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Indigenous Water Rights and Water Law Reforms in Australia

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This article critically examines the diverse policy and legal frameworks in Australia that seek to address Indigenous peoples' water interests. The article analyses three geographically diverse case studies – northern Australia; a river in a metropolitan setting (the Yarra); and southern Australia's Murray-Darling Basin. Each case study examines legislative and representative measures that comprise, more or less, "inclusion" of Aboriginal interests in their legal regimes. The article concludes that even "reformed" water laws can continue the dispossession and exclusion of Aboriginal peoples wrought by colonisation. In particular, water market models which require "full allocation" of water entitlements as a prerequisite to their implementation can operate in an exclusionary manner, but statutory water planning processes are not immune from inequity either. First Nations' advocacy continues for more robust inclusion of Indigenous interests in water, as Australia enters another critical stage in its ongoing water reform agenda and governments review the National Water Initiative of 2004.

I. Introduction: The Global Context for Indigenous Water

The growing acknowledgment of Indigenous peoples' interests in water on a global scale has seen the emergence of legal, economic, and political models to give effect to these interests in an increasing number of countries.[1] There has been cross-fertilisation and the transfer of legal and policy models for Indigenous rights in water across cognate jurisdictions such as the CANZUS settler nations.[2] Concurrently, there is a long practice of Indigenous peoples looking to international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples[3] to set legal benchmarks for national standards of engagement and recognition. Australia, while known internationally as a leading jurisdiction for water reforms, is a nation with marked diversity in its treatment of Indigenous peoples' interests in water. Australia's promulgation of its water law and policy reforms needs critical investigation on several fronts, not least, its limited engagement until recently with Indigenous interests in water.

Currently, several Australian jurisdictions are engaged in developing a suite of policy measures, new statutory instruments and amending legislation and practice to redress the historic exclusion of Indigenous interests in water within legal frameworks and governing institutions, and to address contemporary barriers to enhancing Indigenous peoples' participation in water governance. Australian jurisdictions vary considerably in terms of the involvement of Indigenous groups in the reform process, and in the degree to which the legal models that are instituted, provide for First Nations' aspirations for robust participation and autonomy in managing water on country. Many of the existing models for recognising Indigenous interests in water were originally promulgated in the context of environmental protections,[4]

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[1] See, eg, Elizabeth Macpherson, *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (CUP, 2019).

[2] The CANZUS nations are Canada, Australia, New Zealand, and the United States.

[3] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007). See also Jason Robison et al, "Indigenous Water Justice" (2018) 22(3) *Lewis & Clark Law Review* 841, 847–852.

[4] See 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(2/3) *Journal of Water Law* 109, 111.

and so require amendment to acknowledge the independent but often aligned interests of Indigenous peoples' interests in water.

Notwithstanding the more positive global and national trends, the acknowledgment and legal implementation of Indigenous peoples' rights to water in many parts of Australia remain partial and constrained. Moreover, even though Indigenous interests are now legally recognised,[5] current outcomes fall far short of Indigenous peoples' aspirations for active involvement in water management, due recognition of sovereign claims to waters, and culturally appropriate forms of economic activity based on water utilisation.[6] The emergence of diverse policy and legal frameworks to address Indigenous peoples' water interests across Australia in the context of major water law reforms offer scope to assess the viability of several models and to draw learnings for potential application elsewhere. Australia has some factors however, that mark it as singular, particularly in the extent to which it has moved from individual market transactions in water to the adoption of market-based forms of water regulation in the Murray-Darling Basin (MDB). Given the global impetus to extend water markets,[7] and the adoption of neo-liberal governance mechanisms in the water sector,[8] the consideration of how Indigenous interests in water are configured in respect of the governance of water markets and legal innovations around water entitlements, allocation systems, and water planning are of particular pertinence.

In this context, the article analyses three geographically and legally diverse case studies – northern Australia; the Yarra River in metropolitan Melbourne; and southern Australia's MDB. Further, each case study can be situated along a graded spectrum of models that comprise varying degrees of "inclusion" of Indigenous interests in water. The pathways to significantly advance Indigenous interests in water often depend upon whether such interests have been given legal status prior to the National Water Initiative (NWI) of 2004, which contains several clauses designed to improve Indigenous access to water, and implementation of market-based water reforms. The extent of legal recognition in turn, depends on the history of colonial appropriation of land and water and agricultural development. Even so, the case studies offer important qualification to viewing Australia's water law reforms as exclusively concerned with market-based models.

The insights and reflections we bring to this topic are especially relevant to ongoing processes of domestic law reform and timely, especially since the NWI is now 15 years old and governments have agreed to embark on a review of its implementation.

A. Belated Acknowledgment of Indigenous Water Interests in Australia

Australia's Indigenous peoples represent the longest surviving culture in the world. Water has played an integral part of that culture in its social, economic, and governance dimensions. There is mounting evidence of the myriad ways in which Aboriginal and Torres Strait Islander peoples engaged with water in sustaining small-scale societies, fulfilling customary obligations to country, and in the utilisation of ecological knowledge.[9] Following British colonisation, in 1788, many Indigenous peoples were progressively displaced from their lands and waters across Australia with water laws integral to that dispossession. Yet despite displacement and dispossession, Indigenous peoples' connection to water retains a contemporary dynamic. Revitalising Indigenous peoples' interests in water, in meaningful ways supported by substantive legal measures, is a central challenge across the nation.

[5] *Native Title Act 1993* (Cth).

[6] See Northern Australian Indigenous Land and Sea Management Alliance (NAILSMA), *What We Do* <https://nailsma.org.au/programs> and for water specifically, see eg, Robison et al, n 3, 852–854; Katherine Selina Taylor, Bradley J Moggridge and Anne Poelina, "Australian Indigenous Water Policy and the Impacts of the Ever-changing Political Cycle" (2017) 20 *Australasian Journal of Water Resources* 132.

[7] Jason Alexandra, "Radical Reforms versus Incremental Change in Water Policy: Some Ideas" (Reflections on Water Reform in the Colorado and Murray-Darling Basins, Global Water Forum, Canberra, Australia, 2014).

[8] Karen Bakker, "Commons vs. Commodities: Debating the Human Right to Water" in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, Governance and Social Struggles* (Earthscan, 2012) 19, 20.

[9] Kate Cranney and Poh-Ling Tan, "Old Knowledge in Freshwater: Why Traditional Ecological Knowledge Is Essential for Determining Environment Flows in Water Plans" (2011) 14(2) *Australasian Journal of Natural Resources Law and Policy* 71.

In the first tranche of water reforms (1980s–2000) Indigenous interests in water were largely overlooked. In this phase, the reform of Australian water laws wrestled with achieving the twin objectives of water efficiency and ecological restoration while still operating a highly productive agricultural and resource economy with large, sprawling metropolitan regions. Concurrently with this first phase of national water law and policy reforms, the Commonwealth native title legislation was implemented.[10] At that time, the *Native Title Act 1993* (Cth) (*NTA*) was regarded as the main avenue for securing Aboriginal water interests. The subsequent judicial interpretation of native title rights to water as non-exclusive interests,[11] and legislative amendments made it difficult for many claimants to obtain substantial interests in land and waters. The amendments to the *NTA* of direct impact on Indigenous interests in water centred on the "future acts" regime and various water-related interests that were held to extinguish or suspend native title; thus further securing settler access to water.[12] Since then, in intensively developed areas of Australia, there have been limited prospects for native title to recognise Indigenous peoples' interests in water.[13] Even so, there is a major disparity between Indigenous land-holding and Indigenous rights to water in Australia.[14] These historical and contemporary patterns present a complex legal and policy picture which those developing models for Indigenous peoples' interests in water must navigate.

II. Indigenous Water Models: Legal and Policy Frameworks in Australia

A. Multiple Pathways to Water Reform for First Nations

No single water law or policy can meet the aspirations of all of Australia's First Nations.[15] Australia's Indigenous communities have a range of views about strengthening their rights in relation to water law and governance.[16] For many groups, it is important that their values for water (including commercial aspirations) are incorporated into water planning and management, and that there is fair allocation to ensure the continuation and intergenerational transmission of traditional knowledge.[17] Changes to Australian water laws should adopt approaches that empower First Nations communities to determine water governance frameworks for their lands and waters, and to benefit from water use.[18] This will require significant change under Commonwealth, State, and Territory law and policy. A staged process that uses progressively more proactive models to achieve reforms is discussed below, but it is only one of the many packages of reforms that have been advocated. Importantly, Indigenous peoples have proactively advanced and participated in policy platforms,[19] and have made Declarations in support of water law reforms.

[10] See the initial recognition of native title in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, and subsequently the *Native Act 1993* (Cth).

[11] *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28.

[12] Jackson and Langton, n 4, 112.

[13] Lily O'Neill et al, "Australia, Wet or Dry, North or South: Addressing Environmental Impacts and the Exclusion of Aboriginal Peoples in Northern Water Development" (2016) 33(4) EPLJ 402, 409.

[14] Jon Altman and Francis Markham, "Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities" in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 126, 126; Lana Hartwig, "Aboriginal Water Ownership" (Seminar, Melbourne Law School, Australia, 29 November 2019).

[15] Tony McAvoy, "The Human Right to Water and Aboriginal Water Rights in New South Wales" (2008) 17(1) *Human Rights Defender* 6.

[16] Taylor, Moggridge and Poelina, n 6.

[17] National Cultural Flows Research Project, *Cultural Flows: A Multi-layer Plan for Cultural Flows in Australia – Legal & Policy Design* (2018) 9 <http://www.culturalflows.com.au/index.php?option=com_content&view=article&id=38&Itemid=131> (*Cultural Flows*).

[18] *Cultural Flows*, n 17, 4.

[19] See, eg, Lingiari Foundation and the First Peoples Water Council 2007; First Peoples' Water Engagement Council, as discussed in Taylor, Moggridge and Poelina, n 6, 138–139.

The Cultural Flows project is one recent example, where project researchers working with Indigenous representatives from across Australia[20] identified three "approaches" to legal models "designed to achieve Indigenous peoples' objectives in water governance" – "Water Rights", "Increase Influence", and "Transform Foundations".[21] These approaches comprise legal strategies ranging from consultative and representative measures, to adaptation of water legislation, to water rights and entitlements and wide-ranging political settlements.[22] The project concept was to provide a package of measures that could be tailored to the circumstances of Indigenous groups across Australia, depending on "where" groups were along the spectrum in achieving water reforms.

In the project, water rights were identified as the "first approach", due to the central importance that First Nations representatives attached to water rights at various scales, from water entitlements to statutory reserves for achieving First Nations' responsibilities for on-country management, and in providing commercial opportunities. These allocation-based measures also strengthen First Nations' capacity to manage water and participate in water resources partnerships. These options give stronger expression to First Nations' control due to the water rights being held by First Nations entities, rather than rights held by other entities.[23]

The second approach seeks to utilise and, where necessary, modify water and land laws to create new legal mechanisms to give effect to Indigenous interests in water. It is designed to expand First Nations' influence by strengthening existing laws and policies that affect water management, outside of the water entitlements systems. It seeks to utilise the many legal rules that currently impose conditions and obligations on "actors" whose conduct affects Indigenous interests in water resources and landscapes. This approach includes options to strengthen mandatory consultation requirements, and augmentation of environmental and cultural heritage protections.[24]

Third, the project identifies more transformative legal and policy options that include constitutional rights, treaties, or settlements, and the domestic implementation of international law principles. This approach recognises the imperative for governance measures to be effectively aligned and, as necessary, reappraised and reformed for effective arrangements regarding Aboriginal interests in water. The governance tools that can be considered derive not only from water laws, but also advert to political, institutional, human rights, pluralist thinking.[25] Indigenous interests in water under this model are situated within broader transformative legal frameworks that include more comprehensive participation in water management.[26] Measures such as constitutional recognition hold potential for transformative legal change, but in Australia these have often proved politically fraught, despite Canada and New Zealand having adopted such reforms. The State of Victoria and the Northern Territory (NT) are currently in Treaty discussions with traditional owners.[27] Water will likely be a major issue for negotiation. These comprehensive models have the greatest capacity to enhance the realisation of Indigenous interests in water, but simultaneously are the most ambitious, requiring sustained programs of legal and policy reform. The prospects of more sustained reform are considerations that should inform the review of the NWI to ensure its continuing relevance.

[20] Godden was a project researcher. The participatory group for the project included Aboriginal representatives from three First Nations organisations who co-produced the findings in the project, as well as government agency representatives, and the project was overseen by the National Native Title Council.

[21] *Cultural Flows*, n 17, 4.

[22] *Cultural Flows*, n 17, 4.

[23] *Cultural Flows*, n 17, 4.

[24] *Cultural Flows*, n 17, 4.

[25] See, eg, Paul Schiff Berman, "Non-state Lawmaking through the Lens of Global Legal Pluralism" in Michael A Helfand (ed), *Negotiating State and Non-state Law: The Challenge of Global and Local Legal Pluralism* (CUP, 2015) 15.

[26] *Cultural Flows*, n 17, 4–5.

[27] Queensland has also commenced treaty discussions.

III. Implementing Legal Models: Case Studies

Having canvassed several broad approaches identified by one recent Indigenous-led project, the case studies provide a more detailed examination of how such models are implemented. The case studies comprise: consultative and representative models and utilisation of Indigenous waterway values in Victoria, water rights and entitlements in water markets in the MDB, and more ambitious measures from Northern Australia.

A. Case Study 1: The Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 (Vic)

The first case study involves waterway management in a predominantly urban river, the Yarra River in Victoria.

Background

With an estimated population of over 6.1 million people (and growing), Victoria has the second largest population of all the States and Territories, behind only New South Wales (NSW). However, the percentage of people in Victoria who identify as Indigenous (0.9%) is the lowest in the country, and significantly below the national average of 3.3%.[28] Land under Indigenous control in Victoria, therefore, is also limited. Land has been granted in various forms of freehold title to Indigenous people via land rights legislation, native title settlements under the *NTA*, and the *Traditional Owner Settlement Act 2010* (Vic) (*TOS Act*) (Victoria's equivalent to the *NTA*). Recognition of non-exclusive native title and traditional connection has also occurred pursuant to the *NTA* and the *TOS Act*. Collectively, this amounts to at least 2.8% of Victoria, or 7.5% of Victoria's public land (approximately 37% of Victoria's total terrestrial estate is public land),[29] which is the only land over which Native Title, Aboriginal title, and traditional ownership can be recognised or granted.[30] Accordingly, developments in Victoria, in relation to Indigenous water rights and the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) (*Yarra River Protection Act*), need to be considered against this backdrop.

One of Victoria's most iconic rivers, the Yarra River is approximately 242 km in length and flows from near pristine forested areas in the east of the State, through the Yarra Valley, the suburbs, and the centre of Melbourne, and finally out into Port Phillip Bay. Its catchment contains 2,450 hectares of public open space and is home to around two million people, many of whom live in the greater metropolitan region of Melbourne. Its upper reaches provide Melbourne with around 70% of Melbourne's drinking water.[31] In recognising the iconic status of the Yarra River and the need for it to be properly managed and protected, in 2017, the Victorian Parliament enacted the *Yarra River Protection Act*.

Importantly, the Act includes various features that promote Aboriginal interests in water management – because, until relatively recently, there had been no recognition of any Indigenous water rights and interests in Victoria's water laws. In that regard, the year 2010 heralded the start of a new era with the enactment of the *TOS Act*. Under the *TOS Act*, traditional owner groups can enter into a recognition and settlement agreement, which includes a sub-agreement providing for the recognition of rights to take, and use natural resources, of which water is one such resource.[32]

Due to the enactment of the *TOS Act*, consequential amendments were made to the *Water Act 1989* (Vic) to recognise water rights that have been recognised under a *TOS Act* agreement.[33] Those rights, however,

[28] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (18 September 2018) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.

[29] Victorian Environmental Assessment Council, *Statewide Assessment of Public Land: Final Report* (May 2017) 2 <http://www.veac.vic.gov.au/investigation/statewide-assessment-of-public-land>.

[30] This figure is likely to be an underestimate, as figures for some of the settlements were not available.

[31] Victorian Government, *Yarra River Action Plan* (Department of Environment, Land, Water & Planning, 2017) 2 <https://www.planning.vic.gov.au/policy-and-strategy/waterways-planning/yarra-river-protection>.

[32] *Traditional Owner Settlement Act 2010* (Vic) s 8.

[33] *Water Act 1989* (Vic) s 8A.

are limited to rights to take and use water for traditional purposes, being for personal, domestic, or non-commercial communal needs,[34] and are very similar to rights that would be recognised in Victoria under a determination made pursuant to the *NTA*.[35] They are also similar to rights that traditional owners already have under the *Water Act 1989* (Vic) as ordinary members of the public to take water for domestic and stock use.[36] Significantly, this does not specifically include water management rights and interests.[37] To date, only three traditional owner groups have reached agreement under the *TOS Act*, with a further two groups currently in negotiations.[38]

It has, however, been increasingly recognised at a policy level that Victoria's traditional owners should be given the opportunity to participate in water management decision-making,[39] including in the 2016 "Water for Victoria: Water Plan", a strategic plan developed by the Victorian government to guide the future of water management across Victoria. Chapter 6 of the Water Plan is devoted entirely to how to recognise and manage for Aboriginal water values.

Leading up to the Water Plan, it had also become increasingly clear that the Yarra River was in particular need of attention, given the years of inappropriate development along its corridor and its historical use as a sewer and drain by industry.[40] This was not a new call for action, but one that had been growing for decades.[41] It had been reinvigorated by the Yarra Riverkeeper Association and Environmental Justice Australia which had been lobbying the State Labor opposition to introduce legislation for its protection, should it win the 2014 State election. Labor won that election, and subsequently put processes in place to honour its election promise by appointing a Ministerial Advisory Committee (MAC) to investigate and provide a report containing recommendations on how best to manage and protect the Yarra River. That report was provided to the government in late 2016.[42] Among the recommendations made by the MAC included a recommendation for a bill aimed at protection of the Yarra River,[43] which subsequently became the *Yarra River Protection Act*.

Features of the Yarra River Protection Act

The first important point to make about the Act is that it does not involve the creation of water access or usage rights, nor does it change the decision-making structures. It is in the nature of "framework" planning legislation, intended to guide the management and protection of the Yarra River and its environs within the existing legislative regime. As noted earlier, it does, however, contain various features of significance to Victoria's traditional owners. The first of these is that both the title and preamble are written in English and *Woi-wurrung*, the language of the Wurundjeri people (the traditional owners of

[34] *Traditional Owner Settlement Act 2010* (Vic) s 79 (definition of "traditional purposes").

[35] For more detail on the *Traditional Owner Settlement Act 2010* (Vic) and the *Native Title Act 1993* (Cth), see Katie O'Bryan, "More Aqua Nullius? The Traditional Owner Settlement Act 2010 (Vic) and the Neglect of Indigenous Rights to Manage Inland Water Resources" (2016) 40(2) *Melbourne University Law Review* 547.

[36] *Water Act 1989* (Vic) s 8.

[37] A traditional owner group may, however, be able to negotiate a Traditional Owner Land Management Agreement (TOLMA) with the State enabling them to co-manage a park or reserve on which water resources are located. For example, the Gunai/Kurnai People have a TOLMA which includes the Mitchell River National Park.

[38] Gunai/Kurnai (22 October 2010); Dja Wurrung (28 March 2013) (see Victorian Government, Department of Justice and Community Safety, *Dja Wurrung Settlement* <https://www.justice.vic.gov.au/your-rights/native-title/dja-dja-wurrung-settlement>); Taungurung (26 October 2018). The Victorian Government is currently in negotiations with the Wotjobaluk, Jaadwa, Jardawajali, Wergaia, and Jupagulk peoples, and the Eastern Maar traditional owner group: see Victorian Government, Department of Justice and Community Safety, *Native Title* <https://www.justice.vic.gov.au/your-rights/native-title>.

[39] See, eg, sustainable water strategies made under *Water Act 1989* (Vic) ss 22B–22J.

[40] Kristin Otto, *Yarra: A Diverting History of Melbourne's Murky River* (Text Publishing, 2005) 68–72, 85.

[41] Yarra Riverkeeper Association and Environmental Justice Australia, *Charting the Yarra: A Review of 40 Years of Reports and Plans for the Yarra River Corridor* (2015) <https://actfortheyarra.org.au/2015/11/11/charting-the-yarra/>.

[42] Yarra River Protection Ministerial Advisory Committee, *Protecting the Yarra River (Birrarung): Ministerial Advisory Committee Final Report* (2016) <https://www.planning.vic.gov.au/policy-and-strategy/waterways-planning/yarra-river-protection>.

[43] Yarra River Protection Ministerial Advisory Committee, n 42, Recommendation 12.

much of the land through which the Yarra flows). The word "*Birrarung*" is the Wurundjeri name for the Yarra River and means "river of mists and shadows".[44] The phrase "*Wilip-gin Birraung murron*" means "keep the Birrarung alive". This is the first time in Victoria that Indigenous language has been included in legislation.

Related to this, and of no less significance, was the fact that just prior to the Bill's introduction into Parliament, Wurundjeri elders spoke in support of the legislation. This was the first time in Victoria's parliamentary history that Wurundjeri people had spoken from the floor of the Parliament in their capacity as traditional owners of the land on which Parliament House is built. Also, of importance to Indigenous Victorians, is the recognition of the Yarra River as "one living and integrated natural entity".[45] This is consistent with the Indigenous conception of the Yarra as reflected in the preamble; that it "is alive, has a heart, a spirit and is part of our Dreaming". This holistic approach to the Yarra is intended to enable the co-ordination and management of the many parcels of public land in which it is situated by more than 14 public entities that have decision-making responsibilities along its length.

To facilitate this approach, the Act provides for the development of a strategic plan, the purpose of which is to be an overarching policy and planning framework to guide the future use and development of the Yarra.[46] The strategic plan is developed by the lead agency appointed by the Minister, namely the Melbourne Water Corporation (the statutory water authority encompassing the Yarra River). That process is almost complete, with a draft strategic plan released for comment in January 2020.[47] To enhance community involvement, the Act requires the strategic plan to be developed through "an open and collaborative process involving responsible public entities, local community reference forums and the [Birrarung] Council",[48] about which more is said below.

Prior to the development of the strategic plan, the lead agency is required to develop a long-term (50-year) community vision which must identify the unique characteristics of the Yarra River, and the community values, priorities, and preferences related to the Yarra River.[49] That process was completed in May 2018.[50] The development of the strategic plan is being informed by the Yarra protection principles, another important feature of the Act.[51] Decision-makers (responsible public entities)[52] along the Yarra River must have regard to these principles when performing their functions or exercising their powers in relation to the River.[53] The protection principles are grouped into various categories, the first containing a number of general principles relating to climate change, intergenerational equity, sustainability, and public health and wellbeing.[54] The remaining categories comprise principles which are more specific; namely, environmental, social, cultural, recreational, and management principles.[55] The cultural principles are of particular relevance because they emphasise Aboriginal cultural values, heritage, and knowledge, and the importance of involving Traditional Owners in policy planning and decision-making.[56] These are, however, just part of one of many protection principles.

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[44] Melbourne Water Corporation, *Draft: Yarra Strategic Plan: A 10 Year Plan for the Yarra Strategic Corridor – Draft for Public Consultation* (January 2020) 11 <https://imaginetheyarra.com.au/document-library>.

[45] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 1(a).

[46] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 1(b).

[47] Imagine the Yarra, *How You Shaped the Draft Plan* <https://imaginetheyarra.com.au/engagement>; Melbourne Water Corporation, n 44.

[48] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 18(2)(a).

[49] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 17.

[50] Lisa Neville, Minister for Water, "Community Vision to Shape the Future of Yarra River" (Media Release, 31 May 2018) <http://www.lilydambrosio.com.au/media-releases/community-vision-to-shape-the-future-of-yarra-river/>.

[51] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) ss 7–13.

[52] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 3 (definition of "responsible public entity").

[53] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 1(d).

[54] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 8.

[55] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) ss 9–13.

[56] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 12(1)–(2).

The Act also establishes the Birrarung Council, described in Parliament as the "centrepiece" of the Act.[57] The Council is an independent entity comprising up to 12 members appointed by the Minister, at least two of whom must be chosen by the Yarra's Traditional Owners.[58] Never before in Victoria have Aboriginal people been given a legislatively mandated voice in river management. The membership must also include at least one representative from an environment group, an agriculture industry group, and a local community group, along with two skill-based members. Members are appointed for up to four years[59] and can only be removed prior to the expiry of their appointment if they are unfit to hold office (eg, for misconduct or neglect of duty).[60] The Council is precluded from having any government representatives as members,[61] thus ensuring that its deliberations are independent and not able to be unduly influenced by government. The traditional owner voice on the Council is not particularly strong, given that there are only two mandated positions on a Council of 12. However, there is scope for additional traditional owners to be appointed, as four of the positions are not specifically designated to any particular group.[62]

The Council has two main roles, the first of which is to provide advice to the Minister generally on the administration of the Act; and more particularly, on the protection of the Yarra River, and on the development, implementation, operation, and effectiveness of the strategic plan.[63] However, although the Council is required to be part of the collaborative process used by the lead agency in developing the strategic plan,[64] the Council's functions do not include the provision of advice to the lead agency, only to the Minister. This could be viewed as a deficiency in the legislation; however, in practice, it is likely that the lead agency will work closely with the Birrarung Council, given the Council's role in advising the Minister on the strategic plan.

The second role of the Council is to advocate for the protection and preservation of the Yarra River.[65] In that regard, the Premier of Victoria described it as the "independent voice of the river";[66] its independence underpinned by the legislative preclusion of government representatives as members, noted above. An important point to note about the role of the Council, however, is that it does not have any decision-making authority; that authority remains with the various responsible public entities operating along the length of the Yarra River. Accordingly, in terms of facilitating a direct role for Traditional Owners in decisions about the management of the Yarra River, the Act is of limited utility.

Despite the deficiencies noted above, the *Yarra River Protection Act* is still an important piece of legislation if considered in the wider context of the legislative recognition of Indigenous water rights in Victoria, which is still in its infancy. Promisingly, the *Water Act 1989* (Vic) has recently been amended to (among other things) provide for Indigenous representation on various consultative and advisory entities; for notification to be given to recognised Indigenous groups for various matters; and for Indigenous cultural values and uses of waterways to be identified and planned for.[67]

Further significant developments in Victoria, in relation to Indigenous rights generally, may also provide a platform for strengthening Indigenous water rights. In February 2016, Victoria put in motion a process to commence treaty negotiations with Aboriginal Victorians. In 2018, legislation was passed[68] to lay

[57] Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 2017, 2022 (Richard Wynne, Minister for Planning).

[58] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 49(1)(a).

[59] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 51(1)(a).

[60] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 52(2).

[61] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 49(3).

[62] There are currently three Traditional Owners on the Birrarung Council: Melbourne Water Corporation, *Progress Report for the Yarra Strategic Plan* (October 2018) 13.

[63] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 48(1)(a).

[64] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 18(2)(a)

[65] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) ss 5(d), 48(1)(b).

[66] Daniel Andrews, Premier, "Protecting the Yarra River for Generations to Come" (Media Release, 26 February 2017) <https://www.premier.vic.gov.au/protecting-yarra-river-generations-come>.

[67] *Water and Catchment Legislation Amendment Act 2019* (Vic).

[68] Advancing the Treaty Process with *Aboriginal Victorians Act 2018* (Vic).

the foundation for negotiations by requiring the State and a future Aboriginal representative body to establish "the entities, rules and resource base" needed to support those negotiations.[69] Called the "First Peoples' Assembly of Victoria", that representative body was established in November 2019[70] and held its inaugural meeting at Parliament House on 10–11 December 2019.[71]

Although it sets out guiding principles for the treaty process,[72] the legislation does not set out the parameters of negotiations, nor does it say with whom the State should be negotiating. It is, however, Australia's first ever treaty legislation.[73] Given that the first of the guiding principles is a recognition of the right to self-determination,[74] and that the parameters of negotiations have not yet been determined, the Victorian treaty process would appear to provide an ideal opportunity to put Aboriginal water rights on the negotiation agenda.

IV. Case Study Two: The Murray-Darling Basin in Southern Australia

The MDB in southern Australia is a region characterised by intensive water resource development, significant impacts on Aboriginal peoples' connection to land and waters; and more recently a series of major water law and policy experiments seeking to address extensive ecological degradation, while retaining high levels of irrigated agricultural productivity.[75] The Basin has been the focus for the introduction of a redesign of water entitlements to facilitate water markets and water planning – both models of water governance that initially excluded Aboriginal peoples. Such measures are slowly evolving to allow for Aboriginal participation in the governing institutions, and as holders of water entitlements that are a platform for engagement in water markets. This policy and legal recognition was achieved by sustained advocacy by Indigenous organisations for stronger participation in water management in the Basin, a position strengthened by First Nations' regional alliances, as despite the widespread impacts of colonisation, the Murray-Darling river system holds strong cultural values for First Nations Communities.

The initial exclusion of the consideration of Aboriginal interests in water reform at a policy level, first began to be addressed by the NWI in 2004. The NWI, was given legal effect as an Intergovernmental Agreement, and it contains a set of national principles to guide water law reform. It identifies the need to foster Indigenous peoples' participation in water governance.[76] Clause 52 states, "The Parties will provide for Indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation", through planning processes that ensure: " inclusion of Indigenous representation in water planning wherever possible" and that "water plans will incorporate Indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed".[77] Over time, the NWI objectives for Indigenous engagement in water governance have

[69] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) 2 (preamble).

[70] <https://victreatyadvancement.org.au/news/more-aboriginal-leaders-appointed-first-peoples-assembly>.

[71] Parliment of Victoria, *Historic Day for First Peoples' Assembly* <https://www.parliament.vic.gov.au/about/news/4404-historic-day-for-first-peoples-assembly>.

[72] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ss 20–26.

[73] Natalie Hutchins, Minister for Aboriginal Affairs, "Historic Treaty Legislation Passes in Victoria" (Media Release, 21 June 2018) <https://www.premier.vic.gov.au/historic-treaty-legislation-passes-in-victoria/>. Queensland and the Northern Territory have also commenced treaty discussions.

[74] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 22.

[75] See generally MJ Stewardson et al, *Water Productivity Blueprint* (University of Melbourne, 2014).

[76] Council of Australian Governments (COAG) (2004) *Intergovernmental Agreement on a National Water Initiative*, Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, signed 25 June 2004, cl 52.

[77] COAG, n 76. See also cll 53, 54. Clause 53 notes the need for water planning to take account of native title rights in water and as necessary to allocate water for that purpose. Clause 54 provides that water allocated to native title holders for traditional cultural purposes will be accounted for.

been strengthened by specific measures directed to MDB water management practices.[78] The mandatory second stage review of the NWI occurring now,[79] offers an opportunity to assess the progress made to date in Aboriginal participation in water governance, and to evaluate the specific legal and policy models that have been instituted in the Basin for consultation, representation and water entitlements for Aboriginal communities.

A. From Dispossession to Participation

Historically in the MDB, water laws (and land laws where they govern rights to water) played a pivotal role in the dispossession of Aboriginal peoples.[80] Following British colonisation there was an expansion of pastoral and agricultural settlement into the Basin, which extends across five Australian jurisdictions. Australian colonies, (States after 1901), progressively vested water resources in the Crown; adopted statutory water resources schemes and implemented various water licencing measures to authorise the consumptive use of water, mostly to support irrigated agriculture.[81] These elements remain the basis of much current water law in the Basin. The laws accelerated the denial of access to water for Aboriginal peoples. Across the 20th century, river and ground water resource development expanded to support more intensive irrigation,[82] resulting in severe environmental degradation over much of the Basin, further dispossessing Aboriginal peoples, and with severe impacts on many culturally significant sites in rivers and wetlands.[83]

In 1994, the Council of Australian Governments (COAG) agreed to a productivity-based reform agenda of increased efficiency and sustainability for water use in the MDB. Initial reforms were instituted at a State and Territory level. Specific measures included a basin-wide cap on water allocations at a State-wide level, unbundling of water and land entitlements, and allocation of water to the environment.[84] There was no allocation to Aboriginal peoples. The first phase water reform principles were expanded in 2004 by the NWI to include unbundling (ie legal separation of the resource right, use and delivery components) of water holdings, expansion of water trading, and the return of over-allocated systems across the Basin by setting environmentally sustainable limits.[85] Despite, acknowledgment of the need for engagement with Indigenous peoples under the NWI, again in the MDB, there was limited policy consideration given to the impacts on Aboriginal interests in water; there were no specific water holdings for Aboriginal peoples proposed within the unbundling procedures and water trading expansion, nor was provisions made to incorporate substantive Aboriginal interests in water at the water planning stage. Further a perception continued that Aboriginal interests in water excluded economic dimensions – a view that O'Donnell suggests is not consistent with the NWI, cl 25 (ix) which is to be interpreted as facilitating Indigenous access to water within the water entitlement framework, including for commercial purposes.[86]

[78] See, eg, the NWI module, that was jointly developed by Australian and State and Territory governments in 2017, Recognising Indigenous values and needs in water resource planning and management, Australian Department of Agriculture, Water and Environment, *NWI Module: Engaging Indigenous Peoples in Water Planning and Management* <https://www.agriculture.gov.au/water/policy/nwi/indigenous-engagement>.

[79] *Water Act 2007* (Cth) s 88 (2).

[80] Kate A Berry and Sue Jackson, "The Making of White Water Citizens in Australia and the Western United States: Racialization as a Transnational Project of Irrigation Governance" (2018) 108(5) *Annals of the American Association of Geographers* 1354.

[81] Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths, 2nd ed, 2017) 39.

[82] See Robert Wooding, "Populate, Parch and Panic: Two Centuries of Dreaming about Nation Building in Inland Australia" in John Butcher (ed), *Australia Under Construction: Nation-building: Past, Present and Future* (ANU E Press, 2008) 57, 58.

[83] See generally Jessica Weir, *Murray River Country: An Ecological Dialogue with Traditional Owners* (Aboriginal Studies Press, 2009).

[84] Council of Australian Governments (COAG), "Attachment A: Water Resource Policy" (Council of Australian Governments' Communique, 25 February 1994) <https://webarchive.nla.gov.au/awa/20041031065143/http://www.coag.gov.au/meetings/250294/attachment_a.htm>.

[85] COAG, n 76, cll 23, 24, 25, 26, 28, 35, 41, 58.

[86] See cl 25(ix) National Water Initiative 2004 and Michael O'Donnell's interpretation of that clause as allowing for the grant of water access entitlements to meet Indigenous needs, including for commercial purposes. Michael O'Donnell, "The National Water

The severe Millennium drought (1997–2009) in the MDB, led to further expansive water law reform, which crystallised as the *Water Act 2007* (Cth). Again, there was no express reference to Indigenous interests in water when this statute was enacted beyond a "savings" provision in respect of the interaction between the *Water Act 2007* (Cth) and the *NTA*.[87] The *Water Act 2007* (Cth) established overarching Commonwealth governance over the Basin, facilitated the purchase of water for the environment, and established the Murray-Darling Basin Authority (MDBA) and Commonwealth Environmental Water Holder. In 2012, a Basin Plan was enacted to coordinate efforts in Basin jurisdictions to address water over-allocation by setting a sustainable diversion limit on consumptive water entitlements and in instituting basin-wide water resource planning.[88] Setting the diversion limit was highly controversial, and engendered water sector and community resistance to the first iteration of the limit, including from representatives of Basin First Nations.[89] The approach to setting the diversion limit that subsequently developed as requiring a "balance" between socio-economic considerations and the environment,[90] has contributed to obscuring the consideration of Aboriginal interests in water, as separate from environmental and heritage values.

In turn, the MDB water institutions must meet diverse objectives, within a federal system characterised by conflicting pressures.[91] Moreover, the Basin Plan has proved difficult to fully implement, with a lack of compliance, particularly in the northern Basin, including illegal pumping, and a failure by NSW water authorities at various points to effectively enforce licence requirements.[92] The lack of compliance with MDB processes has had many direct and indirect impacts on Aboriginal interests in water in the MDB. The summer of 2018–2019 was marked by extremely low rainfalls, with parts of the Darling River ceasing to flow with massive fish kills downstream from cotton irrigation areas.[93] In times of extreme drought in the MDB, Aboriginal communities have been severely impacted by low flows, including experiencing a shortage of drinking water supplies.[94]

B. Native Title and Indigenous Land and Water Holdings in the MDB

Although the native title process was running parallel with the trajectory of water law reforms, there was a failure to engage substantively with Aboriginal interests in water in this phase of major structural and distributive changes in the water sector.[95] By contrast, amendments under the *NTA* and relevant High Court jurisprudence both weakened the nature of native title rights to water by characterising them as a non-exclusive rights,[96] and strengthened the extent to which water-related projects and infrastructure were held to either extinguish or suspend native title rights.[97] In the MDB, nonetheless, there have been

Initiative, Native Title Rights to Water and the Emergent Recognition of Indigenous Specific Commercial Rights to Water in the Northern Territory" (2013) 16(1) *Australasian Journal of Natural Resources Law and Policy* 83, 91–92.

[87] See *Water Act 2007* (Cth) s 13.

[88] Basin Plan 2012 (made under *Water Act 2007* (Cth) subpara 44(3)(b)(i)).

[89] National Water Commission, *Australia's Water Blueprint National Reform Assessment 2014* (2014).

[90] *Water Act 2007* (Cth) ss 20–23.

[91] Alex Gardner, "Water Reform and the Federal System" in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation* (Federation Press, 2012) Ch 15.

[92] The final report of the South Australian Royal Commission outlines many of the problems of the water reform process: see Bret Walker, *Murray-Darling Basin Royal Commission Report* (2019) <https://www.environment.sa.gov.au/topics/river-murray/about-the-river/murray-darling-basin-commission>.

[93] Australian Academy of Science, *Investigation of the Causes of Mass Fish Kills in the Menindee Region NSW over the Summer of 2018–2019* (2019) 35–37 <https://www.science.org.au/supporting-science/science-policy-and-sector-analysis/reports-and-publications/fish-kills-report>.

[94] Australian Academy of Science, n 93, 153.

[95] Lily O'Neill et al, "Australia, Wet or Dry, North or South: Addressing Environmental Impacts and the Exclusion of Aboriginal Peoples in Northern Water Development" (2016) 33(4) EPLJ 402.

[96] *Western Australia v Ward* (2002) 213 CLR 1, 151–152 [263] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); [2002] HCA 28.

[97] See, eg, the "future acts" regime, *Native Title Act 1993* (Cth) ss 24AA–24OA; For discussion see National Native Title Tribunal <http://www.nntt.gov.au/futureacts/Pages/default.aspx>.

several successful native title claims within the MDB that have included rights that are relevant to water, for example in relation to a river bed or banks.[98] Quite commonly, native title also will be the basis for an Indigenous Land Use Agreement which will comprise rights of access to traditional lands and water for traditional cultural purposes, for example, accessing land along a river bank to undertake fishing in the river or to access traditional eel fisheries.[99] Similarly, the *TOS Act*, noted earlier in relation to Victoria, can provide for Recognition and Settlement Agreements to recognise certain traditional owner rights over Crown land.[100] Typically such rights to water are held to be for "cultural purposes", with limited acknowledgment that Aboriginal interests in water also comprise economic values.

Water "rights" for Aboriginal peoples in the MDB also may accrue as a result of historic land reserves granted to Aboriginal groups. The *Aboriginal Land Rights Act 1983* (NSW) is a source of landholding for certain Aboriginal groups. In South Australia and Queensland, there are a variety of land rights schemes and/or land trust models.[101] Despite the proliferation of legislative schemes, there are restricted Aboriginal holdings of land and even more circumscribed holdings of water, independently of land in all these jurisdictions.[102] The limited extent, complex nature and diversity of Aboriginal peoples' land-holding and water holding, fragmentation of the holdings, and the constrained land access are major factors inhibiting the viability of Aboriginal peoples' participation in water governance in the MDB.[103] Hartwig, Jackson and Osborne (2020) estimate that Aboriginal organisations in the NSW portion of the MDB hold only 0.2% of the available surface water, whereas the Aboriginal population in this area is nearly 10% of the total population.

C. Aboriginal Interests in Water in the MDB

In the volatile economic, legal and constitutional mix in the MDB, Aboriginal interests in water compete for policy attention. Over several decades, First Nations groups consistently have advocated for greater inclusion of Aboriginal peoples in managing the Basin waters and have developed considerable organisational capacity to undertake such functions. To date, the measures to accord stronger participation in water governance for MDB Aboriginal communities have centred on two interrelated legal models. First, the mandated consultation requirements under the Basin Plan – including consultation on water planning instruments at a local level. Second, the attainment of water entitlements for First Nations – which includes both "cultural licences" and a statutory fund to purchase water entitlements in the water market.

Consultation in the Water Act 2007 (Cth) and Basin Plan

There are various processes and consultation requirements involving Indigenous people in the *Water Act 2007* (Cth) and the Basin Plan as a catchment-wide planning framework. The preparation and content of the Basin Plan is governed by ss 21 and 22. Section 21(4)(c) requires the MDBA, when preparing (or amending) the Basin Plan, to have regard to the NWI[104] and to "social, cultural, Indigenous and other public benefit issues". In that regard, the MDBA did endeavour to consult with Indigenous groups

[98] See Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Japagulk peoples, Consent Determination on 13 December 2005 re Wimmera River: *Clarke v Victoria* [2005] FCA 1795. Ironically, this determination excluded native title holders from rights to the actual water in the river itself. By contrast, see more recent determinations, *Doctor v Queensland* [2016] FCA 1447; *Doctor v Queensland* [2017] FCA 716.

[99] See, eg, Gunditj Mirring and the State of Victoria Indigenous Land Use Agreement associated with the native title consent determination, *Lovett v Victoria* [2007] FCA 474.

[100] *Traditional Owner Settlement Act 2010* (Vic) ss 4, 9.

[101] See, eg, Deeds of Grant in Trust in Queensland, and *Aboriginal Lands Trust Act 1966* (SA).

[102] Jackson and Langton, n 4, estimate less than .01% of diversions. Lana Hartwig, Sue Jackson and Natalie Osborne, "Trends in Aboriginal Water Ownership in New South Wales, Australia: The Continuities between Colonial and Neoliberal Forms of Dispossession" (2020) 99 *Land Use Policy* 1–13.

[103] Lana Hartwig, Sue Jackson and Natalie Osborne, "Recognition of Barkandji Water Rights in Australian Settler-colonial Water Regimes" (2018) 7(1) *Resources* 16.

[104] COAG, n 76, cll 52–54.

in the preparation of the Basin Plan and as a result of the consultations, the Basin Plan opens with an acknowledgment of the traditional owners of the MDB.

These requirements for the inclusion of Indigenous interests in the Basin Plan are reflected in water planning. The Basin Plan, for example, requires a Water Resource Plan (WRP) made by a State to be prepared having regard to the "inclusion of Indigenous representation in the preparation and implementation of the plan";[105] to "Indigenous social, cultural, spiritual and customary objectives, and strategies for achieving these objectives";[106] and to "native title rights, native title claims and Indigenous Land Use Agreements provided for by the *NTA* in relation to the water resources of the water resource plan area".[107]

The Basin Plan is specifically required to provide information about Indigenous uses of Basin water resources. Section 22(1) requires the Basin Plan to include "[a] description of the Basin water resources and the context in which they are used", which "must include information about: … (b) the uses to which the Basin water resources are put (including by Indigenous people)". The benefit of this requirement is that those uses must be ascertained, which necessarily implies consultation with Indigenous people. Further, s 22(3)(ca) requires that the Basin Plan include a requirement that a WRP be prepared "having regard to social, spiritual and cultural matters relevant to Indigenous people in relation to the water resources of the water resource plan area in the preparation of the water resource plan". Notably, this requirement achieved through amendments in 2016, still does not include reference to Aboriginal economic interest in water.

The Basin Plan takes effect as a statutory instrument. Chapter 10 relates to the requirements for WRPs, and Pt 14 of that chapter relates to Indigenous values and uses. Part 14 requires that WRPs must identify the objectives of, and the outcomes desired by, Indigenous peoples in relation to the management of water resources, and that regard must be had to Indigenous values and uses in determining them.[108] Water resource plans are the building blocks of the overarching Basin plan. Under the *Water Act 2007* (Cth), State and Territory governments are responsible for developing proposed plans, which are submitted for adoption/accreditation to the MDBA. The Authority subsequently prepares recommendations to the Commonwealth Minister as to whether the plan should be adopted.[109] Each WRP comprises locally specific rules as to how the available water is allocated and used at a local or catchment level. The rules include setting limits on water to be withdrawn from the system, the water available to the environment, and measures for compliance with water quality standards.[110] The State and Territory governments within the MDB must ensure that WRPs conform to the Basin plan requirements including the sustainable diversion limit.[111]

A significant practical arrangement to enhance consultation that has been put in place is for Aboriginal organisations to take part in the review of WRPs.[112] Section 10.53 of the Basin Plan relates specifically to consultation, and it requires that "[a] water resource plan must be prepared having regard to the views of relevant Indigenous organisations with respect to the matters identified under section 10.52 and relevant other matters".[113] Notably, the listed objectives do not include Indigenous economic or commercial objectives. A WRP must be prepared however having regard to the views of Indigenous people with

[105] Basin Plan, n 88, s 10.53(1)(c).

[106] Basin Plan, n 88, s 10.53(1)(d).

[107] Basin Plan, n 88, s 10.53(1)(a).

[108] Basin Plan, n 88, s 10.52(1)–(2).

[109] *Water Act 2007* (Cth) s 63.

[110] See generally *Water Act 2007* (Cth) ss 54–70.

[111] *Water Act 2007* (Cth) s 55.

[112] MDBA, *Water Resource Plans* <https://www.mdba.gov.au/basin-plan-roll-out/water-resource-plans>.

[113] Those matters include native title; Aboriginal heritage; Indigenous social, cultural, spiritual, and customary objectives; Indigenous representation; Indigenous participation; and risks to Indigenous values and uses.

respect to cultural flows.[114] Despite the lack of recognition of culturally appropriate economic objectives, it is at this very local level of water planning that more meaningful consultation is occurring with traditional owners as it offers an opportunity for traditional ecological knowledge to be incorporated and connection to country to be expressed.

Basin Community Committee

At a basin-wide level, Indigenous participation in water management is occurring via the Basin Community Committee (BCC), established pursuant to s 202 of the *Water Act 2007* (Cth). The main function of the BCC is "to advise the Authority about the performance of the Authority's functions".[115] Eligibility for membership of the MDBA requires a high level of expertise in a field relevant to the MDBA's functions, which includes "Indigenous matters relevant to Basin water resources".[116] Following recent amendments to the Water Act, membership of the MDBA now includes an Indigenous person,[117] and its functions include engaging with the Indigenous community on the use and management of the Basin water resources.[118] In addition, the MDBA must consult with the BCC in preparing the Basin Plan,[119] in preparing any amendment of the Basin Plan,[120] or in preparing a discussion paper for any review of the Basin Plan.[121] The membership of the BCC (up to 17 members) must include, "at least 2 Indigenous persons with expertise in Indigenous matters relevant to the Basin's water resources".[122] It must also include a member of the MDBA, and eight individuals who are water users.[123] The BCC must establish "an Indigenous water subcommittee, to guide the consideration of Indigenous matters relevant to the Basin's water resources".[124] The BCC, however, acts only in an advisory capacity; the MDBA must consult with the committee but is not required to follow the advice of the BCC.

The decision-making role still resides with the MDBA in most circumstances; although in certain areas, such as the adoption of the Basin plan, the MDBA may only make recommendations, with decision-making power resting with the Commonwealth Minister.[125] Nonetheless, the expansion of Indigenous representation in influential forums, such as the BCC to the MDBA (where the current Chair is Indigenous, for example), is important in bringing Aboriginal knowledge and values to bear on water management in the MDB, and in lifting the profile of Aboriginal interests in water across the Basin. These measures still fall short of requirements under international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples,[126] for Indigenous peoples "involvement in decision-making that affects their traditional land and waters". Yet these recent reforms to the *Water Act 2007* (Cth) and initiatives under the Basin Plan mark an important step toward more comprehensive consultation and participation in water governance for Aboriginal communities in the Basin. These representative models however need to occur alongside strengthening Aboriginal peoples' access to water entitlements in the MDB.

[114] Basin Plan, n 88, s 10.54.

[115] *Water Act 2007* (Cth) s 202(2).

[116] *Water Act 2007* (Cth) s 178(3)(g).

[117] *Water Act 2007* (Cth) s 177(b).

[118] *Water Act 2007* (Cth) s 172(1)(ia).

[119] *Water Act 2007* (Cth) s 43(1)(c).

[120] *Water Act 2007* (Cth) s 46(1)(c).

[121] *Water Act 2007* (Cth) s 51(2)(c).

[122] *Water Act 2007* (Cth) s 202(5)(c).

[123] *Water Act 2007* (Cth) s 204(7).

[124] *Water Act 2007* (Cth) s 202(3)(c).

[125] *Water Act 2007* (Cth) s 69.

[126] *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, n 3.

D. Water Rights: Aboriginal Entitlements to Water

The Echuca Declaration 2010 expresses the aspiration of First Nations to have water entitlements that allow autonomy and independence for Aboriginal groups in managing water.

The Declaration states those goals in the following terms:

> Water entitlements that are legally and beneficially owned by Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right.[127]

The type of water rights envisioned under the Declaration can be distinguished from Aboriginal-specific water entitlements or allocations granted solely for the benefit of Aboriginal persons, organisations, or communities.[128] Typically, where Aboriginal-specific entitlements are granted, the water uses will be restricted to traditional or cultural purposes, reinforcing an erroneous perception of Aboriginal interests in water as subsistence-based and non-commercial in character.[129] While Aboriginal peoples have strong connections to traditional waters, these connections are dynamic and expressed in myriad ways.

The *Water Management Act 2000* (NSW) acknowledges the multiple values of Aboriginal interests in water.[130] The legislation, introduced under the first phase of COAG reforms, adopts the term, "licence" to refer to a water entitlement (distinct from land) which comprises a share of water in a system.[131] Water Sharing Plans establish rules and conditions for the exercise of rights and obligations attached to water access licences, including special purpose Aboriginal licences.[132]

In practice, obtaining a licence of this nature is difficult. An Aboriginal cultural access licence will only be granted to take a fixed and small amount of water for cultural purposes,[133] and it cannot be traded or used for commercial purposes.[134] Additionally, infrastructure is needed to take advantage of the access licences (eg, water pumps). To date, few Aboriginal-specific entitlements have been granted, and the lack of uptake emphasises that these water rights are not meeting First Nations' objectives for participation in water management in the MDB. A pertinent factor is that such special purpose licences sit outside the mainstream water market system of entitlements, allocations and water trading.

E. Water Markets in the MDB

The efforts to address over-allocation and to restore sustainability to the MDB have occurred in the context of the instigation, expansion, and deepening of the water market, particularly in the southern-connected basin.[135] Water markets are integral to neo-liberal policies that posit market-based regulation as achieving greater cost-effectiveness than prescriptive regulation. Tradeable property rights in such policy settings are regarded as ensuring resources are fully valued.[136] The prevalence of such policies within the COAG water reform framework, has resulted in water markets becoming the preferred governance model, despite concerns about the extent to which they may precipitate water speculation, escalation of

[127] Murray Lower Darling Rivers Indigenous Nations, *Echuca Declaration 2010* <https://www.mdba.gov.au/sites/default/files/pubs/sa-mldrin-echuca-declaration-2009_0.PDF>.

[128] Jackson and Langton, n 4, 129.

[129] Jackson and Langton, n 4, 129.

[130] The Act in s 3 acknowledges the benefits to Aboriginal people from their spiritual, social, customary, and economic use of land and water.

[131] *Water Management Act 2000* (NSW) s 56.

[132] See, eg, *Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012* (NSW) s 40(1)–(2)(a).

[133] *Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012* (NSW) s 40(4)–(5).

[134] Poh-Ling Tan and Sue Jackson, "Impossible Dreaming: Does Australia's Water Law and Policy Fulfil Indigenous Aspirations?" (2013) 30(2) *Environment and Planning Law Journal* 132.

[135] Sarah Ann Wheeler and Dustin E Garrick, "A Tale of Two Water Markets in Australia: Lessons for Understanding Participation in Formal Water Markets" (2020) 36(1) *Oxford Review of Economic Policy* 132.

[136] Cameron Holley and Darren Sinclair, "Governing Water Markets: Achievements, Limitations and the Need for Regulatory Reform" (2016) 33(4) EPLJ, 301, 303.

water prices and adverse socio-economic impacts on rural communities.[137] The confluence of pressures at play in the MDB have resulted in a complex, market-based but highly regulated structure of water governance that strongly influences the prospects for securing Aboriginal interests in water.

The *Water Act 2007* (Cth) and associated regulatory instruments gave effect to efforts to "deepen" the water market by measures designed to remove barriers to trade within and between jurisdictions.[138] Competition policy has been strongly pursued as a policy driver in governing the water market.[139] Under these conditions, the water market in the MDB has expanded rapidly, and the value of water entitlements and seasonal allocations has escalated, especially in periods of drought.[140] The emphasis on "at a distance" commercial trading regimes in water have proved inimical in many respects to the NWI objective of enhancing Indigenous engagement in water governance in the MDB. Ironically, though, the structural water reforms in the MDB, when combined with the historic exclusion of Aboriginal peoples from land and water holdings create a situation where participation in the water market is one of the few avenues for MDB Aboriginal groups to obtain water entitlements that allow for commercial and non-commercial uses.[141]

F. Water Markets: Mainstreaming Indigenous Interests?

Water markets are unlikely to be displaced in the MDB, despite growing concerns about their capacity to resolve longer-term structural problems in regional Australia.[142] The exclusion of Aboriginal peoples from access to water markets is endemic to those structural problems. Predominantly, land-based models such as native title, while important, are constrained in their ability to address barriers to First Nations obtaining water entitlements.[143] Native title water rights are also attended by uncertainties as to whether they may be used for commercial purposes.[144] Moreover, in a situation of fully allocated or over-allocated catchments and growing pressure on water resources, there is a further narrowing of the policy choices available to Aboriginal peoples.

Recent policy initiatives have sought to enhance the capacity of First Nations to engage with water markets. The Victorian Government has provided funding for Aboriginal water-related Economic Development under its Water Plan.[145] The Commonwealth government also has sought to achieve enhanced Aboriginal access to market-based water entitlements as part of wider policy platforms, and by specific use of funding mechanisms. The Commonwealth, for example in 2018, granted AU$40 million for the purchase of Indigenous water entitlements.[146] The Indigenous Land and Sea Corporation (ILSC) now holds these funds for water market purchases for Aboriginal organisations as part of its expanded portfolio.[147] In concert, the *Aboriginal and Torres Strait Islander Amendment (Indigenous*

[137] Janice Gray, "Snags in the System? Water Trading and the Market: A Review of the Negatives" (2013) 28(3) *Australian Environment Review* 480, 480.

[138] The Basin Plan is a statutory instrument and there are associated Trading Rules and Market Rules.

[139] Janice Gray, "The Legal Framework for Water Trading in the Murray-Darling Basin: An Overwhelming Success?" (2012) 29(4) EPLJ 328, 329; Holley and Sinclair, n 136, 305.

[140] Tim Goesch, Peter Legg and Manannan Donoghoe, *Murray-Darling Basin Water Markets: Trends and Drivers 2002-03 to 2018-19* (Australian Government Department of Agriculture, Water and Environment) <https://www.agriculture.gov.au/abares/research-topics/water/murray-darling-basin-trends-and-drivers>.

[141] Productivity Commission, *National Water Reform, Inquiry Report,* Report No 87 (Australian Government, Canberra, 2017) 18.

[142] Holley and Sinclair, n 136, 304.

[143] Elizabeth Macpherson, "Beyond Recognition: Lessons from Chile for Allocating Indigenous Water Rights in Australia" (2017) 40(3) *University of New South Wales Law Journal* 1130, 1155.

[144] O'Donnell, n 86.

[145] Department of Environment, Land, Water and Planning, *Water for Victoria: Water Plan* (2016) 106 <https://apo.org.au/node/69812>.

[146] Indigenous Land and Sea Corporation (ILSC) (formerly Indigenous Land Corporation), *Annual Report 2018–19* (2019) 3 <https://www.transparency.gov.au/annual-reports/indigenous-land-and-sea-corporation/reporting-year/2018-2019>.

[147] ILSC, n 146.

Land Corporation) Act 2018 (Cth) extended the corporation's sphere of activity "to include water-based interests (salt and fresh)".[148] The ILSC functions now include acquisition of water-related rights and their return to Aboriginal or Torres Strait Islander corporations, as well as assistance (grants or loan guarantees) to Aboriginal or Torres Strait Islander corporations to acquire water-related rights, and assistance to Indigenous corporations in managing water.[149]

These initiatives may not meet every element of the Echuca Declaration vision for an inherent water right, but they do offer a new platform for achieving a range of First Nations' objectives for engagement in water governance and in the water market in the MDB. Nonetheless, a major fiscal barrier to achieving a more expansive range of First Nations objectives in respect of water entitlements in the MDB are the limits to public funding.[150] The mounting costs of water and involvement in trading are clear constraints on Aboriginal participation in water markets.[151] These constraints are more acute where Indigenous peoples' interests are treated as "just another stakeholder" in an era of increased calls for government funding intervention in the light of "market failures" in the MDB. Even where Aboriginal communities hold water entitlements there are a range of pressures operating that may mean that these holdings are traded in the face of financial pressures on the Aboriginal organisations that hold them. Recent research from New South Wales by Hartwig, Jackson and Osborne found that almost one fifth of Aboriginal water holdings by volume were lost over 2009–2018 (at least 17.2% in standardised terms).[152] This same research found no Aboriginal organisations had secured any new water entitlements over the same decade (by way of purchase on the open water market or by any other method). The authors conclude that such declines in Aboriginal water ownership, should they continue under current policy settings, will further reduce options for Aboriginal communities to enjoy the purported benefits of water access and water market participation.

The difficulties in the MDB of having to retrospectively purchase water entitlements for Aboriginal people, due to their exclusion in the initial "sharing" arrangements, highlights the need to dedicate water reserves for Aboriginal purposes in advance of full marketisation of water. This lesson is one that northern jurisdictions are grappling with, as the following section demonstrates.

V. Case Study Three: Reserving Water for Indigenous Economic Benefit in North Australia

Approximately one-third of north Australia's 310,000 inhabitants are Indigenous and the Indigenous proportion of the total population is substantial.[153] Indigenous peoples are major landholders and therefore have considerable control over land use, and relatively more influence in policy debates about development than do Indigenous traditional owners in the country's south-eastern region. Land restitution schemes and the recognition of native title have returned very substantial amounts of territory to Indigenous control, especially in the Northern Territory, where approximately half of the jurisdiction is held communally in trust. In contrast to pastoralism, the relatively low rates of farming of land in north Australia has meant that Indigenous involvement in agriculture has been restricted to this point.[154]

Water allocation plans and water extraction licences are the primary means through which water legislation in this region governs the use of groundwater and surface water. Yet, planning for water allocation or sharing is a relatively new management practice in this region. The ability to trade is still at a formative

[148] ILSC, n 146.

[149] ILSC, n 146.

[150] The ILSC divests to Aboriginal and Torres Strait Islander Corporations creating issues of security and long-term retention of water "assets".

[151] Hartwig, Jackson and Osborne, n 102.

[152] Hartwig, Jackson and Osborne, n 102.

[153] Dean Carson, Andrew Taylor and Suzanne Campbell, *Demographic Trends and Likely Futures for Australia's Tropical Rivers* (Land and Water Australia, 2009) 4.

[154] Sue Jackson and Marcus Barber, "Historical and Contemporary Waterscapes of North Australia: Indigenous Attitudes to Dams and Water Diversions" (2016) 8 *Water History* 385, 389.

stage and occurs only in discrete areas identified within a small number of water allocation plans.[155] Speculation about the potential to harness water has, however, been constant this century as federal and northern State governments examine the potential for further land and water development, particularly irrigated agricultural development reliant on surface water dams and groundwater exploitation.

As described above, water regulation processes in the rest of the country offer Indigenous peoples a low base from which to raise water rights standards in the north. Thus, Indigenous water advocates have been obliged to look for new models of Indigenous rights recognition. In developing policy options, representative organisations have been mindful of the multi-faceted and multivalent nature of water, as well as changes to its governance instituted in other parts of the country and implemented nationally, especially water markets.[156] Although environmental and socio-cultural impacts are clearly a major concern for northern Indigenous communities,[157] the focus here is on policy options to improve and ensure Indigenous access to water for commercial purposes.[158] Indigenous leaders look to the experience of southern Australia where water rights are inequitably distributed and water use is now capped. They point to the risk of excluding northern Indigenous communities from current water allocations, especially those groups who are in the process of claiming land and/or may not have developed plans to use water commercially. Reserving water is therefore seen as a critical means of advancing current and future Indigenous business enterprises that require an entitlement. Additionally, reserving water provides a means of accessing potential revenue streams derived from trading water to non-Indigenous enterprises, should water trading commence. The former National Water Commission stressed the need for a water reserve in 2012.[159]

Water reserves to meet the social and economic aspirations of Indigenous communities have now been set aside in a number of water plans in Queensland and the Northern Territory. Officials in Western Australia are considering adopting this policy innovation. We discuss the developments in Queensland and the Northern Territory in turn.

A. Queensland

The *Water Act 2000* (Qld) provides that Aboriginal or Torres Strait Islander peoples can "take or interfere with" water for traditional activities or cultural purposes (excluding commercial purposes) without the need for a water access entitlement, reflecting the approach of the native title framework.[160] In 2018, the *Water Act 2000* (Qld) was amended to include a requirement for all water plans to consider cultural outcomes for Aboriginal people and Torres Strait Islanders separately from social, economic and environmental outcomes. The amendment also required more direct consideration of the values and uses of water resources in a plan area to Aboriginal peoples and Torres Strait Islanders (see the *Mineral, Water and Other Legislation Amendment Act 2018* (Qld)).[161] The Act defines cultural outcomes to mean a "beneficial consequence to an Aboriginal party or Torres Strait Islander party relating to aquifers, drainage basins, catchments, sub-catchments or watercourses."[162] Macpherson states that these

[155] Sue Jackson and Jon Altman, "Indigenous Rights and Water Policy: Perspectives from Tropical Northern Australia" (2009) 13(1) *Australian Indigenous Law Review* 27, 29.

[156] Jackson and Altman, n 155; William D Nikolakis, R Quentin Grafton and Hang To, "Indigenous Values and Water Markets: Survey Insights from North Australia" (2013) 500 *Journal of Hydrology* 12, 14.

[157] Anne Poelina, Kathrine S Taylor and Ian Perdrisat, "Martuwarra Fitzroy River Council: An Indigenous Cultural Approach to Collaborative Water Governance" (2019) 26(3) *Australasian Journal of Environmental Management* 236.

[158] Jackson and Altman, n 155; William Nikolakis, "Providing for Social Equity in Water Markets: The Case for an Indigenous Reserve in Northern Australia" in R Quentin Grafton and Karen Hussey (eds), *Water Resources Planning and Management* (CUP, 2011) 629, 642.

[159] National Water Commission, "Indigenous Access to Water Resources" (Position Statement, 2012) 2 <http://webarchive.nla.gov.au/gov/20160615060726/http://www.nwc.gov.au/nwi/position-statements/indigenous-access>.

[160] Macpherson, n 1, 84.

[161] Macpherson, n 1, 84.

[162] *Mineral, Water and Other Legislation Amendment Act 2018* (Qld) s 281.

amendments are likely to result in improved consultation but notes that they do not contain any references to "indigenous-specific water allocations."[163]

However, legislation pertaining to Cape York goes further. Reserves were established in Cape York, in 2008, as a direct result of a landmark multiparty negotiated agreement – the 1996 Cape York Agreement and the enactment of the *Cape York Peninsula Heritage Act 2007* (Qld).[164] Aboriginal people hold more than 70% of Cape York in the form of native title and Aboriginal freehold ownership.[165] The *Cape York Peninsula Heritage Act* requires that any water plan made under the *Water Act 2000* (Qld) must provide for a water reserve, for the purpose of helping Aboriginal communities in the area achieve their economic and social aspirations (s 27). Later, more reserves were established pursuant to the *Wild Rivers Act 2005* (Qld), bringing the total to nine by 2013.[166] The Wild Rivers legislation aimed to preserve the value of a river that had not been significantly altered from its natural state, by declaring management areas subject to a cap on resources, and by legislating rules and limits on new development activities. Twelve river systems were declared wild river areas with all, but eleven, being in Cape York. Outside of Cape York, two other Indigenous reserves have been allocated. One in the Cooper Creek Water Resource Plan 2011, which came into existence when Cooper Creek was declared a wild river. The second was enacted in a major groundwater plan, the Great Artesian Basin (GAB), and it has substantially increased the spatial extent of water allocations for Indigenous use.[167]

The initial Cape York reserves were small.[168] Water allocated through these reserves took the form of water licences and were not be tradeable, unlike the majority of allocations that result from water plans.[169] There was no legal requirement that the water in the reserve be owned or managed by the native title holders or traditional owners of the area.[170] There is little evidence that Indigenous people were engaged in the water planning process that set these limits on use, at least in the Gulf and Mitchell Plan areas.[171]

The Wild Rivers legislation was repealed in 2014, two months after the Federal Court ruled that the former declarations over three Cape York river systems were invalid.[172] In 2019, the Cape York Water Plan replaced the reserves established under the Wild River declarations made in Cape York, by providing for Aboriginal and Torres Strait Islander peoples to access unallocated water held as reserve.[173] The Water Plan substantially increased the amount of water that may be granted to Indigenous benefit to a figure that amounts to approximately 94% of unallocated water available for use on Cape York. The unallocated water reserve is set aside for a range of economic opportunities consistent with the objectives of the *Cape York Peninsula Heritage Act 2007* (Qld), and as set out in the Water Management Protocol.[174] According to the Cape York Aboriginal Land Council, this unallocated water will need to be shared across 15 Cape York river catchments, and among Cape York native title and Aboriginal land-holding corporations in each catchment, proportional to the area of land where they hold interests.

[163] Macpherson, n 1, 84.

[164] Tan and Jackson, n 134, 146.

[165] Evidence to Joint Standing Committee on Northern Australia, Parliament of Australia, 29 October 2019 (Gerhardt Pearson, Cape York Land Council) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommjnt%2F799db0d8-3df0-454e-8a81-05ba6a6136fd%2F0002%22;src1=sm1>.

[166] O'Donnell, n 86, 93.

[167] *Water Plan (Great Artesian Basin and Other Regional Aquifers) 2017* (Qld), made under the *Water Act 2000* (Qld).

[168] Tan and Jackson, n 134, 146.

[169] Tan and Jackson, n 134, 146.

[170] O'Donnell, n 86, 93.

[171] Tan and Jackson, n 134, 146.

[172] *Koowarta v Queensland* (2014) 316 ALR 724; [2014] FCA 627.

[173] *Water Plan (Cape York) 2019* (Qld).

[174] Department of Natural Resources, Mines and Energy (Qld), *Cape York Water Management Protocol* (June 2019).

Water thus reserved may be used directly by an Aboriginal corporation, or it may be traded with a third party or as part of a lease of Aboriginal freehold. The reservation of such a large volume of water is expected to leverage positive economic outcomes, because "almost all land users on Cape York will need to trade with their local Aboriginal corporation to access water to support their economic activities".[175] The Cape York Aboriginal Land Council notes that water has not been reserved in two Cape York catchments because of significant pre-existing allocations. One of these catchments contains the region's most productive agricultural soils, some of which is found on large areas of previously cleared Aboriginal freehold land held by an Aboriginal corporation with aspirations to use the land for high value irrigated horticulture. The Council says that "this Aboriginal land cannot be used for its best possible use, and Aboriginal economic development aspirations will be thwarted as long as water is not available".[176]

A reserve for Indigenous use was also included in the revised water plan for the Queensland portion (approximately 70%) of the GAB. The GAB is Australia's most significant groundwater system underlying approximately one fifth of the continent and one of the world's largest freshwater groundwater sources. Artesian water sustains 80 regional Queensland towns, along with countless ecosystems, springs, and sacred Indigenous cultural heritage sites. The *Water Plan (Great Artesian Basin and Other Regional Aquifers) 2017* (Qld), made under the *Water Act 2000* (Qld), stipulates a number of outcomes from the management and allocation of water in the GAB. Section 12(a)(iv) refers to the need "to make water available for future development and social and cultural activities that depend on water, including for the aspirations of Aboriginal peoples and Torres Strait Islanders". The GAB Plan establishes an economic reserve "for the purpose of helping Aboriginal persons or Torres Strait Islanders to achieve their economic aspirations": s 17(4).

The Plan reserves a total of 880 ML for use by Aboriginal and Torres Strait Islanders, representing 3.5% of the total unallocated water reserves. Volumetric limits on this particular use are set for each of the 39 groundwater sub-area (see Table 3 in the Act). Taking water from an Aboriginal and Torres Strait Islander economic reserve requires a licence (s 19), according to the process set out in the *Water Act 2000* (Qld). There is no volumetric limitation on licences from this reserve, other than an overall cap for each groundwater unit/sub-area. Section 28 allows a person to take or interfere with water (ie, without a licence) for a project for the economic or social benefit of Aboriginal and Torres Strait Islanders, if certain conditions are met; one of those conditions being that the maximum amount taken is no more than 2 ML: s 28(2)(a). The Water Management Protocol associated with the Plan states that a project of social or economic benefit to Indigenous people is subject to a maximum take of water of 2 ML during a water year, from a water bore that is controlled (s 28 of the plan).

B. Northern Territory

In the absence of a legislative requirement compelling the Executive to recognise Indigenous rights to water for commercial purposes, officials of the Northern Territory's water agency first included a Strategic Indigenous Reserve (SIR) in the Katherine (Tindal aquifer) Water Allocation Plan in 2009.[177] Soon after, the water agency established reserves for Indigenous use in two other draft water plans in neighbouring water resource areas (Mataranka and Oolloo).[178] After a hiatus of 10 years, in 2019, the NT government formally adopted a policy on Strategic Aboriginal Water Reserves (SAWR) and amended the *Water Act 1992* (NT) accordingly. Another allocation plan has since set aside water for Indigenous use in the Western Davenport Ranges area of central Australia.

[175] Cape York Land Council Aboriginal Corporation, Submission to the Australian Senate Select Committee on the Effectiveness of the Australian Government's Northern Australia Agenda (2019) 9.

[176] Cape York Land Council Aboriginal Corporation, n 175.

[177] Sue Jackson and Marcus Barber, "Recognition of Indigenous Water Values and Resource Governance in Australia's Northern Territory: Current Progress and Ongoing Challenges for Social Justice in Water Planning" (2013) 14(4) *Planning Theory and Practice* 435.

[178] Jackson and Barber, n 177, 446–447.

The amounts of water for Indigenous use vary considerably across the allocation plans, and there was originally no consistent method used in their determination. The first plan applied to the Tindall aquifer in the vicinity of Katherine, where agricultural water use had been growing and groundwater extraction was reaching its sustainable limit. Indigenous people comprised approximately 25% of the town population and almost 30% of the wider regional population.[179] The Katherine Plan (2009–2019) mandated 680 ML for Indigenous commercial development, if the existence of native title was recognised within five years of plan commencement. This amount of water was determined by the percentage of the plan area under native title claim in 2009 – some 2% approximately. That native title claim was not determined during the life of the first plan, and so no Indigenous specific allocation was established.

In the other water plans developed soon after, the water agency substantially amplified the scale and significance of the SIR. Indigenous land ownership in the relevant plan area has been an influential factor in determining the size of the Indigenous reserve. For instance, the draft Mataranka Plan of 2011 set aside 25% of the water available for Indigenous peoples to use commercially. At the time, in that plan area, the Indigenous population represented 70% of the total, and land ownership rates were similar.[180] The reserve could be accessible by the grant of licences (entitlements) that would be saleable as a temporary trade. Although the allocations attached to these reserves are tradeable on a temporary basis, they are not fully transferable property rights.[181] The reserve will only exist for the life of the respective water plan (whereas entitlements compliant with national water policy are perpetual). The reliability category of these licences is not yet determined, but O'Donnell speculated that it "may well not be a priority category because of the preference given to existing licences".[182]

In 2014, the NT Government rejected the SIR policy (its water agency had not endorsed or finalised the two draft plans, Mataranka and Oolloo). Consistent lobbying by Indigenous groups and others resulted in a renewed commitment from a new Labor government which formally adopted a SAWR Policy in 2017, and amended the *Water Act 1992* (NT) in 2019. The intention of the new policy is to "reduce barriers and disadvantage experienced in competing for access to water with other commercial interests".[183] SAWRs are now an enduring requirement of water allocation plans, and only authorised Aboriginal landowners or other parties can extract water from such a reserve.

Under the amending legislation, the *Water Further Amendment Act 2019* (NT), access to water from a SAWR is tied to ownership of, or interest in land. The amending legislation adds a definition of "Aboriginal water reserve" to the *Water Act 1992* (NT) that comprises, "a reserve of water allocated in a water allocation plan for Aboriginal economic development in respect of eligible land designated under section 22C". Section 22C requires that the land must be greater than 1 ha in size and have water resources on, under or adjacent to it. According to s 4B, eligible land includes land defined in s 3(1) of the *Aboriginal Land Rights Act 1976* (Cth); land to which a determination of exclusive possession has been made under the *NTA*; freehold land; or land held under a lease that expires on or after the term of the water allocation plan. It is important to note that land under a non-exclusive possession native title determination is not considered to be eligible land. The definition will mean that a large area of the Northern Territory will be ineligible, because the majority of its native title determinations are non-exclusive determinations over pastoral leases. Indeed, there is "negligible" land held under exclusive native title in the Northern Territory.[184] The need to gain the consent of pastoralists was seen by the

[179] David Cooper and Sue Jackson, *Preliminary Study on Indigenous Water Values and Interests in the Katherine Region of the Northern Territory* (CSIRO, 2008) 15 <https://www.researchgate.net/publication/257985612_Preliminary_Study_on_Indigenous_Water_Values_and_Interests_in_the_Katherine_Region_of_the_Northern_Territory>.

[180] Cooper and Jackson, n 179, 440.

[181] O'Donnell, n 86, 97.

[182] O'Donnell, n 86, 96.

[183] Department of Environment and Natural Resources (NT), *Indigenous Strategic Reserves* (Stakeholder Discussion Paper, 2017) 3.

[184] Northern Land Council, Submission No 8 to the Economic Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, 11 September 2019, 19, <https://parliament.nt.gov.au/__data/assets/pdf_file/0006/729717/Submission-8-Northern-Land-Council.pdf>.

NT Legislative Assembly's Economic Policy Scrutiny Committee as an impediment to "setting up commercial developments" and, because this could result in "significant amounts of water remaining unused in Aboriginal water reserves", was inconsistent with the SAWR Policy Framework.[185]

The amount of water to be made available for Indigenous use is proportional to the percentage of eligible Aboriginal land with direct access to water resources, following a stepped scale. SAWRs will not be included in plans where Aboriginal landowners do not hold any land. In an area with more than 0% but less than 10% of eligible land, 10% of the consumptive pool will be reserved for Aboriginal use. If there is between 10% and 30% of eligible Aboriginal land in the plan area, then the reserve will correspond with the actual percentage. The reserve is capped at 30% in an area containing greater than 30% of eligible Aboriginal land. If the water plan area is comprised of 100% eligible Aboriginal land, as in some areas of Arnhem Land or the Tiwi Islands, then a Strategic Reserve is not warranted because, according to the Department of Environment and Natural Resources, "there is no competition for water".[186] The Department also states that, in such a situation, they would be unlikely to prepare a water allocation plan, instead a management strategy would suffice.

The effect of this rule on areas like Katherine, where agricultural land use is concentrated, can be seen from the water allocation plan for the Tindall Aquifer which was updated in 2019, and which now provides Aboriginal people with access to water from the aquifer for economic development purposes. As the area of eligible land is less than 10% of the area of the water resource, the volume of water to be allocated to the SAWR will be 10% of the available consumptive pool (3,235 ML/yr). This is substantially more than the amount to be reserved in the first plan for this area (and was then dependent on a successful native title claim). Consumptive water is over-allocated in this plan area and the effects on Aboriginal access are discussed below.

Aboriginal people, who have existing land rights under the legislation, or their authorised representatives, will have the right to give or withhold consent to access reserved water. When negotiating temporary and conditional consent to access the Reserve, Aboriginal groups are able to exchange water for employment, payments, or a financial stake in a project. Access will be obtained by an extraction licence and other standard requirements of the *Water Act 1992* (NT); for example, public notification. Trading rules will be specified in the water allocation plan; however, permanent trading is prohibited.

The SAWR policy under consideration during 2018 influenced the development of the NT's fourth water plan, which included a reserve for Indigenous use in a region south of Tennant Creek. Finalised in 2018, the Western Davenport Ranges Water Allocation Plan replaces the plan declared in 2011.[187] The plan is centred on the traditional lands of the Kaytetye, but also encompasses parts of the country of the Alyawarr, Warramungu, and Warlpiri peoples. The Plan states that approximately 41% of the District is recognised as Aboriginal land, and that most of the water sources are of cultural significance.[188] Pastoralism is the major land use. The WAP allocates surface and groundwater "resources" from within three management zones. One of the objectives of the WAP is to "protect Aboriginal cultural values associated with water and provide access to water resources to support local Aboriginal economic development".[189] Environmental sustainability and equitable regional development are also objectives. Traditional owners were consulted during the development of the plan, which also entailed the identification of areas of cultural significance. The Plan recommends that a Traditional Owner Advisory Committee or similar mechanism be established to ensure Aboriginal participation in plan implementation, and that the NT water agency work with local Aboriginal Community Rangers in assessing, monitoring, and

[185] Legislative Assembly of the Northern Territory, Economic Policy Scrutiny Committee, *Inquiry into the Water Further Amendment Bill 2019* (October 2019) 19 <https://parliament.nt.gov.au/__data/assets/pdf_file/0011/743645/100-19-Signed-Report-on-the-Water-Further-Amendment-Bill-2019.pdf>.

[186] Legislative Assembly of the Northern Territory, n 185, 21.

[187] Department of Environment and Natural Resources (NT), *Western Davenport Water Allocation Plan 2018–2021* (2018) (*DENR(NT)*).

[188] *DENR(NT)*, n 187, 11.

[189] *DENR(NT)*, n 187, 16.

preserving cultural values. In consultations, traditional owners prioritised the conservation of cultural and environmental values over new business opportunities. The Western Davenport Ranges Plan acknowledges the role of customary law in water management in this region:

> Traditional Owners are subject to the rules and institutions associated with customary law. It is important to recognise Traditional Owners as being central to the interpretation of customary law as it relates to the management of cultural values. This includes obligations for managing country, managing access to sites, and passing on knowledge and law, which are key aspects of cultural identity. Hence the use of a water resource is not only physical and extends to other cultural values through activities such as visiting and maintaining sites, sharing and teaching cultural knowledge, conducting ceremony, or participating in management decisions.[190]

The Plan allocated 24% of "consumptive water" (or 33,325 ML pa) across the three regions to the SAWR, based on the calculation that the proportion of "eligible land was only 26%". In this Plan, the reserve is exclusively accessible to eligible Aboriginal people to use or trade. It is treated as "a sub-class of water allocated for consumptive use after public water supply and rural stock and domestic use allocations have been made as a priority".[191] Reserved water will not be reallocated if it is not used within a certain timeframe. The Plan also acknowledges the need for the Department of Environment and Natural Resources to "implement a strategy to facilitate the uptake of the SWR" in partnership with Aboriginal Land Councils.

The SAWR policy and amendments to legislation in the Northern Territory, and recent changes to water law and water plans in Queensland, are an advance on previous law and policy. However, there are a number of points to consider and issues to monitor when evaluating these water rights. First, there is no legislative protection of an Indigenous water allocation under the Queensland water statutes.[192] Macpherson contextualises this vulnerability by reference to the principle of "sustainable management" of water resources in the *Water Act 2000* (Qld) which includes, "recognising the interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning".[193]

Second, access to water is tied to ownership of land and, in the Northern Territory, the narrow definition of eligible Aboriginal land has been raised as a particular limitation. Prior to the formal adoption of the SAWR policy, O'Donnell argued that the existence of a SIR, as then conceived by Indigenous advocates could, if more consistently included in water plans, overcome two barriers to justice in the Australia system of water allocation. It could provide assurance of access to water, as the water market emerges and a community's economic aspirations take shape. A reserve could also allow those "indigenous people without land rights or native title guaranteed access to water for development purposes".[194] The reserves described above fall short of that vision, because northern governments have tied water access to land ownership without addressing the effects of historical acts of appropriation of Aboriginal land. These steps have only partially addressed the inequity in our system of allocating water and cannot fully satisfy Indigenous demands, until they address the legacy of past land and water distributions. As the Cape York Land Council and Northern Land Councils argue, in separate submissions to government processes, with some water allocation plan areas – or sub-catchments in the case of the Cape – water is over-allocated or fully allocated, and the Reserves will remain "notional" until sufficient water is returned to the system.[195] In Katherine, for example, because the groundwater in the system is currently over-allocated, there is "no water available to grant licences using water from the Strategic Aboriginal

[190] *DENR(NT)*, n 187, 28.

[191] *DENR(NT)*, n 187, 41.

[192] Macpherson, n 1, 85.

[193] Macpherson, n 1, 85; see *Water Act 2000* (Qld) s 10(v).

[194] Michael O'Donnell, *NAILSMA TRaCK Project 6.2 Indigenous Rights in Water in Northern Australia* (2011) 237. See also Jackson and Langton, n 4.

[195] Northern Land Council, n 184, 1.

Water Reserve".[196] For this reason, the Plan establishes an allocation tied to the SAWR, which it refers to as a "notional allocation".[197]

The narrow definition of "eligible Aboriginal land" in the *Water Further Amendment Act 2019* (NT) will also preclude Aboriginal water use from substantial tracts of land where the interests of the pastoral sector have been prioritised. A further constraint on the benefit to be obtained from Reserves stems from the relative lack of access that Indigenous groups have to capital and infrastructure, yet these policies do not extend to providing such support. Although some of the water plans in the Northern Territory protect the Reserve from under-utilisation, some Aboriginal organisations are fearful that should competition intensify in the future and they do not use the reserved water, they may lose it.

Lastly, while some may applaud the incorporation of a mechanism like an Indigenous or Aboriginal reserve for the relative ease with which it can be institutionalised in the water planning framework, these law and policy reforms were not open to a meaningful process of negotiation with Indigenous communities. Indigenous representative bodies across the north sought to improve the opportunities for Indigenous economic development emerging from water reform.[198] However, there was little room for exploration of alternative forms of property in water as the Reserves were established, and governments did not widely engage with Indigenous peoples throughout these vast and remote regions. Submissions from Indigenous organisations to the Bill to amend the *Water Act 1992* (NT) show that their position on definitions relating to cultural values and objectives were rejected.

VI. Conclusion

Australia has sought to situate itself as a world leader in innovative water law reform. That reputation is primarily based on the COAG structural reforms centred on unbundling water entitlements and the introduction of water markets, while simultaneously seeking to address over-allocation and environmental degradation. The package of reforms is actively promulgated in overseas jurisdictions, including through the Water for Development aid program.[199] The model has also been endorsed through domestic intergovernmental policies for progressive adoption across Australia, irrespective of regional differences. By contrast, the far-reaching impacts that even "reformed" water laws can have in continuing the dispossession and exclusion of Aboriginal peoples and Torres Strait Islanders have been identified in our three case study contexts. In particular, water market models that require "full allocation" of water entitlements as a prerequisite to their implementation can operate in an exclusionary manner, but water planning processes are not immune from perpetuating inequity. Belatedly, many jurisdictions in Australia have introduced measures that draw across the "Water Rights" and "Increase Influence" approaches to water reform, with consultative and representative models the most widely adopted. Some jurisdictions are poised to develop more transformative engagements through treaty negotiations. The range of experimentation in Australia may provide learnings for extrapolation to other national settings – albeit with caution to ensure compatibility to local context.[200] Even so, the outcomes for Australia's Indigenous Peoples remain patchy in terms of the attainment of dedicated water entitlements and statutory water reserves. First Nations' advocacy continues for more robust inclusion of Indigenous interests in water, as Australia enters another critical stage in its ongoing water reform agenda. It remains to be seen whether Australia emerges as a leading jurisdiction in terms of how it engages with the challenge of securing beneficial outcomes for Indigenous interests in water.

[196] *Cape York Water Management Protocol*, n 174, 52.

[197] *Cape York Water Management Protocol*, n 174, 84.

[198] See O'Donnell, n 194; Jackson and Altman, n 155.

[199] Australian Government: Department of Foreign Affairs and Trade, *Water for Development* <https://dfat.gov.au/aid/topics/development-issues/water-for-development/Pages/water-for-development.aspx>.

[200] Rebecca Swainson and Rob de Loe, "The Importance of Context in Relation to Policy Transfer: A Case Study of Environmental Water Allocation in Australia" (2011) 21(1) *Environmental Policy and Governance* 58, 58.