that I am aware of to determine the size of any Indigenous reserve is in the Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019 in the Northern Territory. It uses a percentage of Indigenous owned land including native title in the plan area to establish the size of the reserve. This has the obvious implication, leaving aside the situation in already allocated systems that those Indigenous people who have no land interest for whatever reason will receive no entitlement.

One method by which the amount of water for the reserve could be determined is to establish criteria in the Act that take into account in the water plan area:

- the percentage of Indigenous land ownership/interests;
- that land ownership is not the only criteria for access to a water entitlement and that a minimum amount apply in such circumstances;
- the existing entitlements held by Traditional owner interests be taken into account;
- the extent of Indigenous need and disadvantage; [781]
- a cultural flow component to maximise Indigenous engagement in water management;

In relation to who holds the licence/s the issues that arise here for consideration are addressed in the section on Queensland. This is best addressed by negotiating guidelines with the traditional owners of the water plan area concerned. This is also consistent with and flexible enough to cater for proposals such as the *Anmatyerr Water Agreement* described earlier in this section. A possible framework agreement or guidelines could be included as a schedule to the Act or the regulations. Any such guidelines need to reflect appropriate Indigenous values and aspirations.

There is a significant debate in Indigenous communities concerning the extent to which titles or interests in and waters should be held communally or individually. This important discussion consistent with the principle of

[780] I am referring to the comments and proposals in the Anmatyerr Water rights project described earlier in this section and later comments in the AIATSIS Report *Indigenous Rights to Water in the Murray Darling Basin In support of the Indigenous final report to the Living Murray Initiative* AIATSIS Research Discussion Paper No.14.

[781] Indigenous need is relevant per paragraph 25 of the NWI.

self-determination should be determined at the local and regional level by the communities involved themselves in the particular water plan area. There is a mechanism within the water trading framework that is similar to the leasing of communally held land under land rights legislation that can allow economic flexibility if that is what the particular Indigenous community wishes to achieve.

Trading in a water licence involves the selling of the water access entitlement to another person permanently – a permanent alienation or a permanent trade. One can also make a temporary trade of all or part of the allocation for an agreed time period. The analogy with land is the holding of the "inalienable" freehold title by traditional owners and the leasing of a portion of the land for a set term. This keeps the reserve in perpetuity (subject to the sustainability of the water resource) in control of the traditional owners but allows flexibility for economic advantage in the market place. If structured appropriately such an interest can also be used as security to raise finance in the market.

In relation to the third question this raises a fundamental issue of equity and justice. Whilst the NWI seeks to ensure that Indigenous representation and cultural values are incorporated into water planning processes it is important to note this is not based upon any legal status such as the legal recognition of native title.

Whereas, rights to take and use water in the NWI appear to be based on the legal recognition of native title, apart from paragraph 25 ix). It is therefore important in any attempt to address Indigenous need to ensure that no such restrictions apply in relation to any Indigenous reserve. There is no requirement in the NWI that restricts the application of paragraph 25 ix) to provide for water access entitlements to address Indigenous need.

Indigenous cultural flows

There is no specific mention of the protection and maintenance of Indigenous cultural values in the Western Australian or Northern Territory water legislation. There is a general goal to meet cultural needs in the Northern Territory, and in Western Australia. I have already outlined the more specific recognition in Queensland.

In large measure the maintenance and protection of Indigenous cultural values have been sought to be protected within the maintenance of an adequate or sustainable environmental flow within water planning. There is next to no separate specification to "meet Indigenous social, spiritual and customary objectives" in water plans as currently being drafted.[782]

In recent years advocacy of the right to an Indigenous cultural flow has

[782] "A key finding of the National Water Commission's biennial assessment dependent in the wet season and groundwater was that water to meet Indigenous social, spiritual and customary objectives is rarely clearly specified in water plans. Northern Australia Land and Water Taskforce *Final Report* December 2009 at 34.

become more prominent but in some circles has suffered from a lack of definition.

As Durette has stated in relation to this issue:[783]

> Despite the widespread and growing acceptance of this argument within water management agencies worldwide, indigenous values to date are rarely accounted for in a category of their own in water plans and governments are only beginning to consider how to quantify these values for allocation purposes.

For example, in the Katherine Water Allocation Plan for the Tindall Limestone Aquifer in the Northern Territory, which is examined in Section 5 the concept of a cultural flow is used. But the authors of the plan note a limitation of knowledge about what are described as cultural flows.

> Whilst it is recognised that cultural flows and environmental flows are not the same, the Plan assumes that the provisions for environmental flows will maintain the condition of places that are valued by both Indigenous and non-Indigenous people for cultural purposes. Further research and monitoring to improve our understanding of environmental and cultural flows will be initiated as part of the implementation of the WAP.[784]

The principle of a right to a cultural flow put forward by the Indigenous Nations of the Murray and Lower Darling rivers in the context of the Murray Darling system in southern Australia is one that has a broad definition of a cultural flow that includes economic rights or what is described as the "cultural economy" which includes "environmental, social and economic water flows". I understand it to mean more than a subsistence Indigenous economy that is for example included within the accounting for environmental flows in the Katherine Water Allocation Plan.[785]

To quote from an AIATSIS report concerning Indigenous rights to water in the Murray Darling basin:

> In order to enjoy rights such as fishing rights, or more general cultural and economic rights central to the maintenance of Indigenous Nations cultural traditions, it is first critical to have a healthy river system. The degradation of the river system has threatened these pendant rights.
>
> The Indigenous Nations of the Murray have identified the interrelationship between these elements as the need to preserve the cultural economy through the identification of cultural flows. That is, sufficient environmental, social and economic water flows and

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[783] Durette, Melanie *Accounting for Indigenous Cultural Flows in Water Planning* Synexe knowledge notes 2008/02 at 1.
[784] *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* at 4.
[785] Ibid at 5.

> volumes must be allocated to the River and to Indigenous Nations to sustain the cultural economy of each Nation in the River system.[786]

Further it is advocated that a system of prioritisation of this broad notion of Indigenous rights to water should take place before other interests receive allocations of water.

> Section 211 of the *Native Title Act* provides a precedent for the prioritisation of Indigenous rights to natural resources second only to environmental and scientific research concerns. Indigenous peoples are entitled to seek such a priority in the future allocation of water resources. The allocation of water rights should consider the environmental flow and the cultural flow, arguably on a Nation by Nation basis, before commercial or other economic interests.[787]

In my opinion, it is not the case that section 211 of the *Native Title Act, 1993* prioritises Indigenous rights but simply allows certain subsistence and cultural rights or activities to take place without the need for a licence. It doesn't prioritise them in the sense that in the context of access to a limited resource Indigenous rights to take and use water have priority over other users. There are precedents overseas for the prioritisation of Indigenous rights in relation to water use.

In the United States for example there exists a principle of reserved rights or more formally a "Reserved Rights Doctrine" in relation to Indigenous rights to water. To quote from a text on *Water Law* in the United States:

> The reserved rights doctrine was created to assure that Indian lands and public lands set aside by the government for a particular purpose would have adequate water. The doctrine recognises rights to a quantity of water sufficient to fulfill the purposes of the reservation of land. Although most water rights in western United States have priority based on when they were first put to a beneficial use, rights on federal and Indian lands have a priority dating back to at least as early as the reservations were established even if water use begins long after others have appropriated waters from the stream.[788]

This doctrine has its origin in the landmark United States Supreme Court decision of *Winter v United States* in 1908. [789] The scope of the doctrine has since developed to apply in some circumstances to a broader range of water uses for Indigenous people including culture, history, natural resources and the general consideration of the needs of present and future populations.[790]

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[786] Morgan, Monica; Strelein, Lisa and Weir, Jessica *Indigenous Rights to Water in the Murray Darling Basin In support of the Indigenous final report to the Living Murray Initiative* AIATSIS Research Discussion Paper No.14 at 40.

[787] Ibid 4.

[788] Getches, David H *Water Law* 4th Ed Thomson West 2009 at 332.

[789] 207 US 564; 52 L Ed 340 (1908).

[790] Ibid 346,347.

None the less the exclusion of Indigenous people from the water based economy in the Murray Darling system is a lesson that should be learnt and needless to say not repeated in northern Australia. The inclusion of Indigenous cultural flows and an Indigenous reserve in the many water systems that are not fully allocated presents a unique opportunity for the inclusion and growth of Indigenous interests. As Morgan, Strelein and Weir argue in the AIATSIS report:

> For the Indigenous peoples of the Murray River, water resources provide an opportunity for developing and participating in rural industries. Water allocation rights can mean inclusion in the water trading environment for economic development opportunities, or for achieving cultural and environmental objectives by allocating water for cultural or environmental flows.
>
> The creation of new water property rights without recognition of Indigenous rights in the water denies the existence of those rights, and denies the future participation of Indigenous people in the water property regime. The potential exists for a positive contribution to Indigenous economic development.
>
> The allocation of water directly to the Indigenous Nations and/or local Indigenous communities is the most appropriate model. A generic water trust or provision for affects on native title rights and interests would be unlikely to achieve the objectives of self- management and economic development.[791]

The Murray, Lower Darling Rivers Indigenous Nations (MLDRIN) have defined a cultural flow in the following terms:[792]

> Cultural Flows are water entitlements that are legally and beneficially owned by Indigenous peoples and are of sufficient and adequate quantity and quality to maintain the spiritual, cultural, environmental, social and healthy livelihoods of Indigenous peoples of northern Australia.

I will finish this section with some concluding commentary and two further quotes. Firstly, from the Aboriginal and Torres Strait Islander Social Justice Commissioner:[793]

> At a minimum, Indigenous water rights in "reserved water rights" should include and account for separate cultural, and economic water

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[791] Ibid 51,52.

[792] The MLDRIN 2008 Echuca Statement quoted from Indigenous Water Policy Group water policy statement at paragraph 2.

[793] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2008* Chapter 6 Indigenous Peoples and Water Human Rights and Equal Opportunity Commission 2009 at 173.

> allocations, and where water management is being conducted by Indigenous peoples half of the government, in distinct environmental water allocations.

Secondly, Behrendt and Thompson's work in relation to the NSW *Water Management Act*:[794]

Cultural flows should be an essential component of river management.

> A 'cultural flow' can be set and monitored as sufficient flow in a suitable pattern to ensure the maintenance of Aboriginal cultural practices and connections with the rivers. In circumstances where rights to water are being turned into a commodity and schemes for tradable water rights being expanded, it becomes increasingly important to ensure that Aboriginal cultural flows are secured in legislation as a non-tradable interest. Aboriginal people do not have the means to purchase those water flows on the open market. Indeed, the entire purpose of those markets is to direct the resource in a utilitarian manner rather than in a way that accommodates Aboriginal perspectives on that resource. (fn deleted)
>
> Furthermore, in the absence of any enforceable means to ensure that a flow relevant to Aboriginal cultural needs is secured under the existing regime for developing water sharing plans, it is appropriate that Aboriginal cultural flows be secured in the same manner that basic landholder rights (fn deleted) are protected.

These quotes raise the question that if a cultural flow is to be adopted in legislation and water plans how is it to be allocated in the water planning process. Allocation is obviously an important issue both in terms of the recognition of Indigenous interests and in the sustainable and effective management of the water resource.

Other issues include whether it should be subject to licensing and discretionary use by relevant Indigenous interests; or operate as a separate allocation like the environment that then forms a part of the water flows that are not subject to licensing from the consumptive pool.

Both methods have benefits and some detriment. The former provides a more direct avenue for active Indigenous engagement in the management process and maximizes Indigenous autonomy and self - determination. Alternatively, it may engender undue pressure in communities in decision making when economic projects may affect cultural values.

Alternatively, if the allocation of a Strategic Indigenous reserve is mandated in legislation, it would clearly include an object for economic development.

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[794] Behrendt and Thompson op cit at 111.

The question arises as to whether it should also be available for cultural purposes and indeed whether the cultural flow is included within this reserve.

Recommendation

Whilst views can clearly differ here it would be my recommendation that, accepting the appropriateness and need for an Indigenous cultural flow and given its clear relation to a sustainable environmental flow that it should be primarily specified as a separate reserve (in connection with the allocation to the environment) and not subject to licensing. The Strategic Indigenous Reserve would be primarily for economic use but could also be used to support social and cultural values if thought appropriate by the Indigenous group concerned. This also provides "some" flexibility in terms of recognising the unity of the Indigenous view of country and maximizes Indigenous decision making in the management of water.

Conclusion

I have endeavoured to describe and traverse the various implications that arise from the proposals that exist to change water law in northern Australia. In large measure these arise in the government context from implementation of the *National Water Initiative.* From an Indigenous perspective they revolve around a different philosophical view of the unity of water as part of their traditional country. At a pragmatic level this is primarily reflected in advocacy for the right to a cultural flow and a Strategic Indigenous Reserve.

The findings that follow have not all been canvassed in this section of the report as some of them have been discussed in detail in other sections, but they all go to addressing the implications of full implementation of the NWI and the Indigenous advocacy for the two matters mentioned.[795]

The experience in terms of the implementation of the *National Water Initiative* and with the NSW *Water Management Act* point clearly to the need to specify with particularity in the legislation the recognition of Indigenous interests. This could be achieved in two ways.

Firstly, by ensuring that the objects clause in the Act is similar to the water law in New South Wales recognising the full gamut of Indigenous interests being the social, cultural, spiritual and economic. The relevant objects in NSW are as follows:[796]

> 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:

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[795] For instance, one concerns Indigenous heritage legislation, which is discussed in section1 Part D. The States have relied upon the Indigenous specific heritage legislation as an example of compliance with NWI commitments as explained in section 2 of the report. So it is usefully brought together here.

[796] *Water Management Act, 2000* (NSW) section 3.

(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:

(iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,

Then to ensure that those interests are not marginalized amongst all the competing interests recognised in such broad objects, specific provisions in the water law should particularise the requirements for each subject area of recognition of Indigenous interests. In particular, if this was done in the following areas it would facilitate full implementation of the NWI in a way that can address Indigenous aspirations and be more reflective of Indigenous protocols and processes as discussed in this section of the report:

- the recognition of native title rights to use water which are not being recognized or accounted for in water plans to date despite the clear words of the NWI (clauses 53,54);[797]

- the recognition of Indigenous rights to use water without a license for non-commercial purposes, which is similar to current statutory riparian rights for land owners and occupiers. This would encompass native title holders and also Indigenous people that cannot prove native title – but would be a statutory based right similar to the rights to use water in accordance with tradition in the Northern Territory;[798] This would overcome the difficulties with section 211 of the *Native Title Act, 1993* traversed in section1 Part A of the report; and addresses NWI requirements to provide access for cultural and non-commercial purposes;[799]

- include native title holders within the statutory definitions in legislation as owners and occupiers of land to ensure they are beneficiaries of statutory riparian rights and are able to access water licenses like other landholders in a non-discriminatory manner;

- include section 24HA *Native Title Act, 1993* procedural rights;

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[797] 53. Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth Native Title Act 1993. 54. Water allocated to native title holders for traditional cultural purposes will be accounted for.

[798] See section 1, Part C of the report.

[799] Section 55 of the *Water Management Act, 2000* (NSW) provides a model and precedent. 55 Native title rights (1) A native title holder is entitled, without the need for an access licence, water supply work approval or water use approval, to take and use water in the exercise of native title rights. (2) This section does not authorise a native title holder: (a) to construct a dam or water bore without a water supply work approval, or (b) to construct or use a water supply work otherwise than on land that he or she owns. (3) The maximum amount of water that can be taken or used by a native title holder in any one year for domestic and traditional purposes is the amount prescribed by the regulations.

- the requirement to establish a Strategic Indigenous Reserve in each water plan area is a means of meeting the NWI requirement to grant water access entitlements to address indigenous needs (clause 25 iv) and Indigenous proposals as outlined in this section at the same time; the reserve should be accessible by the grant of licenses at no charge that are saleable as a temporary trade only; this has the additional benefit of preserving the reserve for Indigenous benefit and allowing the government to apply a "use it or lose it" policy in the water trade market place if it wishes;

- ensure that the protection of Aboriginal heritage and culture is not limited by definitional issues such as the absence of water in definitions of land, site and areas;[800]

- the inclusion of a right to an Indigenous cultural flow as an integral part of water planning both as separate licensed and unlicensed allocations;

- the provision for guidelines or a local water agreement to be agreed with government as to the local rules in the water plan for any of the above matters; this could include governance issues relevant to local circumstances and indeed shared responsibility with government for the management of the water resource in a particular area. The agreement or guidelines once settled should be legally binding in the regulations or water plans. This point maximizes the ability of water plans to reflect Indigenous recognition from an Indigenous viewpoint and not only the disaggregation of interests, water and land inherent in the COAG water reform process. It provides a specific strategy for achieving indigenous access to water that incorporates indigenous social, spiritual and customary objectives as per clause 52 ii) of the NWI.[801]

- Recognition of indigenous ecological and cultural knowledge as part of the knowledge base for the determination of environmental sustainability;[802]

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[800] These difficulties are traversed in section1 Part D of the Report. I am not stating that the Indigenous heritage legislation should not be amended to cover these issues but for completeness of water planning in its addressing of Indigenous interests should also be included to properly cover for the accounting for and protection of Indigenous site and areas that include water.

[801] NWI Agreement 51 ii) *water plans* will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.

[802] 7. Both western and Indigenous knowledge of northern Australia is needed to inform our understanding of environmental sustainability One of the Eight agreed Principles of the Northern Australia Land and Water Taskforce upon which its work was based. A report to Government from the Northern Australia Land and Water Taskforce December 2009 *"Sustainable development of northern Australia*" at 1.Also see the *Program Implementation Plan for Indigenous Ecological Knowledge* April 2007 produced by NAILSMA and published by the Natural Resource Management Board (NT) Inc. available at

- The establishment of a Water Trust to ensure that Indigenous people in over allocated plan areas can purchase water access entitlements and hold them on trust if needs be pending the finalisation of local plans to use the water allocated. These can be created at the local community level and recognised in the regulations.[803]

http://www.nrmbnt.org.au/files/iek/pip-iek%20new%20photo2010.pdf (accessed 24/8/10).

[803] One possible method of funding the trust is to charge a payment for commercial water use from all users.

4. Consider implications of recent and proposed amendments to the *Aboriginal Land Rights (Northern Territory) Act* for Indigenous interests in water

Introduction

The recent changes or amendments to the *Aboriginal Land Rights (Northern Territory) Act*, 1976 (ALRA) analysed in this section of the Report are:

- *Aboriginal Land Rights (Northern Territory) Amendment Act, 2006;*
- *Northern Territory National Emergency Response Act 2007* (NTNER Act);
- *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007;*
- *Families, Housing Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Act, 2008*
- *Indigenous Affairs Legislation Amendment Act, 2008*

I know of no further proposed changes at the time of writing, except those relating more generally to the Northern Territory Emergency Response (NOTER). There are amendments currently proposed which are in the form of Bills before the Federal Parliament initiated by the Federal Government and the Australian Greens in the Senate. These are:

- *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009;*
- *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009;*
- *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009*

The latter is an Australian Greens Bill. The first two are Government Bills.

These proposed changes relate primarily to welfare reform and the application of the Federal *Racial Discrimination Act, 1975* to the NOTER and so don't strictly relate to these terms of reference. There are some proposed changes to the five-year leases that affect certain Aboriginal communities on ALRA land and this will be included under that subject matter in this section of the Report.

In addition, it is proposed to add certain areas of land to Schedule 1 of ALRA in the West MacDonnell National Park, Loves Creek and Tennant Creek regions of the Northern Territory[804]. This means that these additional areas

[804] For the details of these areas see *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Bill 2009* Schedule 1.

will become Aboriginal land under the Act.

Aboriginal Land Rights (Northern Territory) Amendment Act 2006

The main areas of change under this amendment Act are to: [805]

- enable the grant of 99 year head leases to government entities over townships on Aboriginal land, and sub-leases subsequently to be made by that entity;
- allow the costs of these head lease arrangements to be met from the Aboriginals Benefit Account;
- change the rules for creation of new Land Councils;
- change the rules for delegation of Land Council powers to allow voluntary, and also government-enforced, devolution to corporate bodies;
- to remove the statutory guarantee of minimum funding for Land Councils;
- terminate land claims to foreshore land not contiguous with Aboriginal land, including where the Aboriginal Land Commissioner has already recommended the land be granted;
- improve the workability of provisions for mining and exploration on Aboriginal land;
- lift some government controls on dealings by traditional owners with Aboriginal land in particular the requirement for further consent when a section 19 lease is granted.

The amendments concerning mining and exploration provisions, the delegation of Land Council powers to regional and other committees of a Land Council, and the deletion of the need for further consent when a lease is later transferred under s 19 were by agreement with the Northern Territory Land Councils.[806]

The changes arising under this amendment Act that are relevant to this report in my opinion are:

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[805] Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 Report on Parliamentary Process by Allison Rickett and Sean Brennan page 1; available at http://www.gtcentre.unsw.edu.au/news/docs/ALRA_2006.pdf

[806] "Detailed Joint Submission to the Commonwealth Workability Reforms of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (ALRA)" (available on internet at www.dcm.nt.gov.au), and Northern Territory Government Media Release, 10 September 2003.

- the new township leasing provisions;
- the changes to the permit system; and
- the termination of certain land claims to the inter-tidal zone, beds and banks of rivers and creeks and to islands in river and creeks that are not contiguous to claimed land or Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act*, 1976 (ALRA).

The township leasing provisions – section 19A

An Aboriginal Land Trust (ALT) the owner of the Aboriginal land may grant to the Executive Director of Township Leasing[807] (Executive Director) a lease – a head lease over an Aboriginal township on Aboriginal land for a term of between 40 and 99 years.[808] The traditional aboriginal owners of the area of the township must consent to the grant of such a lease.[809]

The Executive Director can then issue sub-leases to individuals, governments and corporations for private and public purposes. The intention of the township leases is to encourage private housing ownership and business development by resident Aborigines and to facilitate outside business investment. In addition, the Federal Government requires Aboriginal land in a township to be leased to Territory Housing before any new investment is made by it in public housing and infrastructure on Aboriginal land in the Northern Territory. The later is being achieved primarily by the issuing of leases for 40 years under section 19 of the Act. Section 19 of ALRA provides that a lease can be granted directly by traditional owners to another party through the Aboriginal Land Trust holding the title to the land.

The ALRA since its commencement in 1976 has always allowed for traditional owners to lease Aboriginal land for "non traditional" purposes via section 19 of the Act. In respect of that section of the Act Justice Brennan of the High Court has stated[810]:

> "The Aboriginal people connected with the tract of country were thus made competent to use their country in a non-traditional way if and when an Aboriginal consensus to do so should be established."

The permit provisions controlling access to Aboriginal land do not apply to the area of a section 19A head lease or section 19 lease.[811] The significance of the permit system is covered later in this section of the Report and in section 1 dealing with ALRA in general terms.

The purpose of the new township leasing provisions in the words of the then Minister for Indigenous Affairs in 2006 was to provide for a new system of land tenure in townships on Aboriginal land that will allow individuals to have property rights:

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[807] A Commonwealth statutory officer created under Part IIA of the Land Rights Act.
[808] Section 19A(4).
[809] Section 19A(2)(a).
[810] *The Queen v Toomey; Ex parte Meneling Station Pty Ltd* (1982) 158 CAR 327 at 358.
[811] Section 70(2C) and 70(2B) ALRA respectively.

> "The bill provides for a new tenure system for townships on Aboriginal land that will allow individuals to have property rights. It is individual property rights that drive economic development. The days of the failed collective are over."[812]

To date, two township leases have been negotiated and agreed over Nguiu on the Tiwi Islands – a 99-year lease in 2007 and on Groote Eylandt and Bickerton Island concerning the communities of Angurugu, Umbakumba and Milyakburra. The latter lease/s is for 40 years with a 40-year renewal and was signed on the 4 December 2009.[813]

The effect of this substantive change to the ALRA – the section 19A Township leases is to transfer management control over that area of land to the Commonwealth Statutory Officer – the Executive Director of Township Leasing for the term of the lease. It is important to note that traditional owners have to agree to the lease and terms of the lease before it is implemented and it is done so in return for rent and other community benefits.[814]

Indigenous rights to water under ALRA and the effect of township leases

As discussed in detail in section 1 Indigenous rights to water under ALRA exist in four main areas:

- rights that arise as a result of the grant of the fee simple title (statutory riparian type rights);
- section 71(1) rights – Aboriginal rights to enter, use and occupy land in accordance with Aboriginal tradition. These are rights to access and use water for all purposes consistent with the relevant local Aboriginal tradition;
- the requirement for a permit to access the area and therefore the control of access to the water on or in the land;
- The ability to issue a lease/licence under section 19 to profit from use of water resources on the land;

Firstly, in relation to rights that come with the grant of the fee simple (freehold title) once a lease is granted under section 19A then, the rights are held by the Executive Director of Township Leasing, or a sub-lessee the occupier of the land.[815]

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[812] The Minister for Indigenous Affairs Hon. Mal Brought Second Reading Speech 31 May 2006 Aboriginal Land Rights (Northern Territory) Amendment Bill 2006.

[813] http://www.otl.gov.au/current.htm (accessed 20/1/10).

[814] Section 19A (2) ALRA.

[815] The rights are listed in section 11 of the *Water Act, 1992.* The rights are held by the owner or occupier of the land. Occupier is defined on the following terms in s.4 of the Act: ***occupier***, in relation to land, means the person in occupation (under whatever title or permission, or without title or permission) or entitled to be in occupation of the land. The nature of these "remnant" riparian statutory rights are dealt with in section 1 of this

Section 71(1) traditional rights to access and use water no longer apply *to the extent* that they interfere with the use and enjoyment of the land permitted under the township lease.[816] This effectively means these rights are terminated by agreement of the traditional owners by the grant of the lease except to the extent that a head lease includes areas that are vacant and with no sub lease or these rights are continued by agreement in the lease to certain areas.[817]

In relation to the permit system, essentially an owner of an estate or interest such as a s19A lease or sub-lease is entitled to enter and remain on the land the subject of the lease for any purpose that is necessary for the use and enjoyment of that estate or interest. Secondly, it is a defence to the offence provision of being on Aboriginal land without a permit *for any person* to be on s19A leased land or a sub-lease of that lease for any purpose that is related to the use and enjoyment of that lease or sub-lease by the owner of that estate or interest.[818]

In relation to s 19 leases issued with the consent of traditional owners that power ceases (that is, the power to approve the grant of new leases over that area). All leases in the future, in the areas covered by the s19A head lease, are issued by the Executive Director of Township Leasing, only. There is no requirement for consent by traditional owners to the grant of further sub leases; in fact there is a prohibition upon any requirement for such consent.[819] Although, in practice a consultation forum has been established in the township leases to date to allow the Director to consult with traditional owners in relation to such matters.

The termination of certain land claims under ALRA

The Commonwealth Government made a policy decision (with the support of the Northern Territory Government) that it was "inappropriate" that a number of incomplete claims under the Act be pursued and possibly granted as freehold title under ALRA to certain areas. These areas relevantly consisted of the inter-tidal zone, beds and banks of rivers and creeks and to islands in river and creeks that are not contiguous to claimed land or existing Aboriginal land under ALRA.[820]

This has the obvious effect that rights that arise for traditional owners under the ALRA cannot apply to these areas but these areas could still be the subject of successful native title claims and the rights in relation to water that are capable of recognition under the law of native title in Australia. As

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Report under ALRA.

[816] Section 71(2), (3) ALRA.

[817] The terms and conditions of each lease will have to be examined to determine the extent to which the latter point applies. But in general terms s71 (1) traditional rights do not apply once a section 19 or 19A lease has been granted.

[818] See ALRA sis 70(2) and (2C) respectively.

[819] Ibid s19A (14).

[820] See section 67A(12), (14) and (17) of ALRA.

explained elsewhere, legal rights are stronger under ALRA when there is a grant of freehold title to the inter-tidal zone than under native title.

In fact, the *Native Title Act, 1993* makes inter-tidal areas - "foreshore land" waters not land for the purposes of that Act. Whilst under ALRA if a grant of fee simple is made that includes the inter-tidal zone it is regarded as land for the purposes of the ALRA and consequently a stronger and different legal position follows as described in part 6 of this Report.[821]

Northern Territory National Emergency Response Act 2007 (NTNER Act)

This Act and associated legislation enable the Commonwealth Intervention in Aboriginal communities in the Northern Territory, which is formally known as the Northern Territory Emergency Response (NOTER).

The Act relevantly applies to Aboriginal land as defined in ALRA, that is land held by a land trust for an estate in fee simple.[822] In addition, it applies to certain roads, rivers, streams, estuaries and other areas located within Aboriginal land that has been excluded from the freehold title.[823]

The Commonwealth has compulsorily acquired 5-year "exclusive possession" leases over some 64 Aboriginal communities with some twenty-six of these leases commencing on the 18 August 2007 and the remaining ones on the 17 February 2008. All of these leases expire on the same date – five years after the commencement of section 31 of the NTNER Act (18 August 2007[824]) regardless of the commencement date of the particular lease. Thus all leases are intended to expire in 2012. Any proposal to develop or change the use of the land subject to these leases must therefore be given by the Australian government during the term of these leases.

There are obviously also many other measures that form part of the NTNER which include changes to the issues of alcohol management, pornography, the criminal law, community stores, housing and infrastructure and police. I will only outline and analyse the relevant ones which in my opinion are the compulsory acquisition of 5 year lease over communities, changes to the permit system and the suspension of native title.

The NTNER Act and five-year leases

The Commonwealth has compulsorily acquired 5-year leases over the 64 larger communities (generally those that have more than 100 residents) in the Northern Territory. The High Court in the 2009 case of *Wurridjal v The*

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[821] *Gumana v Northern Territory of Australia* [2007] FCAFC 23 at [93].
[822] See sections 3(1) of ALRA and section 4 of the NTNER Act respectively.
[823] See section 4(2)(b) of the NTNER Act and page 8 of the Explanatory Memorandum to the *Northern Territory National Emergency Response Bill 2007.*
[824] See section 2 of NTNER Act for commencement date of various provisions.

Commonwealth of Australia[825], which involved the township of Maningrida, confirmed that this was a compulsory acquisition of the township area by the Commonwealth.

It is important to note that not all of these communities are located on Aboriginal land under ALRA. A minority – some 16 communities are what are described as community living areas on Northern Territory land tenure.[826] This part of the Report is only about those on Aboriginal land under ALRA.

The Commonwealth under these leases has a right of exclusive possession and quiet enjoyment of the land. Whilst the underlying title – the fee simple or freehold title held by the relevant Land Trust remains, the owner has no rights with respect to the lease, except to seek compensation. The Aboriginal Land Trust cannot vary or terminate the lease.[827]

These rights mean that the Commonwealth has the right to determine who enters, remains, uses and enjoys the land and waters the subject of the lease area.[828]

In addition, the responsible Commonwealth Minister has the right to determine additional conditions for these leases.[829] This was done on the 17 August 2007[830] and further provides the Commonwealth with a wide discretion to determine the use of the land (clause 2.1.1):

> The Commonwealth is entitled to use, and permit the use of, the Land for any use the Commonwealth considers is consistent with the fulfillment of the object of the Act.

The stated object of the Act is to "improve the well-being of certain communities in the Northern Territory."[831]

Existing rights, titles and interests on these lease areas are preserved, unless terminated by the Minister.[832] The High Court has determined that this also includes section 71(1) rights under ALRA for Aboriginal people to enter, use and occupy the land and so to take and use water from that land in accordance with Aboriginal Tradition are also preserved under the NITER legislation. A five-year lease is terminated if the Aboriginal Land Trust grants a township lease under section 19A of the ALRA.[833]

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[825] [2009] HCA 2
[826] For relevant details of these communities see http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/Pages/default.aspx (accessed 28/1/09).
[827] Section 35(4) of the NTNER Act.
[828] *Radaich v Smith* 101 CLR 209 at 222.
[829] Section 36 of the NTNER Act.
[830] Additional Terms and Conditions for Leases Determination 2007 Dated 17 August 2007.
[831] Section 5 of the NTNER Act.
[832] Sections 36,37 of the NTNER Act.
[833] Section 37(7) of the NTNER Act.

This means that unlike the situation with respect to section 19A township leases the rights of Aboriginal people entitled under Aboriginal tradition to access, use and occupy the 5-year lease area are preserved and not terminated by the former lease. Although, it is important to understand that s19A township leases are granted with the consent of traditional owners.

The current Federal Government in line with its policy decision to apply the *Racial Discrimination Act, 1975* (IRDA) to the NTNER is proposing changes to the provisions dealing with the 5 year leases in Part 4 of the NTNER Act.

These changes involve a clarification of the objectives of the provisions creating the leases to state explicitly that they are special measures under the IRDA to "improve the delivery of services in Indigenous communities" and "to promote economic and social development in those communities."[834]

It will also be made explicit that these leases are to be administered "with regard for Aboriginal people and culture", and enact new provisions to facilitate a "transition" from the current 5 year leases to longer term leases of community areas. For example, a section 19 lease to Territory Housing or Township Leases under section 19A to the Executive Director of Township Leasing. New Guidelines are proposed to be specified that the Commonwealth must have regard to "when exercising a power under section 35(2)" "to sublease, license, part with possession or otherwise deal with its interest" in a 5-year lease.[835]

It is the Federal Governments intention that these changes to the 5 year leasing provisions will ensure that the leases are special measures for the purposes of the IRDA. The changes are intended to take effect from the 1 July 2010[836], but as mentioned have not yet passed into law.

In conclusion, "the Commonwealth's right of "exclusive possession" under its statutory 5 year lease is made subject to all prior interests, including prior interests in possession granted by the Land Trust, as well as being made subject to all traditional rights covered by s 71."[837]

Any Indigenous rights to water that arise as a result of the grant of the fee simple title as outlined in section1 of this report concerning ALRA are exercisable by the Commonwealth because of the nature of the lease compulsorily acquired by the Commonwealth - a right to exclusive possession.

Native Title and five year leases under the NTNER

If any native title exists in respect of the land the subject of the lease the

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[834] Explanatory Memorandum - *Social Security and other legislation amendment (Welfare Reform and Reinstatement of Racial Discrimination act) Bill 2009* at page 52.

[835] Ibid 47.

[836] http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/strengthening_nter_25nov2009.htm (accessed 3/2/10)

[837] Crennan, J; *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 at pages 159-160.

"non-extinguishment principle" applies to the grant and activities of the Minister under the lease. This means that any native title is suppressed but not extinguished during the term of the lease.[838] Further, this also means that any native titleholders have no rights with respect to what the Federal Minister does or authorizes on the lease area except for the right to make a claim for compensation.

To some extent the existence of native title on Aboriginal land under ALRA is a non-issue as it is generally accepted that the freehold title and the rights over development and access are more substantive than under any recognition of native title in accordance with the *Native Title Act, 1993* and the future act provisions under that Act. In fact, the future act provisions of the NAT have never applied on Aboriginal land under the ALRA - they are deliberately excluded.[839] In addition, section 210 of the *Native Title Act, 1993* provides that nothing in that statute affects the rights or interests of any person under ALRA.

Consequently, most traditional owners under ALRA have and do not seek any recognition of native title under the NAT.

The Courts have held that the grant of land (fee simple) under ALRA to a Land Trust is consistent with the continued existence of native title.[840] In the *Gumana* or Blue Mud Bay litigation, which is considered in detail in Part 6 of this Report the Federal Court did specifically made a determination that native title does exist in relation to areas of land where a grant of fee simple under the ALRA also existed.[841] As mentioned, it is unusual for Indigenous groups to do so because of the already prevailing stronger legal position under ALRA.

It is widely recognised that the proof and recognition of native title rights and interests under the NTA and ALRA are quite different[842] and more onerous under the NTA.

The effect of this suspension of native title is that any native title rights to water are suspended and inoperative during the term of the 5-year leases.

Families, Housing Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Act 2008

This amendment Act dealt with pay TV broadcasts into prescribed areas under the NTNER, the transport of prohibited material through a prescribed area, the licensing of certain roadhouses as a community store and relevantly the proposed re-imposition of the permit system to community areas in

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[838] See section 51 of the NTNER Act generally and section 238 of the *Native Title Act, 1993*.
[839] Section233 of the *Native Title Act, 1993*.
[840] *Pareroultja v Ticker* (1993) 42 FCR 32.
[841] *Gawirrin Gumana v Northern Territory of Australia* [2005] FACT 1425 at pages 5-7 of the judgement.
[842] Ibid 6.

townships subject to the NITER. The latter is dealt with specifically under the heading the Permit System in this section of the Report.

Indigenous Affairs Legislation Amendment Act 2008

This amendment Act[843] provided that:

- Section 19 A township leases could be for a period between 40 years and 99 years. Instead of 99 years only as originally provided for in the Act;
- made improvements to the process by which payments are made for the effect of the 5 year leases acquired by the Commonwealth under the NTNER; and
- 13 further areas of land would be granted as Aboriginal land under the ALRA and be operated as National Parks under Northern Territory law.[844]

This amendment Act effects no further relevant changes to the subject matter of this Report.

Permit system

The Land Rights Act – section 70, generally speaking makes it an offence to be on Aboriginal land – Aboriginal freehold land except in accordance with the Act or a law of the Northern Territory.[845] This effectively has meant that one needs a written permit to access Aboriginal land, a system generally administered by the Land Councils unless an area had been approved under section 11 of the *Aboriginal Land Act* (NT) as not requiring permission to access through the permit system. In addition, if a person holds a lease under section 19 of the ALRA then they don't require a permit to access the land the subject of the lease.[846] Permits are also not required in s19A township leases.

In large measure until amendments brought in as a result of the NTNER the permit system was administered under Northern Territory law through the Northern Territory *Aboriginal Land Act.*[847] As a result of the NTNER the Commonwealth has taken a far more direct role in this area as with others obviously under the Intervention. There are now extensive provisions in ALRA that provide for a defence to being on Aboriginal land without a permit, some of which are similar to the exceptions to the permit requirement already applying in the NT Aboriginal Land Act.

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[843] *Indigenous Affairs Legislation Amendment Act* was assented to on 1 July 2008 and commenced on 2 July 2008 (section 2).

[844] As agreed in the *Parks and Reserves (Framework for the Future) Act* (NT) Schedule 1 and now included within Part III of the Territory Parks and Wildlife Conservation Act**.** For the particular areas included see Part 5 of Schedule 1 of ALRA.

[845] Section 70 and 73(1)(b) of the *Aboriginal Land Rights (Northern Territory) Act, 1976*.

[846] Section 70(2) of ALRA.

[847] Section 73 of the ALRA provides for the NT Legislative Assembly to make laws regulating or authorising entry onto Aboriginal land, but any such laws must provide for the right of Aboriginal to enter such land in accordance with Aboriginal tradition. See also section 4 of the NT *Aboriginal Land Act, which* creates the permit system.

As a result of the NTNER legislation and the review conducted by the Commonwealth Government of the permit system in 2006[848] a number of short term (for the term of the NTNER) and long term or "permanent" changes have been made to the permit system. The word permanent is used advisedly with the proviso that the Federal Parliament can change this legislation as and when it wishes to do so.

The current situation as implemented as part of the NTNER is that the permit system no longer applies to "access common areas in the main townships" and "barge landings and airstrips connected with them".[849] This applies to some 52 communities. It was also the intention to include "road corridors" on Aboriginal land to these communities but this has never been implemented.[850] There is still no requirement for a permit on a public road to a community. At the time of writing this situation did not appear likely to change.

It is the intention of the current Federal Labor Government to revoke these changes to the permit system, that allow public access to the common areas of the 52 communities mentioned, but to date the amendments to achieve this have been rejected by the Senate.[851] It is important to note that these changes to the permit system just outlined only apply to the 52 communities.[852]

The ALRA was also amended to state, amongst other things that relevantly persons exercising powers or performing functions under any law of the Commonwealth or the Northern Territory do not require a permit. This includes a person who is in the service or employment of a Commonwealth or Territory Authority. These changes are permanent and are not intended to be changed by the current Federal Government.[853] Importantly, it should be noted that these changes apply to ALL Aboriginal land not just the township areas subject to the 5-year leases or the common areas of Aboriginal townships.[854] Although under the Northern Territory *Aboriginal Land Act* the Northern Territory Minister has always had power to issue a permit to a person to perform statutory duties.[855]

In addition, NTNER changes for 5 years were introduced that provide that an approved (by the Federal Minister) class of persons can enter and remain on Aboriginal Land – being government workers, contractors and others doing

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[848] Hansard House of Representatives Tuesday 7 August 2007 at page 20.
[849] Ibid.
[850] See section 70B(1) and (2) ALRA. A Ministerial determination to decide which roads the public may use to access these communities without a permit has never been made.
[851] See *The Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008.*
[852] These areas are now described as community land in ALRA and are the communities to which the new access provisions in sis 70B-70F apply.
[853] http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/housing_land_reform/Pages/permit_system.aspx (accessed 25/01/10).
[854] Section 70(2A) ALRA.
[855] Section 6 *Aboriginal Land Act, NT.*

work as part of the NTNER.[856]

Importantly, none of these new changes to the permit system limits traditional rights to enter, use and occupy the land in accordance with Aboriginal tradition.[857] Nor do they affect section 69 of ALRA, which makes it an offence to enter or remain on a sacred site in the Northern Territory. The definition of common area in a township for which access is now allowed without a permit specifically excludes a sacred site, which as mentioned elsewhere includes water that is a sacred site.[858]

Conclusion

The effect upon Indigenous rights to water of these various changes are in a practical sense quite limited. This is because the changes are limited to the township areas only on Aboriginal land under ALRA. The extent of Indigenous rights to water under ALRA is discussed in detail in the section dealing with ALRA in section 1 of this Report.

Sacred Sites

The protection for sacred sites that consist of water under ALRA and the Northern Territory Sacred Sites Act are maintained in all cases.

Statutory riparian rights to take and use water

Indigenous rights to water that arise as a result of the grant of the fee simple title under ALRA are exercisable by the Commonwealth:

- because of the nature of the lease compulsorily acquired by the Commonwealth under the NTNER for 5 years - a right to exclusive possession.

- and where a s19A township lease applies by the Executive Director of Township leasing (a Commonwealth statutory officer) or by any sub-lessee.

Section 71(1) Rights to use and occupy Aboriginal land and to take and use water in accordance with Aboriginal tradition

These rights are protected under the NITER legislation in relation to 5-year leases held by the Commonwealth but are terminated in relation to section 19A township leases where granted by traditional owners to the extent of any inconsistency with the terms of the lease.

As Justice Crennan of the High Court said in *Wurridjal* in relation to the NTNER and 5 year leases:

> …all persons who presently hold s 71 rights under the Land Rights Act can continue to participate in ceremony on or in relation to the four

[856] Section 70 (2BA) – (2BD) ALRA.
[857] Ibid section 70H.
[858] Ibid section 70F(20)(b).

sacred sites on the Maningrida land and continue to enter, use and occupy the Maningrida land for all the traditional purposes set out above, without any intrusion upon those rights.[859]

This quote refers to the claimed s 71(1) rights in *Wurridjal* being[860]:

(a) a person who is entitled by the body of traditions, observances, customs and beliefs of the traditional Aboriginal owners governing his or her rights with respect to the Maningrida land to enter, use and occupy the Maningrida land for the following purposes:
   (i) to live;
   (ii) to participate in ceremony, particularly on or in relation to the sacred sites referred to … herein;
   (iii) to forage as of right;
   (iv) to hunt;
   (v) to fish; and
   (vi) to gather
   (together, *the traditional purposes*).

   Particulars of traditional purposes
      (aa) Fishing and foraging in the inter-tidal zone.
      (bb) Harvesting bivalves, such as mangrove mussels that grow on the margins of the salt water creeks and live in the mud on inland creeks and freshwater mussels.
      (cc) Gathering of bush fruit and vegetables which is generally undertaken by women, but also by men.
      (dd) Gathering tucker sourced from the billabong located in Area 5 of the Maningrida land, including water lilies, long-necked fresh water turtles, fresh water goannas, geese and ducks.
      (ee) Hunting wallabies, goannas, geese, ducks and flying foxes.
      (ff) Utilising certain floral species and minerals on the Maningrida land for medicinal purposes in accordance with custom. A species of white mango fruit is gathered and eaten in order to assist in the treatment of flu, coughs and headaches.
      (gag) Taking white pigment from the Maningrida land to paint bodies and sacred objects for ceremonies.
      (he) Observing traditional laws and performing traditional customs and ceremonies, particularly on sacred sites, on the Maningrida land.
      (ii) Being responsible for maintaining the traditional connection of the members of the Dhukurrdji clan with country.
(b) a person who, by reason of the matters set out in paragraph (a), is

[859] *Wurridjal* Ibid at p155-156.
[860] Quoted in the judgement of Justice Kirby in *Wurridjal* at [245].

entitled to benefit of the rights conferred by s 71 of the Land Rights Act."

Permit system

The permit system allows for the control of access to water on and in Aboriginal land. This is also dealt with in section 1 of the report under the section on ALRA. The extent to which permits are no longer required in township areas affects that part of Indigenous rights to water to control access to those areas.

Section 19 interests

Section 19 interests can be granted by traditional owners that enable their involvement in water developments under the NITER even where 5 year leases have been acquired by the Commonwealth.

This is not the case with respect to township leases where the legal power to issue all leases after the head lease is granted is with the Executive Director of Township Leasing and consequently it is not possible for traditional owners to consent to a s19 lease or other interest.

5. Where practicable and useful, illustrate analysis with at least one existing or emerging water allocation scenarios (e.g. the Katherine Water Allocation Plan) and their legal implications for owners of Indigenous lands and holders of native title interests within water allocation districts

Introduction

The content and law surrounding water allocation plans has been discussed in Section Two of this Report in the context of the *National Water Initiative* (NWI). The NWI commits the northern Australian jurisdictions to "transparent, statutory-based water planning."[861] If one of the things that are meant by "statutory-based water planning," is that there is a requirement that water plans are legally binding then this is only the case in two of the three northern Australian provincial jurisdictions.

In Queensland and the Northern Territory this requirement has been implemented so that once a water allocation plan in those jurisdictions is approved the management of water resources in the area for that plan must be in accordance with the plan. This is not the situation in Western Australia where there are no "statutory" water plans. The plans provide guidance to the responsible Minister only for management of the water resources in the relevant area.[862]

The Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019[863] is the chosen example. This Plan solely deals with an underground water resource which impacts on local surface waters in the form of springs and rivers.

By way of comparison another "emerging water allocation" situation in northern Australia, the La Grange aquifer in the West Kimberley of Western Australia has been identified. The La Grange groundwater allocation plan was finalised in February 2010.[864] The Tindall Limestone Aquifer plan is a statutory or legally binding water plan whilst the La Grange plan in Western Australia is not. This fact in itself therefore has implications for local Indigenous groups. In the sense that to the extent that they are beneficial to Indigenous interests one is legally binding and the other is not.

The Tindall Limestone Aquifer Plan area includes a native title claim – a registered native title claim whilst the La Grange plan also dealing with

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[861] National Water Initiative Objectives paragraph 23 ii).
[862] *Rights in Water and Irrigation Act, 1914* (WA) ss 26 GW (2), GX (2), GY (2).
[863] http://www.nt.gov.au/nreta/water/kwac/index.html (accessed 15/3/10).
[864] Both of these water allocation plans are also briefly looked at in section 2 of this Report dealing with compliance with the *National Water Initiative*.

subterranean waters has a number of finalised and recognised native title determinations within the same area. That is, Court orders recognising the existence of native title.

Native Title rights and aquifers – subterranean waters

The nature of native title rights in relation to aquifers and subterranean waters is examined before I go to the respective water allocation plans and their legal implications.

There are interesting conceptual problems that arise in terms of the recognition and exercise of native title rights with respect to waters that consist of subterranean water. These arise due to the wording of native title orders and whether that wording fully captures the nature of the Indigenous connection to aquifers and subterranean waters. As an example, the following is a common Court finding of a native title right in relation to areas and sites of significance.

- the right to care for and maintain sites and areas that are of significance to the native title holders under their traditional laws and customs.[865]

There is no doubt that native title rights can be recognised in relation to subterranean waters as the *Native Title Act, 1993* (NTA) clearly applies to waters. Subterranean waters are included within the definition of waters under the Act.[866]

In relation to the Tindall Aquifer the subject of the Katherine Water Allocation Plan the authors David Cooper and Sue Jackson in a Report for NAILSMA's Indigenous Water Policy Group entitled a *Preliminary Study on Indigenous Water Values and Interests in the Katherine Region of the Northern Territory* reported the following from local Indigenous traditional owners:[867]

> the underground waters, including the water of the Tindall Aquifer, are themselves significant and feature in Aboriginal ritual knowledge.
>
> Local Aboriginal cultural traditions concerning the Rainbow Serpent also include beliefs regarding its travels and presence underground, including within the limestone formations of the Tindall Aquifer. Aboriginal conception of the Tindall Limestone formation is that it has tunnels or channels within it along which Rainbow Serpents travelled and which now channel the water in underground rivers.[868]

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[865] Attorney-*General of the Northern Territory v Ward* [2003] FCAFC 283 Order 9.2 in WA consent determination.

[866] See Section 1 Part A of the report

[867] Cooper, David and Jackson, Sue *Preliminary Study on Indigenous Water Values and Interests in the Katherine Region of the Northern Territory* March 2008 A report prepared for NAILSMA's Indigenous Water Policy Group CSIRO Sustainable Ecosystems and NAILSMA, Darwin, Northern Territory at 31.

[868] Ibid 28.

Indigenous people often access and use subterranean water after or as it arises from underground in springs and soaks for example at the surface. In addition people often dig into the ground to locate water, establish and maintain "native" wells and to keep and maintain springs and soakages. The native title rights to maintain and protect and practice culture in relation to areas and sites of significance also includes waters below the surface of the land in an aquifer if it is part of that site or area. Generally the soakage or springs are significant and the act of digging by following certain laws and traditions is part of the religious and cultural practice.

In relation to the La Grange aquifer (properly called the Broome sandstone aquifer) an anthropological Report by Ms. Sarah Yu entitled *Ngapa Kunangkul: Living water; Report on the Aboriginal cultural values of groundwater in the La Grange sub-basin* explains the nature of these values and connection to subterranean waters in that area of northern Australia:[869]

> Living waters may be surface waters such as the springs (referred to as *pajalpi*) at Malupirti, or they may require digging, such as the *jila* at Jungkurljartiny. They are all said to be connected to the underlying water table, whether regional or local, which is referred to as *kurtany*, literally 'mother'. I have interpreted *kurtany* in this context to connote 'mother of underground water', that is, the groundwater itself. TOs refer to the water table in Aboriginal English as 'the balance of water'. They say that it is their responsibility to maintain the balance (i.e. to keep it at the same level).

In terms of the connection with subterranean areas as being part of a group's country and the significance of these areas Ms. Yu further writes as follows:

> These features are not just surface phenomena, such as hills, trees, animals, creeks, bays and so on. They also include subterranean features and activities, for example groundwater and its flow, or rock formations and associated activity such as earth tremors.[870]
>
> Active *pulany* (rainbow serpent that lives in the permanent water places) are believed to be able to move around under the ground, surfacing through escape holes called *tulkarru*.[871]

One Traditional Owner who was an informant for this report is quoted as saying:

> The big water, the mother of water, *kurtany*, keeps the water level. It keeps it [the water] alive. Same like the mother of a human being.

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[869] Yu, Sarah "*Ngapa Kunangkul: Living water; Report on the Aboriginal cultural values of groundwater in the La Grange sub-basin"* prepared by The Centre for Anthropological Research, University of Western Australia, for The Water and Rivers Commission of Western Australia December 1999 at 21.

[870] Ibid 17.

[871] Ibid 19.

> That's the mother of the water level. The water is from the *Pukarrikarra* (the creative epoch in which the world was given form and meaning)—it's underneath. The water underneath doesn't live free - it travels underneath, from the high country to the sea.[872]

The notion that an aquifer being a geological structure containing water wholly below the ground is an area or site may well strain the limits of the normal meaning of those words, but informed by the relevant Indigenous tradition as exemplified here should be included within the ambit of the native title rights. Due to the conceptual difficulties in expressing these concepts in Court orders and that this issue has not been subject to examination by the Courts, a precise understanding of the meaning and reach of these native title rights remains open.

An "area" is obviously larger than a "site" and native title orders use both these words. The meaning of the words area and site seem to comfortably encompass water and land below the surface. The "living" subterranean waters in an aquifer that are sacred, the geological structure of an aquifer that are the representation/s or manifestation of the existence and travels of rainbow serpents would I would have thought made that water and area or site significant in accordance with Indigenous tradition.

What is not in doubt is that the native title rights to take and use water can include subterranean water and in an exclusive possession determination of native title can also include a right to control access to that water. I'll now go to an examination of some of the native title orders in relation to this subject.

In the Full Federal Court decision of Attorney - *General of the Northern Territory v Ward* in 2003 in relation to the Northern Territory[873] part of that litigation the Court made orders that native title existed in two separate areas. In one area it decided that the native title was "an entitlement to possession, occupation, use and enjoyment of those parts of the NT determination area to the exclusion of all others provided, however, that rights and interests in flowing and subterranean waters are non-exclusive."[874]

In the other area relevantly it was not an exclusive possession determination and the rights to water were: "the right to hunt on the land, to gather and use the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin, and to have access to and the use of natural water on the land;" and "the right to have access to, maintain and protect the sites of significance on the land of the NT determination area;"[875]

One order in an exclusive possession finding recognizes a right to use

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[872] Ibid 29.

[873] [2003] FCAFC 283. This was part of the of the Ward/Miriuwung Gajerrong litigation that also related to the bordering areas in the East Kimberleys in Western Australia.

[874] Ibid Order 9 at 8,9.

[875] Ibid Order 5 (a) at 5.

subterranean waters (being non-exclusive) and the other recognises a right to take and use natural water ***on*** the land. In the native title context in Australia the meaning of the word "land" does not include waters because of its definition in the *Native Title Act, 1993* where land is defined in the following terms:

> *land* includes the airspace over, or subsoil under, land, but does not include waters.
>
> Note 1: Because of the definition of *waters*, not only rivers and lakes etc., but also such things as the bed or subsoil under, and airspace over, rivers and lakes etc. will not be included in *land*.
>
> Note 2: Because of the definition of *waters*, the area between high water and low water will not be included in *land*.

Interestingly, in the associated claims on the Western Australia side decided in the same litigation it was similarly determined that "There are no exclusive native title rights in or to flowing or subterranean water in the Determination Area"[876] in relation to exclusive possession areas of the determination. In relation to the area where native title was determined to be not of an exclusive nature there was no restriction in relation to the right to take water being *on* the land. It was expressed in the following terms:[877]

(a) the right of access to the land and waters;
(g) the right to take water;
(i) the right to care for and maintain sites and areas that are of significance to the native title holders under their traditional laws and customs.

The latter right is in relation to sites and areas not just sites as in the Northern Territory determination. I have noted the potential problems with the use of the word site earlier and in the section of this report on Indigenous Heritage protection legislation in Section A Part D.

To the extent that subterranean water is water that arises from underground in springs and soaks and is then located at the surface then this would appear to present no difficulties.

But to the extent that these rights are said to apply to water when it is still subterranean that is below the ground it is more problematic in my opinion. For instance the order "a right to take and use natural water ***on*** the land" would appear to not apply to subterranean waters.

In another later Northern Territory case - *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* in 2005 a similar right was expressed in these terms which does not suffer from the

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[876] Ibid Order 11 in WA Consent determination.
[877] Ibid 9.2.

apparent limitation I have just discussed as it includes the words "on or in the land ":[878]

> '(a) the right to hunt and fish, to gather and use the resources of the land such as food and medicinal plants and trees, tubers, charcoal, ochre, stone and wax and to have access to and use of the water on or in the land.

This variation in the wording of court orders indicates that it is necessary to look at each determination or order and factual situation with respect to native title individually. Whilst often rights to water appear to be in common form; the facts and evidence in each case may lead to different outcomes. See in Section 1 Part A and Section 6 of this Report which illustrate that other native title outcomes do not appear restricted in the manner raised here. The recognized rights to water are often in the following form:

- A right to take water, for the purposes of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs;[879]

In the *Karajarri* native title determination, which covers parts of the La Grange groundwater allocation plan in the West Kimberley region of Western Australia a further definitional exercise was undertaken. For the purposes of the recognition of native title rights in relation to water in that case "flowing and subterranean waters" have been excluded from the definition of waters and defined as follows:[880]

> "flowing and subterranean waters" means those waters within Determination Area A which are:
>
> (a) waters which flow, whether permanently, intermittently or occasionally, within:
> (i) any river, creek, stream or brook; and
> (ii) any natural collection of water into, through, or out of which a river, creek, stream or brook flows; and
>
> (b) waters from and including an underground water source, including water that percolates from the ground;

The latter part of this definition is obviously the part that concerns subterranean waters. The native rights that then apply to those waters are:

> (b) the right to use and enjoy the flowing and subterranean waters,

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[878] *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135. See page 1 of the Court orders at paragraph 2(iii).

[879] *Mark Anderson on behalf of the Spinifex People v State of Western Australia* [2000] FCA 1717.

[880] *Nangkiriny v State of Western Australia* [2002] FCA 660 at Order 1 of the determination in the definitions at 3, 4 and paragraph 4(b)(i) and (ii) at 5.

including:

(i) the right to hunt on and gather and fish from the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs; and

(ii) the right to take and use the flowing and subterranean waters and other resources accessed in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs.

In this case clearly rights to take and use subterranean waters for a variety of non-commercial purposes are included which as mentioned applies in the La Grange groundwater allocation plan.

The rights to water claimed in the Katherine registered native title claim in relation to the Katherine Water Allocation Plan (WAP) for the Tindall Limestone Aquifer include:

- exclusive possession to the land and waters, and
- to use and enjoy the resources of the area including water;
- to control the use and enjoyment of others of the natural resources of the area including water; and
- to maintain and protect places of importance which includes water.[881]

It may be that the claimed rights are not the same rights in relation to water recognised if and when the claim is finalised. There are no apparent limitations upon the claimed rights to subterranean waters in the Katherine native title claim.

Katherine Water Allocation Plan (WAP) for the Tindall limestone Aquifer - Northern Territory

A Water Allocation Plan (WAP) is a legal framework for the management of water in the Northern Territory. According to the government department administering this legislation:

> Water Allocation plans are statutory instruments, declared under the Water Act to ensure that water extraction is undertaken in a sustainable and equitable manner with priority given to environmental and cultural flows to protect our unique environment.[882]

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[881] The claimed native title rights and interests are taken from the registration test decisions made by an officer of the National Native Title Tribunal and available at http://www.nntt.gov.au/Applications-And-Determinations/Registration-Test/Pages/search.aspx (accessed 2/8/10).

[882] http://www.nt.gov.au/nreta/water/manage/index.html (accessed 2/8/10).

A statutory instrument is delegated or subordinate legislation of the Parliament that has the force of law. In this case – the WAP is approved by the responsible Minister who has been delegated the power by the Parliament, the Legislative Assembly of the Northern Territory through the *Water Act, 1992* to declare the Plan and thus make it legally binding in the area to which it applies.[883] As a statutory instrument it is "an order with the force of law made under authority granted to a minister by an Act of Parliament."[884]

The Plan acknowledges the traditional owners of the area:

> For hundreds of years, people from the clans of Jawoyn, Wardaman and Dagoman have lived on the lands surrounding Katherine. These people today still have an important connection to the many springs, sinkholes, streams and rivers, used for fishing, swimming, camping and dreaming.[885]

This plan declared by the responsible Minister on the 19 August 2009 governs subterranean waters only in the Tindall Limestone Aquifer, which is located within the Daly Roper Water Control District.[886]

Subsurface water or water in an aquifer is defined in the *Water Act, 1992* (NT) to be ground water. Ground water is defined in the following terms:

> *ground water* means water occurring or obtained from below the surface of the ground (other than water contained in works, not being a bore, for the distribution, reticulation, transportation, storage or treatment of water or waste) and includes water occurring in or obtained from a bore or aquifer.[887]

It is an offence to take water from a bore[888] except in accordance with a licence granted under section 60 of the Act.[889]

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[883] Section 22B(1) *Water Act, 1992.*

[884] http://www.law-glossary.com/definition/statutory-instrument.html (accessed 2/8/10).

[885] Department Of Natural Resources, Environment, The Arts And Sport, Northern Territory Government *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* at 12.

[886] Department Of Natural Resources, Environment, The Arts And Sport, Northern Territory Government *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* at page 12. To quote from the Plan: b. Waters to which this Plan applies (i) This Plan applies to management of water contained within the unconfined and confined Tindall Limestone Aquifer within the Katherine River Catchment. (ii) This Plan does not directly apply to the management of surface water extractions from the Katherine River but a range of groundwater management provisions are made which aim to achieve environmental and cultural outcomes which depend on groundwater discharge to the river

[887] Section 4 *Water Act, 1992* (NT)

[888] Ibid s 59.

[889] "A bore located outside a Water Control District does not require a construction permit from NRETAS under the *Water Act*," see http://www.nt.gov.au/nreta/water/permits.html (accessed 2/8/10).

An Implementation strategy is to be developed in relation to the "monitoring, investigation, and compliance of the Plan".[890] Many of the measures to recognise and protect Indigenous interests in the water allocation plan are dependent upon the successful completion of the Implementation Strategy.

The Water Allocation Plan has a lifespan of 10 years and is subject to a review after 5 years.[891]

Current Indigenous land interests

There are no existing Indigenous land interests comprising Aboriginal freehold land under the *Aboriginal Land Rights (Northern Territory) Act,* 1976 in the water allocation plan area. Indigenous interests do hold some standard Northern Territory land titles.

There are two registered native title claims in the water allocation plan area.[892] A registered native title claim is an unresolved application for the recognition of native title. The registration of the claim enables native title claimants to have the benefit of the various procedural rights in the future act regime of the *Native Title Act, 1993* (Cth). Not all native title claims are registered before resolution. The *Native Title Act, 1993* establishes a registration test that must be passed by the native title claimants to achieve registration. The test is administered by the National Native Title Tribunal.

Procedural rights

The most significant relevant procedural rights in the context of a registered native title claim in relation to this report are those in section 24 HA of the *Native Title Act, 1993* (NTA). By procedural rights in this context I mean rights to be treated fairly, for example to be notified about something that affects your interests. As opposed to the substantive right being a right to a take and use subterranean waters. These procedural rights are specifically explained in Section 1 Part A of this report concerning native title.

In summary, section 24HA provides that prior to the grant of a licence to take and use water notice of the intention to grant such a licence is to be given to the native titleholders or any registered native title claimants. An opportunity to comment about the grant is to be provided before it is made. The grant of any licence/authority to take and use water is subject to the non-extinguishment principle and a right to claim compensation for the affect upon native title is available to native titleholders.

In this instance the Katherine WAP states that from commencement of the

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[890] http://www.nt.gov.au/nreta/water/kwac/index.html (accessed 28/7/10).

[891] Department Of Natural Resources, Environment, The Arts And Sport, Northern Territory Government *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* at page 2 Part 1 Introduction.

[892] The registered native title claim is Federal Court file no. NTD 6002/99 with an application name of Katherine. There is also another registered claim concerning one Lot 1348 in application no. NTD60001/00.

Plan there will be no new licences granted. New licenses may be granted after the 5-year review if there is available water that will not diminish "the reliability of existing licences, or degrading environmental or cultural values."[893]

In the limited circumstances available because of these restrictions any proposal to grant new licences to take groundwater in relation to this water allocation plan area will attract the requirements of section 24 HA of the NTA mentioned above in relation to the registered claimants.

There are provisions in Part 6A of the *Water Act, 1992 (NT)* for the giving of notice and an opportunity to comment in relation to what is called a water extraction licence under that Act. These provisions are similar to the section 24HA NTA requirements. A water extraction licence is defined to mean:

> *water extraction licence* means:
> (a) a licence under section 45 to take or use water; or
> (b) a licence under section 60 to take water from a bore.[894]

The latter subsection (b) concerns the taking of ground water from a bore. Section 60 of the Act is in the following terms:

> 60 Grant of licence to take ground water
> (1) Subject to this Act, the Controller may, of his or her own motion or on application in the prescribed manner and form, grant to a person a licence in the prescribed form to take water from a bore.
> (2) A licence may be granted under subsection (1) subject to such terms and conditions, if any, as are specified in the licence document.
> (3) Subject to subsection (4), a licence shall be granted for such period, not exceeding 10 years, as is specified in the licence document.
> (4) The Controller may, where in the opinion of the Minister there are special circumstances that justify so granting the licence, grant a licence for such period exceeding 10 years as is specified in the licence document.

Part 6A requires the Water Controller under the Act to give "notice of the Controller's intention to make a water extraction licence decision." The decision is whether a licence should be granted or not in relation to a new licence or an amendment to an existing licence which involves an increase in the quantity of water that may be taken or used.[895]

The requirement to give notice appears to be subject to the receipt of an application for a water extraction licence. The Controller also has the power

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[893] *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* at 7 - Rules for granting licences.
[894] Section 4 Interpretation *Water Act, 1992* (NT).
[895] Ibid s 71A(2).

under section 60 to grant a licence to take ground water of his/her own motion, that is, without an application. The notice requirement does not appear to apply in such a circumstance as section 71B (1) states that the obligation to give notice applies within 30 days after lodgement of an application.[896]

The notice is to be published in a newspaper circulated throughout the Northern Territory and may be published in a local newspaper also.[897] The notice must also include a range of information pertaining to the licence including location of the bore from which water is proposed to be taken, beneficial uses of the water and quantities.[898]

The notice must also include an invitation to make written comments about the application within 30 days after publication of the notice.[899] The Controller must also give a copy of the notice to the owners and occupiers of land immediately adjacent to the land from which the water will be taken and the land on which the water will be used.

The definition of an owner under the Act does not include registered native title claimants.[900] In relation to an occupier the situation is not so clear, as the definition includes a person in actual occupation or entitled to occupation of the relevant land.[901] Depending on the facts of a particular case then registered claimants may come within this definition. Section 24HA also requires the registered claimants to be notified by post and includes the necessary detail to be included in any notice. [902] The required detail in the notice conforms with the NTA requirements but there is no requirement in the *Water Act* or regulations to ensure it is delivered by post to the registered native title claimants.

These provisions, that is Part 6A of the *Water Act, 1992* (NT) do not fully reflect the requirements of section 24HA of the NTA. As long as administratively the notice is sent by post for example to the registered native title claimants then compliance will still occur with the NTA. The notice and opportunity to comment in this case would also have to be

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[896] The full provision is as follows: 71B Notice of intention to make water extraction licence decision (1) Within 30 days after lodgment of an application to which this Part applies, the Controller must give notice of the Controller's intention to make a water extraction licence decision.

[897] Ibid s 71B (2).

[898] Ibid s 71B (3).

[899] Ibid s 71B (4).

[900] Ibid s 4 Interpretation. *owner* means: (a) in relation to land alienated from the Crown by grant or by an Act – the owner of an estate in fee simple in the land; (b) in relation to land held under a lease granted by the Crown – the lessee; (c) in relation to land of the Crown subject to an agreement for sale or right of purchase – the person entitled to the benefit of the agreement or right of purchase; and (d) in relation to unalienated Crown land, not being land referred to in paragraph (c) – the Territory.

[901] Ibid s 4 Interpretation ***occupier***, in relation to land, means the person in occupation (under whatever title or permission, or without title or permission) or entitled to be in occupation of the land.

[902] See s 24 HA (7)(a) NTA and s8 (1) (e) *Native Title (Notices) Determination 1998 (Cth)*.

provided administratively in relation to a decision to grant a licence by the Water Controller "of his own motion" without an application to also ensure compliance with section 24HA of the NTA.

I say administratively as there is nothing in the NTA that requires a State or Territory to enact into law the notice requirements of section 24 HA as long as the requirements are carried out is sufficient. It may well be preferable that the complete notice and other procedural requirements are enacted in relevant legislation. It then makes clear what the requirements are and lessens the scope for administrative error and oversight.

However even if government doesn't comply and afford these procedural rights then the licence will still be valid with respect to the affect upon any native title in accordance with the *Native Title Act 1993*.[903]

Water Allocation Plan (WAP) and future acts

A primary question in relation to native title and a Water Allocation Plan is the rather complex issue as to whether a water allocation plan is a future act. That is, does the act affect native title and if so does the *Native Title Act, 1993* (NTA) operate in relation to the Plan? I have dealt with future acts in general terms in Section 1 Part A. A future act is any act by government or a Parliament that affects native title. For example, new legislation, the grant of a new land title or a licence to take and use water are all potentially future acts if they affect native title.

If it is a future act then the NTA provides a legal process that affords in some circumstances procedural rights to native titleholders and registered native title claimants. The future act process in the NTA at the same time provides a legal process by which government can ensure that legislation and grants are validly made when the making of or grant of them affects or may affect native title. In this case the native title situation is unresolved and future acts can still be valid. This is further complicated as in this case there are registered native title claims and not legally recognised or determined native title holders.

In one of the major court decisions concerning the future act regime in the NTA -the *Lardil* decision[904] Justice French noted:

> "To fall within the definition of "future act" an act must "affect native title". It does so if "it extinguishes the native title rights and interests or if it is otherwise inconsistent with their continued existence, enjoyment or exercise". The definition speaks in the present tense on the evident premise that the future act is done".[905]

It should also be remembered in this context that the NTA and equivalent

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[903] See Section 1 Part A for the detail in relation to this aspect.

[904] *The Lardil Peoples and Others v State of Queensland and Others* 108 FCR 453 (Justice French was in the majority in this case).

[905] *The Lardil Peoples and Others v State of Queensland and Others* 108 FCR 453 at 471.

Territory legislation confirms the right of the Crown to manage water generally and in relation to native title rights in water.[906]

A WAP in accordance with the Northern Territory *Water Act* is the primary mechanism or planning process for the management of the water resource in the particular plan area.[907] The relevant parts of section 22B of the *Water Act* disclose this fact:

> (4) Water resource management in a water control district is to be in accordance with the water allocation plan declared in respect of the district.
>
> (5) A water allocation plan is to ensure in the water control district that:
>
> (a) water is allocated within the estimated sustainable yield to beneficial uses;
>
> (b) the total water use for all beneficial uses (including those provided through rural stock and domestic use and licences granted under sections 45 and 60) is less than the sum of the allocations to each beneficial use;

Beneficial uses are the uses to which water may be first allocated then a license granted to take and use the water. Domestic and stock water uses do not require a licence. Beneficial uses of water and the allocation of water within estimated sustainable yields are usefully summarised in this Plan as follows:[908]

> Under the *NT Water Act* (the *Water Act*), a Water Allocation Plan can be declared to allocate water to beneficial uses within the estimated sustainable yield. Sustainable yield refers to the amount of water that can be reliably supplied from a water source to the consumptive beneficial uses of public water supply, agriculture, aquaculture, industry and rural stock and domestic, without causing unacceptable degradation to the non-consumptive environmental and cultural beneficial uses.

In essence, the plan determines the allocation of water in the plan area, that is the amounts of water that can be used for certain purposes or "beneficial uses" as described and what must be kept aside for environmental and cultural purposes.

To determine whether a WAP is a future act one must firstly determine whether it is an "act" for the purposes of the NTA. The immediate relevant

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[906] See s212 NTA and also the *Validation (Native Title) Act* NT s12 and discussion at page 10 Section1 Part A of this Report.
[907] *Water Act, 1992* (NT) s 22B.
[908] *Water Allocation Plan for the Tindall Limestone Aquifer* at 52.

provisions of the NTA are sections 226 and 227[909], which are in the following terms:

> 226 Act
>
> *Section affects meaning of act in references relating to native title*
>
> (1) This section affects the meaning of *act* in references to an act affecting native title and in other references in relation to native title.
>
> *Certain acts included*
>
> (2) An *act* includes any of the following acts:
>
> (a) the making, amendment or repeal of any legislation;
>
> (b) the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument;
>
> (c) the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters;
>
> (d) the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise;
>
> (e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;
>
> (f) an act having any effect at common law or in equity.
>
> *Acts by any person*
>
> (3) An *act* may be done by the Crown in any of its capacities or by any other person.

Justice Sackville in the *Jango* decision said with respect to section 226 that: "The term 'act' is defined very broadly in s 226".[910] The next relevant provision of the NTA concerns the definition or explanation as to whether an act "affects" native title.

> Section 227 of the Act affecting native title
> An act *affects* native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

Similarly, to the word "act" the definition of the word "affects" in section 227 of the NTA has been held that it is to be read broadly.[911]

A Water Allocation Plan as mentioned is declared by the responsible Minister, in accordance with a statutory power created under the *Water Act* and as such is an exercise of executive power – the approval of a statutory instrument under legislation pursuant to s226 (2)(e) of the NTA:

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[909] I have not reproduced or discussed section 233 the actual definition of a "future act" as it doesn't add anything in the context of this discussion.

[910] *Jango and Others v NT of Australia [2006] FCA 318* at paragraph 66.

[911] *Fejo v Northern Territory* (1998) 195 CLR 96 at [71].

(e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;

The next question to be decided therefore is whether the WAP affects native title in accordance with the NTA. It may affect native title if it extinguishes native title or is wholly or party inconsistent with the native title or the exercise and enjoyment of the native title rights and interests.

The claimed native title rights and interests in this case are for exclusive possession to the land and waters, and in relation to water to use and enjoy the resources of the area including water; to control the use and enjoyment of others of the natural resources of the area including water and to maintain and protect places of importance which includes water.[912]

The WAP in my opinion clearly does not extinguish any native title as it doesn't create any interests in relation to the water and certainly nothing that is inconsistent with any native title rights. It doesn't create any rights to take and use water nor does it provide any access rights to the water. The power to grant such rights, are within the *Water Act, 1992* (NT) only. It should be emphasised again that this is a complex area and there are currently no precedent court cases that have looked at this issue.

The most that could be said in my opinion is that the terms of the WAP in the broadest sense regulates the use of water in that it determines the amounts of water that may be allocated to different uses, that is environmental and consumptive purposes.[913] The environmental allocation does include the protection of cultural values. The Plan refers to the Indigenous subsistence use of water as a cultural value in the environmental allocation. This is in large measure the non-commercial native title right to use water within the environmental allocation although this is not explicit.[914]

The Plan determines the content of the rules of general application that determine environmental flows and secondly determines some of the conditions of the grant of a license for consumptive purposes to take water in the *Water Act*. The legal effect upon native title occurs with the grant of the licence not the Ministerial approval of the plan. It follows therefore that there is no affect upon the exercise of native title rights and interests either in my opinion.

The legal rights to take and use water from the consumptive pool and therefore any legal effect upon native title are made elsewhere, that is under

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[912] The claimed native title rights and interests are taken from the registration test decisions made by an officer of the National Native Title Tribunal and available at http://www.nntt.gov.au/Applications-And-Determinations/Registration-Test/Pages/search.aspx (accessed 2/8/10).

[913] By this I do not mean regulate the exercise of native title short of the abrogation or extinguishment of native title as discussed in *Yanner v Eaton* 166 ALR 258 for instance.

[914] *Water Allocation Plan for the Tindall Limestone Aquifer* at 5.

the *Water Act.* The plan sets some of the rules not the rights of use and therefore in my opinion is not an act that affects native title and consequently is not a future act. If it is not a future act therefore no question as to its validity arises. This is clear from the description given in the Plan itself in my opinion:

> A water allocation plan outlines the vision, objectives, strategies and performance indicators for the particular water source/s implicated by the plan. It also sets limits to the availability of water assigned to each beneficial use, rules for managing licences and water trading. A critical component of any water allocation plan is how it will be monitored. Monitoring is important to assess the performance of a plan and to inform reviews.[915]

The regulation of water at this very broad level does not in my opinion affect the potential native title rights and interests of the registered claimants as outlined above– it doesn't affect the right to control access to waters or limit any native title rights to use water for non-commercial purposes. It doesn't extinguish or abrogate or curtail any native title activities. In some respects it protects some of those activities such as the protection and maintenance of cultural sites and subsistence use as they are protected within the environmental pool by ensuring sufficient water is available for cultural values.

One factor that may change this opinion would be the recognition in the future of a native title right to trade in the resources of the area being water. I have dealt with this possibility in Section 6 of the report. This would be a commercial aspect of native title and the water for this would be allocated from the consumptive pool and would be subject to licensing requirements.[916] The affect upon native title involving as it would water trading would be more complex and may involve some inconsistency and therefore trigger the future act regime.

The Plan does affect the eventual determination by the Water Controller under the *Water Act* of the conditions of any licence from the consumptive pool in terms of the amount of water that can be used from time to time during the life of the licence. This is described as the Licence Security Categories and Reliability in the Plan. This establishes four categories of licences that have different levels of water availability to the licensee depending on the overall amount of water available for consumptive purposes.[917] Even with this possible development in native title law – a right to trade my opinion remains the same. The legal affect upon any native title comes from the grant of the licence not the plan itself.

If I am incorrect in this conclusion in relation to the future act regime in the

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[915] http://www.nt.gov.au/nreta/water/kwac/act.html (accessed 2/8/10).

[916] Section 211 of the NTA would not apply to lift licensing requirements as it would be for a commercial purpose.

[917] *Water Allocation Plan for the Tindall Limestone Aquifer* at 25.

NTA then the applicable provision would be section 24HA of the NTA concerning the validity of the WAP with respect to native title. As the WAP is a statutory instrument or delegated legislation it would come specifically within the terms of section of 24HA (1). This section is concerned with legislation and the WAP is a form of subsidiary or subordinate legislation. The provision is as follows:

> *Legislative acts*
> (1) This section applies to a future act consisting of the making, amendment or repeal of legislation in relation to the management or regulation of:
> (a) surface and subterranean water; or
> (b) living aquatic resources; or
> (c) airspace.
>
> In this subsection, *water* means water in all its forms and *management or regulation* of water includes granting access to water, or taking water.
>
> *Validity of act*
> (2) The act is valid.
>
> *Non-extinguishment principle*
> (4) The non-extinguishment principle applies to the act.
>
> *Compensation*
> (5) The native title holders concerned are entitled to compensation for the act in accordance with Division 5.

In Queensland in accordance with the *Water Act, 2000* the equivalent of a Water Allocation Plan in the Northern Territory is described as a Water Resource Plan. It is also subsidiary or subordinate legislation in that jurisdiction.[918]

If this provision was to apply then the Plan is valid in relation to its affect upon native title and the non-extinguishment principle applies in relation to the native title and compensation is payable for any proven affect upon native title. In these circumstances there are no applicable procedural rights such as prior notice and an opportunity to comment. These rights only apply in relation to water with respect to the grant of a licence or similar authority to take and use water required in section 24HA(2) not in relation to legislative acts.

Interestingly, the WAP does not explicitly account for the potential recognition of non-commercial native title rights to use water that are a common feature of a native title determination.

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[918] *Water Act, 2000* (Qld) s 50 (3) (a).

The legal status of a water allocation plan and whether it is a future act and the procedural rights that flow from that fact are yet to be finally determined by the Courts.

Existing licences held by Indigenous interests

There are a number of existing licences under the *Water Act* held by Aboriginal communities in this water plan area and those licences are protected as existing licences in accordance with the plan. These licences are for agricultural and industry purposes, and therefore, are licences to take water from the consumptive pool. The Kalano community has a high security licence[919] and at NT Portion 1533 a medium security licence.[920] The Kalano Community (Warlpiri) also holds a medium security licence.[921]

Strategic Indigenous Reserve (SIR)

The WAP also provides for the possibility of a reserve of water from the consumptive pool to be set aside for economic development by Indigenous people in the planning area. This is not a statutory requirement as in the Cape York region in Queensland in accordance with the *Cape York Peninsula Heritage Protection Act, 2007* but does have the force of law through its inclusion in the plan. As mentioned Water Allocation Plans are legally binding documents, a statutory instrument under the *Water Act, 1992* in the Northern Territory.

The creation of this reserve being an amount "up to" 680ML is dependent upon the recognition of native title in claim no NTD6002/00,which as mentioned is within the plan area.[922] It is also dependent upon sufficient water being available after the 5-year review of the plan for allocation to this reserve. Allocation of "excess" water from the consumptive pool after the review of this plan to this reserve is given second priority out of four other potential allocations. The first priority being any increase in demand from rural stock or domestic use and other small volume uses.[923] The review provisions also describe that the Indigenous reserve is to be held on trust. The trustee is not designated.

> 36. b. to hold up to 680ML in trust for Indigenous commercial development at the security level from which it is recovered;[924]

If native title is legally recognised by the courts prior to the 5-year review

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[919] A primary entitlement 298 full high and a secondary entitlement 16 Partial Medium (current as of 14/7/10).

[920] Kalano Community NT portion 1533 Primary 31 Partial Medium 9. (current as of 14/7/10).

[921] A primary 31 Partial Medium (current as of 14/7/10). Details of all these licences available at http://www.nt.gov.au/nreta/water/manage/register/pdf/wapgwel_register.pdf (accessed 2/8/10).

[922] *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* at page 20 Part 8.

[923] Ibid at page 36. Paragraph 36 Review of Extraction Limit ii.

[924] Ibid at 37.

then the plan provides for the amount of 680ML to be allocated upon recognition through an amendment to the plan.[925]

The amount of water allocated to Indigenous interests is based upon the percentage of Indigenous held land in the plan area. The potential allocation of 680ML is based upon existing licenses already described and the percentage of land that any successful native title outcome may include. To quote from Part 5 of the Background Document to the Plan:[926]

> 5.2.9.3 Providing water for future Indigenous economic development
>
> At present, Indigenous owned or managed land overlying the Tindal Aquifer comprises less than 1% of the Plan area. Under the Plan, water is provided for existing Indigenous developments through five separate licences, including one used for agriculture and four used for industry at a total of 411ML/yr. Water for future Indigenous economic development has not currently been set aside in the Plan because there are no other Indigenous land holdings in the Plan area.
>
> It is recognised that the provision of water for future Indigenous economic development is significant to Indigenous people to secure future opportunities for their livelihood.
>
> Consequently, if sufficient water is recovered as part of the licence review an allocation will be reserved for the purpose of future Indigenous economic development.
>
> The Plan states that up 680ML of water recovered from licensees may be reserved for future Indigenous economic development. This is based on a pending Native Title application (NTD6002/99), which may result in the acquisition of additional land by Indigenous people within the Plan area. Should this application be successful, Indigenous owned land directly over-lying the Tindall Aquifer within the Plan area, will increase by approximately 2%. In relative terms, 2% of the licence limit represents 680ML/yr. This figure does not include land that may be acquired in areas unsuitable for development, such as Katherine Township.

There is no legal reason why the amount of water set aside for Indigenous commercial purposes has to be determined by the amount of Indigenous owned land within the plan area and appears reflective of a view that rights should be attached or tied to land holdings.

Whilst the percentage of the allocation of water for commercial purposes to Indigenous interests is being based on actual and potential land interests

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[925] Ibid at 36. Paragraph 35 vi.
[926] Ibid 78.

within the plan area it should be noted that the granting of water access licences from the consumptive pool under the Northern Territory *Water Act* is not linked to land ownership as it is in Queensland, for example.

The WAP also "acknowledges" the fact that traditional owners live within the plan area and have "a deep cultural connection to the many water features interconnected with the Tindall Limestone Aquifer."[927] The extent to which this acknowledgment is actuated in the Plan appears to be limited by a lack of knowledge concerning Indigenous interests and the detail of the Indigenous connection to the water. As with the Strategic Indigenous Reserve much depends upon the successful implementation of the Implementation Strategy to ensure this acknowledgement has substance.

It is understood that many Indigenous sites of significance are water dependent.[928] It is also the case that there are a number of registered Indigenous sites of significance in accordance with the *Northern Territory Sacred Sites Act.*[929] For some reason, this fact has not been acknowledged and included within the Plan. In general terms the underlying premise in the Plan is that the maintenance and protection of environmental flows will ensure the protection of Indigenous cultural sites and uses.

> Some assumptions have been made in the WAP because of some limitations in knowledge, particularly in regards to climate change and environmental and cultural flows.
>
> Whilst it is recognised that cultural flows and environmental flows are not the same, the Plan assumes that the provisions for environmental flows will maintain the condition of places that are valued by both Indigenous and non-Indigenous people for cultural purposes. Further research and monitoring to improve our understanding of environmental and cultural flows will be initiated as part of the implementation of the WAP.[930]
>
> The purpose of this Plan is to initiate strategies for sustainably allocating and managing water from this water source. These strategies as detailed in Clause 18, were created by assessing:
>
> (i) water availability in the context of climatic variability and community, environmental and Indigenous cultural needs;
>
> (ii) community response to the economic opportunities associated with the use of this water source, including consumptive uses such as agriculture, industry and public water supply and non consumptive uses such as tourism and recreation;

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[927] Ibid 12.
[928] Ibid 21 Outcome 5 and Part 4 of the Plan.
[929] Cooper, David and Jackson, Sue *Preliminary Study on Indigenous Water Values and Interests in the Katherine Region of the Northern Territory* March 2008 at 5.
[930] *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* at 4.

(iii) opportunities and needs arising from growth in existing and emerging activities, including economic development opportunities for Indigenous landowners.

Tindall Limestone Aquifer (Katherine) Water Implementation Strategy

The strategy is formally called the Tindall Limestone Aquifer (Katherine) Water Implementation Strategy.[931] As mentioned much depends on the Strategy that follows this plan to implement the measures therein. It is a separate process to the Plan.[932] The Implementation Strategy has no independent legal status in the *Water Act* or regulations. The Water Allocation Plan obliges the Water Controller to undertake the strategy.

> The Controller will establish an Implementation Strategy to this Plan that outlines how objectives and strategies made in this Plan will be achieved. [933]

This strategy is critical to the effective implementation of the legally binding components of the WAP in two respects for Indigenous interests. Firstly, in relation to the implementation of the Strategic Indigenous Reserve. Secondly, to ensure the protection of Indigenous cultural interests in the area, and an understanding of the principle of cultural flows. It is said in relation to the SIR that it is "to be developed in partnership with Indigenous people", that is to put in place the detail concerning the SIR with Indigenous people.[934]

Similarly further research and discussions are to take place concerning cultural sites and other issues concerning Indigenous people. The Plan relevantly states:

> Through engagement and research identify sites of Indigenous cultural importance, which are dependent on water from the Tindall Aquifer, and assess essential water requirements. To be detailed in an Implementation strategy to this Plan.[935]
>
> Undertake consultation and research to improve understanding of Indigenous water issues and options to address them in the Katherine and Daly Rivers.[936]

It is notable that the requirement to recognise cultural interests is not dependent upon the legal recognition of native title unlike the SIR. Presumably this is because the protection of cultural interests is mandated in

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[931] Ibid 12.
[932] Ibid see the note at 39.
[933] Ibid paragraph 41 iii at page 39.
[934] Ibid fn 8 at 17.
[935] Ibid 21.
[936] Ibid 19.

the Act whereas the SIR is not. The definition of beneficial uses of water and environment in the *Water Act* includes the cultural aspects and needs of humans.[937]

Similarly, there is no account of native title rights to use water for various non –commercial purposes. These are common and well recognised native title rights in relation to water and are not solely covered by the cultural component included within environmental flows. I have outlined the standard rights, with caveats in the Introduction to this section of the report.

It is somewhat strange that this native title right – a legally enforceable right is not included as a use within the plan. It is admirable that an attempt has been made to further include Indigenous interests in economic development yet no explicit account is made of the native title rights of non-commercial uses of water in the planning process. Those rights include activities often undertaken by Indigenous people regardless of legal recognition on a regular basis in any event. These matters should be included and addressed in the review of the plan.

Perhaps this has occurred because native title use of water is not included with the definition of beneficial uses of water under the *Water Act* around which a WAP is primarily framed.[938] It is acknowledged that the cultural values of water are described as including "Indigenous subsistence and recreation such as camping and fishing" in the plan.[939] Admittedly, the native title claim is not resolved but as mentioned the possibility of an SIR has still been included in the plan upon recognition of native title.

Conclusion - Katherine Water Allocation Plan for the Tindall Limestone Aquifer

The legal implications for registered native title claimants of an approved Water Allocation Plan in this circumstance are that water management must be in accordance with the plan. The registered native title claimants have the same rights in relation to the preparation and approval of the plan as any other affected or interested person in the process. There is no specific

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[937] See the definitions of environment and beneficial uses of water in section s3 and 3(3), respectively. s 3 *environment* means all aspects of the surroundings of man, including the physical, biological, economic, cultural and social aspects.
s3(3) The following are the beneficial uses of water: (a) agriculture – to provide irrigation water for primary production including related research;(b) aquaculture – to provide water for commercial production of aquatic animals including related research; (c) public water supply – to provide source water for drinking purposes delivered through community water supply systems; (d) environment – to provide water to maintain the health of aquatic ecosystems;
(e) cultural – to provide water to meet aesthetic, recreational and cultural needs;
(f) industry – to provide water for industry, including secondary industry and a mining or petroleum activity, and for other industry uses not referred to elsewhere in this subsection;
(g) rural stock and domestic – to provide water for the purposes permitted under sections 10, 11 and 14.

[938] See s3 (3) of the *Water Act, 1992.*

[939] *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine* at 5.

recognition of native titleholders nor claimants in the *Water Act, 1992* (NT) that has to be reflected in a Water Allocation Plan under the Act. This includes the statutory factors to be taken into account when granting or amending any new licences to take and use water in the plan area.[940]

Notice of the grant of these licences and an opportunity to comment about how those licences may affect native title interests is to be afforded to the claimants. Those interests include the affect upon the rights claimed in the application for a determination of native title including the rights to use water for non-commercial purposes, that is, for domestic, personal and cultural purposes.

The terms of the Northern Territory *Water Act* in Part 6A do not fully capture the requirements of section 24 HA of the *Native Title Act, 1993* although this is of no fatal "legal" consequence in my view as discussed in the body of this section. This should still be remedied to spell out the full requirements in Northern Territory law. There is also a right of review to the Minister of the Water Controllers decision to grant such licences, which is available to the registered native title claimants along with other members of the public.[941]

The Water Allocation Plan regulates how water may be used within the Plan area and to the extent that the Act requires licences to access ground water from a bore then the registered claimants rights to use water are also restricted. This is subject to the lifting of licensing restrictions that applies because of section 211 of the *Native Title Act, 1993.* As I said in Section 1 Part A of this report concerning native title:[942]

> This section of the Act relevantly applies where States and Territories prohibit the taking and using of water without a license or permit in water management legislation. This provision allows native titleholders to access and take and use water without the requirement for a licence and without committing an offence as part of the conduct of the activities listed, *but only as part of the undertaking of the listed activities*. The provision does not act as a general relief from the obligations of obtaining a licence when a native title right or activity is outside or unrelated to these listed activities.
>
> These activities are hunting, fishing, gathering and conducting cultural or spiritual activities, and gaining access to land or waters for such purposes. This is qualified by the requirement that it must be for the purpose of satisfying personal, domestic or non-commercial communal needs only.

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[940] *Water Act, 1992* s 22B (4) and s 90(1) concerning factors to be taken into account in the grant of licences includes; (ab) "any water allocation plan applying to the area in question;".

[941] *Water Act, 1992* section 30. This review is subject to recommendations by an independent Review Panel in certain circumstances.

[942] Section 1 Part A Native Title of this report at 11,12.

The legislative protections arising from Indigenous heritage protection legislation – in this case, the *Northern Territory Sacred Sites Act* apply to the water plan area. I have analysed the application of this Act in section 1 of the report. The application of such legislation to an aquifer is not without difficulty, especially where protection is based on a site and not an area. The Indigenous conception of country does not easily fit within the Australian legal framework.

The *Northern Territory Sacred Sites Act* uses the words "site" and not area. I have described earlier the difficulties that arise when trying to apply the word site as opposed to area and in particular in relation to an underground area. There is no difficulty where the underground water rises into springs and rivers and those are easily characterised as sites for the purposes of the Sacred Sites Act in the Northern Territory.

Western Australia

In Western Australia no question arises as to the water plan being a future act as water allocation plans are not legally binding documents or instruments. These documents are only a guide to the responsible Minister's exercise of his/her powers under the Act including as to how rights in respect of water use are to be allocated.[943]

In this respect the 2008 Western Australian *National Water Initiative* progress report states:

> Current water plans give consideration to environmental and public benefit matters but are not legally binding on water users or the Minister for Water. The legislative reform process will provide for legally binding water management plans.[944]

To date this has not occurred. It is also important to note that the non-legally binding water resource plans "do not provide for a consumptive pool regime" in Western Australia. The plans only set out matters for consideration when licenses are to be granted to take and use water.[945]

The La Grange Groundwater allocation plan in the West Kimberley region of Western Australia was finalised in February 2010.[946] The plan has not commenced operation, as approval by the Minister has not been notified in the *Western Australian Government Gazette*.[947]

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[943] *Rights in Water and Irrigation Act 1914* s26GY (2).

[944] Western Australia's achievements in implementing the National Water Initiative Progress report Department of Water Government of Western Australia, November 2008 at page 13.

[945] Discussion Paper Water Resources Management Options, Department of Water Government of Western Australia, November 2009 at 29.

[946] Government of Western Australia Department of Water Water resource allocation planning series Report no. 25 La Grange Groundwater allocation plan February 2010.

[947] *Rights in Water and Irrigation Act 1914* ss 26GZE, 26GZF requires Ministerial consent of the plan and publication in the Government Gazette for the plan to commence operation. As of 4 August 2010 no such notice had been published.

The area covered by the plan is described as the "superficial Broome sandstone aquifer" and it is described as having a substantially low current use of the underground water reserve. It is estimated in the plan that it is currently at "approximately 13 % of the allocation limit".[948]

There is no time limit on the plan.[949] Review is dependent on reaching certain allocation limits 50-90% or if the Department identifies impacts on groundwater dependent ecosystems or cultural sites.[950] There are also statutory triggers for a review by the Minister within 7 years of its commencement.[951] The plan states that hydro-geological information is adequate to establish the plan.[952] The plan also states:[953]

Information gaps in determining the ecological water requirements for sites of significance include:

- identification of locally specific groundwater-dependent ecosystems;
- sensitivity of groundwater-dependent ecosystems to water regime changes due to groundwater abstraction;
- sensitivity of groundwater-dependent ecosystems to water quality changes due to the taking or use of water;
- sensitivity of other biota to changes in groundwater-dependent ecosystems.

The department will identify what investigative work is needed to define an ecological water requirement. This work would be a first step toward identifying an environmental water requirement to inform future water allocation plans.

There is also no current regional monitoring network for the water resource and it is not regarded as necessary at this stage by the Water Department as it is of the view that there is a low risk to the environment and cultural sites. To further quote from the plan:

> The department does not have a regional monitoring network in the La Grange groundwater subareas, although we collect water resource information through reporting from licensees. We use this information to improve knowledge of the hydrogeology of the La Grange groundwater subareas, as well as to review water availability. The low level of groundwater abstraction in the area has not warranted

[948] Ibid ix.
[949] Ibid 1.
[950] Ibid 30.
[951] Ibid Section 26GZG. Review, revocation, amendment and correction of plan.
[952] Ibid 7.
[953] Ibid 9.

> investment into a regional monitoring network and has meant that other users and ecological and cultural sites are at a low risk of impacts.[954]

The plan includes management principles and objectives. The principles include meeting the water needs of cultural and social values and that "Aboriginal connections to groundwater will be recognised and protected in water allocation limits and licensing policies." The objectives include to "Conduct the licence assessment process in recognition of Native Title holder's rights."[955]

In relation to the maintenance of cultural values the plans states:

> The department has accounted for the water's ecological and cultural values by allowing approximately 50 per cent of the 105 GL/year to remain in the aquifer to support those values. This results in an allocation limit of 50 GL/year in the Broome Sandstone aquifer in La Grange subareas.[956]

In contrast, the *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* in the Northern Territory works on the basis that from 87% (during very dry years) down to 70% (during normal or wet years) of the water resource is allocated to the environment including cultural values.[957]In addition in the Northern Territory where there has not been a "detailed assessment of water availability as part of preparing a Water Allocation Plan" an 80% estimate of the water resource for maintenance of environmental including cultural values is applied.[958]

As I mentioned in Section 2 of this Report with respect to the *National Water Initiative* interestingly in the Plan there is also no allocation or accounting of water to native title holders as per paragraph 53 of the NWI despite the fact that there are Court determined - "legally recognised" native title holders. As part of the recognition of cultural values there is a recognition of the "special significance" of groundwater resources to the recognised native title holders in the plan area.[959]

In the Northern Territory example Indigenous subsistence use which could include some native title rights to take and use water for non-commercial purposes was accounted for within environmental flows. That is not the case in this plan.[960] Although, as mentioned in relation to the Katherine Plan there was similarly no explicit recognition or accounting for native title rights to use water for non-commercial purposes.

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[954] Ibid 28.
[955] Ibid 3.
[956] Ibid at 37.
[957] *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* at 19 and 22,23.
[958] Ibid 67 [5.1].
[959] La Grange Groundwater allocation plan at 9 [3.3].
[960] Ibid 5.

There is also no mention of or recognition of the existence of native title rights to takes and use water in the water management legislation for this jurisdiction – the *Rights in Water and Irrigation Act, 1914* (WA).

The three native title determinations in the La Grange plan area – the Karajarri, Nyangumarta and Rubibi (Yawuru) native title determinations cover different parts of the area covered by the plan.

These determinations include a right to exclusive possession and therefore control over access to the waters on and under the land. I will use the Karajarri determination as an example. The Karajarri people have been legally recognised native titleholders since 2002.[961] The recognised native title legal rights from that determination in the plan area also include:

> the right to take and use the waters and other resources accessed in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs;[962]

The only recognition of these legal rights to take and use water and control access to the water is the recognition in the Plan of the need to comply with the section 24HA procedural rights in the *Native Title Act, 1993*. This is with respect to the grant of new licenses to take water by third parties in accordance with section 5C and 26D(bores) of the *Rights in Water and Irrigation Act, 1914* (WA).[963]

> The department considers Native Title decisions in its water licence assessments. Native Title holders, or their representative body, will be notified of new applications to take water where Native Title exists and given an opportunity to comment as per Policy 18 in Table 3 (Section 6.1). Native Title holders will also have the opportunity to provide submissions when applications are advertised publicly as per Policy 4 in Table 3.[964]

There are provisions in the *Rights in Water and Irrigation Act, 1914* (WA) and regulations that require notice and an opportunity to comment concerning the grant of new licenses to take and use water or an application to amend the licence to increase the water to be taken.[965] In certain circumstances, the Minister is to require the applicant for a licence to publish in a newspaper circulating in both the state and locality to which the application relates a

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[961] There are also other native title holders in the plan area - Nyangumarta, Karajarri (No 2) and Rubibi native title determination areas. Also see page 11 of the La Grange Groundwater allocation plan.

[962] *Nangkiriny v State of Western Australia* [2002] FCA 660 Order 4(1)(iv).

[963] "A licence to construct a bore (26D) or take water (5C) is required under the Rights in Water and Irrigation Act 1914 within the La Grange plan area" at 22.

[964] La Grange Groundwater allocation plan at 11.

[965] *Rights in Water and Irrigation Act, 1914*(WA) Schedule 1 s 5 and *Rights in Water and Irrigation Regulations 2000.*

notice in an approved form. The approved form is as follows:[966]

> (4) A notice is to be in a form approved and is to state —
> (a) that an application for a licence under section 5C has been made;
> (b) such details of the application as are necessary to identify the relevant water resource;
> (c) a brief description of the ambit of the licence applied for;
> (d) that interested persons may within the time specified in the notice (which is to be not less than 14 days after the publication of the notice) make written submissions to the Minister regarding the application; and
> (e) that if a submission made under paragraph (d) contains an objection, that the person making the submission is to specify what action, if any, the person considers would overcome the objection.

This notice requirement is not in strict conformity with the *Native Title Act, 1993* requirements as the latter also include that the notice be delivered by post and not just advertised in a newspaper and that the name and postal address of the person to whom comment must be given (the Minister) is also included.[967] The circumstances where notice by an applicant (explained below} are not required is also not in conformity with section 24 HA of the NTA. As mentioned in relation to the *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine* these provisions can be complied with administratively.

The Minister is also required to have regard to the submissions made when determining whether to grant the licence.[968]

The circumstances where the Minister may not require notice to be published by the applicant are in relation to an underground water source:[969]

- where it is proposed to take less than 100,000 kilolitres per year;
- or an application to amend a licence to increase the amount taken by the licensee by more than 100,000 kilolitres per year; or
- the Minister is of the opinion that it will not be of sufficient impact on the water resource as to be "desirable" to be publicly notified.

As some of the plan area is covered by pastoral leases, then the issue of pastoral diversification and related water use is a potential issue in relation to native title.[970] I have dealt with the approval of primary production activities also known as pastoral diversification in Section 1 Part A of the report. Similar procedural rights apply as with section 24HA and those are

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[966] *Rights in Water and Irrigation Regulations 2000* r.24 (4)
[967] *Native Title (Notices) Determination 1998* (Cth) s 8(1) (e) and (3).
[968] Ibid r.24 (5).
[969] Ibid r.23 (3)(a).
[970] Ibid 25 [17.2].

explored further in that section.

Whilst there is a recognition of procedural rights there is no recognition of the substantive native title rights to take water for non-commercial purposes in the plan. There is a factual acknowledgement that the native title right to control access has already been exercised in relation to certain proposals to commercially explore and use the water in 2004. The Plan states the following in that respect:

> The Karajarri Native Title claim was subsequently determined over much of the La Grange subareas, including areas that WAI needed to access for groundwater investigations. WAI were unable to negotiate access to the land for exploratory drilling and thus did not undertake detailed hydrogeological investigation at that time.[971]

La Grange – issue of Indigenous Specific Reserve for commercial purposes

A major issue raised by Aboriginal native title holders in the planning process was the reservation of water for Indigenous commercial use. The following is stated in this respect in the plan:

> Traditional owners are concerned that all the water in the region will be licensed for use by others, before they have a chance to develop enterprises that might require water. Local Indigenous people want some certainty that water will be available if or when they seek water for commercial use in the future.
>
> The department understands the importance of this issue and is considering how to address traditional owners concerns.
>
> Action 5 – La Grange management
> The Department will continue to work with other state agencies, through the Indigenous Implementation Steering Committee and with aboriginal communities to identify ways that good water management can assist with Aboriginal economic and social development.[972]

Unfortunately, no recommendations or decisions were made to reserve a proportion of the consumptive pool for Indigenous interests in the plan. This would have addressed the expressed need for certainty upfront in the planning process. This is a missed opportunity to address this issue especially given the fact that well over 50% of the estimated water available for licensing for consumptive purposes is unallocated,[973] and the Department has decided to allocate ground water licenses "on a first-in first served basis" [974] in the plan. Or more correctly at least via the plan recommend that course

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[971] La Grange Groundwater allocation plan at 6.
[972] Ibid 19.
[973] Ibid 16.
[974] Ibid 1.4 Table 3 at page 22.

of action to the responsible Minister.

More recent advice from the Western Australian government (as of March 2010) indicates that it is not prepared to support an Indigenous specific reserve for commercial and economic development from the consumptive pool in its water resource management planning processes. The position appears to be that Indigenous people can apply as other members of the public for licenses to use water for commercial purposes.

> The Department of Water's established water licensing process, water allocation planning process and supporting policies provide clear pathways for access to water for commercial use by Indigenous water users as defined under the Rights in Water and Irrigation Act 1914.[975]

It would seem that the status of the three Aboriginal peoples - the Karajarri people, the Nyangumarta and the Yawuru as the legally recognised native title holders in relation to the land and waters in the plan area will afford them no special status in the economic development of their own traditional waters.

The *Aboriginal Heritage Act 1972* clearly applies to the plan area and sites manifested as springs, soakages or wetlands where underground water wells up to the surface. The difficulties of legislative heritage protection being focused on a "site" and thus affording the protection of the Act to an underground aquifer per se is dealt with in section 1 part D of this report.

Conclusion - La Grange Groundwater allocation plan

This plan does not legally govern the management of water in the plan area and thus does not affect the rights and interests of the native title holders in the plan area.

Overall conclusion

In summary, the legal implications of water allocation plans in relation to native title in the two cases examined are that the plans do not affect native title. This is a complex area not yet tested in the Courts.

The water management legislation that sets the rules for the content of water allocation plans in each northern Australian jurisdiction except for Queensland is essentially blind to the recognition of native title rights to take and use water. In Queensland the *Water Act, 2000* (Qld) defines sustainable management to include:

> (v) recognising the interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning;[976]

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[975] Copied from the power point presentation of the Director, Strategic Policy and Water Services WA Department of Water to the Indigenous Water Policy Group meeting in Darwin, March 2010.

[976] *Water Act, 2000* (Qld) s 10(2)(c)(v).

The legislation in Western Australia and the Northern Territory as it currently exists does not preclude the recognition of commercial and non-commercial Indigenous specific rights in a water allocation plan but essentially leaves its inclusion or not as a good will measure.

The *Commonwealth Native Title Act, 1993* sets minimum procedural rights in relation to the grant of rights to take and use water by third parties where it may affect native title rights to water. These procedural rights should be enacted in the local water management legislation or regulations. The amounts of water that can be taken under these licences, is influenced by the water allocation plan. Native title rights of a non - commercial nature are indirectly protected by plans that effectively secure sustainable environmental flows, which include cultural values and specifically Indigenous cultural values. They are also protected to some extent by s 211 of the *Native Title Act, 1993.*

Native Title determinations for exclusive possession that include a right to control access to water on and in the land including subterranean waters are not affected by these water allocation plans.

To the extent that a Strategic Indigenous Reserve (it is not a native title right) is part of a legally binding Water Allocation Plan then it is secure for the life of that plan.[977] It is preferable that the requirement for such a reserve be mandated in the water management legislation.

[977] *Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019* at 36.The potential recognition of a Strategic Indigenous Reserve in the Katherine Tindall Aquifer plan is mandated by the legally binding water allocation plan. To further quote from the plan (my emphasis in bold italics): In accordance with section 22B of *the Act*, the Controller ***must*** ensure:
vi. If the existence of Native Title (under application NTD6002/00) is recognised within five years of the commencement of this Plan, the Controller ***must amend*** the relevant Parts of the Plan to include 680ML for Indigenous commercial development.

6. Examine implications of recent court decisions, including the High Court's (August 2008) decision in Blue Mud Bay

Introduction

The Blue Mud Bay case[978] (*Northern Territory of Australia v Arnhem Land Trust*) concerning the inter tidal zone (the area and waters between the low and high water marks) is the most significant legal case in relation to Indigenous rights to waters in Australia since the High Court decision in the Croker Island case[979] - *Commonwealth v Yarmirr*.

It is important to note at the outset that there are important legal distinctions between the legal rights and interests held by traditional owners under Land Rights legislation, such as the *Aboriginal Land Rights (Northern Territory) Act, 1976* and by native title holders under the law of native title including the *Native Title Act, 1993* in Australia.

The Croker Island case or *Yarmirr* case concerned the law of native title and held that non-exclusive indigenous rights were capable of recognition within Australia's territorial seas, that is, to 12 nautical miles. This recognition applies to both the sea and seabed. In *Yarmirr* specific Indigenous rights to fish, hunt and gather for personal, non – commercial needs; and the right of access to the sea and seabed to exercise rights to visit and protect places of cultural or spiritual significance were recognised.

The original *Mabo* decision in 1992 recognising native title in Australia did not consider the seas nor specifically consider the situation with respect to waters existing on or within the land. In *Mabo*[980] the High Court declared that the Meriam people are entitled as against the whole world to possession, occupation use and enjoyment of the island of Mer – Murray Island.

There has yet to be a test case in the High Court concerning Indigenous rights to waters that exist on or within the land, that is freshwater as opposed to the sea. Although, the High Court has clarified certain areas of the law, for example that because the rights to the use, flow and control of water has vested in the Crown in Western Australia in accordance with the *Rights in Water and Irrigation Act, 1914* (WA) then "any native title right to possession of those waters to the exclusion of all others" has been extinguished.[981] This is likely to be the legal position throughout Australia. In any event it has always been the legal position in Australia that ownership of land does not include ownership of natural waters on or in the land. It is clear that this is

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[978] *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 (30 July 2008).
[979] *Commonwealth v Yarmirr* 208 CLR 1.
[980] *Mabo v Queensland* [No 2] 175 CLR1 at 76 and 16.
[981] *Western Australia v Ward [2002] HCA 28; 213 CLR* 1 at paragraph [263]

also the legal outcome with respect to water and native title in Australia.

As I understand the purpose of this part of the report when it refers to recent court decisions to mean court decisions that have occurred since the publication of the Lingiari Foundation – ATSIC papers on Indigenous Rights to waters in 2002.[982] The purpose of this report is to examine Indigenous rights to water that occur on and within the land and not the seas, except for the Blue Mud Bay case.

There are four main areas in the development of native title law that have occurred since 2002 that have implications for Indigenous rights to water which I will discuss in this section of the Report.

These are:

- The implications of the rights of native title holders to control *access to the use of water* that occurs on or within land that is the subject of a determination of *native title for exclusive possession*;[983]
- The confirmation that there is *no native title right to ownership of flowing and subterranean waters;*
- Whether there is a *native title right to trade resources including water*, and
- The *native title right to protect sites or areas of significance that includes water.*

Initially I will go the Blue Mud Bay case concerning the *Aboriginal Land Rights (Northern Territory) Act, 1976*.

The Blue Mud Bay Case – Land Rights in the Northern Territory

The case originated in the Federal Court of Australia and concerned both an application for the recognition of native title and the legal consequences of a grant of freehold title under the *Aboriginal Land Rights (Northern Territory) Act, 1976* in the inter tidal zone and the area of rivers and estuaries affected by the ebb and flow of the tides.

The final High Court decision of Blue Mud Bay, which ***only*** concerns the *Aboriginal Land Rights (Northern Territory) Act, 1976* is examined in this section. I will cover the Federal Court decisions that are part of this litigation later in this section of the Report as they deal with important aspects of

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[982] Lingiari Foundation and ATSIC Indigenous Water Rights Project Reports available at http://catalogue.nla.gov.au/Record/3515126 which have been revised and updated by NAILSMA in the publication entitled "An overview of Indigenous rights in water resource management Revised: Onshore and offshore water rights discussion booklets, Lingiari Foundation" available at http://www.nailsma.org.au/publications/indigenous_water_rights.html

[983] A determination in this context means an order of the Federal Court recognizing the existence of native title. Exclusive possession native title include a right to control access to land subject to the general law authorising access onto land.

native title law.

The Blue Mud Bay case[984] more formally known as *Northern Territory of Australia v Arnhem Land Trust* is about whether:

- Aboriginal land which is a freehold title[985] granted to the Arnhem Land Aboriginal Land Trust under the Northern Territory Land Rights Act includes the inter-tidal zone – the area between the low and high water mark and the tidal waters in that area, and if so whether;

- A fishing licence granted under the Northern Territory *Fisheries Act* entitles the person who holds that licence to fish in the waters of that inter tidal zone without a permit to access Aboriginal land.

The High Court of Australia decided that the answers to both questions are that:

- Yes it is Aboriginal land for the purposes of the Land Rights Act as the particular grant of freehold title (the boundaries of the title) extended to the low water mark in this case, and

- That a fishing licence under the Northern Territory *Fisheries Act*, does not authorise access to the inter-tidal zone which is a part of Aboriginal land. This means that a permit is required to enter the waters of the inter-tidal zone by the holder of a fishing licence under the Northern Territories *Fisheries Act*.[986]

To re-emphasise this case is about Indigenous rights in accordance with the *Aboriginal Land Rights (Northern Territory) Act, 1976*. The case is ***not*** about native title rights and interests and does not affect the High Court's decision in *Commonwealth v Yarmirr* that excusive possession native title cannot exist seaward of the high water mark and that there can be no native title right to control access to or use of an area of the seas. *It is not a case about the law of native title in Australia or the Northern Territory.*

Background

On the 30 May 1980 grants of an estate in fee simple (a freehold title) were made to the Arnhem Land Aboriginal Land Trust in relation to the Arnhem Mainland between " the mouth of the East Alligator River in Van Dieman Gulf (in the West) and the mouth of the Roper River in the Linmen Bight (in the East) but excluding Cobourg Peninsula. The other grant, the Arnhem Land

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[984] *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 30 July 2008.

[985] under the *Aboriginal Land Rights (Northern Territory) Act ,1976* a Federal law.

[986] There are temporary arrangements in place concerning permits and one should check with the Northern Land Council and NT government concerning these requirements. Permits are the main means by which access to Aboriginal land is regulated under the *Aboriginal Land Rights (Northern Territory) Act 1976* are issue under the *Aboriginal Land Act* (NT).

Islands Grant ("the Islands Grant"), concerned all the islands (except Groote Eylandt) in the Northern Territory generally adjacent to the land the subject of the Mainland Grant." [987]

Both the grants extended to the low water mark:

> Each extended to low water mark and included areas bounded by straight lines joining the seaward extremities of the banks of rivers, streams and estuaries intersecting the coast. The grants encompass the area of land that is covered and uncovered by water at different times of the day, depending upon the position of the tides ("the intertidal zone"). In addition, rivers and estuaries are affected by the ebb and flow of the tides and tidal waters therefore extend landward of the straightline boundaries of the grants.[988]

The case commenced because over a number of years people who were not traditional owners of the land and adjacent waters in Blue Mud Bay[989] had been fishing without the permission of the Aboriginal traditional owners. The Director of Fisheries in the Northern Territory was of the view that "tidal waters over Aboriginal land were not part of "Aboriginal land" and that fishing licenses could validly authorise fishing in those waters".[990]

The High Court stated that section 70(1) of the Land Rights Act makes it an offence to enter or remain on Aboriginal land. A range of defences to entering or remaining on Aboriginal land is provided for under the Land Rights Act. The grant of a fishing licence does not provide such a defence.

Therefore the holder of a fishing licence requires a permit to access these inter tidal waters that are part of Aboriginal land. A Northern Territory fishing licence does not authorise the holder to enter/access the waters of the inter-tidal zone of Aboriginal land.

The *Fisheries Act* (NT) applies to those waters to authorise the "specific activity" of fishing but it does not authorise access to those waters. Access to the waters, is determined by the Land Rights Act.

Implications

In simple terms the High Court found that as the grant of freehold title to the Arnhem Land Trust included the intertidal zone that is the land down to the low water mark and the river beds of estuaries (that is tidal waters overlying river beds), then the provisions of the Act that controlled access to that land also applied even if it was covered by waters.

The Court specifically stated that:

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[987] *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2].
[988] Ibid [5].
[989] This Bay is located in the East Arnhem land region of the Northern Territory in the western part of the Gulf of Carpentaria.
[990] Ibid [10].

> The Land Rights Act thus expressly provided for the grant of interests in fee simple over areas that included areas that would be covered by tidal waters.[991]

and that:

> it is a grant of rights that include the right to exclude others from entering the area identified in the grant.[992]

Therefore a permit to access these waters and land is generally required unless a person is exempt under the *Aboriginal Land Rights (Northern Territory) Act, 1976* or the *Aboriginal Land Act* (NT).

It is important to note that some 80% of the Northern Territory coastline including many islands is Aboriginal land, which extends to the low water mark. It has been suggested that any grant of freehold title made by the Governor General as a result of the unresolved Kenbi land claim near Darwin may not include the intertidal zone. This merely reinforces the fact that it is the boundaries of the grant of freehold title under the Land Rights Act that determines the outcome not any inherent or unique view of the nature of Indigenous rights.

The case cannot be regarded as a finding that Aboriginal land under the Land Rights Act includes ownership of the waters that are on or within Aboriginal land.[993] The Court did say that the expression Aboriginal land extends to the water that "may lie above the land within the boundaries of the grant and is ordinarily capable of use by an owner of land".

But like the mining provisions of the Land Rights Act where the ownership of minerals is not included there is a right to approve/reject access to those minerals.[994] Similarly, there is a right to approve or reject access to fishing or the use of waters (subject to the exceptions in the Act). This right to control access will no doubt provide commercial opportunities for Traditional Owners.

The control of access to the land and waters is the key legal control held by Aboriginal traditional owners in this situation under the *Aboriginal Land*

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[991] Ibid paragraph [46].

[992] Ibid [50].

[993] The Court stated at [52] that " it is not to be supposed that the grants to the Land Trust give a proprietary interest to the grantee in respect of any particular column of water that might overlie the intertidal zone.

[994] Interestingly the definition of minerals (see sections 3 and 12(2)) in the *Aboriginal Land Rights (Northern Territory) Act, 1976* includes water which would appear to confirm that water like minerals is not included in the freehold title grant made under the Land Rights Act. I deal with this in more detail in section one part B of the Report.

Rights (Northern Territory) Act, 1976 and has been examined in Section 1 Part B of this report.

Public right to fish in tidal waters abolished by the NT Parliament

The Court also decided that the Parliament of the Northern Territory abolished any common law public right to fish in tidal waters in the Northern Territory when it enacted the *Fisheries Act* (NT), which commenced operation on the 14 December 1988. The *Fisheries Act* (NT) does not require a licence for fishing for subsistence or personal use by Aborigines acting in accordance with tradition.

Aboriginal right to traditionally use the resources of land and water in the Northern Territory.

The Court also mentioned the provision in the Northern Territory *Fisheries Act* (section 53), which states that nothing in the *Fisheries Act* limits the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to do so.

This provision applies to all waters not just those waters that are part of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act, 1976*.

Summary

The Blue Mud Bay case means that the land within the inter tidal zone and river beds where tidal waters flow within the boundaries of the Arnhem Land Mainland Grant of Freehold title held by the Arnhem land Aboriginal Land Trust (from the mouth of the East Alligator river to the mouth of the Roper river - excluding Cobourg peninsula) are Aboriginal land under the Northern Territory Land Rights Act.

Access to those waters is determined by the Land Rights Act, and a permit is required to access those waters. The case is not authority for the proposition that these waters are owned or include a proprietary interest held by the Land Trust for the benefit of traditional owners.

Native Title and Water - Recent Cases concerning the law of native title and water

All the major Court cases concerning the recognition of native title with respect to water have been summarised for each of the three jurisdictions of Northern Australia. There are no other cases or legislative changes that I am aware of that have led to a different outcome generally within Australia concerning the law of native title with respect to water.

I wrote in *Background Briefing Papers - Indigenous Rights to Waters* in February 2002:

> "In summary, to date the courts have been prepared to recognize rights to the use of waters which are not exclusive rights and are not

> commercial rights. A right to protect sites or areas of significance that include waters has also been recognized as a native title right and interest (the recognition of this right is practically universal in all court orders recognising native title)"[995]

There is now a greater level of specificity as to the consequences of an exclusive possession determination with respect to water and the activities recognised as being able to take place with respect to water. That being so the position is still that rights to the use of water for non-commercial purposes are a standard outcome for native title holders in the courts of Australia.

I shall now summarise the outcomes with respect to water in major cases in the three jurisdictions in northern Australia and then go to the major issues I have identified with respect to native title and water in the introduction to this section of the Report. I have also included an analysis of the native title right to protect sites or areas of significance as this right also involves areas or places where water exists.

A number of the cases analysed in this section of the report involve both exclusive and non-exclusive rights in the determination because of the differing existing land title situations in different parts of the claim area. I have explained the difference in these type of court orders in Section 1 part A of the report dealing with native title and the *Native Title Act, 1993*.

Northern Territory and recent Native Title cases

The most significant recent cases in the Northern Territory with respect to water have been:

- *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283.
- *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135.
- *Gumana v Northern Territory of Australia* [2007] FCAFC 23; and
- *Griffiths v Northern Territory of Australia* [2007] FCAFC 178.

All are judgments of the Full Federal Court - the appeal division of the Federal Court of Australia. The trial judges' decisions in the Federal Court will also be included where appropriate.

The *Gumana* litigation[996] has already been generally introduced or described – it is the Blue Mud Bay case. This litigation also involved questions concerning native title in the Federal Court and Full Federal Court. The final High Court decision in this litigation is only concerned with the *Aboriginal Land Rights (Northern Territory) Act, 1976* and rights of traditional owners under that Act.

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[995] Page 99.

[996] The trial judges decision in the Federal Court is reported as *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425.

Attorney-General of the Northern Territory v Ward [2003] FCAFC 283

In this case the Court made two separate determinations recognizing native title in relation to the Northern Territory and Western Australian sections of the claim near Kununurra in the East Kimberley (it is commonly known as the *Miriuwung Gajerrong* Case).

In the Northern Territory area, exclusive and non-exclusive rights over different parts of the claim area were recognised.

In respect to the exclusive determination areas the Court wrote that native title:

> .. rights and interests in flowing and subterranean waters are non-exclusive.[997]

The Court in its judgment made specific reference to the fact that:

> The substance of this clause is uncontroversial; all parties accept that the native title holders cannot obtain exclusive water rights.[998]

In respect of the other areas non-exclusive rights[999] to use and enjoy the land and waters in accordance with the traditional laws and customs were recognized, being:

- to have access to and the use of natural water on the land;
- the right to have access to, maintain and protect the sites of significance on the land of the Northern Territory determination area;

The use of the term natural water although not defined in this case is taken to mean water not stored or diverted from its natural flow or not in anyone's lawful possession.

Interestingly, the Court further considered the status of certain statutory rights in the Northern Territory in terms of native title. The *Territory Parks and Wildlife Conservation Act* (NT) provides that this legislation does not limit "the right of Aboriginals who have traditionally used an area of land or water from continuing to use that area in accordance with Aboriginal tradition for hunting, food gathering (otherwise than for the purpose of sale) and for ceremonial and religious purposes."[1000]

The Court described the rights in that legislation as rights of the native title holders and affirmed that those rights were not exclusive of the rights of

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[997] *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283. Clause 9 of the Determination at page 8.
[998] Ibid [31].
[999] Ibid clause 5 of the determination at page 5.
[1000] Ibid clause 10 of the determination and Section 122 of the Act.

others and could continue to be enjoyed and exercised "subject to the principle of reasonable use". This is notwithstanding the existence of other interests such as existing rights of access held by Telstra. The principle of reasonable use provides that the rights can be used as long as there is no unreasonable infringement on the rights of others.

In this case the Commonwealth Government argued that it was inappropriate to include the word "protect" in relation to sites of significance as it "would give the holders an entitlement to exclude others from the land."[1001] The Court did not agree, and stated that it didn't involve "general control of access" and further stated that:

> The notion of protection of significant Aboriginal sites is well understood. It may involve physical activities on the site to prevent its destruction, but it also extends to control of ceremonial activities.[1002]

This appears to mean that whilst a right to control or conduct the ceremony is recognized it does not include a right to exclude access by others to the site or area of significance even though unauthorised access or presence at the site may be in breach of local traditional law and customs.

This reinforces the relevance of Aboriginal Heritage protection legislation outlined in section 1 part D in this Report, which in some instances makes mere presence on a site unlawful.

In the Western Australian section of the claim there were also separate findings of exclusive and non-exclusive native rights over different areas. It was also made clear by specific reference that there was "no exclusive rights in or to flowing or subterranean water".[1003] A right to access and take water and care for and maintain sites and areas of significance was recognized.[1004]

The case of *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group (Northern Territory v Alyawarr)* involved a determination of native title over the land and waters of the proposed Davenport National Park located south east of Tennant Creek and the Hatches Creek townsite, which was declared but never developed as a town. The waters of the area were described by the Court in these terms:

> There are a number of rivers and streams flowing from the Davenport Ranges near the claim area. The Ranges contain reliable sources of water including large streams with intermittent and perennial waterholes. Water reaching the end of the creeks floods into the surrounding desert which provides high value areas for hunting and

[1001] Ibid [24].
[1002] Ibid [25].
[1003] Ibid page10 WA Determination clause 11.
[1004] Ibid clause 9 of the WA determination.

foraging.[1005]

The Court recognised rights to have access to and use of water on or in the land by native title holders.[1006] The Court also recognized a right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters.[1007]

In respect of the unused Hatches Creek town site area exclusive possession native title was recognized. This relevantly means that there is:

- a right to make decisions about access by people to the use of the waters;[1008] and
- the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources in and on that area;[1009]

Significantly, these rights to control access to waters and to make decisions about how the waters are used are subject to two important qualifications. One, they can only exist and be legally recognised where exclusive possession native title is recognised and secondly are subject to existing rights of access and use of the waters conferred by or arising under a law of the Northern Territory or Commonwealth.

The second point raises the real question as to whether the existence of these other non native title rights makes the native title right to control access to the waters effectively illusory only. I have dealt with this important issue in Section 1 part A of the report. It concerns the interaction of State and Territory water legislation, the *Native Title Act*, *1993* and these recognized rights. In summary, the Crown or government has the right to regulate the use and flow of water, any determination of native title is also subject to existing rights of access to use the water and the *Native Title Act, 1993* which controls how new rights to use water are granted in the future act regime.

The right to control access is, subject to these interests a substantive right. The effectiveness of the right will be determined in a practical sense by whether the particular use of water or development of the water resource is

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[1005] *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [14].

[1006] Ibid at page 1. New paragraph 3(a) of the determination recognizing native title.

[1007] Ibid at 1 New paragraph 3 (c) (iii).

[1008] Amended paragraph 3(e) of the determination is in the following terms:
3 (e) in respect of the Hatches Creek townsite only, the right to make decisions about access to the land by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters;

[1009] Amended paragraph 3(f) of the determination is in the following terms:
3 (f) in respect of the Hatches Creek townsite only, the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters;

subject to rights granted to a third party before the legal recognition of the native title in a Court order or determination or if government decides for example to use compulsory acquisition powers.

The other important relevant native title right recognised in this case concerned what are commonly called sacred sites or areas of significance, which includes waters - the right to have access to, maintain and protect places and areas of importance on or in the land and waters.[1010]

In *Gumana v Northern Territory of Australia* [2007] FCAFC 23 the Full Court canvassed issues already covered in *Alyawarr* concerning control over access and confirmed that there can be no native title right of exclusive possession in the intertidal zone. The native title holders/traditional owners argued that section 47A of the *NTA* meant that the consequences of the assertion of British sovereignty on the recognition of such a native title right should be disregarded.[1011] The Court confirmed that the common law did not permit recognition of exclusive native title rights and interests in the sea nor inter tidal zone upon the acquisition of sovereignty originally by the British Crown.[1012] It was not a question of extinguishment of such a right because it was not capable of recognition in the first place as it was inconsistent with the common law.[1013]

Importantly, the Court below the single Federal Court judge in this litigation said:

> .. that the native title rights and interests over the land and inland waters, should be expressed so as to include the exclusive right to control access to water on that part of the claim area (it being contained within the claim area over which there is such an exclusive right) and to use and enjoy that water.[1014]

This was said in reference to an exclusive possession native title determination only and does not include any notion of "an exclusive right to ownership of those waters". [1015]

The Court also made findings somewhat contrary to what was said in *AG (NT) v Ward* in relation to the native title right to protect significant sites, generally expressed as a right to have access to, maintain and protect sites of significance.

[1010] Ibid Annexure B to the judgment at page 2. Clause 3 (d) of the determination recognizing native title.

[1011] Remembering that this is not the part of the Gumana litigation dealing with the *Aboriginal Land Rights (Northern Territory) Act, 1976* but only with the law of native title. Section 47A of the *NTA* is a beneficial provision that provides in general terms that on an area where land title is held or reserved for the benefit of Indigenous people that the effects of past extinguishment should be disregarded in a native title claim.

[1012] This issue had been essentially decided in *Commonwealth v Yarmirr (2001)* 208 CLR 1.

[1013] *Gumana v Northern Territory of Australia* [2007] FCAFC 23 at [119], [125], [134].

[1014] *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425 at [42].

[1015] Ibid [40].

The Court stated in relation to the inter-tidal zone and outer waters – the seas that:

> a right to 'maintain or protect' such sites would include the right to exclude others from those sites. That entitlement would be inconsistent with the public rights to fish and to navigate. I do not consider that the maintenance of a particular site involves the assertion of an exclusive right in the claimants inconsistent with those public rights, but the protection of a particular site would have that effect.[1016]

This distinction concerning the word protect is probably illusory as the Courts elsewhere have held that the inclusion of the word "protect" does not connote a right of exclusion or to deny access in a non-exclusive determination.[1017]

The native title claimants had also sought to establish a commercial right to use the waters of the inter-tidal zone and seas and in particular a native title right to fish for commercial purposes. It was decided that this could not be recognized because as a matter of evidence no such right in the case was found to exist[1018] and also that:

> … any rights possessed under traditional laws and customs to use the waters of the inter-tidal zone and outer waters for commercial purposes were simply rights which were not recognised by the common law, and so should not be the subject of a determination.[1019]

In light of the decision in the *Akiba v Queensland* case and other full Court cases discussed later in this section concerning a right to trade this proposition would no longer appear to be correct.

In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 the Court decided a claim for native title over land and waters located within the town of Timber Creek. The appellate Court found the existence of both exclusive possession rights and in non-exclusive areas "the right to have access to and use the natural water" of the area[1020] and "the right to have access to, maintain and protect sites of significance".[1021]

The judge at first instance in this case also suggested that in the absence of an exclusive possession determination a native title right to fish (in non-tidal waters) may involve an ability "to control access during specific times, as for example when undertaking any ceremonial or ritual activities in relation to

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[1016] Ibid [62].
[1017] See the discussion of *AG (NT) v Ward* in this section of the Report.
[1018] *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425 at [66].
[1019] Ibid at [70].
[1020] *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 at clause 7(d) of the determination.
[1021] Ibid clause 7(g).

those waters. However, that right exists only to the extent necessary to enable such activities to be carried out."[1022]

Similarly, the Court said in the context of non-exclusive native title rights that:

> They may also confer upon their holders a limited entitlement to control access to the land or waters in question. That limited entitlement exists essentially only for the purpose of ensuring that the primary right can be properly exercised.[1023]

It was suggested that this proposition may operate in relation to the following types of rights:

- rights to conserve the natural resources of the land for the benefit of the native title holders (*Ward* HC);
- rights to hunt, gather or fish for the purpose of satisfying personal, domestic or non-commercial communal needs (*Billy v Queensland*);
- rights to maintain, use and manage the land by protecting significant sites, inheriting or passing on native title rights, determining who are the native title holders, resolving disputes about native title rights, and conducting social, religious, cultural and spiritual activities on the land (*Alyawarr*);
- rights to control the disclosure of spiritual practices and beliefs which relate to the land or waters (*Alyawarr*); and
- rights to use and enjoy natural resources for traditional and customary purposes.

In *Gumana* the trial judge also found for the recognition of a right to control access in relation to the use and enjoyment of the inter tidal zone "by Aboriginal people who recognise themselves as governed by the traditional laws and customs acknowledged and observed by the native title holders."[1024]

This was overturned by the Full Federal Court because a native title right that is inconsistent with the "public's right of access to the inter-tidal zone and outer waters for fishing and navigation" cannot be recognized by the common law.[1025] It was stated that Aboriginal people who do regard themselves as "governed by the traditional laws and customs" of the native title holders are also part of the public and therefore enjoy this general public right as well.[1026] The High Court decided later in this litigation that such public rights had been abolished by the enactment of the Northern Territory *Fisheries Act*.

1022 *Griffiths v Northern Territory of Australia* [2006] FCA 903 at [776].
1023 Ibid [609] to [611].
1024 *Gawirrin Gumana v Northern Territory of Australia* (No 2) [2005] FCA 1425 at page 6, clause 7 (c) of the Determination.
1025 Gumana Full Federal Court at [170].
1026 Ibid [170].

These propositions in both *Griffiths* and *Gumana* seem unsustainable in light of higher Court authority to the effect that in the absence of an exclusive possession determination there cannot be a right to control access even of a limited kind in relation to a certain right only or for a limited purpose/time only.

In *Alyawarr v Northern Territory* the Full Federal Court said after referring to High Court authority that:

> …it seems that the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world.[1027]

The rationale for this reasoning is interesting as the Court in the same case further said that:

> The underlying rationale for that conclusion is that particular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty.[1028]

This meaning of this is best exemplified in the cases where a pastoral lease has been granted over an area and the Court also finds that a limited number of native title rights exist over the same area. The Courts have held that the grant of the pastoral lease extinguishes any native title right to control access to the area[1029] and therefore once that right is extinguished there can't be some partial form of it left, as that would be different to the original form of the right based on traditional law and custom. It remains to be seen at this highly technical level of analysis whether in any give native title case it could be established that a right to control access in relation to a particular activity existed independently of a general native title right to control access to the land and waters.

At one level, it seems highly artificial to state that an indigenous society has established as a matter of evidence in Court in 2009 that at the time of the acquisition of sovereignty by Great Britain it possessed a right of exclusive possession - to then state that as a matter of law that a pastoral lease extinguishes that particular right but not all native title rights but doesn't allow any right of reasonable use for example to conduct that right in a manner so as to include some restrictions over access for the purpose so practising that right. For example, to conduct ceremonies on a part of the land or waters in private be that control only temporary and of no significant consequence to the rights of the co-existing land user and title holder.

Queensland and recent Native Title cases

The recent native title cases examined in Queensland are:

[1027] *Alyawarr* Ibid [148].
[1028] Ibid [148].
[1029] *Western Australia v Ward* [2002] HCA 28 at [194].

- the most recent *Wik* case in 2009; [1030]
- *Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland* a decision of the Federal Court in 2008; [1031]
- *Walker v Queensland* (Eastern Kuku Yalanji People) in 2007;[1032]
- *Timothy James Malachi on behalf of the Strathgordon Mob v State of Queensland*;[1033]
- *Nona and Manas v Queensland*; [1034]
- *Riley v Queensland* in 2006; [1035]

The outcomes in these cases are similar to those examined in the Northern Territory except for the developments in relation to a potential right to trade. This is not to say that such a right can't also be found to exist in both Queensland and Western Australia as the 2010 case of *Akiba v Queensland* indicates if the evidence of such a right is established in a particular case.
The most recent *Wik* [1036] case in 2009 is typical of the language and outcomes in Queensland. The Court recognized in relation to water non-exclusive rights to [1037]:

- hunt and fish in or on, and gather from Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the Native Title Holders; and
- take, use and enjoy the Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the Native Title Holders.

In addition, it has been made clear that there can be no right to control access or the use of the area in a non-exclusive possession determination.[1038]

Similar rights were found to exist in *Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland* a decision of the Federal Court in 2008[1039] in relation to the Wellesley Group of islands in the Gulf of Carpentaria. This decision covered certain areas of land and water, above the High Water Mark.

Water is defined in accordance with the *Water Act, 2000 (Qld*) and includes tidal water as defined in the *Land Act, 1994* (Qld) in these cases where appropriate.

1030 *Wik and Wik Way Native Title Claim Group v State of Queensland* [2009] FCA 789.
1031 [2008] FCA 1855. Clause 10 of the Determination.
1032 *Walker v Queensland* [2007] FCA 1907 (Eastern Kuku Yalanji People)
1033 [2007] FCA 1084
1034 [2006] FCA 412; *Manas v Queensland* [2006] FCA 413 .
1035 FCA 72 Western Yalanji.
1036 *Wik and Wik Way Native Title Claim Group v State of Queensland* [2009] FCA 789
1037 Ibid clause 4 of the Determination.
1038 Ibid clause 7(b) of the Determination.7.Notwithstanding anything in paragraphs 3, 4, 5 and 6, the native title rights and interests:(a) do not confer possession, occupation, use and enjoyment of the Determination Area on the Native Title Holders to the exclusion of all others; and (b) do not extend to a right to control access to or a right to control the use of the Determination Area.
1039 [2008] FCA 1855. Clause 10 of the Determination.

Native Title and Pastoral Leases in Queensland

In cases where native title and pastoral leases have been found to co-exist on the same area there has been some interesting refinements of the right to take and use water. These refinements are unique to the Queensland determinations examined in the three "top end" jurisdictions.

For example, in *Walker v Queensland (Eastern Kuku Yalanji People)* the right to take and use water is subject to " any water captured by the pastoral lessees". This covers presumably what has been called in other determinations the right to take only *natural* water. That is water dammed by a pastoralist is not included within the native title right to take and use the water. This is also reflective of the fact that in a non-exclusive possession native title determination with a co-existing pastoral lease the legal fact is that the rights of the pastoralist prevail over the native title rights.

In relation to underground waters a particular non-exclusive native title right was found to maintain springs and wells in the determination area where underground water rises naturally, for the sole purpose of ensuring the free flow of water.[1040]

Presumably, this was drafted to this level of particularity to ensure native title holders could clear and maintain springs and wells from damage done by cattle or other causes on a pastoral lease and to ensure a right to clear naturally occurring blockages of the spring so that the native title holders could utilize their right to take and use water for cultural and non-commercial purposes and "look after" springs that are also sacred or significant places.

In *Timothy James Malachi on behalf of the Strathgordon Mob v State of Queensland*[1041] in 2007 the Court made an exclusive possession determination of native title over the Aboriginal owned Strathgorden Pastoral lease in Cape York located between the Edward and Coleman rivers near Pormpuraaw.

In relation to water it was stated that:

> (3) (b) in relation to Water – non exclusion rights to:
>
> (i) hunt and fish in or on, and gather from, Water for the purpose of satisfying personal, domestic and noncommercial communal needs; and
>
> (ii) take and use Water for the purpose of satisfying personal, domestic or noncommercial communal needs.

The native title in relation to Water does not confer possession, occupation, use

[1040] A similar right was recognized in *Riley v Queensland* [2006] FCA 72 (Western Yalanji).
[1041] [2007] FCA 1084

and enjoyment of the Water on the Native Title Holders to the exclusion of all others.

The drafting in relation to water rights is unusual as it states "non-exclusion rights" to take and use water instead of the normal form of wording being "non-exclusive rights". The wording would appear to have no different end result in the sense that there is no "ownership" of water but permission to access the land where the water exists would still be required as in other "exclusive possession" determinations.

The same rights to water were recognised in *Nona and Manas v Queensland* [1042] (2006) landward of the high water mark,[1043] and in *Riley v Queensland* [2006].[1044] The latter case included non-exclusive rights to: "maintaining springs and wells" "where underground water rises naturally, for the sole purpose of ensuring the free flow of water;" and maintaining and protecting from physical harm, by lawful means, those places of importance and areas of significance to the native title holders under their traditional laws and customs.

In relation to water the Court orders were that there were non-exclusive rights to:

- hunt, fish and gather on, in and from Water for personal, domestic or non-commercial communal purposes; and
- take, use and enjoy Water and Natural Resources in such Water for personal, domestic or non-commercial communal purposes.

The latter description of "natural resources" has been defined in this determination as follows:

> "Natural Resources" means any Plant, Animal, including shells and Forest Products, found on or in the Determination Area from time to time and flints, clays, soil, sand, gravel and rock on or below the surface of the Determination Area.[1045]

This is unusual in terms of the cases analysed in other jurisdictions and in particular unusual in not referring to water also as a natural resource, although noting seems to turn on it in terms of general outcomes.

Native Title cases in Western Australia

The leading case concerning water in Australia and Western Australia is the High Court decision of *Western Australia v Ward*- the Miriuwung Gajerrong case in 2002.[1046]

[1042] [2006] FCA 412; *Manas v Queensland* [2006] FCA 413 .
[1043] "The native title rights and interests recognised are confined to the area landward of the 'high water mark' as defined in the *Land Act 1994* (Qld)."
[1044] FCA 72 Western Yalanji at clauses 3(a) (iv) and (vi) of the Court orders.
[1045] Ibid clause 11 of the Determination.
[1046] [2002] HCA 28; 191 ALR 1.

The High Court stated that:

> "The vesting of waters in the Crown was inconsistent with any native title right to possession of those waters to the exclusion of all others"[1047].

This means that there cannot be anywhere in Western Australia a native title determination that recognizes a form of ownership of water. I have discussed the question of the vesting of waters in the Crown and its meaning elsewhere in the Report in the introduction part B.

In a series of more recent determinations in WA recognizing native title the right to take flowing and subterranean water for personal, domestic or non-commercial purposes has been confirmed.[1048] Flowing and subterranean water has generally been defined in Western Australia to include rivers and creeks whether they flow permanently or intermittently; any natural collection of water into or out of which a river or creek flows and water from an underground source.[1049] In some determinations the right to take water has been further delineated as a right to take for social, cultural, religious, spiritual and ceremonial purposes.[1050]

In the Yawuru Rubibi [1051] case from the Broome area in 2006 the following relevant specific rights have been recognized:

- the right to access, move about in and on and use the land and waters;
- the right to hunt and gather on the land and waters for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes);
- the right to engage in spiritual and cultural activities on the land and waters;
- the right to access, use and take any of the resources of the land and waters

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[1047] Ibid [265].

[1048] For example see *Hayes on behalf of the Thalanyji People v Western Australia* [2008] FCA 1487 clause 3 of the determination:
3. Subject to paragraphs 4, 5, 6 and 7 the nature and extent of the native title rights and interests is: (a) except in relation to flowing and subterranean water – the right of possession, occupation, use and enjoyment to the exclusion of all others; and (b) the right to take flowing and subterranean water for personal, domestic, or non-commercial communal purposes.

[1049] "flowing and subterranean water" means the following water within the Determination Area:
(a) water which flows, whether permanently, intermittently or occasionally, within any river, creek, stream or brook;(b) any natural collection of water into, through, or out of which a river, creek, stream or brook flows; and (c) water from and including an underground water source, including water that percolates from the ground;
Also see *Billy Patch and Others on behalf of the Birriliburu People v State of Western Australia* [2008] FCA 944 and *Cox v Western Australia* [2007] FCA 588 for determinations in similar terms

[1050] *Rubibi Community v State of Western Australia* (No 7) [2006] FCA 459.

[1051] Ibid clause 5.

(including ochre) for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes); and
- the right to care for and maintain and protect the land and waters, including places of spiritual or cultural significance.

In relation to the inter-tidal areas[1052] the following rights were recognized:

- the right to access, move about in and on and use the land and waters;
- the right to hunt and gather in and on the land and waters, including for dugong and turtle for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes);
- the right to access, use and take any of the resources of the land and waters (including the fresh water) for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes); and
- the right to maintain and protect the land and waters, including its places of spiritual significance.

Interestingly, in this context fresh water is specifically described as a resource that can be taken and used. As mentioned in the analysis of the Northern Territory cases in the context of a potential native title right to trade the issue as to whether water is a resource itself has not been clearly dealt with in those cases. Whilst one would think it makes sense to describe and understand water as such this determination makes it explicit, which is important in understanding the meaning and utility of native title outcomes and its application to any right to exchange or trade water which is discussed later in this section of the report.

In the same case *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 specific mention is also made of some important provisions of the *Native Title Act, 1993* that generally affect native rights with respect to water. These provisions come within the general area discussed elsewhere about existing interests at the time a native title determination is made. The native title rights are made subject to those existing rights.

An example of this is in relation to public access to and enjoyment of waterways, the beds, banks or foreshore of waterways, coastal waters and beaches. A native title outcome or determination is subject to these public rights of access.[1053]

In *Sampi v Western Australia (No 3)* [1054] a native title claim by the Bardi and Jawi people over the northern end of the Dampier Peninsular north of Broome in 2005 the Court was considering the recognition of native title over

[1052] Ibid clause 6.
[1053] Ibid clauses 8-9.
[1054] [2005] FCA 1716.

land, waters, the inter-tidal zone and offshore reefs, islets and the waters in their immediate vicinity. On certain parts of the land the Court recognized exclusive possession native title, which included the following rights:[1055]

- the right to access, use and take any of the resources of the land and waters (including ochre) for food, shelter, medicine, fishing and trapping fish, weapons for hunting, cultural, religious, spiritual, ceremonial, artistic and communal purposes;
- the right to refuse, regulate and control the use and enjoyment by others of the land and its resources;
- the right to have access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.

On "certain intertidal areas and adjacent and offshore reefs and islets together with the waters in their immediate vicinity" non-exclusive native title rights recognised were:[1056]

- the right to access, move about in and on and use and enjoy those areas;
- the right to hunt and gather including for dugong and turtle;
- the right to access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes.

Again I note in this case water has been described as a resource.

A right to trade in natural resources including water

The most explicit new development in native title jurisprudence is the recognition of a native title right to trade. There has been recognition of such a right in Australia for some time but it appears to have "slipped under the radar" as it has been part of consent determinations[1057] in the Torres Strait and has not been the subject of any commentary to my knowledge. For instance, in *Kaurareg People* in 2001 a native title right to engage in trade in relation to the natural resources of the determination area was recognised. Natural resources in this case are defined to include water.[1058] The judge in this case noted that:

> It is worthy of note that the Kaurareg, in addition to the close cultural and spiritual connection they have with the islands, have traditionally played an important part in the complex trade and customary exchange networks that have long linked Australia, the various Torres Strait Islands and New Guinea.[1059]

[1055] Ibid clause 4 of the Determination.
[1056] Ibid clause 5 of the Determination.
[1057] A consent determination is a court order in this example by agreement between the parties that native title exists.
[1058] *Kaurareg People v Queensland* [2001] FCA 657 (23 May 2001). See Order 6(iii) and 11(j) for the definition of natural resources.
[1059] Ibid [7].

In the most recent Torres Strait native title case in June 2010 in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland* [1060] the Federal Court recognised a right to take marine resources including fish for trading or commercial purposes.

The full Federal Court has also now looked at a right to trade in the context of contested litigation in native title cases in the Northern Territory. It is not clear specifically what this will mean in relation to water until there are further cases but I will explore the possibilities in this section.

A right to trade was claimed in the original *Yarmirr* Croker Island seas *c*ase in 1998 in the following terms – as " the right to trade in the resources of the waters and land of the Clans's estate".[1061] The Court in that case held that a right to trade was not established on the evidence.

The Court further wrote:

> Whilst there can be no doubt that the trade here described related to objects which can properly be categorised as resources of the waters and land, the trading was constituted by the exchange of goods. The so-called "right to trade" was not a right or interest in relation to the waters or land. Nor were any of the traded goods "subsistence resources" derived from either the land or the sea.[1062]

The Court concluded on this aspect that:

> The evidence does not support the claim that the applicants enjoy a native title right or interest to trade in the resources of the claimed area.[1063]

In *Northern Territory v Alyawar* in 2004 the Court at first instance (the trial judge in the Federal Court)[1064] found that there was a native title right to trade in the following terms:

> …the right to share, exchange or trade subsistence and other traditional resources obtained on or from the land and waters;[1065]

On appeal to the Full Federal Court in this case, the Northern Territory Government submitted that a right to trade could not be a right in relation to land or waters and therefore could not be a legally recognizable native title right and interest. The Full Federal Court held that a right to trade is a right

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[1060] (No 2) [2010] FCA 643 at [13].
[1061] *Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* [1998] FCA 771 [119].
[1062] Ibid at [120].
[1063] Ibid at [122].
[1064] The trial judge in the Federal Court reported as *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472.
[1065] Ibid [152].

relating to the use of the resources of the land and therefore that as a matter of principle there can be found to exist such a native title right.

> The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it would not be a right in relation to the land.[1066]

The same analysis applies in relation to the resources of the water/s.

The appeal Court went on to further find that the existence of such a right had not been proven on the evidence in this particular case. It was decided that the Judge in the lower Court was in error in finding the existence of such a right in this particular circumstance. To quote:

> The evidence relied upon by his Honour in this respect was not exposed in any detail beyond his earlier reference to the evidence of the applicants that they had asserted the right to use the natural resources of the claim area. In the circumstances, it is difficult to see how this evidence was capable of supporting a finding of a native title right to trade in the resources of the area. There appears to have been no evidentiary support for this aspect of the determination.[1067]

The Appeal Court therefore amended the particular native title right to read as follows:

> The right to share or exchange subsistence and other traditional resources obtained on or from the land and waters[1068]

In the case of *Griffiths v Northern Territory of Australia*[1069] in 2007 a similar right was recognized but with a clear addendum that it was not for any commercial purposes. It is in the following terms:

> The right to share or exchange subsistence and other traditional resources obtained on or from the land and waters (but not for any commercial purposes)

Also in the *Gumana* litigation the trial Judge recognised that there is a "right to hunt, fish, gather and use resources" for "non-commercial exchange".[1070]

The question therefore arises as to what does this mean for Indigenous rights and water?

[1066] Ibid [153].
[1067] Ibid [157].
[1068] Ibid page 2. Clause 3(g) of the amended determination.
[1069] [2007] FCAFC 178 at Clause 7(h) of the amended determination.
[1070] *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425 at page 6 clause 7(a) of the Determination.

A right to share or exchange subsistence and other traditional resources obtained from the waters is clearly capable of recognition. Similarly, a right to trade those resources is capable of legal recognition if such a right is found to exist on the evidence presented in a particular case. In *Akiba v Queensland* the Court found a right to access, use and take marine resources for any purpose, including trading fish for commercial purposes.[1071] The Court also in that case made it clear that the existence of a native title right to trade was not dependent on a finding of exclusive possession.[1072]

The case law shows that water is also described as a natural resource. A natural resource can be used, shared, exchanged and traded if the existence of such a native title right is proved in any particular case. The Appeal Court said in *Alyawarr v Northern Territory*:

> Evidence had also been given by the applicants that they had asserted the right to use the natural resources of the claim area including water, trees, bush medicines, soakages, sacred sites and other things including ochre from various places in the claim area. His Honour said (at [160]):
>
> 'In my judgment, it is also consistent with the evidence to which I have referred that the applicants, under their traditional laws and customs, have the right to share, exchange or trade subsistence and other traditional resources obtained from or on the land and waters constituting the claim area.' [1073]

As the Appeal Court said a right to trade if established "defines a purpose for which those resources" (including water) "can be taken and applied".[1074]

Importantly, in the Western Australian cases analysed earlier in this section of the report it is clear that freshwater has been specifically identified as such a natural resource.

To summarise, a right to access, take and use water for non-commercial purposes has clearly been established in a number of cases. These cases just outlined clearly show that it is possible to also establish if that is the evidence in a particular case that a right to take and use water for the purpose of sharing and exchange can be recognised as a native title right. In addition, a right to trade in natural resources has been recognized and water is a natural resource. At this time a right to trade in water has not been recognised in any cases.

It would not be an easy matter, to distinguish between say, the exchange of water for traditional purposes and trade of water for commercial purposes. One could presumably trade water already in possession or the knowledge of

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[1071] *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland* at [540]
[1072] Ibid [752] [753].
[1073] *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group* at [157].
[1074] Ibid [153].

the location of drinking water for other goods. Whether the Courts will view this only as exchange and not trade remains to be seen. The *Akiba* case may represent a bifurcation in the recognition of native title rights based on the cultural background of the native title claimants, that is, between Aboriginal and Torres Strait Islander societies. The Court in *Akiba* published a summary which included the following statement:

> Unlike in native title claims in Aboriginal Australia, the laws and customs advanced by the communities do not reflect an overarching spiritual connection with the waters. There is no creation story. Yet there are still some, for the most part minor, traditional spiritual beliefs revealed in the evidence. In consequence, the laws and customs of present concern are informed in quite some degree by considerations of utility and practicality. This has unusual ramifications in the application of accepted Native Title Act jurisprudence. No more is this so than in relation to the "connection" requirement of s 223(1)(b) of the *Native Title Act 1993* (Cth).[1075]

The next consideration is presumably if one can establish a native title right to trade water on the evidence in any particular case what would be the usefulness or utility of such a right?

It is clear from the precedent set in the *Akiba* case that even a highly regulated right like the commercial right to trade fish or marine resources can still be recognised as a native title right. It is highly regulated in the sense that licences are required to fish and strict limits set on catches etc by fisheries legislation.

Similarly the taking and use of water is now highly regulated and managed under water management legislation. So by analogy there is no reason why a native title right to trade water if proved on the evidence could not still have such a right recognised.

It should be noted that general State and Territory water legislation generally prohibits the taking of water without a licence except for domestic and stock purposes.[1076]Laws of general application apply to native title rights and interests. Any right to trade water if recognised would be subject to the prohibitions in water legislation that requires the taking of water to be done only in accordance with a licence or other regulatory permission.

If section 211 does apply to the use of water for non-commercial purposes it would not operate to remove licensing requirements for the commercial use of water. Section 211 of the *Native Title Act, 1993* provides that a law that prohibits or restricts the exercise of certain native title activities being hunting, fishing, gathering or a cultural or spiritual activity other than in accordance with a licence or permit is inoperative when carried out for

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[1075] *Akiba v Queensland* summary at [6].
[1076] See the introduction part b of this report.

"personal, domestic or non-commercial communal needs".[1077]

Conclusion

A number of recent cases analysed above have confirmed the following significant points with respect to water.

Aboriginal Land Rights Act Land and the Inter-Tidal zone

Firstly, the Blue Mud Bay case in the High Court of Australia establishes that the inter-tidal zone along the Arnhem land coast is Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act, 1976* and so permission to access that area including the waters is required in accordance with that Act. A fishing licence under the Northern Territory *Fisheries Act* does not authorize access.

Right to control access to water on native title lands and right to make decisions about the use and enjoyment of the waters

Secondly, that an exclusive possession determination includes the right to control access to water on the areas of land where such a Court order or determination exists. As an example, it was said by the Court in *Sampi v Western Australia [2005],* that "The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others."[1078] More particularly, in *Gumana* the Court said:

> …that the native title rights and interests over the land and inland waters, should be expressed so as to include the exclusive right to control access to water on that part of the claim area.

The significant point to be made here is that the recent cases confirm and make explicit that whilst it is not possible for native title holders to own natural waters they can determine access by others to the water that exists in or on the land if they hold an exclusive possession determination to that land. Similarly generally a right to make decisions about the use of water is found to exist within such a determination.

This is subject to existing rights of access at the time the determination of native title is made and the provisions of the *Native Title Act, 1993* such as s24 HA which is dealt with in Section 1 Part A of this report.

A general non-commercial right to take and use water

Thirdly, a general non-commercial right to take and use water for purposes consistent with the traditional laws and customs of the group is recognized as a native title right.

[1077] Section 211(3)(e) of the *NTA* also provides that any other kind of activity can be prescribed for the purpose of this section. So if the taking of water is not included because of its association with one of the listed activities then it could be added by regulation.

[1078] *Sampi v Western Australia* [2005] FCA 777 at [1072].

A right to share or exchange traditional resources including water

Fourthly, the right to share or exchange subsistence and other traditional resources from the land and waters has been found to exist in a number of cases. It has not been found to exist particularly in relation to the exchange of water but there is no reason why this could not occur if the evidence is produced in a particular case.

Native Title Right to trade – the commercial use of water

Fifthly, it has been made clear that as a matter of law there can be a native title right to trade in the natural resources of the land and water, which potentially can include water. No such right on the evidence in a particular case has been found to exist to date. It must be emphasised that each case turns on its own facts and the evidence in a particular case.

Right to access, maintain and protect place and sites of significance that consist in whole or in part of water

Sixthly, the meaning of the word "protect" in this commonly found and important native title right has been clarified to state that in the absence of an exclusive possession determination there is no right to control access to such sites or places. The word "protect" has been described to include such activities as to:

- involve physical activities on the site to prevent its destruction, and
- the control of ceremonial activities.

As mentioned in the body of this section of the report the word "protect" has been deleted in one determination of native title because the Court decided it may in that case mean a right to control access to the site in certain circumstances. But more generally, when the word has been included it has been held not to mean the right to control access to the area.

Seven, in Queensland there have been some refinements of the generally accepted native title right to take and use water where native title co-exists with a pastoral lease - the right to take and use water is subject to "any water captured by the pastoral lessees". This is consistent with the general law that states that a pastoralist's rights prevail over a co-exiting native title right in any event.

Also in Queensland in relation to underground waters a particular non-exclusive right has been recognised to maintain springs and wells in the determination area where underground water rises naturally, for the sole purpose of ensuring the free flow of that water.

7. In conjunction with economic studies of the role of markets in management of water entitlements, consider the legal implications of markets for Indigenous interests and rights

Introduction

I will examine the legal implications for water markets in relation to Indigenous rights and interests that exist under land rights legislation, native title and the Aboriginal Reserve system in Western Australia. A more detailed analysis of the law in these areas with respect to water generally is to be found in Section 1 Parts A and B of this Report. I have confined this section only to the points relevant to a water market. Reference should be made to these parts before reading this section.

This section of the report should be read in conjunction with the reports produced by W.D. Nikolakis and R.Q. Grafton with respect to TRaCK theme 6.1 "Sustainable Enterprises". A total of three reports have been produced as part of that theme. These concern the institutional arrangements and constraints affecting water markets in northern Australia; a stakeholders values and attitudes survey towards water markets in the same region; and an assessment of the potential costs and benefits of water trading in northern Australia.[1079]

Background

It has been estimated that approximately 30% of the land in northern Australian is "owned" by Indigenous peoples[1080] and therefore the legal controls over access to water on the land controlled by Indigenous peoples is a significant factor. This may well determine in the long term in many areas in the north whether a water market will develop or not. There are many other factors that also determine the development of water markets being water scarcity or the lack of it in the north, demand, community attitudes and the regulatory system in water management legislation. These issues are dealt with fully in the TRaCK theme 6.1 reports.

Definition of a Water Market

A water market is where water trading takes place and involves the buying and selling of water access entitlements. The meaning of a water access entitlement is derived from the *National Water Initiative*. It is a licence

[1079] Nikolakis, W.D. and Grafton, R.Q. (2009). Analysis of institutional arrangements and constraints affecting the establishment of water markets across northern Australia. Charles Darwin University; Nikolakis, W.D. and Grafton, R.Q. and To, H. (2010) Stakeholder values and attitudes towards water markets across northern Australia. Charles Darwin University, Darwin; W. D Nikolakis and R.Q Grafton (2011). Assessment of the potential costs and benefits of water trading across northern Australia. Charles Darwin University, Darwin.

[1080] Altman, J., Jordan, K., Kerins, S., Buchannan, G., Biddle, N., Ens, E., and Mary, K. (2009) Chapter 7, Indigenous interests in land and water, northern Australian Land and Water Science review Full Report.

(separate from interests in land) to take a share of the consumptive (commercial) pool of water in a water allocation plan. A water access entitlement is tradable, transferable (on a temporary or permanent basis) and subject to registration in a public water register.[1081]

Definition of a Water Access Entitlement

The precise definition from the NWI is as follows:

> *water access entitlement* – a perpetual or ongoing entitlement to exclusive access to a share of water from a specified *consumptive pool* as defined in the relevant *water plan*.

A water access entitlement is inherently susceptible to change as the water allocation plan in which it operates provides that the amount of water available for use is variable. This depends primarily upon the amount of water needed within the plan area to maintain environmental and cultural flows. The situation is different in over-allocated systems.

Water access entitlements are an unusual form of property interest and have been described as having the following characteristics:

- a long-term interest in a stream of periodic allocations (the underlying entitlement);
- the stream of periodic allocations which, following assessment of resource availability, have been distributed or made available for use or trade (the allocations);
- permission to 'use' the resource at a specific location subject to use conditions and obligations typically associated with the management of externalities (such as pollution and environmental degradation).[1082]

Water trading only occurs with water taken from the consumptive pool not that set aside for environmental and cultural maintenance. At this time it is only in Queensland where the entitlement to water has been separated from land in practice but only where there is a Resource Operation Plan in place.[1083]

It is the regulation of water in Australia in accordance with water management legislation and the NWI that creates a market for water and

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[1081] The INTERGOVERNMENTAL AGREEMENT ON A NATIONAL WATER INITIATIVE Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory. See in particular paragraphs 28 – 34.

[1082] ACIL Tasman in association with Freehills 2004. An effective system of defining water property titles. Research Report, Land & Water Australia, Canberra at 43,44.

[1083] Nikolakis, W.D. and Grafton, R.Q. (2009). Analysis of institutional arrangements and constraints affecting the establishment of water markets across northern Australia. Charles Darwin University at 21.

water trading.[1084]

There are "two separate markets" in water trading. Firstly, what has been described as the water collectors and distributors or the "bulk market," generally government instrumentalities and secondly the "private market" where the trade in water access entitlements occurs.[1085]

In terms of legal analysis the NWI water planning framework with its twin goals of seeking to retrieve or maintain environmental and cultural sustainability in water management and the establishment and encouragement of water markets has been said to be pushing legal doctrine "in two different and potentially conflicting directions." [1086]

Water Markets in the North

There is no real water market in northern Australia at this stage as there has been little if any trades take place to date. As Nikolakis, W.D. and Grafton, R.Q. have summarised:

> Water trading is at a formative stage in northern Australia, with few (if any) recorded trades at the time of writing. Markets have been effective in southern Australia in providing flexibility to irrigators and supporting productivity through reallocation during drought. Markets under the National Water Initiative (NWI) are seen as an effective tool to optimise economic, social and ecological values associated with water.[1087]

The trading activity in total volume traded and recorded in the 2007-2008 "water" year was:[1088]

Queensland – 75,968 ML
Western Australia – 486 ML
Northern Territory – 0 ML

It is the case that "non market methods of water allocation are generally used" in northern Australia to date.[1089]

[1084] Alford, L. "The law, the rules and mechanisms to consider when dealing in the property right of water: Comparing the regulation of an emerging water market in Queensland with New South Wales, Victoria and South Australia " (2007) 14 Australian Property Law Journal at 262.

[1085] Ibid 262,263.

[1086] Professor Fisher Ibid as quoted at 264.

[1087] W. D Nikolakis and R.Q Grafton (2011). Assessment of the potential costs and benefits of water trading across northern Australia. Charles Darwin University, Darwin at summary 1.

[1088] National Water Commission, Australian Water Markets Report 2007–2008, December 2008 at 22 Table 3.1.

[1089] Nikolakis, W.D. and Grafton, R.Q. (2009). Analysis of institutional arrangements and constraints affecting the establishment of water markets across northern Australia. Charles Darwin University at 41.

Water Trading and the Northern Territory

Water trading can only occur within a declared water control district, which also has a declared and operational water allocation plan within that district. There are three declared Water Allocation Plans (WAP) in the Northern Territory as of March 2011. A water allocation plan ensures that a right to take and use water in accordance with a licence under the Northern Territory *Water Act* can be traded fully or partly.[1090] All trades are subject to prior approval under the Act and subject to the Water Allocation Plan, which sets local rules in relation to trading to reflect local circumstances. For example, the Tindall Aquifer WAP for the Tindall Limestone Aquifer, at Katherine at this stage does not allow for a licence to take water to be separated from land title.[1091] It is intended that licences will be separated from land to facilitate permanent water trading when the Plan is renewed after 10 years.

There are two other restrictions that apply, upstream river trade is only allowed if there will be "no impact on the environmental provisions of the water allocation plan" and secondly if water is extracted from an aquifer trade is restricted within that aquifer area.[1092]

There is no trading in the Northern Territory to date. This is said to be due to the "relative abundance of water." [1093]Community attitudes averse to trading would also seem to be a factor.[1094]

Water trading and Queensland

Water trading is only currently occurring in relation to surface waters. Trading can occur once both a Water Resource Plan and the next stage of the planning process in Queensland a resource operation plan has been established.[1095] The latter document sets the rules for water trading in a particular area. In the Gulf Resource Operations Plan for example, a tradable water allocation of approximately 75,150 mega litres is available.[1096]

Licences to take water are attached to a particular land title. An allocation of water is a separate legal interest in water, which is separate from land title and can be traded and used independently of landholdings. A trade in an allocation that changes the location where the water is to be used requires the consent of the Department of Environment and Resource Management in Queensland.[1097]

Water trading and Western Australia

Water allocation is regulated through plans both regional and local. The plans

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[1090] *Water Act* (NT) ss 22,22B, 22B(5)(c).
[1091] Water Allocation Plan for the Tindall Limestone Aquifer, Katherine 2009 – 2019 at 76.
[1092] Australian Water Markets Report 2007–2008, December 2008 at 135.
[1093] National Water Commission Australian Water Markets report 2009 – 2010 at 215..
[1094] Nikolakis, W.D. and Grafton, R.Q. and To, H. (2010) Stakeholder values and attitudes towards water markets across northern Australia. Charles Darwin University, Darwin
[1095] *Water Act, 2000* (Qld) Division 4 Water Allocations ss121, 122.
[1096] Gulf Resource Operations Plan June 2010 – Foreward.
[1097] *Water Act, 2000* (Qld) Part 6 Water Licences and permits.

are not legally binding. They are guides to the relevant Minister's responsibilities to manage the water resources of the state in accordance with the *Rights in Water and Irrigation Act, 1914*. In northern Western Australia a Kimberley Regional Water plan 2010-2030 is currently in draft form and subject to public comment.[1098] A local Ord River Surface water plan operates in the East Kimberley and no trading has occurred in the Ord Scheme – the largest irrigation project in northern Australia.[1099] The Ord Irrigation Cooperative Ltd holds a "bulk licence". The Cooperative is responsible for managing the activities of individual irrigators who hold a certificate of water entitlement from the Cooperative. These are not registrable.[1100]

In the negotiation that settled the native title claims in relation to the Ord area the Miriuwong Gajerong peoples acquired some 5% of the irrigation land in the Ord Stage 2 development the development of which is underway now and therefore "an implied 5% right to access water" for irrigation purposes when the land becomes available.[1101]

Trading takes place in accordance with the *Rights in Water and Irrigation Act, 1914* [1102]and Operational policy 5.13.[1103] A transfer must take place within a water resource management unit, which can be in relation to surface water or an aquifer. This is what is described as the "base unit" of allocation planning. It must also be consistent with any water allocation plan or approved policy or guidelines of the Department.

Legal implications Native Title and markets

Native Title rights in relation to water can apply to flowing, surface and subterranean waters. In the context of an exclusive possession native title determination the right to control access to water is also included but not the ownership of water and a right to make decisions about access by people to the use of the waters.

The right to control access to water and to make decisions about how the waters are used are subject to three important qualifications. One, they can only exist and be legally recognised where exclusive possession native title is recognised. Secondly, are subject to existing rights of access and use of the waters conferred by or arising under a law of the Northern Territory,

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[1098] http://www.water.wa.gov.au/PublicationStore/first/95832.pdf (accessed 30/3/11)

[1099] Nikolakis, W.D. and Grafton, R.Q. (2009). Analysis of institutional arrangements and constraints affecting the establishment of water markets across northern Australia. Charles Darwin University at 29.

[1100] National Water Commission, Australian Water Markets Report 2007–2008, December 2008 at 106.

[1101] Nikolakis, W.D. and Grafton, R.Q. (2009). Analysis of institutional arrangements and constraints affecting the establishment of water markets across northern Australia. Charles Darwin University at 55.

[1102] *Rights in Water and Irrigation Act, 1914* Schedule 1 Clause 29,30.

[1103] Operational policy 5.13 Water entitlement transactions for Western Australia November 2010. (Previously *Statewide policy 6 Transferable (tradeable) water entitlements for Western Australia)* Department of Water W.A.

relevant State or Commonwealth at the time the determination or Court order recognising native title is made. Thirdly, are subject to the grant of rights to use water by others under the *Native Title Act, 1993* in particular section 24HA.

Native Title rights with respect to water are commonly legally recognised as a right to access and take water, for the purposes of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs. This can include:

- A right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters;
- The right to have access to, maintain and protect places and areas of importance on or in the land and waters;
- A right of access to take water for those purposes;

The management regimes to establish and regulate water trading are found in the relevant water management legislation and water allocation plans of each jurisdiction in northern Australia. I have set out my opinion in section 5 of this report that the two water allocation plans examined in the Northern Territory and Western Australia are not future acts under the NTA.[1104]

Licenses and water allocations that can be the subject of permanent or temporary water trades are able to be granted to third parties. These clearly are future acts if the native title interest has not been otherwise or previously extinguished. The grant of such interests should be subject to s24HA of the *Native Title Act, 1993*. This provides native title holders and registered claimants with certain procedural rights - to be afforded prior notice of the grant, an opportunity to comment about the affect of the grant on the native title, the application of the non-extinguishment principle if the grant is made and compensation for the affect upon native title.[1105] There is no veto or consent requirement to the grant of these tradeable licences held by native title holders.

The native title right to control access in the context of an exclusive possession native title determination is of a different order, as the licence or water allocation does not give a right to access the land where the water exists. Access to the water in these circumstances must be negotiated with the relevant native title holders. [1106]

Queensland - Aboriginal Land Act 1991(ALA) & *Torres Strait Island Land Act 1991*

A landowner the trustees of ALA land where the title is held as freehold, or a perpetual of fixed term lease in the normal way control access to the waters

[1104] See also Section 1 Part A for the meaning of future acts and the future act regime.
[1105] I have discussed and explained these concepts in Section 1 Part A of this Report.
[1106] Subject to the exceptions outlined in Section 1 Part A.

on that land. Therefore any licence or tradable allocation requires the consent of the landholder to access water on the land.

A landowner of ALA or Torres Strait Islander land also has a statutory preference to apply for a licence to take water from the land for a range of purposes.[1107] Any such licence granted, "attaches to the licensee's land".[1108] The licence allows the owner to take and use water on any of the land and to interfere with the flow of water on, under or adjoining any of the land. The licence may provide for the taking of water from any watercourse, lake or spring on or adjoining any of the land; an aquifer under any of the land; and water flowing across any of the land.

The owner of the land may also apply for and be granted permission to convey water from another property to use on their land subject to approval by the State and neighbouring landowners.[1109] This applies to ALA land. The grant of such a license amongst other things is subject to any water resource plan, resource operations plan and wild river declaration that may apply in that water plan area.[1110] These plans constitute quite substantial controls on the amount and manner of water used but are the mechanism by which water trading can take place and for traditional owners to be involved in that trade.

Northern Territory - *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA)

The ALRA provides for the grant of an inalienable freehold title held by an Aboriginal Land Trust. There are 4 aspects to the Indigenous rights to water that flow from the Act and the form of title:

Firstly, statutory riparian type rights to use water:

- for domestic purposes;
- for drinking water for grazing stock on land; and for
- irrigating a garden (not exceeding 0.5 ha – part of the land and used solely in connection with a dwelling on that land.

Secondly, to take and use water for all purposes consistent with Aboriginal tradition in accordance with s71 (1) of the Act (without the need for a licence under the NT *Water Act, 1992*).

Thirdly, to control access to water on Aboriginal land via the permit system; and
Fourthly, to approve water related developments via section 19 of the Act.

The application of the *Aboriginal Land Rights (Northern Territory) Act, 1976*

[1107] *Water Act, 2000* s 206.
[1108] *Water Act 2000* s213 (e).
[1109] Ibid s 206 (3).
[1110] Ibid s 210 (c).

as a Commonwealth law means that any law of the Northern Territory Parliament including the local *Water Act* that is inconsistent with the rights granted under ALRA are inoperative. The effect of this in relation to water is that primacy is given to the use and occupation of land and waters in accordance with Aboriginal tradition on Aboriginal land. The application of the Northern Territory *Water Act* is therefore limited to rights and actions under the legislation that are consistent with that occupation and use. This includes the application of water plans at least theoretically under the *Water Act*. As Water Allocation Plans in the Northern Territory give no right of access or use and occupation on Aboriginal land then there is no inconsistency.

The *Aboriginal Land Rights (Northern Territory) Act, 1976* does not restrict or inhibit the grant of licenses and water allocations that can be the subject of permanent or temporary water trades but as with an exclusive possession native title determination such interests do not include a right of access onto the land where the water exists. Access can be granted or refused by Traditional owners via the permit system. Conditional access and commercial agreements can be negotiated via section 19 of ALRA.

Western Australia

There is no land rights legislation in Western Australia. Apart from native title the only other regulatory controls relevant to markets that affect Indigenous interests occur in relation to the large Aboriginal reserves proclaimed under Part III of the *Affairs Planning Authority Act, 1972* (WA) and the *Land Administration Act, 1997*.

Any permit, licence or authority granted to take and use water under the *Rights in Water and Irrigation Act, 1914* (WA) in a reserve proclaimed under Part III of *Affairs Planning Authority Act, 1972* (WA) is subject to two requirements.

Firstly, the grant of a license or authority to take water on such a reserve is subject to the approval of the Aboriginal Affairs Planning Authority (now the State Department of indigenous Affairs.[1111]

Secondly, an entry permit to access that water is required. Entry permits are issued by the Indigenous Affairs Minister or his/her delegate. Normally when it comes to a development or profit making activity an access agreement is negotiated which provides benefits to the Aboriginal inhabitants of the resident community. This would then allow those persons to be involved in that economic activity if it involved water trading depending on the terms of the particular agreement.

Conclusion

To date there has been no recognition of a native title right to trade specifically in water. Indigenous land holders both in terms of native title and

[1111] http://www.dia.wa.gov.au/en/Boards-And-Committees/ALT/ (accessed 4/7/10)

land rights legislation can determine access to waters over a significant part of northern Australia. This provides them with a key role in determining the future of water trading in the region.

If Indigenous aspirations in relation to the establishment of Strategic Indigenous Reserves for the commercial use of water are met in water allocation plans and water management legislation then that role will increase and provide a positive incentive for Indigenous people to be involved in trading in water markets. This is also one means by which water access entitlements can be granted to Indigenous people to meet Indigenous needs as required by the NWI.[1112]

This is not to say that many Indigenous people do not have real concerns about the water planning process and its ability to properly protect environmental and cultural flows.

The ability of the water planning process to properly take into account and protect the full range of Indigenous values – economic, social and cultural is one of the major factors that will determine whether water markets develop in northern Australia. It is clear that at this time the customary use of water, the native title right to take and use water for non- commercial purposes are not being accounted for and recognised in water planning.[1113]

This will require the full implementation of the NWI in relation to Indigenous interests and the substantive acceptance and legal recognition of Indigenous aspirations in relation to the establishment of Strategic Indigenous Reserves and the recognition of a right to a cultural flow that includes a direct role in the management of water.

[1112] See clause 25 ix) of the NWI and the discussion about this clause in section 2 of this report.
[1113] I have dealt with these issues in other sections of the report especially Section2 concerning the NWI.

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