

**MORE AQUA NULLIUS?
THE TRADITIONAL OWNER SETTLEMENT
ACT 2010 (VIC) AND THE NEGLECT OF
INDIGENOUS RIGHTS TO MANAGE
INLAND WATER RESOURCES**

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The Traditional Owner Settlement Act 2010 (Vic) was enacted in response to the deficiencies of the Native Title Act 1993 (Cth) in recognising the native title rights and interests of Victoria's Traditional Owners. It is widely recognised that the NTA is particularly inadequate when it comes to Indigenous participation in water management. This article evaluates the TOS Act to see if it improves on the NTA in that regard. After outlining the deficiencies of the NTA and its application in Victoria, it considers the nature of water rights capable of being recognised under the TOS Act. This is followed by an analysis of the procedural rights under the land use activity regime, the TOS Act's equivalent of the NTA's future act regime. Finally, it analyses the role of Aboriginal title (introduced by the TOS Act) and joint management (enhanced by the TOS Act) in facilitating Indigenous participation in water management. It concludes that the TOS Act does little to advance the water management aspirations of Victoria's Traditional Owners.

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I INTRODUCTION

The *Traditional Owner Settlement Act 2010* (Vic) (*'TOS Act'*) was enacted in response to the deficiencies of the *Native Title Act 1993* (Cth) (*'NTA'*) in recognising the native title rights and interests of Victoria's Traditional Owners.¹ As an alternative to the *NTA*, it was described by then Premier, John

¹ A note on terminology is necessary. In this article, the term 'Indigenous' is generally used to refer to both Aboriginal and Torres Strait Islander Australians collectively, and Indigenous people more generally. When referring to Victoria's Indigenous people, the local self-identification term is used where appropriate, otherwise the term 'Traditional Owner' is

Brumby as ‘a fairer and more flexible way to resolve [native title] claims than under the [NTA]’.²

It is widely recognised that the *NTA* is particularly inadequate when it comes to providing for Indigenous participation in water management.³ Whilst the *TOS Act* delivers on a number of Indigenous aspirations for land and natural resources management, the question arises as to whether or not it also delivers on Indigenous water management aspirations.

In light of the inadequacies of the *NTA*, this article will evaluate the *TOS Act* for its ability to facilitate the participation of Indigenous Victorians in water management. To provide some background and context for the *TOS Act*, this article first explains the main deficiencies of the *NTA* in relation to water rights, and then outlines the limited native title water outcomes achieved to date by Victoria’s Traditional Owners. The article then considers

used. This terminology emphasises that it is those Indigenous people with a traditional connection to the land and waters who are entitled to ‘speak for country’ and should therefore be participating in decision-making about the management of water resources on their country. It also encompasses various ways in which Indigenous people have been recognised as having the right to ‘speak for country’, including as native title holders, as Traditional Owners under the *Traditional Owner Settlement Act 2010* (Vic), and under the *Aboriginal Heritage Act 2006* (Vic) (*AH Act*) as those with traditional and familial links. The term in this context also includes those who have asserted that they are the Traditional Owners but have not necessarily had formal recognition. This extends both to native title claimants and to those whose native title claims were unsuccessful, but who have been recognised in other ways, such as the Yorta Yorta people.

² John Brumby, ‘New Framework a Just Approach to Native Title’ (Media Release, 28 July 2010).

³ See, eg, Jason Behrendt and Peter Thompson, ‘The Recognition and Protection of Aboriginal Interests in NSW Rivers’ [2004] (3) *Journal of Indigenous Policy* 37, 81–2; Sue Jackson and Jon Altman, ‘Indigenous Rights and Water Policy: Perspectives from Tropical Northern Australia’ (2009) 13(1) *Australian Indigenous Law Review* 27, 31–2; Poh-Ling Tan and Sue Jackson, ‘Impossible Dreaming — Does Australia’s Water Law and Policy Fulfil Indigenous Aspirations?’ (2013) 30 *Environmental and Planning Law Journal* 132, 140–1; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2008*, Report No 2 (2009) 194–5; Michael O’Donnell, ‘Indigenous Rights in Water in Northern Australia’ (Tropical Rivers and Coastal Knowledge Project No 6.2, North Australian Indigenous Land and Sea Management Alliance, March 2011) 70–5; Katie O’Byrne, ‘Issues in Natural Resource Management — Inland Water Resources — Implications of Native Title and the Future of Indigenous Control and Management of Inland Waters’ (2007) 14(2) *eLaw Journal: Murdoch University Electronic Journal of Law* 280, 289–306; Lee Godden and Mahala Gunther, ‘Realising Capacity: Indigenous Involvement in Water Law and Policy Reform in South-Eastern Australia’ (2009) 20 *Journal of Water Law* 243, 245–6.

the nature of water rights capable of being recognised under the *TOS Act* and the consultation and procedural rights under the land use activity regime (which is the *TOS Act*'s equivalent of the *NTA*'s future act regime). The final Parts of the article analyse the role of Aboriginal title (introduced by the *TOS Act*) and joint management (enhanced by the *TOS Act*) in facilitating Indigenous participation in water management. It concludes that the *TOS Act* does little to advance the aspirations of Victoria's Traditional Owners to have a greater role in water management.

II NATIVE TITLE AS A SOURCE OF INDIGENOUS WATER RIGHTS

A *Background to the NTA*

Following the seminal 1992 High Court decision in *Mabo v Queensland [No 2]* ('*Mabo*'),⁴ the legal fiction that Australia was 'terra nullius' or uninhabited was finally put to rest. The *Mabo* decision thus marked a watershed moment in Australia's history of settler relations with its original Indigenous inhabitants. With the rejection of the terra nullius doctrine⁵ came the recognition that Australia's Indigenous peoples were the prior owners and occupants of this country,⁶ and that any rights and interests that survived British acquisition of sovereignty could be recognised by the common law.⁷ Native title thus emerged, albeit not unscathed, from the shadows of the land ownership regime imported by the colonial settlers.

Mabo was a direct challenge to conventional understandings of Australia's land management and property rights regimes, the very existence of which had been predicated on the assumption that there were no Indigenous rights

⁴ (1992) 175 CLR 1.

⁵ There is a common misconception that the doctrine of terra nullius was overturned by *Mabo*, whereas it was the common law equivalent, 'desert and uncultivated', that was dealt with: Richard H Bartlett, *The Mabo Decision* (Butterworths, 1993) ix [5.3]; Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 28-9 [2.22]-[2.23]. For a comprehensive discussion see David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 *Sydney Law Review* 5; Ulla Secher, 'The High Court and Recognition of Native Title: Distinguishing between the Doctrines of Terra Nullius and "Desert and Uncultivated"' (2007) 11 *University of Western Sydney Law Review* 1. The doctrine of terra nullius was referred to and clearly rejected by the High Court, but as a concept in international law.

⁶ *Mabo* (1992) 175 CLR 1, 58 (Brennan J), 109 (Deane and Gaudron JJ), 182 (Toohey J).

⁷ *Ibid* 53 (Brennan J), 183 (Toohey J).

to land. It was, therefore, imperative that a mechanism be put in place to deal with native title claims, and with activities occurring on land on which native title exists or may be found to exist in the future. Thus, the *NTA* was born. Following a change in government and the High Court decision in *Wik Peoples v Queensland* ('*Wik*'),⁸ the *NTA* was the subject of major amendments in 1998,⁹ with a number of those amendments affecting Indigenous water rights.¹⁰

The following section identifies the provisions of the *NTA* that recognise Indigenous rights to participate in the management of water resources and evaluates their effectiveness in light of the relevant case law.

B *The NTA and Native Title Rights to Water*

1 *Relationship between the NTA and the Common Law*

Mabo established that the common law could recognise those native title rights and interests that had survived the acquisition of sovereignty by the British Crown, provided that such recognition did not 'fracture a skeletal principle of our legal system.'¹¹ The *NTA* then established a statutory regime for the recognition of native title. It is now the *NTA* rather than the common law to which Indigenous people turn if they wish to seek recognition in the

⁸ (1996) 187 CLR 1. Note that *Wik*, like *Mabo*, was a common law native title claim, having been lodged prior to the enactment of the *NTA*. Like *Mabo* and the original *NTA*, the *Wik* decision and the Native Title Amendment Bill 1997 (Cth) were the subjects of much controversy: see, eg, Bryan Keon-Cohen, 'Wik: Confusing Myth and Reality' (1997) 20 *University of New South Wales Law Journal* 517; Richard Bartlett, 'Is Equality Too Hard for Australia?' (1997) 20 *University of New South Wales Law Journal* 492; Garth Nettheim, 'Wik: On Invasions, Legal Fictions, Myths and Rational Responses' (1997) 20 *University of New South Wales Law Journal* 495.

⁹ *Native Title Amendment Act 1998* (Cth).

¹⁰ See, eg, *NTA* ss 24HA, 24MB, 44H. An effect of the amendments to the *NTA* was that water-related activities were no longer subject to the right to negotiate.

¹¹ (1992) 175 CLR 1, 43 (Brennan J).

courts of their native title rights and interests.¹² The common law and *Mabo* remain relevant, although only to a limited extent.¹³

Although *Mabo* referred expressly only to recognition by the common law of native title rights to land,¹⁴ the *NTA* clearly encompasses native title rights in relation to water: the long title of the *NTA* refers to waters,¹⁵ and the definition of native title includes references to waters.¹⁶ Waters are then separately defined as including:

- (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.¹⁷

¹² *Commonwealth v Yarmirr* (2001) 208 CLR 1, 35 [7] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Yarmirr*'); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 440 [32] (Gleeson CJ, Gummow and Hayne JJ) ('*Yorta Yorta*').

¹³ They remain relevant insofar as they assist in the interpretation of the *NTA*: see *Western Australia v Ward* (2002) 213 CLR 1, 65–6 [16], 69 [25] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Ward*'); *Yarmirr* (2001) 208 CLR 1, 111–12 [249] (Kirby J); *Wilson v Anderson* (2002) 213 CLR 401, 456–7 [137] (Kirby J); *Yorta Yorta* (2002) 214 CLR 422, 440–1 [35]–[36], 452–4 [74]–[77] (Gleeson CJ, Gummow and Hayne JJ).

¹⁴ In *Yarmirr* (2001) 208 CLR 1, 117 [260] (citations omitted) Kirby J noted, albeit in relation to native title rights to the sea:

The mere fact that rights of indigenous peoples in Australia in relation to the sea were not expressly mentioned in *Mabo [No 2]* is not determinative of the rights of the present parties. This Court was there responding to the claim before it, which related to land. Nothing was said in *Mabo [No 2]* that excludes recognition and protection of rights in, or in relation to, 'waters' and 'fishing' if, conceptually, they give rise to a claim analogous to that presented with respect to land.

His Honour appeared to be responding to a concern expressed by McHugh J in *Yarmirr* at 73–4 [118] (dissenting) that the inclusion of waters in the statutory definition of native title went beyond matters referred to by Brennan J in *Mabo*; see also at 76–7 [128]–[131] (McHugh J); 150–1 [340], 158–9 [365] (Callinan J).

¹⁵ The long title of the *NTA* states that it is '[a]n Act about native title in relation to land or waters, and for related purposes' (emphasis added).

¹⁶ *NTA* s 223(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.'

¹⁷ *Ibid* s 253 (definition of 'waters').

Many determinations of native title provide their own definition of waters, usually of a less inclusive nature.¹⁸ A separate definition of water also exists for the purposes of s 24HA of the *NTA*. The rationale for separate definitions and the discussion of native title determinations appear later, below.

A number of sections of the *NTA* relate to or have an impact on Indigenous water management rights.¹⁹ The following is an analysis of the most significant, commencing with the aforementioned s 24HA.

2 Future Act Provisions: Section 24HA — Management of Water and Airspace

Section 24HA is one of the ‘future act’ provisions of the *NTA*.²⁰ It is of particular relevance because it relates to the management of water, the role of native title holders and claimants, and notification/opportunity to comment procedures.²¹ This section was one of the 1998 amendments to the *NTA*,²² implementing point eight of Prime Minister John Howard’s ‘Wik 10 Point

¹⁸ See, eg, *Nangkiriny v Western Australia* (2002) 117 FCR 6, 10–14 [28] (North J); *Mervyn v Western Australia* [2005] FCA 831 (29 June 2005). In addition, some determinations use the term ‘water’ rather than ‘waters’ without providing a definition. Thus the ordinary meaning of the term must be used to work out what native title rights and interests are encompassed by the determination: O’Byrne, ‘Issues in Natural Resource Management’, above n 3, 290.

¹⁹ *NTA* ss 24GA–24GE, 24IA–24ID, 24KA. For a more detailed discussion of these sections of the *NTA* see Lila D’souza, ‘Native Title Implications for Existing and Future Water Entitlements in Western Australia’ (Report, National Native Title Tribunal, 3 May 2002).

²⁰ The term ‘future act’ is defined in s 233 of the *NTA*. It is essentially the making, amendment or repeal of legislation taking place on or after 1 July 1993, or any other act taking place on or after 1 January 1994, and which validly affects native title or is invalid because of native title. It does not include ‘past acts’, defined in s 228. The operative future act provisions, contained in pt 2 div 3, constitute a regime by which ‘future dealings affecting native title may proceed’ and ‘set[s] standards for those dealings’: at s 3(b).

²¹ *Ibid* s 24HA(7).

²² *Native Title Amendment Act 1998* (Cth) sch 1 item 9, inserting *NTA* s 24HA.

Plan',²³ the government's response to the so-called 'uncertainty' it saw as having been created by the *Wik* decision.²⁴

The term 'water', for the purposes of this section, means 'water in all its forms'.²⁵ This definition deliberately excludes the bed or subsoil under, or airspace over, any waters because it was intended that these would be generally dealt with elsewhere in the *NTA*.²⁶

Under s 24HA, the making, amendment or repeal of legislation or the grant of a lease, licence, permit or authority that relates to the management or regulation of water is valid.²⁷ The non-extinguishment principle applies,²⁸ and compensation is payable for any effect the act may have on native title rights.²⁹

Unlike future acts which relate to mining,³⁰ future acts under this section do not attract the right to negotiate.³¹ Instead, they fall within the class of

²³ John Howard, 'Amended *Wik* 10 Point Plan' (Media Release, 8 May 1997) <<http://pmtranscripts.pmc.gov.au/release/transcript-10333>>. Point eight, titled '[m]anagement of water resources and airspace', states as follows:

The ability of governments to regulate and manage surface and subsurface water, offshore resources and airspace, and the rights of those with interests under any such regulatory or management regime would be put beyond doubt.

²⁴ John Howard, 'Transcript of the Prime Minister the Hon John Howard MP Press Conference — Parliament House' (7 May 1997) <<https://pmtranscripts.pmc.gov.au/release/transcript-10331>>.

²⁵ *NTA* ss 24HA(1)–(2).

²⁶ For an explanation of the purpose of this exclusion see Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 111 [10.2] (emphasis in original):

Subdivision H does *not* deal with the management and regulation of the bed or subsoil under onshore and offshore waters (which includes the regulation of offshore mining such as the petroleum and gas industries). These matters are generally dealt with in proposed Subdivisions M and N, respectively, of Division 3 ... It is for this reason that the term 'water' is used rather than the term 'waters' (which is defined in section 253 to include the bed or subsoil).

NTA pt 2 div 3 sub-div N relates to offshore places and so is not relevant for the purposes of this article. However, pt 2 div 3 sub-div M does have some relevance to native title rights to inland waters, as discussed below.

²⁷ *NTA* ss 24HA(1)–(3).

²⁸ *Ibid* s 24HA(4).

²⁹ *Ibid* s 24HA(5).

³⁰ *Ibid* pt 2 div 3 sub-div P.

³¹ According to Jackson and Langton, '[i]n 1998, native title holders lost the short-lived right to negotiate over water resource developments': Sue Jackson and Marcia Langton, 'Trends in the Recognition of Indigenous Water Needs in Australian Water Reform: The Limitations of "Cultural" Entitlements in Achieving Water Equity' (2011) 22 *Journal of Water Law* 109, 113.

future acts to which only the rights to be notified and to have an opportunity to comment apply. These rights are found in s 24HA(7) and are limited to those acts contained in s 24HA(2). They do not apply to s 24HA(1) which relates to the making, amending or repeal of legislation. That is, native title holders do *not* have to be notified nor given an opportunity to comment on any proposed making, amending or repeal of legislation relating to the management or regulation of water that affects their native title rights.³²

In relation to the future acts in s 24HA(2) and the corresponding rights in s 24HA(7), those rights are very limited in scope, as the following cases demonstrate.

The scope of the opportunity to comment was discussed in *Harris v Great Barrier Reef Marine Park Authority* ('Harris').³³ In this case, the Full Federal Court stated:

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 subsection 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.³⁴

The Full Court made a clear distinction here between the right to comment, as found in s 24HA, and other rights,³⁵ such as those found in other parts of pt 2 div 3: the right to make submissions,³⁶ the right to object,³⁷ the right to be consulted³⁸ and the right to negotiate.³⁹ The Full Court was clearly of the view

³² That is not to say that the government will not consult with native title holders, or Traditional Owners, when proposing to amend legislation relating to water management. In the recent reviews of both the *Water Act 2007* (Cth) and the *Water Act 1989* (Vic), native title holders and Traditional Owners were consulted and invited to make written submissions: see, eg, Expert Panel, Australian Government, *Report of the Independent Review of the Water Act 2007* (2014).

³³ (2000) 98 FCR 60.

³⁴ *Ibid* 71 [38].

³⁵ See *ibid* 71–4 [38]–[52].

³⁶ See, eg, *NTA* s 31(1).

³⁷ See, eg, *ibid* ss 24CI(1), 24DJ(1).

³⁸ See, eg, *ibid* ss 24JAA(13)–(15).

³⁹ *Ibid* pt 2 div 3 sub-div P.

that the opportunity to comment was a lesser right and that if the legislature had intended it to be more substantial, it would have provided as such.

In relation to notification, the applicants in *Harris* argued that the common law requirements of procedural fairness entitled them to be provided with sufficient information to enable them to have 'a proper opportunity to advance all legitimate arguments to avert a decision that might profoundly affect their interests, an opportunity that in turn requires that they be given a proper notice of the case they have to meet.'⁴⁰ The Court rejected this argument, on the basis that the *NTA* provided a statutory regime to meet the requirements of procedural fairness.⁴¹

In relation to the content of the notification, the Federal Court stated:

The ordinary meaning of the phrase 'or acts of that class' in s 24HA(7) suggests that it is not necessary for the Authority to give notification to the registered native title claimants that it is proposing to grant each specific permit of a class of permit proposed to be granted. That that is also the intended meaning is confirmed by par 10.20 of the explanatory memorandum ...⁴²

Thus, the Full Federal Court in *Harris* gave a narrow scope to both the opportunity to comment and notification requirements in s 24HA(7).

In a subsequent decision of the National Native Title Tribunal ('NNTT'), Member Sosso saw fit to be guided by *Harris* on the adequacy of notice.⁴³ However, there appears to have been no further cases that specifically deal with the opportunity to comment.

A failure to notify does not render the act invalid. This was clearly the intention of the government as evidenced in the Explanatory Memorandum for the 1998 amendments.⁴⁴ Although there has been no definitive judgment on this point, it was the view expressed in obiter by a majority of the Full Federal Court in *Lardil Peoples v Queensland* ('*LardiP*').⁴⁵ As Dowsett J stated:

⁴⁰ (2000) 98 FCR 60, 65 [19].

⁴¹ *Ibid* 67-8 [29].

⁴² *Ibid* 72 [44].

⁴³ See *Dann v Western Australia* (2006) 208 FLR 357, 376-7 [58]-[65].

⁴⁴ Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 114 [10.20] states: 'Failure to notify will not affect the validity of the future act.'

⁴⁵ (2001) 108 FCR 453, 471-2 [52], 473 [58] (French J), 486-7 [117]-[120] (Dowsett J).

Section 24HA(3) validates a future act without any suggestion that such validation is dependent upon compliance with any other aspect of the section or subdivision. Native title rights are not extinguished by the act in question, but enjoyment of them may be suspended. Compensation is payable, but there is no suggestion that payment is a condition of validity. There is also nothing to suggest that compliance with s 24HA(7) is a condition precedent to validity.⁴⁶

This reasoning conforms with the intention of the government, but it renders any efforts by native title claimants and holders to have their comments considered in the decision-making process largely futile. In other words, even if a court held that a decision-maker had failed to follow the notification procedures in s 24HA(7) and had granted the licence, there would be little, if any, value for native title holders to then provide comments: the licence has been granted and is valid. There is also no incentive for the decision-maker to follow the notification procedures due to the absence of a legal sanction or consequence for non-compliance. The only disincentive might be a loss of goodwill from the affected native title holders.

Professor Bartlett has suggested that the view of the Full Federal Court in *Lardil*⁴⁷ is incorrect.⁴⁸ In support, he referred to the reasoning of the Full Federal Court in *Harris*,⁴⁹ stating, '[i]n explaining the procedural entitlement of claimants, the court assumed that non-compliance led to invalidity'.⁵⁰ In that regard, the Full Federal Court in *Harris* made various observations of procedural rights having the effect of enabling claimants to be involved in the validation process, of which one observation is particularly pertinent:

The non-extinguishment principle, defined in s 238 applies to most of the future acts covered by sub-divs G, H, I and J. Though the native title holders can-

⁴⁶ Ibid 486 [117].

⁴⁷ (2001) 108 FCR 453.

⁴⁸ See especially Bartlett, *Native Title in Australia*, above n 5, 591 [23.13]:

It must be suggested that, consistent with the objects of the [NTA] as declared in the preamble, and the overview of the future act process in [NTA] s 24AA and general provision of [NTA] s 24OA, the Federal Court dicta in *Lardil* is in error. It renders much of the future act process meaningless, introduces considerable uncertainty as to the effect of future acts, and denies any pretensions of the [NTA] to the seeking of equality for native title holders with respect to future acts.

⁴⁹ (2000) 98 FCR 60.

⁵⁰ Bartlett, *Native Title in Australia*, above n 5, 591 [23.13].

not prevent the doing of these future acts, they ... have certain procedural rights to which effect must be given before the act can validly be done.⁵¹

Nonetheless, a number of cases have taken guidance from the view of the Court in *Lardil* on the issue of validity.⁵²

Given these cases, and the clearly stated intention in the Explanatory Memorandum, the likelihood of a later court now coming to a different conclusion appears remote.

3 Future Act Provisions Affecting Native Title Rights to Inland Waters: Subdivisions M and P

The definition of water in s 24HA deliberately excludes the bed or subsoil under waters so that they can be dealt with under other future act provisions of the *NTA*.⁵³ Part 2 div 3 sub-div M is relevant in this regard. Also of relevance is pt 2 div 3 sub-div P. For the purposes of brevity, these subdivisions will be referred to in text as 'sub-div M', and 'sub-div P' respectively.

⁵¹ (2000) 98 FCR 60, 68 [33].

⁵² In *Daniel v Western Australia* (2004) 212 ALR 51, 65 [63] ('*Daniel*'), Nicholson J, after noting the dicta of the court in *Lardil* (2001) 108 FCR 453, agreed with a respondent's submission that there was 'no reason to depart from such persuasive authority which is not clearly incorrect.' In *Banjima People v Western Australia [No 2]* (2013) 305 ALR 1, 165 [987], Barker J also accepted respondent submissions on *Lardil* and noted *Daniel*. In *Queensland Construction Materials Pty Ltd v Redland City Council* (2010) 271 ALR 624, 642 [84], Chesterman JA and Applegarth J, although noting that the decision in *Lardil* was not binding, were clear that they would be reluctant to depart from that decision unless clearly wrong, and here they thought it was 'plainly right'. Arguably this statement was referring to the issue of whether native title exists, in order for it to be affected by a future act. However, Chesterman JA and Applegarth J then proceeded to quote, with apparent approval, French J in *Lardil* in relation to the issue of validity (even though it was not necessary for the appeal): at 643 [90], quoting *Lardil* (2001) 108 FCR 453, 473 [58] (French J). See also *Western Desert Lands Aboriginal Corporation v Western Australia* (2008) 218 FLR 362, 379 [37] (Deputy President Sumner); *Leach v Nominal Defendant (QBE Insurance (Australia) Ltd) [No 2]* [2014] NSWCA 391 (14 November 2014) [38] (McColl JA).

⁵³ Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 111 [10.2]. The Explanatory Memorandum states that this is dealt with in *NTA* pt 2 div 3 sub-divs M and N. Part 2 div 3 sub-div N relates to acts affecting offshore places, and is therefore not relevant to this article.

(a) *Subdivision M: Treatment of Acts that Pass the Freehold Test*

Subdivision M relates to acts passing the freehold test.⁵⁴ The basic concept behind this test is that ‘for the purposes of providing equality before the law, future acts should only be valid over native title lands or waters if they could also be done over freehold and subject to similar conditions and procedural requirements.’⁵⁵ As it follows s 24HA, the terms of s 24HA take priority.⁵⁶

Under sub-div M, native title holders are entitled to the same procedural rights as if they held freehold title.⁵⁷ Thus, if a freehold owner of land has a right to be consulted or to lodge an objection, then native title holders would also have that right. Similarly, if a freehold owner has only the right to be notified and given the opportunity to comment, then native title holders would face the same restrictions. However, if the act is one to which sub-div P applies (the ‘right to negotiate’), then those procedural rights apply rather than the procedural rights in sub-div M.⁵⁸

At first glance, it is difficult to reconcile sub-div M with the priority given to s 24HA. Yet, if one recalls that the definition of waters which applies to s 24HA does not include the bed or subsoil under waters, then to those elements (ie the bed or subsoil), at least, the freehold test in sub-div M would still apply.⁵⁹

(b) *Subdivision P: Right to Negotiate*

Subdivision P arguably contains some of the strongest provisions for native title claimants and holders. Under this subdivision, registered native title claimants and holders have a right to negotiate in regard to certain future acts occurring on their traditional land, such as the conferral of mining rights or compulsory acquisitions.⁶⁰ By far the majority of right to negotiate matters relate to the conferral of mining rights.⁶¹ Mining operations use a significant

⁵⁴ NTA s 24MB(1).

⁵⁵ Bartlett, *Native Title in Australia*, above n 5, 616 [23.74].

⁵⁶ NTA s 24AB(2).

⁵⁷ *Ibid* s 24MD(6A).

⁵⁸ *Ibid* s 24MD(6).

⁵⁹ See generally Bartlett, *Native Title in Australia*, above n 5, 618 [23.81].

⁶⁰ NTA ss 25(1)(a)–(b).

⁶¹ This is the case even in Victoria: see, eg, Native Title Services Victoria, *Annual Report 2010–11* (2011) 15–16; Native Title Services Victoria, *Annual Report 2009–10* (2010) 13–14;

amount of water, often derived from local sources, so this subdivision is of particular importance.⁶² Pursuant to this subdivision, ‘the parties must negotiate with a view to reaching an agreement about the act.’⁶³

After the negotiating parties have been identified, the procedure includes a requirement that they negotiate in good faith in an effort to obtain the agreement of the native title parties.⁶⁴ But native title parties have no right of veto: if the parties are unable to reach an agreement within the six month statutory time frame, then the matter may be taken to an arbitral body for determination.⁶⁵ If this is the case, it is unlikely to be resolved in favour of the native title party,⁶⁶ and any conditions imposed on the non-native title party are usually minimal.⁶⁷

Unfortunately, agreements reached pursuant to sub-div P are not publicly available, generally being in the nature of a private contract between the

Native Title Services Victoria, *Annual Report 2008–9* (2009) 8–9; Native Title Services Victoria, *Annual Report 2007–8* (2008) 11–12.

⁶² For example, RioTinto notes on its website that ‘[w]ater is a vital resource for communities and ecosystems and is essential to our operations. Our operations rely on the ability to obtain water of suitable quality and quantity’: RioTinto, *Environment* (2016) <<http://www.riotinto.com/ourcommitment/environment-4794.aspx>>. The mining industry accounted for three per cent of Australia’s water consumption in the 2013–14 financial year: Australian Bureau of Statistics, *Water Account, Australia, 2013–14* (ABS Catalogue No 4610.0, Australian Bureau of Statistics, 26 November 2015).

⁶³ *NTA* s 25(2).

⁶⁴ *Ibid* s 31(1)(b).

⁶⁵ *Ibid* s 35(1). Arbitral body is defined in s 27 and includes the NNTT.

⁶⁶ A search of the NNTT website on 28 July 2016 of future act determinations querying whether an act can proceed or not (excluding those determinations made by consent or dismissed) identified 94 determinations. Of those 94, only three had the result that the act cannot be done. Of the remaining 91 determinations, 52 had the result that the act can be done, and 39 had the result that the act can be done subject to conditions: NNTT, *Search Future Act Applications and Determinations* <<http://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx>>.

⁶⁷ Conditions imposed have included, for example: that the native title party have continued access to the area subject to safety or security requirements; that the native title party have notice of applications under heritage protection legislation and that the native title party be provided with material relevant to the application; that the native title party receive a copy of any proposed plan of operations including any location plans provided to the Director of the Environment in the Department of Mines and Petroleum; and that any successors to the tenement also be bound by these conditions: see, eg, *Cheedy v Western Australia* [2012] NNTTA 11 (7 February 2012) [63] (Member O’Dea); *Taylor v Western Australia* [2011] NNTTA 213 (20 December 2011) [68] (Member O’Dea).

parties concerned. Further, the *NTA* does not require that the NNTT maintain a register of sub-div P agreements. These limitations make it difficult to assess the effectiveness of sub-div P agreements with respect to water rights beyond what the *NTA* specifically elicits.

4 *Future Act Provisions: Indigenous Land Use Agreements*

Introduced in 1998, the provisions relating to Indigenous Land Use Agreements ('ILUAs') were 'generally seen to be a positive element of the 1998 package'.⁶⁸ They were intended to enable agreements to be reached between 'actual or potential native title holders and those wishing to use land'.⁶⁹ If such an agreement is in place, 'then its terms are intended to take precedence over any other provisions in the *NTA* which would otherwise apply to the future acts covered by the agreement'.⁷⁰ Agreement-making is seen as beneficial because it avoids litigation and:

is an important process through which people build relationships and carry forward the public recognition of Indigenous rights ... [and] to varying degrees, gives Indigenous people a genuine decision-making role in a range of issues affecting their lives and their territories.⁷¹

The potential content of ILUAs is extremely wide. As long as an ILUA includes one or more of the native title matters enumerated in the relevant section, it remains free of any other limitations.⁷²

⁶⁸ Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2006) 8.

⁶⁹ Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 68 [6.7].

⁷⁰ *Ibid.*

⁷¹ Marcia Langton, Maureen Tehan and Lisa Palmer, 'Introduction' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 1, 25.

⁷² *NTA* ss 24BE, 24CE and 24DF all state the following:

(1) The agreement may be given for any consideration, and subject to any conditions, agreed by the parties (other than consideration or conditions that contravene any law).

Consideration may be freehold grant or other interests

(2) Without limiting subsection (1), the consideration may be the grant of a freehold estate in any land, or any other interests in relation to land whether statutory or otherwise.

An exception relates only to alternative procedure ILUAs, which are not able to provide for the extinguishment of native title: at s 24DC. At the time of writing, no alternative procedure ILUAs were in place.

Given the wide-ranging scope of ILUA content, it is conceivable that an ILUA could provide for rights to participate in the management of water resources. Such rights do not have to be in the nature of a future act, provided that the ILUA pertains to at least one enumerated native title matter.⁷³

Once registered, ILUAs are binding as a contract between parties.⁷⁴ This means that parties are essentially ‘contracting out’ of the future act provisions of the *NTA* and can negotiate their own procedures for dealing with particular matters. Theoretically, a native title party could negotiate for inclusion in an ILUA of procedural rights in relation to the management of water resources that are greater than those contained in s 24HA.

In practice, this is unlikely to occur, given the relative bargaining positions of native title parties vis-à-vis non-Indigenous parties.⁷⁵ There are no incentives or benefits (other than perhaps increased goodwill) for states or other parties to do more than that which is required under s 24HA.

Most ILUAs are privately reached between the parties concerned, with only limited details publicly available.⁷⁶ Accordingly, as with sub-div P agreements, it is difficult to come to any conclusion regarding the effectiveness of ILUAs to provide for water rights greater than those contained in s 24HA.

⁷³ However, given the existence in the *NTA* of s 24HA, any procedural rights negotiated in an ILUA in relation to the management of water resources are likely to be encompassed by ss 24BB(a), 24CB(a) and 24DB(a), which are identical in their terms, stating: ‘The agreement must be about one or more of the following matters in relation to an area: (a) the doing, or the doing subject to conditions (which may be about procedural matters), of particular future acts, or future acts included in classes.’

⁷⁴ *Ibid* s 24EA(1).

⁷⁵ See Langton, Tehan and Palmer, above n 71, 20.

⁷⁶ The NNTT maintains a register of ILUAs pursuant to *NTA* s 199A. The content of the register is limited to only those details of the ILUA as set out in s 199B; it does not contain the entire ILUA. An entire ILUA may be publicly available if the parties agree to it being made public, but this will not be via the register and is quite uncommon.

5 General Provisions of the NTA Affecting Native Title Rights to Manage Inland Waters

(a) Section 211: Preservation of Certain Native Title Rights and Interests

Section 211 of the NTA provides that where a law of a state or territory would normally prohibit or restrict a class of activity⁷⁷ other than in accordance with the relevant permission, the rights of native title holders to undertake those activities and to access land and waters for the purposes of undertaking those activities is preserved. This is subject to some qualification, as the activities undertaken must be:

- (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.⁷⁸

In addition, native title holders are still subject to laws of general application (for example, if they propose to go hunting with a gun, they will require a gun permit). It is also arguable that the activity must not have been prohibited outright, but merely regulated.⁷⁹

Section 211 relates to water rights in that it preserves access to waters, and the conducting of cultural and spiritual activities insofar as those activities

⁷⁷ NTA s 211(3) defines these activities as hunting, fishing, gathering and conducting cultural or spiritual activities.

⁷⁸ Ibid s 211(2).

⁷⁹ D'souza, above n 19, 29. See also *Yanner v Eaton* (1999) 201 CLR 351, 372–3 [37]–[39] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Ward* (2002) 213 CLR 1, 152 [265] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [633], [636] (Sundberg J); *Karpány v Dietman* (2013) 252 CLR 507, 514 [5]. Legislation enacted prior to the enactment of the *Racial Discrimination Act 1975* (Cth) ('RDA') which prohibits activities outright will extinguish native title see *Ward* (2002) 213 CLR 1, 152 [265] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). However, if legislation prohibiting an activity outright is enacted post-*Racial Discrimination Act 1975* (Cth) then it becomes a category D past act, and the non-extinguishment principle applies: NTA ss 15–16, 19; and, in relation to Victoria, the *Land Titles Validation Act 1994* (Vic) ss 6–10, 12, which are sections similar to ss 15 and 16 of the NTA. See also the definitions of past act, and category D past act: NTA ss 228, 232. In *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [879]–[880] it was argued before Nicholson J (an argument that his Honour appears to have accepted) that the prohibition (if occurring post-*Racial Discrimination Act 1975* (Cth)) would suspend native title while the legislation remained in existence, reviving only when the legislation is repealed, thus leaving no scope for NTA s 211 to operate while the legislation is in force.

relate to water. It could be argued that management, or aspects thereof, of water resources is both a cultural and spiritual activity and would thus fall within the class of activities covered by this section.

So this section may have some scope, albeit limited, for the continuance of some cultural and spiritual activities that have an impact on water management. There has, however, been no judicial consideration of this point.

(b) Section 212: Confirmation of Ownership of Natural Resources, Access to Beaches Etc

Section 212 of the *NTA* enables the Commonwealth, states and territories to pass legislation confirming: the Crown's existing ownership of natural resources;⁸⁰ its right 'to use, control and regulate the flow of water';⁸¹ fishing access rights;⁸² and existing public access to waterways, beaches and other public places.⁸³ Such confirmation does not extinguish native title.⁸⁴

All of the states and territories have passed such legislation.⁸⁵ Confirmation of the right of the Crown to use, control and regulate the flow of water has implications for the participation in water management by native title holders, particularly given that nearly all of the states have water management legislation which vests such rights in the Crown. Case law examining some of this legislation is discussed below.

6 *Judicial Consideration of Inland Water Rights*

The most significant native title case relating to the recognition of Indigenous water rights is the High Court's 2002 decision in *Western Australia v Ward* ('*Ward*').⁸⁶ In *Ward*, the High Court determined that Western Australian legislation vesting the 'right to the use and flow and to the control of the

⁸⁰ *NTA* s 212(1)(a).

⁸¹ *Ibid* s 212(1)(b).

⁸² *Ibid* s 212(1)(c).

⁸³ *Ibid* s 212(2).

⁸⁴ *Ibid* s 212(3).

⁸⁵ *Native Title Act 1994* (ACT) ss 10-13; *Native Title (New South Wales) Act 1994* (NSW) ss 16-18; *Validation (Native Title) Act 1994* (NT) ss 12-13; *Native Title (Queensland) Act 1993* (Qld) ss 16-18A; *Native Title (South Australia) Act 1994* (SA) s 39; *Native Title (Tasmania) Act 1994* (Tas) ss 13-14; *Land Titles Validation Act 1994* (Vic) ss 14-16; *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) ss 13-14.

⁸⁶ (2002) 213 CLR 1.

water' in Western Australia⁸⁷ did not extinguish native title rights in water, but destroyed any exclusivity.⁸⁸

(a) *Ward and Inland Water Rights*

Ward has been discussed in more detail elsewhere and, as such, the following summary of it will be brief.⁸⁹

At first instance, Lee J found that the vesting of the 'right to the use and flow and to the control of the water' in pt III of the *Rights in Water and Irrigation Act 1914* (WA) ('*RWI Act*') did not extinguish native title rights to water.⁹⁰

On appeal to the Full Federal Court, Western Australia submitted that Lee J had erred in coming to this conclusion. However, the majority of the Full Court did not accept this submission.⁹¹ Nonetheless, the Court proceed-

⁸⁷ *Rights in Water and Irrigation Act 1914* (WA) s 4(1).

⁸⁸ (2002) 213 CLR 1, 151–2 [263] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). This was only a small aspect of *Ward*; however, it was very significant in relation to water rights. Note that prior to *Ward*, in *Wandarang People v Northern Territory* (2000) 104 FCR 380 ('*Wandarang*'), Olney J had already briefly considered this issue in relation to Northern Territory legislation. In *Wandarang*, Olney J opened by referring to common law recognition under s 223(1)(c), stating that '[s]ection 223(1)(c) of the [NTA] makes it clear that a right or interest which is not recognised by the common law of Australia cannot be recognised as a native title right or interest': at 392 [24]. His Honour then elaborated on the limits of common law recognition, citing both Brennan J in *Mabo* (1992) 175 CLR 1, 43 and Kirby J in *Fejo v Northern Territory* (1998) 195 CLR 96, 150 [104] ('*Fejo*') with approval: at 392 [25]. Olney J later concluded at 432 [126] by stating:

As previously discussed, the common law does not recognise a claim to ownership of flowing water. In relation to water generally, the *Control of Waters Ordinance 1938* (NT) (now replaced by the *Water Act 1992* (NT)) 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 this view of the *Control of Waters Ordinance 1938* (NT) that was later to be largely replicated by the High Court in *Ward* in relation to the equivalent Western Australian legislation. Note, however, that the High Court in *Ward* did not refer to *Wandarang*.

⁸⁹ O'Bryan, 'Issues in Natural Resource Management', above n 3, 302–4.

⁹⁰ *Ward v Western Australia* (1998) 159 ALR 483, 582–3. The relevant provision at the time was *RWI Act* s 4(1). However, the Act has since been amended and the equivalent provision is now *RWI Act* s 5A.

⁹¹ *Western Australia v Ward* (2000) 99 FCR 316, 422 [400] (Beaumont and von Doussa JJ):

We consider that s 4(1) of the [*RWI Act*] is a clear example of a statutory provision where all that is vested in the Crown is only such powers of control and management as are necessary to enable the Crown to discharge the powers and functions arising under the Act.

ed to accept Western Australia's argument that the *RWI Act* removed any exclusive native title rights to water.⁹²

The matter then proceeded on appeal to the High Court, which upheld, by majority, the majority view of the Federal Court, stating that '[t]he vesting of waters in the Crown was inconsistent with any native title right to possession of those waters to the exclusion of all others.'⁹³

Comparable vesting provisions are found in most other states and territories in Australia.⁹⁴ In Victoria, for example, s 7(1) of the *Water Act 1989* (Vic) provides that '[t]he Crown has the right to the use, flow and control of all water in a waterway and all groundwater.' Thus, it is clear that in Victoria, and arguably Australia-wide, any native title rights to water recognised by the courts will be non-exclusive.⁹⁵

At this juncture, mention should be made of the High Court's 2009 decision in *ICM Agriculture Pty Ltd v Commonwealth* ('*ICM Agriculture*').⁹⁶ In that case, the High Court stated that common law riparian rights to water⁹⁷ in New South Wales had been extinguished by statutory vesting provisions,⁹⁸ and noted similar historical vesting provisions around Australia.⁹⁹ However, native title rights, although they can be recognised by the common law, are

We do not consider that the mere vesting effected under s 4(1) evidenced an intention to extinguish native title rights.

⁹² *Ibid* 423 [405]: 'The Act imposed restrictions upon the diversion or obstruction of any water-course, lake, etc and on the use of water. These restrictions necessarily removed the exclusivity of the right to control the use and enjoyment of the water.'

⁹³ *Ward* (2002) 213 CLR 1, 152 [263] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁹⁴ *Water Resources Act 2007* (ACT) s 7; *Water Management Act 2000* (NSW) s 392; *Water Act 1992* (NT) s 9; *Water Act 2000* (Qld) s 19; *Water Management Act 1999* (Tas) s 7; *Water Act 1989* (Vic) s 7. South Australia is the only state which does not have such vesting provisions.

⁹⁵ Even though South Australia does not have legislation vesting the use, flow and control of water in the State, the common law position would probably still find no exclusive possession of water, as this would amount to ownership which the common law will not recognise: see *Wandarang* (2000) 104 FCR 380, 432 [126] (Olney J).

⁹⁶ (2009) 240 CLR 140.

⁹⁷ Riparian rights are essentially landowner rights to take and use water from water sources on, adjacent to or flowing through their land, for domestic and stock purposes: see O'Donnell, above n 3, 32–6.

⁹⁸ *ICM Agriculture* (2009) 240 CLR 140, 177 [72] (French CJ, Gummow and Crennan JJ).

⁹⁹ *Ibid* 172–3 [52]–[54].

not common law rights.¹⁰⁰ It has been argued that this distinction is ‘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’.¹⁰¹

This argument has not yet been tested in court, and to date, native title determinations continue to be made around Australia which recognise non-exclusive native title rights to waters.

7 Determinations of Native Title and Water Rights: Victoria

The High Court decision in *Ward*¹⁰² relating to the effect of the *RWI Act* was applied in *Daniel v Western Australia*¹⁰³ and *Neowarra v Western Australia* (‘*Neowarra*’).¹⁰⁴ However, there are very few cases post-*Ward* which have dealt with native title rights and interests in waters in any detail; most cases do not specifically discuss them but will simply recognise them (or not, as the case may be) in the relevant determination.¹⁰⁵ The content of native title rights and

¹⁰⁰ *Yorta Yorta* (2002) 214 CLR 422, 453 [75]–[76] (Gleeson CJ, Gummow and Hayne JJ). See also *Fejo* (1998) 195 CLR 96, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁰¹ O’Donnell, above n 3, 48. At 32–50, O’Donnell discusses at some length the impact of *ICM Agriculture* (2009) 240 CLR 140 on Indigenous water rights in the three northern Australian jurisdictions.

¹⁰² (2002) 213 CLR 1.

¹⁰³ [2003] FCA 666 (3 July 2003).

¹⁰⁴ [2003] FCA 1402 (8 December 2003). In this case Sundberg J cited *Wandarang* (2000) 104 FCR 380 and noted that as the common law did not recognise private ownership in flowing water or subterranean water flowing in undefined channels, it could not recognise a native title right to own such water: at [609]. Sundberg J then went on to state at [609], citing *Ward* (2002) 213 CLR 1, 152 [263] (Gleeson CJ, Gaudron, Gummow and Hayne JJ):

In any event, as was held in *Ward* ... the vesting in the Crown under s 4(1) of the *[RWI Act]* of the right to the use and flow and to the control of the water in natural waters is inconsistent with any native title right to possess those waters to the exclusion of all others.

¹⁰⁵ A case that does discuss native title rights to water is *Griffiths v Northern Territory* (2006) 165 FCR 300. In this case Weinberg J discussed the special position of the waters of Timber Creek: at 372 [775]–[777]. Although some confusion arose as to the nature of the water rights being claimed, his Honour eventually found that the native title rights and interests in water were non-exclusive: at 375 [798]. On appeal to the Full Federal Court, the trial judge’s finding on exclusive possession was overturned: *Griffiths v Northern Territory* (2007) 165 FCR 391, 428–9 [125]–[128]. Furthermore, in *Gumana v Northern Territory [No 2]* [2005] FCA 1425 (11 October 2005) [43], Mansfield J remarked that although there could be no ownership in or exclusive rights to free-flowing or subterranean waters, there could be a right to control access to waters in areas of exclusive possession. This is potentially very important,

interests in waters recognised by the courts in such cases will vary between groups, and will depend on a number of interrelated factors.¹⁰⁶ The content of rights and interests in waters has also varied over time, as both claimants and respondents become more familiar with the *NTA* and what is or is not possible to achieve.

In Victoria, since the enactment of the *NTA*, there have been five determinations of native title: one litigated, and four by way of a consent determination. In chronological order they are *Yorta Yorta*,¹⁰⁷ *Clarke v Victoria* ('*Wimmera Clans*'),¹⁰⁸ *Lovett v Victoria* ('*Gunditjmara*'),¹⁰⁹ *Mullett v Victoria* ('*Gunai/Kurnai*'),¹¹⁰ and most recently, *Lovett v Victoria [No 5]* ('*Gunditjmara and Eastern Maar*').¹¹¹

In the 2002 *Yorta Yorta* decision (the only fully litigated determination in Victoria), it was held that native title did not exist,¹¹² which means that the *Yorta Yorta* people cannot rely on native title as a basis for recognising their interests in water.

In *Wimmera Clans*, native title was held to exist along the banks and beds of a section of the *Wimmera River*, *Outlet Creek*, and over *Lake Albacutya* and *Lake Hindmarsh* ('*Determination Area A*').¹¹³ However, pursuant to the determination, native title does not exist in 'any waters within *Determination Area A*. For the avoidance of doubt, waters do not include the bed or subsoil under, or airspace over, any waters within *Determination Area A*'.¹¹⁴ Given the

and may provide one of the only bases upon which native title holders can assert their rights to make decisions about the management of waters on their native title lands. Michael O'Donnell has also come to a similar conclusion: O'Donnell, above n 3, 10, 59–61, 303.

¹⁰⁶ These will include: the rights and interests claimed in the original application for determination of native title; the location of the native title claim; the types of water sources found within the claim; the negotiating strength of the parties (where the determination is one made by consent); the nature of other interests in the claim area; and policy and political imperatives of the government of the day.

¹⁰⁷ (2002) 214 CLR 422.

¹⁰⁸ [2005] FCA 1795 (13 December 2005).

¹⁰⁹ [2007] FCA 474 (30 March 2007).

¹¹⁰ [2010] FCA 1144 (22 October 2010).

¹¹¹ [2011] FCA 932 (27 July 2011).

¹¹² (2002) 214 CLR 422, 458 [96] (Gleeson CJ, Gummow and Hayne JJ), 468 [135] (McHugh J), 493 [189] (Callinan J).

¹¹³ [2005] FCA 1795 (13 December 2005) O 3 (Merkel J).

¹¹⁴ *Ibid* O 4(a).

definition of waters in the *NTA* and that the determination itself only relates to the banks and beds of various water bodies, without this clarification there would have been almost no recognition of native title.

The *Wimmera Clans* determination then sets out the native title rights that were recognised, namely 'the non-exclusive rights to hunt, fish, gather and camp for personal, domestic and non-commercial communal needs.'¹¹⁵ As a result, the peoples of the *Wimmera clans*¹¹⁶ can camp on the banks of the *Wimmera River*, fish in and gather reeds from the river, but have no native title rights to take or use water from it. Thus, even with a consent determination in their favour, the *Wimmera clans*, like the *Yorta Yorta*, cannot rely on native title as a basis for recognition of their interests in water.¹¹⁷

The extremely limited native title rights and complete lack of native title rights to water that were recognised in *Wimmera Clans* can perhaps be explained by two factors. First, *Wimmera Clans* was the first claim to be determined in Victoria after *Yorta Yorta*. As a result of the outcome of *Yorta Yorta*, it was a commonly held view that the chances of a positive determination in Victoria, indeed in any part of southern Australia, were almost non-existent.¹¹⁸ Bartlett sums it up as follows: *Yorta Yorta* 'is significant in indicating how difficult is the establishment of native title in areas that were the subject of intensive European settlement, as is much of southern Australia.'¹¹⁹

Secondly, at the time, Victoria was experiencing a severe drought. Accordingly, reluctance by the Victorian government to agree to recognise any native title rights to water, no matter how limited, would not be difficult to infer. This reluctance was, perhaps, an overreaction given that the nature of native title rights to water that had been recognised elsewhere in Australia was generally limited to domestic, non-commercial, communal-type rights. The exercise of native title rights of this nature is likely to have minimal if any impact on water resources. Further, pursuant to s 8 of the *Water Act*

¹¹⁵ Ibid O 7.

¹¹⁶ The *Wimmera clans* consist of the *Wotjobaluk*, *Jaadwa*, *Jadawadjali*, *Wergaia* and *Jupagulk* peoples: *ibid* [1].

¹¹⁷ They still have general rights to take and use water for domestic and stock purposes pursuant to *Water Act 1989* (Vic) s 8.

¹¹⁸ See, eg, Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31 *University of Western Australia Law Review* 35.

¹¹⁹ Bartlett, *Native Title in Australia*, above n 5, 92 [7.2]. See also Strelein, *Compromised Jurisprudence*, above n 68, 84.

1989 (Vic), a person may use water from any waterways accessible by public road or reserve for domestic and stock purposes. Given that the determination of native title was over public land, and was therefore publicly accessible, the Victorian government would have been agreeing to recognise water rights for the Wimmera clans arguably no greater than they already had as members of the public.

*Wimmera Clans*¹²⁰ did, however, pave the way for some improvement in the recognition of native title rights in the subsequent *Gunditjmarra*¹²¹ and *Gunai/Kurnai*¹²² determinations.

The rights and interests recognised are similar in each case, being various non-exclusive rights over land and now also over waters. Rights in relation to water are limited to the right to take water from a waterway for domestic and ordinary use.¹²³ However, although the term ‘waters’ is used in each determination, the default NTA definition of waters is qualified. For example, *Gunai/Kurnai* provides that there is no native title in relation to ‘groundwater as defined in the *Water Act 1989* (Vic), as in force at the date of this determination.’¹²⁴ The determinations in the *Gunditjmarra*¹²⁵ and *Gunditjmarra and Eastern Maar*¹²⁶ determinations in this respect are identical. This qualification is incompatible with the holistic view of country held by Indigenous people. It is also inconsistent with the objectives of the *Intergovernmental Agreement on a National Water Initiative*,¹²⁷ one of which is to achieve the ‘recognition of

¹²⁰ [2005] FCA 1795 (13 December 2005).

¹²¹ [2007] FCA 474 (30 March 2007).

¹²² [2010] FCA 1144 (22 October 2010).

¹²³ Lisa Strelein notes that in *Gunditjmarra* [2007] FCA 474 (30 March 2007), this qualification is only explicit in relation to water, ‘leaving implicit commercial rights in relation to all other rights and resources’: Lisa Strelein, ‘The Right to Resources and the Right to Trade’ in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 44, 50. Note that in the subsequent *Gunai/Kurnai* [2010] FCA 1144 (22 October 2010) determination, the right to take resources for commercial purposes was explicitly excluded.

¹²⁴ [2010] FCA 1144 (22 October 2010) determination item 3(c) (North J).

¹²⁵ [2007] FCA 474 (30 March 2007) determination item 3(c) (North J).

¹²⁶ [2011] FCA 932 (27 July 2011) determination item 3(c) (North J).

¹²⁷ *Intergovernmental Agreement on a National Water Initiative* (25 June 2004) (‘*National Water Initiative*’). The *National Water Initiative* is an intergovernmental agreement between the Commonwealth, states and territories. Signed in June 2004 (being joined later by Tasmania in June 2005 and Western Australia in April 2006), it remains the leading policy document on water management in Australia.

the connectivity between surface and groundwater resources'.¹²⁸ Therefore, the native title rights to water recognised in these determinations remain problematic.

One final and important point to note about the Victorian determinations is that they pertain to water access and use, rather than management. For a determination to include management rights over water resources, the rights sought in a native title claim would need to include a right to make decisions about the land and waters. Although generally always claimed (and they were indeed claimed in all of the Victorian determinations),¹²⁹ this kind of native title right is usually only recognised in determinations of exclusive native title.¹³⁰ Such determinations are extremely unlikely to occur in Victoria given its land tenure history, the myriad of other interests in land, the nature of Victorian determinations to date and the enactment of the *TOS Act*.

The other native title right claimed that may give rise to a right to manage water resources is the right to protect sacred sites or places of importance, where those sites or places of importance include water resources. But there are limitations on this right as it does not allow for the holistic management of water resources and only protects the site or place in question. This may be relatively simple if the sacred site or place of importance is a rock hole or similarly confined location, but when it is part of a larger water body, such as a river, it becomes problematic, as it has the potential to fragment the management of that larger water body.

¹²⁸ Ibid cl 23(x).

¹²⁹ See, eg, *Yorta Yorta v Victoria* [1998] FCA 1606 (18 December 1998) [11], where the right was expressed as:

the right to participate to the fullest extent practicable in the making of decisions by non native title holders, being decisions made pursuant to a law, regulation, order or administrative arrangement by Government or its agencies about access to, occupation, use and enjoyment of the determination area, the waters and the natural resources, including the right to be consulted about such decisions ...

¹³⁰ There are some non-exclusive determinations in which a limited right to make decisions has been recognised, but in such cases this right only relates to decisions about the use of the land and waters by other Aboriginal people, and not the wider non-Aboriginal community. For example, in the non-exclusive determination concerning the Sandover River in *Apetyarr v Northern Territory* [2014] FCA 1088 (14 October 2014), the right recognised was 'to speak for and make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders': at determination item 6(i) (Mortimer J).

C Concluding Remarks on Native Title

Despite the initial promise of both *Mabo* and the *NTA*, neither has lived up to expectations, particularly in relation to Indigenous participation in the management of water resources. Recognition of water rights under the *NTA* is limited to only those rights capable of being recognised by the common law, which is reflected in the limited scope of water rights recognised in determinations to date. The *NTA* provisions relating to procedural rights, as interpreted by the courts, further reduce the capacity of native title holders to participate in decisions regarding the management of water resources, to the point where participation is almost meaningless. Significant barriers hindering Indigenous groups, particularly in the more settled parts of Australia such as Victoria, from obtaining recognition of any native title rights persist. It is, therefore, apparent that as a mechanism for the legal recognition of Indigenous rights to participate in the management of water resources, the *NTA* is woefully inadequate.

The *NTA* was the subject of a recent inquiry by the Australian Law Reform Commission ('ALRC'), which released its final report on 4 June 2015.¹³¹ Although the report discussed (among other things) the nature and content of native title rights and interests,¹³² it had little to say about water, with the ALRC in that regard making 'no specific recommendation.'¹³³ The limited discussion centred largely on the current recognition of non-exclusive rights to take and use water for domestic, personal and communal needs, and the potential extension of those rights to commercial uses.¹³⁴ No mention was made of amending the *NTA* to improve procedural rights under s 24HA.¹³⁵

However, the report did proceed to state that there was 'merit in a broader review of native title rights in relation to water'.¹³⁶ This may provide the

¹³¹ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015).

¹³² *Ibid* ch 8.

¹³³ *Ibid* 249 [8.105].

¹³⁴ *Ibid* 248-9 [8.97]-[8.105].

¹³⁵ This is likely to have been due to the scope of the report's terms of reference: *ibid* 5-6. The terms of reference focused on two main issues: 'connection requirements relating to the recognition and scope of native title rights and interests'; and 'any barriers imposed by the [*NTA*'s] authorisation and joinder provisions'.

¹³⁶ *Ibid* 249 [8.105].

impetus needed for a comprehensive review of water rights; one which encompasses the management of water, as well as rights to take and use water.

In Victoria, an alternative process now exists for the settlement of native title claims: the *TOS Act*, which is the Victorian government's preferred process.¹³⁷ The *TOS Act* is an effort to alleviate some of the inadequacies of the *NTA* and to provide land justice for Indigenous Victorians.¹³⁸ It is the only Act of its kind in Australia,¹³⁹ and was described by the Aboriginal and Torres Strait Islander Social Justice Commissioner in 2011 as setting 'the benchmark for other states to meet when resolving native title claims.'¹⁴⁰ As the most important development in Victoria in relation to the recognition and regula-

¹³⁷ There is nothing in the *TOS Act* which precludes both a determination of native title and agreement being reached under the *TOS Act*, the Gunaikurnai settlement being evidence of this. In relation to Gunaikurnai, the Victorian government has noted:

In this particular case, the settlement will also include orders by the Federal Court recognising that the Gunaikurnai people hold native title in the agreed area under the [NTA]. This formal determination by the court is appropriate in this case because of the years of work that had gone into recognising the rights of the Gunaikurnai people since their native title claim was first made in 1997.

Department of Justice and Regulation (Vic), *Gunaikurnai Native Title Agreement* (21 September 2015) <<http://www.justice.vic.gov.au/home/your+rights/native+title/gunaikurnai+native+title+agreement>>.

¹³⁸ Prior to the enactment of the *TOS Act*, the Victorian government had passed various statutes granting specific parcels of land to Traditional Owners: *Aboriginal Lands Act 1970* (Vic) relating to Framlingham and Lake Tyres; *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* (Vic); *Aboriginal Land (Northcote Land) Act 1989* (Vic) relating to the Aborigines Advancement League; *Aboriginal Land (Manatunga Land) Act 1992* (Vic) relating to land adjacent to the township of Robinvale; *Aboriginal Lands Act 1991* (Vic) relating to the Coranderrk, Ebenezer and Ramahyuck cemeteries. The total amount of land transferred pursuant to these statutes was 1878 hectares, or approximately 0.008 per cent of the State. The vast bulk of this land was the Lake Tyres grant of 1970. The Commonwealth government also passed legislation granting land to Aboriginal Victorians, namely the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth). Pursuant to that Act, some 1183 hectares comprising parcels of land at Condah and Framlingham Forest were handed back to Aboriginal corporations.

¹³⁹ See Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 2016, 3237 (Martin Pakula, Attorney-General). See also Justice Michael Barker, 'Zen and the Art of Native Title Negotiation' (Speech delivered at the National Native Title Conference, Port Douglas, 16–18 June 2015) 9 [40] <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-barker/barker-j-20150616>>.

¹⁴⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2011*, Report (2011) 8.

tion of Indigenous rights and interests, it is therefore that Act to which this analysis now turns.

III VICTORIAN TOS ACT

A Background

In 2005, a group of Traditional Owners formed the Victorian Traditional Owner Land Justice Group ('VTOLJG') and called for a comprehensive land justice settlement 'to finally address the fundamental need for land justice in Victoria.'¹⁴¹ The concept of land justice included: that the State recognise ownership and accommodate the Traditional Owners' rights to manage land and natural resources without need for proof of native title;¹⁴² and that measures to involve Traditional Owners with management be negotiated and taken with their informed consent.¹⁴³ The VTOLJG made particular mention of water management.¹⁴⁴ The VTOLJG produced a detailed discussion paper in August 2006 expanding on the matters (including water) outlined in 2005, and which was provided to the State in September that year.¹⁴⁵ These developments formed the basis for negotiations between Victorian Traditional Owners, represented by the VTOLJG, and the State on a new policy framework for land justice in Victoria. These negotiations were resourced by the State and Native Title Services Victoria ('NTSV').

In March 2008, a Steering Committee was established to investigate and develop options for policy reform in relation to land justice in Victoria, including in relation to native title.¹⁴⁶ It produced its final report ('*Steering*

¹⁴¹ Victorian Traditional Owner Land Justice Group, 'Land Justice Statement' (Statement, 17 February 2005) [1.1] <<http://www.landjustice.com.au/document/Communique-Statewide-Meeting-17-18Feb05.pdf>>.

¹⁴² *Ibid* [3.1].

¹⁴³ *Ibid* [2.1]–[2.3].

¹⁴⁴ *Ibid* [9.1]–[9.3].

¹⁴⁵ VTOLJG, 'Towards a Framework Agreement between the State of Victoria and the Victorian Traditional Owner Land Justice Group' (Discussion Paper, 26 August 2006) 7 [7.2].

¹⁴⁶ The Steering Committee was chaired by Professor Mick Dodson and consisted of members of the VTOLJG and NTSV, and senior departmental representatives of the State government. The author was an employee of NTSV during this time and participated in one of the working groups which were set up to advise the Steering Committee on various topics contained in the terms of reference and to assist in negotiations.

Committee Report)¹⁴⁷ in December 2008, which was subsequently endorsed by the State government in June 2009.¹⁴⁸

The *Steering Committee Report* contained numerous recommendations for land justice, referred to in the report as 'core principles'. In relation to water, core principle 31 recommended increased participation by Indigenous people in natural resource management, including a statutory requirement to consult.¹⁴⁹ Core principle 32 recommended statutory recognition of customary non-commercial use and access to water, and greater consideration of Traditional Owner groups' interests in developing and implementing water resource actions.¹⁵⁰ As part of its response to the recommendations contained in the *Steering Committee Report*, the State government enacted the *TOS Act*.

Unfortunately for the Traditional Owners of Victoria, the recommendations contained in core principles 31 and 32 were not incorporated into the *TOS Act*. So what did get included in the *TOS Act*?

B *The TOS Act as It Relates to Indigenous Water Rights*

Section 9 of the *TOS Act* provides for recognition of Traditional Owner rights and interests akin to native title rights, with one glaring exception, namely water rights. Water rights are not mentioned, but are instead a subset of natural resource rights in s 9.¹⁵¹ To have Traditional Owner rights and interests recognised, the Traditional Owner group must enter into a recognition and settlement agreement ('RSA').¹⁵² The exercise of natural resource

¹⁴⁷ Steering Committee for the Development of a Victorian Native Title Settlement Framework, *Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework* (2008) <http://www.landjustice.com.au/document/report_sc_vic_native_title_settlement_framework_13May09.pdf>.

¹⁴⁸ See Rob Hulls, 'Keynote Address' (Speech delivered at the Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Conference, Melbourne, 4 June 2009).

¹⁴⁹ Core principle 31 did not specify water, but it is clear that the report intended to deal with water as a natural resource, as evidenced by core principle 32: *Steering Committee Report*, above n 147, 41–2. This is also apparent from the *TOS Act*.

¹⁵⁰ *Steering Committee Report*, above n 147, 42–4.

¹⁵¹ Rights in relation to natural resources may be recognised under the *TOS Act* ss 9(1)(b), (f). Natural resources are, for the purposes of natural resource agreements, defined as including 'water (whether or not it contains impurities) that is in, on or under the land': at s 79 (definition of 'natural resources').

¹⁵² *Ibid* s 9.

rights is then dealt with in pt 6. When the *TOS Act* was first enacted, a Traditional Owner Group Entity ('TOGE')¹⁵³ was required to first enter into a natural resource agreement ('NRA')¹⁵⁴ after which it could obtain an authorisation order.¹⁵⁵ The NRA is a sub-agreement to the RSA and is intended to be entered into at the same time.¹⁵⁶

A water authorisation order was limited to taking and using water 'from a waterway or bore, for traditional purposes'.¹⁵⁷ Traditional purposes was defined as 'the purposes of providing for any personal, domestic or non-commercial communal needs of the members of the traditional owner group',¹⁵⁸ terminology which is consistent with s 211(2)(a) of the *NTA*.¹⁵⁹ An authorisation order was also limited to where the Traditional Owner 'has access to the waterway or bore in the circumstances set out in section 8(1) of the *Water Act 1989*'.¹⁶⁰

An authorisation order was made by the Governor in Council and could contain any terms and conditions as recommended by the Minister.¹⁶¹ These terms and conditions could also be varied by the Governor in Council on the recommendation of the Minister,¹⁶² and remained in force for a set period of

¹⁵³ '[T]raditional owner group entity' is defined in s 3 of the *TOS Act* (in relation to an area of public land) as an Aboriginal or Torres Strait Islander corporation, a company limited by guarantee, or a body corporate, where that entity has been appointed by a traditional owner group to represent them.

¹⁵⁴ *Ibid* s 80.

¹⁵⁵ *Ibid* s 85.

¹⁵⁶ *Ibid* s 8. In the Gunai/Kurnai settlement, there was not enough time before the State election for the NRA to be negotiated. So an agreement was reached to defer its negotiation with a view to entering into it within 24 months of the commencement of the RSA: *Recognition and Settlement Agreement between Victoria and Gunaikurnai Land and Waters Aboriginal Corporation* (22 October 2010) cl 2. To date, an NRA has not been entered into.

¹⁵⁷ *TOS Act* s 85(1).

¹⁵⁸ *Ibid* s 79 (definition of 'traditional purposes'). This definition was amended in 2016, but only in relation to its format. It is still limited to personal, domestic or non-commercial communal needs.

¹⁵⁹ It is also consistent with determinations of native title made in Victoria. Note, however, that in relation to s 211 of the *NTA*, s 211(3) includes cultural and spiritual activities as a class of activities to which the section applies.

¹⁶⁰ *TOS Act* s 85(2).

¹⁶¹ *Ibid* s 85(3).

¹⁶² *Ibid* s 87.

time as specified in the order.¹⁶³ The first of such orders was made in favour of the Dja Dja Wurrung and is only for a five-year term.¹⁶⁴

The provisions in relation to authorisation orders were repealed in November 2016¹⁶⁵ in recognition that they ‘fall short of the natural resource rights available under the [NTA].’¹⁶⁶ This is an important amendment to the *TOS Act* as it makes it easier for traditional owners with an NRA to exercise their water rights. It removes an unnecessary administrative hurdle, as well as reducing the tenuous and limited nature of their existence. But like native title rights to water, water rights under the *TOS Act* are still limited to rights to take and use water; they do not include management rights.

The *TOS Act* also inserted s 8A into the *Water Act 1989* (Vic), Victoria’s primary statute relating to the use and management of water resources. It was also amended in 2016 and now reads as follows:

8A Traditional owner agreement for natural resources

If a traditional owner group entity has an agreement under Part 6 of the *Traditional Owner Settlement Act 2010*, a person who is a member of a traditional owner group bound by the agreement has the right to take and use water on the land that is subject to the agreement —

- (a) in accordance with the agreement; and
- (b) if the water is to be taken from a place from which water may be taken under section 8(1).

The purposes for which a TOGE can take and use water are still confined to traditional purposes,¹⁶⁷ unlike some other resources.¹⁶⁸ And as noted above,

¹⁶³ *Ibid* s 90.

¹⁶⁴ Victoria, *Victoria Government Gazette: Special*, No S 354, 7 October 2014, 1. See also National Water Commission, *Australia’s Water Blueprint: National Reform Assessment 2014*, Report (2014) 232.

¹⁶⁵ *Traditional Owner Settlement Amendment Act 2016* (Vic). At the time of writing, the relevant amendments were due to come into effect by 1 May 2017, although an earlier commencement date may be proclaimed: Victoria, *Victoria Government Gazette*, No S 345, 15 November 2016, 1–2.

¹⁶⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 2016, 3236 (Martin Pakula, Attorney-General).

¹⁶⁷ The definition of traditional purposes has been amended, but only in relation to its format. It is still confined to personal domestic and non-commercial communal needs.

there is no scope for Traditional Owners to be involved in the *management* of water resources, it merely gives Traditional Owners the right to *take and use* water.

Furthermore, given that s 8 of the *Water Act 1989* (Vic) allows any person (including Traditional Owners) to take water from a bore or waterway to which they have access for domestic and stock purposes, an authorisation order under s 85 of the *TOS Act* would appear to add very little to rights which Traditional Owners already have under s 8 of the *Water Act 1989* (Vic). Indeed the *Gippsland Region Sustainable Water Strategy* explicitly acknowledges this similarity.¹⁶⁹

Thus, s 8A of the *Water Act 1989* (Vic) is largely symbolic. Although we should not underestimate the importance of symbolism, it needs to be accompanied by practical recognition. The provision has no effect on the operation of the *Water Act 1989* (Vic); it creates no obligations on water authorities or other water users to consider Indigenous water issues. Nor does it give Traditional Owners a voice in water management. It essentially quarantines Traditional Owner water rights from the rest of the Act, in effect allowing them to be ignored.

Further, the provision says nothing about native title rights and interests in water. Although native title rights and interests do not provide an adequate foundation for the recognition of Traditional Owner water management rights, nonetheless they are still rights that ought to be acknowledged in the *Water Act 1989* (Vic), given that they exist in Victoria. This is not without precedent elsewhere in Australia: s 55(1) of the *Water Management Act 2000* (NSW) entitles native title holders in New South Wales 'to take and use water in the exercise of [their] native title rights.'

It may be argued that, as alternative settlement agreements under the *TOS Act* will be the most likely outcome for all native title claims in Victoria in the future, it is not necessary to accommodate native title in the *Water Act 1989* (Vic). However, there have already been a number of determinations of native title in Victoria in which native title rights in water have been recognised.¹⁷⁰

¹⁶⁸ *TOS Act* ss 84, 79 (definition of 'natural resources' paras (b)(i), (iv)). These include vegetation and forest produce, and various earth resources.

¹⁶⁹ Department of Sustainability and Environment (Vic), *Gippsland Region Sustainable Water Strategy*, Report (2011) 82.

¹⁷⁰ *Gunditjmara* [2007] FCA 474 (30 March 2007); *Gunai/Kurnai* [2010] FCA 1144 (22 October 2010); *Gunditjmara and Eastern Maar* [2011] FCA 932 (27 July 2011).

Those determinations should not be disregarded in any legislative recognition of Traditional Owner water rights. Further, the *TOS Act* does not specifically preclude both a determination of native title and alternative settlement outcomes, as evidenced by the settlement of the Gunai/Kurnai native title claim.¹⁷¹ Although the hurdles to be overcome to achieve a native title outcome in Victoria remain high, it is still a possibility. The fact that a number of Traditional Owner groups in Victoria have successfully obtained a native title determination is indicative of this. Whether any more Victorian Traditional Owner groups have their native title rights and interests recognised or whether they go solely down the path of the *TOS Act* agreement will depend on their own particular circumstances.¹⁷²

It could also be argued that native title rights and interests in water are indirectly acknowledged by virtue of the definition of 'traditional owner group' in s 3 of the *TOS Act*, which includes native title holders, where any exist within the meaning of the *NTA*.¹⁷³

The difficulty with this is that s 8A of the *Water Act 1989* (Vic) recognises rights to take and use water only in those Traditional Owner groups (which includes native title holders according to the above definition) which have an NRA. This means that the native title rights and interests in water of those native title holders who settled their claims prior to the enactment of the *TOS Act* are not recognised or accounted for. Thus the *Water Act 1989* (Vic) is deficient in that it does not recognise native title rights in water; it only recognises (limited) rights under the *TOS Act*.¹⁷⁴

¹⁷¹ See above n 137.

¹⁷² As of February 2017, only two native title claims had been resolved utilising the *TOS Act*, namely those of Gunai/Kurnai and Dja Dja Wurrung. The Dja Dja Wurrung native title claim was settled under the *TOS Act* without a native title outcome (as part of the settlement under the *TOS Act*, the Dja Dja Wurrung withdrew their native title claim). Thus, the Dja Dja Wurrung's rights are limited to the recognition of those Traditional Owner rights contained in the *TOS Act*: see Government of Victoria/Dja Dja Wurrung Clans Aboriginal Corporation/NTSV, 'Settlement between the Dja Dja Wurrung Traditional Owner Group and the State of Victoria' (Fact Sheet, 28 March 2013) <<http://ntsv.com.au/ntsvwp-content/uploads/2013/05/Dja-Dja-Wurrung-Settlement-Factsheet.pdf>>. In July 2015, NTSV announced that the Taungurung people had commenced negotiations with the State of Victoria to settle their native title claim under the *TOS Act*: NTSV, 'Taungurung People Congratulated on the Commencement of Their Native Title Negotiations' (Media Release, 3 July 2015) <<http://www.ntsv.com.au/media-centre/>>.

¹⁷³ *TOS Act* s 3 (definition of 'traditional owner group' para (b)).

¹⁷⁴ This will not prevent native title holders from exercising their native title rights to water.

In conclusion, s 8A is limited to access to water resources for Traditional Owner groups with an NRA to take and use for traditional purposes. It is silent on native title and Traditional Owner participation in the management of water resources.

*C Consultation and Procedural Rights under the TOS Act:
The Land Use Activity Regime*

Insofar as Indigenous water rights encompass decision-making or consultation rights in relation to the management of water resources, there may be some scope for Traditional Owners to have them included in a *TOS Act* settlement package via the land use activity regime ('LUA regime').¹⁷⁵

1 *Overview*

The LUA regime is intended to be generally equivalent to the future act regime in the *NTA* (albeit simplified).¹⁷⁶ For the LUA regime to apply, a TOGE must first enter into a land use activity agreement ('LUAA').

An LUAA reached under the LUA regime provides procedural rights in relation to land use activities occurring on land recognised under an RSA as being Traditional Owner land. The nature of the procedural rights of Traditional Owners depends on the nature of the activity being undertaken. Activities can be categorised as (in increasing order of impact) routine, advisory, negotiation (class A or class B) or agreement activities.¹⁷⁷ In general, the category into which each activity is placed is negotiated by the parties to the LUAA, namely the Traditional Owners and the State. Importantly, as the following analysis will show, activities regarding water management and

¹⁷⁵ *TOS Act* pt 4.

¹⁷⁶ In the second reading speech for the Traditional Owner Settlement Bill 2010 (Vic), the Premier stated:

The next form of agreement — land use activity agreements — will replace the future acts regime in the [C]ommonwealth system and will recognise and protect traditional owner rights in public land, as well as existing third party rights. It will set in place a process whereby activities on Crown land will be able to proceed and traditional owners and proponents will both be provided with procedural rights broadly analogous to those under the *Native Title Act*.

Victoria, *Parliamentary Debates*, Legislative Assembly, 28 July 2010, 2753 (John Brumby, Premier).

¹⁷⁷ *TOS Act* s 32(2).

allocation to which the LUA regime applies are very limited. Thus, the LUA regime can be seen as largely only an indirect avenue for participating in the management of water resources.¹⁷⁸

A routine activity requires no involvement of Traditional Owners before it can proceed.¹⁷⁹ This type of activity includes an exploration activity where the proponent has agreed to comply with pro-forma conditions.¹⁸⁰ An advisory activity requires that the TOGE be notified of the proposal to carry out the activity and to be consulted about the proposal.¹⁸¹ If an activity is categorised as a negotiation activity, the parties must negotiate in good faith towards reaching an agreement about the carrying out of the proposed activity.¹⁸² If agreement cannot be reached within six months, then the matter can be taken to the Victorian Civil and Administrative Tribunal ('VCAT') for a determination.¹⁸³ The Minster can also make a determination and substitute it for the determination by VCAT if it is in the public interest.¹⁸⁴ Traditional Owners have no right of veto over activities classed as negotiation activities. There are also limits to what activities can be included in this category. A negotiation activity (class A) is limited to a 'significant land use activity', and a negotiation activity (class B) is limited to an activity which is either a 'significant land use activity' or a 'limited land use activity'.¹⁸⁵ The final category, agreement activities, can only include an activity which is a 'significant land use activity'.¹⁸⁶ However, the consent of the TOGE is required in order for an agreement activity to proceed, and there is no review by VCAT if an agreement cannot be reached.¹⁸⁷ It effectively gives TOGEs a right of veto. The agreement category thus provides the strongest procedural rights of all of the categories, and is stronger than the strongest of the procedural rights under the *NTA*, namely the right to negotiate.

¹⁷⁸ The one exception to this would appear to be *TOS Act* s 28(p), which concerns the preparation of draft management plans under s 31 of the *Water Act 1989* (Vic).

¹⁷⁹ *TOS Act* s 33(1).

¹⁸⁰ *Ibid* s 33(2).

¹⁸¹ *Ibid* s 34.

¹⁸² *Ibid* s 50.

¹⁸³ *Ibid* s 53.

¹⁸⁴ *Ibid* ss 66(1)–(2).

¹⁸⁵ *Ibid* s 32(3).

¹⁸⁶ *Ibid* s 32(3)(b).

¹⁸⁷ *Ibid* ss 40(4)–(6).

2 Definitions Applicable to Water Management

It is now necessary to set out in more detail a few of the defined terms noted above. This will assist in understanding how Traditional Owners might be able to use the LUA regime to ensure that they are consulted about proposed activities that relate to or may affect water resources in the area of their agreement. These definitions place upper limits on which category each activity can be allocated to; it may be the case that an activity will be allocated to a lower category, depending on the outcome of negotiations.

The definition of 'land use activity' relevantly includes:

- the 'granting of a public land authorisation' over land, including amendments or variations which allow for the change of the authorised activity;¹⁸⁸
- the 'preparation of a management plan' under ss 17, 17B, 17D or 18 of the *National Parks Act 1975* (Vic);¹⁸⁹ and
- the 'preparation of a draft management plan' under s 31 of the *Water Act 1989* (Vic).¹⁹⁰

The definition of 'public land authorisation' referred to above includes 'a licence under Division 2 of Part 5 of the *Water Act 1989* to construct any works on a waterway or bore'.¹⁹¹ A 'limited land use activity' is defined to include 'a land use activity that is for the purpose of the establishment, use or operation of any specified public works'.¹⁹² Specified public works are also defined and include:

- (g) a well or bore for obtaining water;
- (h) a pipeline or other water supply or reticulation facility;

¹⁸⁸ *Ibid* s 28(a).

¹⁸⁹ *Ibid* s 28(l). A management plan made pursuant to the *National Parks Act 1975* (Vic) is likely to be over an area which contains water resources. Such a plan is therefore potentially an alternative avenue for input, provided the land is not already the subject of a joint management plan made by a Traditional Owner Land Management Board via a Land Agreement or Traditional Owner Land Management Agreement: *National Parks Act 1975* (Vic) s 17B(2). Even so, a management plan made pursuant to the *National Parks Act 1975* (Vic) could only be included in the advisory category: *TOS Act* ss 32(3), 27(1) (definition of 'limited land use activity'), 27(1) (definition of 'significant land use activity').

¹⁹⁰ *TOS Act* s 28(p). These are water area management plans for supply protection.

¹⁹¹ *Ibid* s 27(1) (definition of 'public land authorisation' para (h)).

¹⁹² *Ibid* s 27(1) (definition of 'limited land use activity' para (b)).

- (i) a drainage facility, or a levee or other device for the management of water flows;
- (j) an irrigation channel or other irrigation facility ...¹⁹³

And finally, a 'significant land use activity' is defined as including:

- an authorisation to occupy, use or otherwise access the land for 10 years or more;
- carbon land sequestration agreements;
- the 'clearing of the land or the carrying out of any works on the land which has a substantial impact on the physical quality of the land, having regard to the size and scale of the activity';
- various types of earth resource and infrastructure authorisations; and
- grants of land in freehold under the *Land Act 1958* (Vic).¹⁹⁴

Accordingly, the highest category that a TOGE could negotiate for any of the specified public works noted earlier to be categorised is negotiation activity (class B). Then any proponent who wished to undertake one of those public works, such as constructing a device for the management of water flows, would be required to negotiate in good faith with the TOGE in order to reach agreement about *how* the activity can proceed, although not on *whether* it can proceed.

A TOGE could also negotiate for the relevant public land authorisation (ie construction of any works on a waterway or bore) or other relevant land use activity (ie preparation of a draft management plan under s 31 of the *Water Act 1989* (Vic)) to be categorised as an advisory activity. In this case the TOGE would have a right to be notified of the proposed activity and be entitled to be consulted about the effects of the proposed activity on Traditional Owner rights.¹⁹⁵ This is the highest category to which these activities can be allocated.

Given the definition of significant land use activity set out above, it would appear that no land use activity that is directly water-related can be categorised as an agreement activity. However, negotiations in relation to proposed activities that have been categorised as agreement activities may be able to

¹⁹³ Ibid s 27(1) (definition of 'specified public works' paras (g)-(j)).

¹⁹⁴ Ibid s 27(1) (definition of 'significant land use activity').

¹⁹⁵ Ibid s 34(1).

consider impacts on water resources provided that those impacts relate to Traditional Owner rights.¹⁹⁶ Although water rights are not specifically included in the list of Traditional Owner rights able to be recognised pursuant to s 9, they could arguably fall within ss 9(1)(f) or 9(1)(h).¹⁹⁷ An example of s 9(1)(f) might be where an agreement activity (eg ‘the clearing of the land or the carrying out of any works on the land which has a substantial impact on the physical quality of the land’)¹⁹⁸ also impacts on a water resource authorisation, or, for s 9(1)(h), on a water body which is also a place or area of importance to the Traditional Owner group.

There is no equivalent in the LUA regime of s 24HA of the *NTA*, which contains the limited right to be notified and given the opportunity to comment on activities relating to the management and regulation of water. This has both benefits and disadvantages. One benefit is that it enables various water-related activities to potentially be categorised as negotiation activities, which is not possible under s 24HA of the *NTA*. The disadvantage is that any water-related activities that do not fit within the definition of ‘land use activity’ or other relevant definition are not able to be included in any of the categories. Thus, Traditional Owners will have no procedural rights at all in relation to those activities; they are effectively deemed routine activities. So decisions regarding the allocation of water licences, for example, would fall into this category.

In contrast, although s 24HA of the *NTA* is a very limited right, somewhat analogous to the ‘advisory’ category in the LUA regime,¹⁹⁹ it at least requires that native title claimants/holders be notified of and given an opportunity to comment on all activities related to the management and regulation of water (with the exception of the making, amendment or repeal of water management legislation). Section 24HA also requires the payment of compensation for any effects on native title rights and interests caused by the activity, in contrast to the *TOS Act*, whereby routine and advisory activities do not attract

¹⁹⁶ Ibid ss 50(1)–(2)(a).

¹⁹⁷ Ibid ss 9(1)(f) relates to ‘the ability to take natural resources on or depending on the land’ and 9(1)(h) relates to ‘the protection of places and areas of importance on the land.’

¹⁹⁸ Ibid s 27(1) (definition of ‘significant land use activity’ para (b)).

¹⁹⁹ The advisory category is only *somewhat* analogous because arguably the right to be consulted is a more extensive right than the ‘opportunity to comment’: see *Harris* (2000) 98 FCR 60, 71–2 [40].

the ability for Traditional Owners to negotiate any ‘community benefits’ for impacts on their Traditional Owner rights.²⁰⁰

A further issue to consider here is whether or not a failure to comply with the procedural requirements to notify and consult with the relevant TOGE will render the authorisation of the proposed activity invalid. In that regard, s 35 of the *TOS Act* states that:

A decision-maker who is carrying out an advisory activity on any agreement land to which a direction under section 34 applies [being a direction to the decision-maker to notify and consult the TOGE], must give effect to the direction in carrying out the activity.

In relation to s 24HA of the *NTA*, a majority of the Federal Court (in obiter) was of the view that a failure to comply with procedural requirements in that section would not render an authorisation invalid.²⁰¹ Reasons given by the Court in support of this view included the specific reference to invalidity for non-compliance in relation to other future act provisions of the *NTA*, the express statement in the Explanatory Memorandum that failure to comply would not result in invalidity, and by looking at the language of the provision, and the scope and objects of the legislation as a whole (the test set out in *Project Blue Sky Inc v Australian Broadcasting Authority*).²⁰²

However, should this question ever be brought before the court, factors that point to a different result (ie invalidity) in relation to a failure to comply with s 35 of the *TOS Act* include:

- section 36, which states that ‘[a] direction of the Minister under section 34 has effect despite anything to the contrary in the Act or regulations under which the land use activity is being carried out’;²⁰³
- the arguably stronger right of consultation in contrast to the opportunity to comment;

²⁰⁰ Note that negotiation activities and agreement activities may provide for community benefits: *TOS Act* ss 40(1), (4), 40A.

²⁰¹ See *Lardil* (2001) 108 FCR 453, 486 [117] (Dowsett J).

²⁰² *Ibid* 486–7 [117]–[120]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 388–91 [91]–[93] (McHugh, Gummow, Kirby and Hayne JJ).

²⁰³ It could be argued that failure to comply with *TOS Act* s 35 (which requires the decision-maker to give effect to a direction of the Minister to notify and consult) will invalidate the making of the decision to issue the authorisation.

- the inability for Traditional Owners to obtain community benefits (ie compensation) for any impact of advisory activities on their Traditional Owner rights;
- the lack of reference in the Explanatory Memorandum to the fact that a failure to comply is not intended to result in invalidity; and
- the scope of the application of the procedural requirements for advisory activities; that is, they are not limited to activities in relation to the management or regulation of water but extend to all advisory activities.

On the other hand, the categorisation of an activity as an advisory activity is the outcome of negotiations, not of statute. Thus, presumably the Traditional Owners would be aware of the potential limitations of the procedural requirements for advisory activities.

This may all be moot because, as just noted, Traditional Owner groups still need to negotiate to have any land use activities affecting water resources included as a land use activity in any LUAA reached pursuant to the *TOS Act*. Given that only specified land use activities can be included in an LUAA,²⁰⁴ the only specified land use activity directly relating to the management of water being the preparation of draft management plans pursuant to s 31 of the *Water Act 1989* (Vic), it appears that apart from this one activity, the LUA regime can only be used indirectly by Traditional Owners to participate in water management. The LUA regime, therefore, has little to offer Traditional Owners in terms of meaningful participation in water management.

An alternative could be to look to other means of being involved in water management, such as via joint management.

D *Joint Management*

Joint management in the Victorian context has been described as 'a formal partnership arrangement between Traditional Owners and the State where both share their knowledge to manage specific national parks and other protected areas.'²⁰⁵

²⁰⁴ See *ibid* ss 28, 30(1).

²⁰⁵ Parks Victoria, *Aboriginal Joint Management* (2016) <<http://parkweb.vic.gov.au/park-management/aboriginal-joint-management>>. Parks Victoria is a statutory authority established pursuant to the *Parks Victoria Act 1998* (Vic). Its functions include the provision of

1 Background: The River Red Gums Act

The ability of joint management to be implemented in Victoria commenced with the enactment of the *Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009* (Vic) ('*River Red Gums Act*'). The *River Red Gums Act* amended a number of Acts, but importantly it amended the *Conservation, Forests and Lands Act 1987* (Vic) ('*CFL Act*').²⁰⁶ Under agreements reached pursuant to these legislative amendments, known as Traditional Owner Land Management Agreements ('TOLMAs'), a Traditional Owner Land Management Board ('TOLMB') — a joint management board with a majority of Traditional Owners — can be established to manage an agreed area of significance to Traditional Owners.²⁰⁷

The *River Red Gums Act* was enacted to fulfil a commitment by the Labor State government 'to involving traditional owners in the management of public land and to helping traditional owners achieve their long-held aspirations to be involved in caring for country.'²⁰⁸ It was initially intended to result in agreements for management arrangements over the Barmah National Park with the Yorta Yorta people and the Nyah-Vinifera Park with the Wadi Wadi people, but was designed so that agreement could be reached over other areas of land and with other Traditional Owner groups in the future.²⁰⁹

It was the view of the government at the time that the *River Red Gums Act* would enhance Traditional Owner involvement in decision-making over their traditional lands, with the Minister stating '[t]his is historic legislation for Victoria. For the first time, the ability for traditional owners to be decision-makers and to have a substantial involvement in the management of their traditional lands will be enshrined in the [S]tate's law.'²¹⁰

services to the State for 'the management of parks, reserves and other land under the control of the State': at s 7(1)(a).

²⁰⁶ See *River Red Gums Act* s 1(c).

²⁰⁷ *CFL Act* ss 82P(1)(a), 82M(3)(a).

²⁰⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 October 2009, 3637 (Peter Batchelor, Minister for Community Development).

²⁰⁹ *Ibid.* At the time of writing, the Yorta Yorta people had reached agreement, along with the Gunai/Kurnai people and Dja Dja Wurrung people as part of their respective *TOS Act* settlements.

²¹⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 October 2009, 3637 (Peter Batchelor, Minister for Community Development).

2 Joint Management and the TOS Act

The *TOS Act* then took this a step further in two respects. First, it amended the *CFL Act* to provide for the making of a joint management plan ('JMP') by TOLMBs.²¹¹ Associated with this were amendments to various other Acts to require that any person responsible for the management of appointed land under those Acts must ensure that management is not inconsistent with any JMP for that land.²¹²

This can be contrasted with the co-operative management agreements reached prior to the enactment of the *TOS Act* (and the *River Red Gums Act*).²¹³ Under these co-operative management agreements, advisory councils were set up comprised of Traditional Owners and State representatives to provide non-binding advice to park managers, but which had no power to prepare a JMP. The first such agreement was with the Yorta Yorta People.²¹⁴ Notably, as far as water bodies are concerned, it includes 'Kow Swamp, Barmah State Park, Barmah State Forest, and public land and waters along sections of the Murray and Goulburn Rivers'.²¹⁵ A co-operative management agreement was also reached with the Wimmera clans over various Crown land reserves within the external boundary of their consent determination, which includes a section of the Wimmera River, Lake Hindmarsh and Lake Albacutya.²¹⁶

²¹¹ *CFL Act* pt 8A div 5A, as inserted by *TOS Act* s 106 (now repealed).

²¹² *Crown Land Reserves Act 1978* (Vic) s 20A; *Forests Act 1958* (Vic) s 57A; *Land Act 1958* (Vic) s 4C; *National Parks Act 1975* (Vic) s 16B; *Wildlife Act 1975* (Vic) s 18B. These amendments were made by *TOS Act* ss 112, 119, 123, 126, 135 respectively.

²¹³ These agreements were made pursuant to s 12 of the *CFL Act*: see, eg, *Co-Operative Management Agreement between Yorta Yorta Nation Aboriginal Corporation and Victoria* (15 June 2004) cl 3.

²¹⁴ *Co-Operative Management Agreement between Yorta Yorta Nation Aboriginal Corporation and Victoria* (15 June 2004).

²¹⁵ Department of Justice (Vic)/Department of Sustainability and Environment (Vic), 'Yorta Yorta Co-Operative Management Agreement' (Fact Sheet, May 2004) 1.

²¹⁶ *Co-Operative Management Agreement between Barengi Gadjin Land Council Aboriginal Corporation and Victoria* (13 December 2005) sch 2. A co-operative management agreement was also reached with the Gunditjmarra over Mt Eccles National Park: see Department of Environment and Primary Industries (Vic), *Agreements with Traditional Owners* (31 March 2016) <<http://www.depi.vic.gov.au/forestry-and-land-use/managing-land/indigenous-land-management/agreements-with-traditional-owners>>.

The second important development of the *TOS Act* was to allow for agreements to be made which provide for the transfer of title of areas of reserved public land to TOGEs on the basis that that the land will be jointly managed on the same basis for which it had been reserved prior to the transfer.²¹⁷ For example, a national park would continue to be managed as a national park and a nature reserve would continue to be managed as a nature reserve. This title is known as Aboriginal title.²¹⁸ A condition for an agreement to transfer Aboriginal title is that the TOGE enter into a TOLMA with the relevant Ministers under s 82P of the *CFL Act*.²¹⁹ At the time of writing, there had been only two such instances of concurrently reached agreements under the *TOS Act*, namely the agreements reached in settlement of the Gunai/Kurnai native title claim in October 2010 and in settlement of the Dja Dja Wurrung native title claim in March 2013.²²⁰

The total amount of land transferred to Traditional Owners in Aboriginal title to date via the *TOS Act* is approximately 93 000 ha.²²¹ Given that this land relates to the traditional country of only two of the many Traditional Owner groups in Victoria, with many groups still to take advantage of the *TOS Act*, it is a significant (albeit still inadequate) improvement on the amount of land transferred prior to 1992 under various land rights statutes.²²²

But this does not necessarily translate into an ability by Traditional Owners (via their nominated TOGE) to participate in the management of the water bodies on or flowing through the land the subject of a land agreement reached under the *TOS Act*.

Aboriginal title under the *TOS Act* and associated joint management (ie TOLMA) arrangements do not automatically allow for the inclusion (and

²¹⁷ *TOS Act* ss 12(3), 20.

²¹⁸ However, the *TOS Act* does not capitalise 'Aboriginal' in the phrase 'aboriginal title': see, eg, at ss 19, 24.

²¹⁹ *Ibid* s 23.

²²⁰ In July 2015, NTSV announced that the Taungurung Native Title Group had commenced negotiations with the State of Victoria to settle their native title claim under the *TOS Act*: see above n 172.

²²¹ Approximately 47 500 ha were transferred to the Dja Dja Wurrung: 'Settlement between the Dja Dja Wurrung Traditional Owner Group and the State of Victoria', above n 172. Approximately 45 500 ha were transferred to the Gunai/Kurnai: *Traditional Owner Land Management Agreement between Victoria and Gunaikurnai Land and Waters Aboriginal Corporation* (22 October 2010) ('*Gunai/Kurnai TOLMA*').

²²² See above n 138.

management) of the water bodies on the subject land. These may have to be specifically negotiated for inclusion as part of the agreement.²²³ An example of where negotiations failed to achieve the inclusion of a water body is the Lake Tyers Catchment Area, transferred in Aboriginal title to the Gunai/Kurnai people as part of the settlement of their native title claim.²²⁴

Aboriginal title and joint management arrangements, even when they do include water bodies, may not encompass them in their entirety. This can lead to a fragmentation of management responsibilities. Another example from the Gunai/Kurnai settlement is the Mitchell River, which flows through the Mitchell River National Park. The Gunai/Kurnai people were recognised as both native title holders and Traditional Owners over the entire length of the Mitchell River, and of the National Park. However, it is only the Mitchell River National Park which was granted in Aboriginal title and is therefore subject to the *Gunai/Kurnai TOLMA*.²²⁵ It is therefore only that section of the Mitchell River which falls within the National Park which would be encompassed by a JMP prepared by the TOLMB.

In terms of the content of a JMP, this is set out in the relevant TOLMA.²²⁶ The *Gunai/Kurnai TOLMA*, for example, provides that '[a] Joint Management Plan must provide for the sustainable management of the Appointed Land and may include strategies for' various topics.²²⁷ Although there is no specific reference to water management as one of the topics for which strategies may be developed, the term 'may include' is inclusive rather than exhaustive. This suggests that other strategies could also be included in the JMP, which further suggests that water management strategies are not precluded. Indeed, given that the Gippsland Lakes Coastal Park²²⁸ is one of the areas transferred in Aboriginal title to the Gunai/Kurnai and for which the Gunai/Kurnai TOLMB

²²³ Katie O'Bryan, 'The National Water Initiative and Victoria's Legislative Implementation of Indigenous Water Rights' (2012) 7(29) *Indigenous Law Bulletin* 24, 26.

²²⁴ Lake Tyers itself was not included in the transfer of Aboriginal title, merely the land in the catchment area surrounding the Lake. This was despite the recognition of native title over both the Lake and the surrounding catchment area.

²²⁵ There were also nine other areas transferred in Aboriginal title to the Gunai/Kurnai which are therefore subject to the *Gunai/Kurnai TOLMA*.

²²⁶ *CFL Act* s 82PC.

²²⁷ *Gunai/Kurnai TOLMA* cl 3.3(a).

²²⁸ The Gippsland Lakes Coastal Park consists largely of Lake Reeve.

has been given responsibility to prepare a JMP, it would be bizarre if a JMP encompassing this park could not include strategies for water management.²²⁹

However it has been noted elsewhere that 'even if a water body has been included in the joint management area, there is no requirement in the *Water Act* for a decision-maker under that Act to implement a joint management plan made by a traditional owner board of management.'²³⁰

The *Water Act 1989* (Vic) in that respect can be contrasted with s 20A of the *Crown Land (Reserves) Act 1978* (Vic) which provides:

If any appointed land of a Traditional Owner Land Management Board constitutes the whole or a part of land reserved under this Act, the person responsible for the management of that appointed land under this Act must ensure that the land is managed in a way that is not inconsistent with any joint management plan for the land.

Similar provisions are found in the *Forests Act 1958* (Vic),²³¹ *Land Act 1958* (Vic),²³² *National Parks Act 1975* (Vic)²³³ and *Wildlife Act 1975* (Vic),²³⁴ all of which were inserted as the result of amendments made by the *TOS Act*. So there was clearly an awareness that the *TOS Act* needed to coordinate with

²²⁹ The State has purported to retain some core management functions, such as fire management, coastal planning and more importantly, management of designated water supply catchment areas under the *National Parks Act 1975* (Vic): Department of Justice and Regulation (Vic), above n 137. The Act refers to 'designated water supply catchment areas', which are defined in s 3 as '(a) any Melbourne water supply catchment area; or (b) the Barwon water supply catchment area; or (c) the Wannon water supply catchment area': *National Parks Act 1975* (Vic) s 3 (definition of 'designated water supply catchment area'). The Barwon and Wannon water supply catchment areas are located in Western Victoria. This does not affect the TOLMB established pursuant to agreement reached with the Gunai/Kurnai People, as the designated water supply catchment areas in the Act do not fall within the Gunai/Kurnai agreement area. However, it could impact on future TOLMAs if those agreements encompass designated water supply catchment areas.

²³⁰ O'Bryan, 'The National Water Initiative', above n 223, 26. Note that in the preparation of a draft water supply protection area management plan under the *Water Act 1989* (Vic), pursuant to s 32 'the consultative committee must take into account any other draft or approved management plan that applies to the area or part of the area under this Division', which would include a JMP made by a TOLMB relating to the area. It does not, however, require implementation of the JMP.

²³¹ *Forests Act 1958* (Vic) s 57A.

²³² *Land Act 1958* (Vic) s 4C.

²³³ *National Parks Act 1975* (Vic) s 16B.

²³⁴ *Wildlife Act 1975* (Vic) s 18B.

land management legislation. The arguably deliberate omission of a similar requirement for decision-makers under the *Water Act 1989* (Vic) indicates an intention that legislative recognition of Traditional Owner participation in water management was to be kept to a minimum.

Accordingly, despite assertions of the significant benefits to Traditional Owners of the *TOS Act*,²³⁵ it is seriously inadequate insofar as it facilitates Indigenous involvement in the management of water resources.

E *Concluding Remarks on the TOS Act*

The *TOS Act* provides for the recognition of Traditional Owner rights to take and use water for limited purposes as a subset of natural resource rights. However, a separate agreement and authorisation order are needed in order to exercise those rights, and in any event do not include management rights.

Traditional Owners with recognised rights over land under the *TOS Act* can reach an LUAA with the State about certain procedural rights which may relate to the management of water resources on that land. But because these are negotiated rights, and are limited to specified land use activities, virtually none of which directly relate to water management, the LUA regime does not have much to offer Traditional Owners.

The *CFL Act* (as amended by the *River Red Gums Act* and *TOS Act*) provides more potential for Traditional Owner participation in water management, without even the need for Traditional Owners to have title. But TOLMAs reached under the *CFL Act* apply only to public land, or Aboriginal title land (and therefore only water bodies on that land) so they too are limited in their application and have the capacity to fragment Indigenous management of water. Furthermore, JMPs prepared by TOLMBs have no status under Victoria's primary water management statute, the *Water Act 1989* (Vic).

IV CONCLUSION

How then does the *TOS Act* compare with the *NTA* in providing for Indigenous participation in the management of water resources in Victoria? As the

²³⁵ Brumby, above n 2; Victorian Traditional Owner Land Justice Group, 'Land Justice within Reach' (Media Release, 28 July 2010).

preceding analysis elucidates, there is little to separate the two legislative regimes. Both focus on rights to take and use water for limited purposes, rights which are not dissimilar to those they have as ordinary members of the public, and both regimes have significant flaws in relation to the limited procedural rights to be involved in decisions affecting water resources. Accordingly, the *TOS Act*, although arguably an improvement on the *NTA* when it comes to land justice generally, does little to improve Indigenous participation in water management. As a legislative response to Indigenous Victorians' aspirations for managing waters on their traditional lands, it is far from satisfactory.

Further reform of the *TOS Act* and related legislation would go some way towards alleviating some of the law's current deficiencies. This could be as simple as adding the *CFL Act* to the list of statutes in relevant provisions of the *Water Act 1989* (Vic) to ensure that JMPs prepared by TOLMBs have the same status as other plans, and by amending the definitions in the LUA regime in the *TOS Act* to include more activities directly related to water.

Although legislative reform will not be the panacea for resolving all of the issues surrounding Traditional Owner participation in water management, the law is an indispensable tool for effecting change. Strengthening the voice of Victoria's Traditional Owners in the *TOS Act* and related legislation will start to redress an imbalance that has been in existence since Victoria's first water laws were enacted.

We might well celebrate the 1992 *Mabo* decision for its rejection of the terra nullius concept, but we have not yet properly addressed the issue of aqua nullius; the *NTA* and the *TOS Act* as they currently stand indicate that at best we are still in an era of aqua minima rights for Victoria's Traditional Owners.