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Fluid mechanics:

the practical use of native title for
freshwater outcomes

Nick Duff

JUNE 2017





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AIATSIS research report

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First published in 2017 by AIATSIS Research Publications

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National Library of Australia Cataloguing-in-Publication entry

Creator: Duff, Nick, author.
Title: Fluid mechanics: the practical use of native title for freshwater outcomes/Nick Duff
ISBN: 9781922102676 (pdf)
9781922102683 (ebook)
Subjects: Native title (Australia)
Water rights--Australia.
Water--Law and legislation--Australia.
Aboriginal Australians--Land tenure.

Other Creators/Contributors:

Australian Institute of Aboriginal and Torres Strait Islander Studies

Typeset in Arial

Cover: 'Ground/Water' © Nick Duff 2017

AIATSIS acknowledges the funding support of the Department of the Prime Minister and Cabinet (PM&C).



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Introduction

For more than two centuries of Australian¹ law and policy regulating freshwater resources, the rights and interests of Aboriginal² people were largely ignored until quite recently. Although statutory land rights have existed since the 1970s, and native title has been recognised since 1992 with the courts gradually clarifying a range of questions about its application to land and marine areas, the laws that regulate freshwater consistently failed to address Aboriginal peoples' needs, priorities, and traditional-legal entitlements.

Modern Australian freshwater policy, which emphasises the need to balance economic, environmental and other outcomes, was most recently articulated at the national level in the National Water Initiative (NWI) intergovernmental agreement.³ The NWI commits state, territory and Commonwealth governments to a range of reforms including the recognition of "indigenous needs in relation to water access and management".⁴ Much of the policy and academic work in this regard has focused on three areas for reform: Aboriginal involvement in planning and management processes, Aboriginal access to water resources for economic development, and the protection of Aboriginal peoples' priorities and values in relation to water.⁵ Researchers, policymakers and advocates have had to deal with the issue of how Aboriginal peoples' relationships to country should be accommodated in water planning and management. Aboriginal and non-Aboriginal viewpoints on these issues are diverse, as was demonstrated at the First Peoples' National Water Summit in 2012.⁶

Native title is one of the elements in the existing legal framework determining Aboriginal rights in water, though certainly not the only one.⁷ Of the three Indigenous-specific commitments in the NWI, two centre on native title:

53. Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need⁸ to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth *Native Title Act 1993*.
54. Water allocated to native title holders for traditional cultural purposes will be accounted for.

The NWI assumes that native title is relevant under both current water planning legislation and future reforms. This paper focuses on the first of these, describing the practical possibilities and constraints within the existing system. The paper outlines the scope within which native title holders can currently promote and protect their priorities, rights and interests relating to freshwater. In light of the slow and difficult reality of water reform at the state and territory level and native title reform at the Commonwealth level,⁹ there is value in gaining an understanding of what is practically possible *now*. Although



this paper does not advocate any particular reforms, its conclusions may suggest future directions for policy.

This paper identifies ways in which native title can be used to promote the freshwater-related objectives of Aboriginal people. No assumptions are made about what those objectives are or should be. Aboriginal peoples' aspirations and priorities can involve freshwater regulation in one of two ways: using water for their own purposes; or preventing other people using or interfering with particular water resources. This paper has two parts, which deal with these consumptive use and protective situations in turn.

In relation to the consumptive use of water resources, the paper concludes that the *Native Title Act 1993* (Cth) (Native Title Act) privileges the environmental and economic objectives of states' and territories' natural resource management regimes over the claims of native title holders. Native title affords only very limited exemptions to water licencing regimes and provides no legal basis to force governments to grant water licences. Generally, the rights of native title holders to take water without a licence are equivalent to any other landholder: domestic purposes, watering stock and (sometimes) small gardens. Depending on how liberally courts are willing to interpret the relevant legislation, there may be some scope for expanding from these generic landholder rights to encompass the watering of culturally significant ecological sites or the establishment of non-market-oriented irrigation or aquaculture projects. Subject to one extremely speculative exception, the current law does not allow native title holders to use water for commercial purposes without a licence.¹⁰ So, to establish a commercial irrigation project, native title holders must either go through the mainstream system or convince the government or some other party to help them get legal access to the water they need. Native title does provide traditional owners with potentially valuable sources of leverage, which may be exploited to obtain access to water resources.

Distinct from the taking and using of water resources is the issue of preventing the depletion or degradation of water resources, and protecting things that depend on those resources. Here, native title provides much more tangible and direct legal tools to traditional owners. First, in some cases native title holders may be able to use 'exclusive possession' rights to deny physical access to the land from which water resources might otherwise be accessed, though this is only useful to the extent that prospective developers do not have other means of accessing the same resources. Second, the 'future acts' regime under the Native Title Act provides both a direct means of challenging proposed developments that might impact freshwater and an indirect source of bargaining leverage that can be used to minimise impacts or be compensated for them. Third, native title may also give traditional owners legal standing to participate in, or to challenge, administrative decisions by which governments authorise new developments. Fourth, the common law torts of nuisance, trespass and negligence may provide native title holders with legal remedies against interference with their water-related rights and



interests. Finally, native title holders can make agreements with prospective developers to prevent or limit potential impacts.

These conclusions, which are primarily relevant to native title holders, also have implications for water reform at the state and territory level:

- Even though the Native Title Act gives governments considerable ‘freedom of movement’ in water planning, it does not give them freedom from consequences. The cost of potential compensation liability means native title cannot be ignored in water planning or licensing decisions.
- To identify and avoid negative environmental, social, cultural or economic impacts on native title holders, water planners need to consult and negotiate with them. No simple formula exists for volumetric allocation or similar. Particularly in light of recent case law indicating the importance of specific cultural and emotional harms (as opposed to a generic measure of damages),¹¹ governments would be well advised to engage early and seriously with native title holders to identify ways in which the harms (and therefore the consequent compensation liability) can be minimised or prevented entirely.
- The NWI would be a more practically useful guide to policy if, instead of using the vague but limiting language of ‘traditional cultural purposes’, it emphasised the need to build constraints into water planning (which should then feed into the approvals process for new developments) that protect the exercise and enjoyment of native title rights. This would help cut through the confusion, highlighted above, between freedom of movement and freedom from consequences, by forcing decision-makers to consider the consequences before taking action. Constraints could take the form of mandatory consultation and negotiation requirements in water legislation, or less rigid policy initiatives within water planning authorities.
- Advocacy for better access to water for economic development is probably best framed by reference to clearly articulated policy goals and clearly identified barriers, rather than by adversarial legalistic arguments based primarily on native title rights. Similarly, government action in this area should not be delayed or constrained by a risk-averse or adversarial focus on legal rights; the Native Title Act’s compensation provisions mean that potential liability can arise.

Legal recognition of native title in relation to water

In the Australian legal system, ‘native title’ is the name for rights and interests in relation to land and waters¹² that Aboriginal and Torres Strait Islander people hold under their own traditional laws and customs, and that are also recognised by the Australian legal system. Native title can be seen as a point of intersection between Indigenous legal systems and settler legal systems.



Under the Native Title Act, claimants can apply for a native title determination from the Federal Court of Australia. A determination is a document, attached to a Court order that sets out which people hold the rights, what rights they hold and the geographic area covered by those rights.¹³ A determination can be made by consent (with the agreement of the relevant state/territory government and other affected parties) or by contested litigation in which claimants bring evidence to prove their rights.

To be recorded in a native title determination, a particular native title right must:

- be proven to the satisfaction of the Court (or, in consent determinations, to the satisfaction of the other parties)
- not be inconsistent with any fundamental principle of the common law, and
- not have been extinguished by inconsistent legislation or by another person being granted an inconsistent interest in the land.¹⁴

A native title determination typically lists a number of specified rights. Every case is different, but the rights listed below are indicative of the most commonly recognised rights. Some determinations include, in addition to the 'activity-centred' rights described below, the right 'as against the whole world to the possession, occupation, use and enjoyment of the land and waters'¹⁵ to the exclusion of all others'. This is called a right to 'exclusive possession' and is the closest thing in native title to freehold or 'full ownership' of land. Often, a determination will recognise exclusive possession in a portion of the claim area, with the remaining area only being subject to so-called 'non-exclusive'¹⁶ rights. Some typical non-exclusive native title rights are:

- the right to live on the land, including the right to erect shelters and other structures
- the right to hunt, fish and gather on the land and waters (sometimes naming particular species that may be taken)
- the right to take, use and share natural resources from the land and waters (sometimes naming particular resources that may be taken)
- the right to conduct ceremonies and other cultural or spiritual activities on the area
- the right to teach on the area about the physical and spiritual attributes of the area
- the right to maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm¹⁷ (sometimes also worded as the right to protect places and areas of importance in or on the land and waters within the determination area¹⁸)
- the right to make decisions about the use of the land and waters of their respective estates within the determination area¹⁹
- the right to speak for the land and waters.²⁰



Most of these rights are dependent on or indirectly connected to freshwater in some way. But what about native title rights dealing *directly* with water? Again, the rights enjoyed by any particular group depend on what is written in their determination of native title, but it is possible to make some comments about the rights that *may* be recognised under the Native Title Act.

In the course of my research, I have found it useful to distinguish between the following four types of right:

- a general freedom to take and use water, not limited to any particular volume or purpose (this may be thought of as a *water-use freedom*, and may apply to groundwater and/or surface water)
- a right, enforceable against others, to receive a particular volume or proportion of available water; for example, a right to the natural flow of a watercourse or a right to take sufficient water for particular purposes (a *minimum-supply water right*)
- an enforceable right to prevent others from diminishing the naturally occurring quality of the groundwater or surface water (a *quality-protection water right*)
- a right to prevent other people from taking or using water from a particular resource, exercisable in the right-holder's absolute discretion²¹ (an *exclusive water right*).

For the purposes of this paper I will make the following assumptions. It is beyond the scope of this paper to provide the legal analysis that supports them:

- A water-use freedom is quite possible for native title holders to prove (although some respondents or courts may dispute that the evidence establishes a general right rather than one that is limited to personal, domestic, cultural or non-commercial communal needs) and is arguably consistent with the common law.²² The right may have been extinguished by legislation or inconsistent grants in some jurisdictions, depending on timing and location.
- Proving a minimum-supply water right is possible but not easy. Such a right is consistent with the common law, albeit with some qualification.²³ Whether or not it has been extinguished by water legislation or by the grant of water licences to third parties is a complex case-by-case question that depends on the wording and timing of the relevant legislation and licensing decisions.
- A quality-protection water right is capable of proof, consistent with common law principles and largely unaffected by water legislation.²⁴
- An exclusive water right may be difficult for native title claimants to prove and is almost certainly inconsistent with fundamental common law principles.²⁵ It would in any case probably be extinguished by legislation in most jurisdictions²⁶, though location and timing may be relevant to that issue.



On the basis of these assumptions, native title claimants should generally be able to obtain a native title determination that supports a water-use freedom and a quality protection water right, possibly with some sort of minimum-supply water right. The language used in most existing native title determinations is usually not so specific, generally speaking of a “right to take and use” water, albeit one that is often qualified in various ways (see below). Nevertheless, it is reasonable to suppose that this wording would still support the three rights just mentioned. As shown below, many of the strategies described in this paper do not involve the direct enforcement of water-specific rights, but instead involve either the indirect leveraging of water-specific rights or more direct applications of other native title rights. This means that in many cases the particular wording of water-specific rights will not necessarily be determinative.

Further, some native title determinations place explicit limits on the rights recognised; for example, specifying that the water can be used only for particular purposes or cannot be used for commercial purposes. These may appear in determinations because of difficulties in establishing general, rather than activity-specific, rights in relation to water; or, they may reflect a compromise in which native title claimants agreed to a qualified right in order to secure an otherwise acceptable determination. Where such limitations are included in a determination they can constrain the ability of native title holders to pursue their water-related objectives. But again, as shown below, such limitations do not affect all strategies available to native title holders.

The main situations in which the specific rights (and limitations) are directly relevant are:

- where native titleholders wish to establish — or credibly threaten — compensation liability for future acts or past acts affecting their water-specific rights, and
- where native titleholders attempt to use the common law torts of nuisance or trespass to restrain or seek compensation for interference with their water-specific rights.

In general, if the use or protection of water resources is important for a group, they should do what they can during the claim process to ensure that the fullest set of rights possible is recognised in their determination.



1. Taking and using water

Aboriginal individuals, communities or enterprises may have various reasons for accessing water for consumptive purposes. They may want water for small-scale uses such as drinking, washing and cooking. They may want to water ecologically or culturally important areas that have been deprived of natural periodic flooding because of human interference.²⁷ And, significantly, they may want water for economically productive projects²⁸ such as irrigated agriculture, horticulture or aquaculture.²⁹

Each state and territory in Australia has legislation regulating the extraction and use of freshwater resources. Broadly these laws do three things; they:

- prohibit the taking and using of water without authority
- create a system for granting licences or entitlements to take and use water, and
- specify certain situations where water can be used without a licence (usually described as usage for ‘domestic or stock’ purposes).

Water users under these regimes must apply for and pay for licences and allocations, or else rely on certain exceptions to the licensing regime (described below).³⁰ For many native title holders³¹ this ‘mainstream’ route may be prohibitive because of financial and other capacity constraints. Further, some native title holders may object to asking permission and paying for something they consider to be already theirs by right.

Beyond the mainstream route, native title holders logically have only four options (not all of which are plausible):

- invalidity — challenging the validity of the underlying legislation
- exemption — asserting that native title holders are exempt from the statutory prohibition on taking water without a licence
- grant of licence as of right — using native title to compel state or territory authorities to issue a licence or entitlement without charge
- bargaining leverage — using native title as a source of leverage that can be used to obtain a licence or entitlement.

Each of these four avenues is dealt with below. I conclude that under the current law bargaining leverage offers the clearest pathway for native title holders to gain access to substantial volumes of water for commercial purposes. With respect to the first two options, the Native Title Act ensures that the validity and integrity of water legislation prevails over native title rights. Although there is some scope for licence-free use of water, it is very limited. Like other landholders, native title holders can use water for ‘domestic and stock’ purposes under mainstream water legislation. In NSW and Queensland, the legislation makes specific provision for native title holders to use water for certain non-commercial³² purposes, perhaps extending to the cultural watering of



significant sites. In all states and territories, the Native Title Act provides an exemption from licensing requirements, again limited to non-commercial uses. This exemption may allow watering of cultural sites and perhaps non-commercial communal irrigation or aquaculture projects. I was unable to identify any legal avenue for compelling governments to grant water licences to native title holders — at most, native title holders can compel authorities to *consider* their interests in making planning or licensing decisions.

Invalidity

Two legal arguments could be used to challenge the validity of a particular piece of water legislation in its application to native title holders.

- Constitutional invalidity: The Commonwealth Constitution prohibits the Commonwealth from ‘abridg[ing] the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation’ by ‘any law or regulation of trade or commerce’.³³ The Constitution also prevents the Commonwealth from making laws for the acquisition of property other than on ‘just terms’ (usually interpreted to mean fair compensation).³⁴ If a Commonwealth law regulating native title holders’ use of water breached either of these prohibitions, the law would (subject to what is said below) be invalid.³⁵ However, water is regulated almost exclusively at the state and territory level.³⁶ State governments are not under any such constitutional restrictions: they have the constitutional power to take property without paying compensation and are constitutionally free to abridge the water-use rights of their residents.³⁷ Territory governments are subject to the ‘just terms’ restriction but not the ban on abridging water-use rights.³⁸ So constitutional arguments could potentially assist native title holders in the ACT and Northern Territory but not in any of the states, *if* the native title holders could establish that their rights in water constituted ‘property’ in the relevant sense and could demonstrate that the Territory legislation acquired that property on unjust terms.³⁹ I make no comment at this stage about the likelihood of such an argument succeeding, for reasons outlined below.
- Racial discrimination: An additional argument, available at the state, territory and Commonwealth levels, is that water legislation affecting native title rights is invalid under the *Racial Discrimination Act 1975* (Cth). To succeed in this argument a native title holding group would need to demonstrate that a law made after 1975 (the date the Commonwealth prohibition on racial discrimination began) had the effect of extinguishing native title rights to water while leaving the rights of other landholders intact.⁴⁰ This would not necessarily be an easy task, since current High Court case law suggests that state water legislation had if anything a *more* destructive effect on the common law water rights of non-native title landholders than those of native title holders.⁴¹



Regardless of whether either of these two arguments about invalidity were successful on their own merits, they would in any case be blocked by the *Native Title Act*. First, s 212 of the Native Title Act allows the states and territories to ‘confirm...any existing ownership of natural resources by the Crown...[or] any existing right of the Crown in that capacity to use, control and regulate the flow of water’.⁴² Every state and territory has taken advantage of s 212 and passed legislation confirming their powers over water.⁴³ However, this provision does not say that the Crown holds the relevant rights and interests in the first place. So it might still be possible to argue that there is nothing to confirm because the previous laws were invalid.

Second, and more importantly, water legislation is given very strong protection by the ‘past act’ and ‘future act’ validation provisions in Divisions 2–3 of the Native Title Act. Section 24HA validates legislation passed after 1 July 1993⁴⁴ that relates to the ‘management or regulation of...surface and subterranean water’.⁴⁵ This validation applies regardless of the legislation’s potential effect on native title, without any need for negotiation with native title holders.⁴⁶ That means that even if a law contravenes the *Racial Discrimination Act 1975* by discriminatorily disadvantaging native title holders, it will be protected from invalidity on that basis. Of course, there may still be a right to compensation for laws that negatively affect native title holders’ ability to exercise their rights and interests.⁴⁷ This possibility, discussed later, may dissuade governments from taking action that infringe native title holders’ rights. Even so, it does not stop the legislation from being valid.

For legislation made before 1 July 1993, ss 14 and 19 of the Native Title Act allow each Australian government to pass a law stating that such legislation is valid despite any effect that native title would have otherwise had on the legislation’s validity.⁴⁸ All states and territories have passed such a law.⁴⁹ Again, compensation may be available, but the validation will still be effective.⁵⁰

So, because of the validation provisions of the Native Title Act, the states’ constitutional power to acquire property other than on ‘just terms’ and the difficulties of demonstrating a racially discriminatory impact on native title holders, it is very doubtful that native title holders can avoid water regulation laws by challenging their validity.

Exemption from limits and licensing requirements

Each state and territory has legislation that prohibits the taking or using of water except under a licence or entitlement issued under the legislation, or without a licence in limited amounts for certain purposes (discussed below).⁵¹ Is it possible for native title holders to use their native title rights as a shield against this regime? Does native title create a useful exemption from regulatory legislation? The following discussion demonstrates that it does not.



To explore this point, it is useful first to imagine a situation where members of a native title holding community have set up, say, an irrigation project using water from a river or an underground aquifer. Assuming that the community members have not obtained a licence or entitlement through the mainstream process, they could be charged under the criminal offence provisions of the relevant water legislation.

In court, their lawyers might argue that the relevant legislation is wholly invalid because it interferes with rights held under traditional law and custom. But, as explained earlier, such an argument is almost certain to fail. Alternatively, the lawyers could argue that the legislation does not actually *apply* to native title holders. This argument would require interpreting the relevant legislative provisions to apply differently to native title holders versus other landholders. However, when one examines the provisions of each jurisdictions' water legislation this argument seems untenable. (The exceptions are New South Wales and Queensland, addressed below, which provide limited exceptions for native title holders). The clear intention and effect of the legislative provisions are that no person, regardless of the type or source of their rights in the land and waters, may take water except pursuant to the regime set out in the legislation. It would be difficult to argue that such legislation does not apply equally to native title holders. Such an interpretation would effectively require the word 'person' to be construed to mean 'person other than a native title holder'.⁵²

As mentioned earlier, New South Wales and Queensland have legislation that specifically allows native title holders to take water without a licence in certain limited circumstances.⁵³ Section 55 of the *Water Management Act 2000* (NSW) states that native title holders⁵⁴ are entitled to 'take and use water in the exercise of native title rights' without the need for an access licence, water supply work approval or water use approval.⁵⁵ The entitlement does not authorise native title holders to construct dams or bores without the necessary approvals, nor does it authorise them to construct or use water supply infrastructure on land other than on land that they own.⁵⁶ Further, the Act's dictionary defines 'native title rights' to mean 'non-exclusive rights to take and use water for personal, domestic and non-commercial communal purposes (including the purposes of drinking, food preparation, washing, manufacturing traditional artefacts, watering domestic gardens, hunting, fishing and gathering and recreation, cultural and ceremonial purposes)'.⁵⁷ Finally, the New South Wales legislation allows the government to impose a maximum limit on the amount that can be taken in any one year by a native title holder.⁵⁸ So the New South Wales' prohibition-and-licence regime exemption for native title holders is quite narrow in scope.⁵⁹ It might allow non-commercial irrigation ventures (although the specific mention of 'domestic gardens' might be taken to exclude larger communal gardens), and could possibly extend to the watering of significant cultural or ecological sites.

Similarly, s. 20B of the *Water Act 2000* (Qld) allows native title holders to 'take or interfere with water for traditional activities or cultural purposes'.⁶⁰ The term 'cultural



purposes' is defined to mean 'an activity, other than a commercial activity, that supports the maintenance or protection' of cultural heritage. 'Traditional activities' means hunting, fishing, gathering or camping; performing rites or other ceremonies; or visiting sites of significance, where such activity is done 'in accordance with Aboriginal tradition or Island custom'. Interestingly, there is no explicit commercial restriction on traditional activities. Arguably, then, commercial exploitation of water could be supported under s 20B so long as it were done in accordance with the relevant tradition or custom, and could be characterised as hunting, fishing or gathering, etc. This is a highly speculative interpretation, and it is quite likely that courts would be reluctant to classify a commercial aquaculture or irrigation project as a 'traditional activity' within the meaning of s 20B. Certainly, native title holders would be prudent to conduct a detailed risk-benefit analysis before relying on s 20B to support a water-intensive enterprise without a licence. Indeed, even a non-commercial communal irrigation project might not fall within the definition of 'traditional activities or cultural purposes'. However, as with the NSW exemption, s 20B could arguably support the use of water to service a culturally significant water-dependent ecological site.

Returning to our hypothetical court hearing, then, we are confronted with a situation in which the validity of the legislation cannot be challenged and the legislation is almost certainly intended to prevent any person, including native title holders, from taking water without a licence other than for domestic and stock purposes. Perhaps, however, our native title holders' lawyers might look to the Commonwealth Native Title Act for an exemption, knowing that under the Constitution the laws of the Commonwealth will prevail over state and territory law?⁶¹ In fact there *is* a section of the Native Title Act that helps native title holders escape the effects of state and territory resource-management legislation but — as will become evident — this provision would not help our hypothetical irrigators.

Section 211 of the Native Title Act applies where a law (Commonwealth, state or territory) prohibits or restricts people from doing certain things without a licence, and where the effect of that law is to prevent native title holders from hunting, fishing, gathering or engaging in cultural or spiritual activities⁶² in the exercise of their native title rights and interests.⁶³ In those circumstances, s 211 effectively creates an exception to the licensing regime: it states that the regulatory law 'does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity'.⁶⁴ That exception, however, is limited: it applies only to activities 'for the purpose of satisfying [the native title holders'] personal, domestic or non-commercial communal needs'.⁶⁵

An example of s 211 in action was the case of *Yanner*,⁶⁶ where a Gangalidda traditional owner was charged in a Queensland Magistrates Court for taking estuarine crocodiles without a licence contrary to the *Fauna Conservation Act 1974* (Qld). Mr Yanner avoided conviction because his hunting was found to have been an exercise of his native title



rights (even though the Gangalidda people had not obtained a formal determination of native title at that time)⁶⁷ and s 211 was held to apply to him.

Similarly, in *Karpany*⁶⁸ a number of Narrunga people were charged under South Australian fisheries management legislation for possessing undersize abalone. The prosecution had conceded that, subject to issues of extinguishment, the defendants possessed the relevant native title right to take the abalone. The abalone were agreed to have been taken for non-commercial communal consumption. On appeal, the High Court found that previous (and current) South Australian fisheries legislation had not extinguished the right to take abalone generally, nor the right to take undersize abalone in particular. The Court held that s 211 provided an effective defence to the charges against the defendants.⁶⁹

There are three potential problems that may prevent native title holders from relying on s 211 in support of an unlicensed irrigation project:

1. Most obviously and seriously, s. 211 is expressly limited to personal, domestic or non-commercial communal purposes. A community irrigation project that was not intended to generate market revenue could conceivably meet this requirement,⁷⁰ but not a commercial enterprise.
2. It may be difficult to characterise the pumping or diverting of water from a river or aquifer as 'gathering'. While the term is not defined in the Native Title Act, it is generally used to refer to collecting by hand. This, though, is arguably not as serious a problem as the others — the use of modern techniques or equipment can be accommodated by s 211.⁷¹ A related problem is the fact that water legislation generally regulates the activities of pumping or boring separately to the fact of taking water.⁷² So, in addition to establishing that the taking of water is subject to a licensing exemption under s 211, the native title holders would further have to establish that the exemption applied to the construction and operation of necessary water works. Again, this would mean characterising those activities as 'gathering' for the purposes of s 211.
3. The native title holders would also need to establish that the gathering of water was done in the exercise of their native title rights and interests.⁷³ This means that native title holders must be able to prove that they have the relevant rights under traditional law and custom, and establish that these rights are recognisable by the common law and have not been extinguished.⁷⁴ If the native title holders have previously obtained a determination of native title, the way in which the relevant rights are described in the determination may be crucial.⁷⁵ Note that there is no problem in the mere fact that *irrigation* (in our example) is not a traditional activity *per se* — the use of non-traditional methods or equipment do not prevent an activity from being an exercise of native title rights.⁷⁶



So the only way in which native title could prevent native title holders from being convicted under water regulation legislation is if:

- The water was not used for a commercial purpose; and
- The native title holders could establish a native title water-use freedom (where such a right is not limited to specific purposes like washing, bathing and drinking) or, possibly, a right to derive sustenance from the area⁷⁷; and
- The relevant native title was not extinguished by the regulatory legislation or one of its predecessors; and
- The taking of the water could successfully be characterised as ‘gathering’.

The combined effect of this is that there *may* be a *limited opportunity* for some native title holders to use native title rights to access water for ventures such as irrigation, but not for any commercial benefit.⁷⁸

This conclusion arguably also extends to the taking of water from a river or aquifer to water a flood-dependent ecosystem. As before, the native title holders would need to establish that ‘the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity’. Here, the relevant right could be either a freedom to take water for any purpose *or*, for instance, a native title right to protect and maintain sites of significance. The relevant class of activity could be either ‘gathering’ (s. 211(3)(c)) or ‘a cultural or spiritual activity’ (s. 211(3)(d)), and again the native title holders would need to establish that this class of activity extended to the use of pumps, bores, and the like.

Reliance on s. 211 will not be necessary in situations where native title holders are merely using water for washing, bathing, drinking, cooking, gardening, or (in some cases) watering stock. (Ceremonial uses such as those described in *Griffiths*⁷⁹ would also fit within this category.) In fact, s. 211 would not even apply in such situations: s. 211(1)(b) specifies that the exemption provision applies where native title holders are affected by a law that ‘prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law’. As outlined below, the ‘domestic and stock’ uses just mentioned will generally fall within exemptions written into each state and territory’s water legislation.⁸⁰ In such cases s. 211(1)(b) will not be satisfied and so the s. 211 exemption will not apply. This is understandable, as there would be no relevant prohibition on which the exemption could operate!

Depending on the jurisdiction in question, the application of ‘domestic and stock’ exceptions to native title holders may be straightforward or may require some explanation.



- In Victoria, these rights are available to any person who has lawful access to the relevant water source, which will clearly cover native title holders.⁸¹
- In Queensland and South Australia, the members of the general public have some rights to take water⁸² but owners or occupiers of land⁸³ have the full standard domestic and stock rights, whether in prescribed areas or not and whether their use would affect other water users or not.⁸⁴ In South Australia, the relevant term ('occupier') is defined explicitly to include native title holders.⁸⁵ In Queensland, the relevant term ('owner') is defined in such a way that it would include native title holders — or at least exclusive possession native title holders.⁸⁶ If there were any doubt about whether native title holders fell within the statutory definition, arguably s. 10 of the *Racial Discrimination Act 1975*⁸⁷ would operate to ensure that the 'domestic and stock' rights were enjoyed by native title holders on an equal basis to other landholders.⁸⁸
- In Western Australia and the Northern Territory, the general public has the same rights as owners and occupiers of land⁸⁹ except that owners and occupiers can additionally use water for non-commercial domestic gardens⁹⁰ and in the Northern Territory only owners or occupiers can use groundwater for stock and domestic purposes.⁹¹ The term 'occupier' is not defined in the legislation, although the term 'owner' is defined in the Northern Territory so as to exclude native title holders.⁹² There is no simple way of fitting native title holders into the legal concept of 'occupier'⁹³, since the meaning of that word will depend on the context and the purpose of the relevant law.⁹⁴ In the context of water legislation (particularly where the rights are fairly similar between occupiers and the general public) it is arguable that the primary importance of 'occupier' is that a person has an ongoing relationship with an area of land which gives rise to a need and opportunity to access water. A majority of the Full Court of the Federal Court in *Ward*⁹⁵ considered that the 'definition is wide enough to include native title holders who in accordance with their laws and customs occupy lands, even where that occupation co-exists with occupation by a pastoral lessee'.⁹⁶ That case was decided at a time when the WA legislation *did* contain a definition for 'occupier',⁹⁷ and in any case does not directly bind other Courts' interpretation of water legislation. Nevertheless, the Full Court's decision indicates that native title holders are likely to enjoy domestic and stock rights as occupiers of land. Again, this conclusion could be strengthened by the operation of the *Racial Discrimination Act 1975* as mentioned previously.
- In New South Wales, the 'stock and domestic' rights are specifically for owners and occupiers. As in the Northern Territory, 'owner' is defined in a way that excludes native title holders, and 'occupier' is not defined.⁹⁸ Native title holders are likely to enjoy the rights of occupiers, for the reasons outlined above. One difference that may shift this conclusion is that the NSW legislation provides a separate legal regime for native title holders' water usage; this arguably indicates a statutory intention to treat native title holders differently.



So native title rights essentially put native title holders in the same position as other owners or occupiers of riparian land. (It is worth noting that this outcome is a consequence of the water legislation interacting with the native title holders' rights in relation to the *land* — it does not depend on them having any particular native title rights in relation to *water*.) On the above analysis, s. 211 of the Native Title Act has no application for domestic and stock use. It is possible that in some cases a particularly large communal irrigation project might fall outside the meaning of 'domestic and stock use' but still satisfy the s. 211 definition of "non-commercial communal" purposes. In that limited and speculative case, native title would genuinely provide an avenue for water use that the native title holders would not otherwise enjoy.⁹⁹ However, that result would require success on the other untested elements of s. 211, such as the definition of 'gathering' and the use of bores or pumping equipment.

One can imagine a future scenario where water scarcity is so serious that even domestic and stock rights are subjected to a licensing requirement. If such legislation were passed in the future,¹⁰⁰ s. 211 would operate to exempt native title holders from the licencing requirement — again, assuming that they could prove their right to take water, could characterise the taking as 'gathering', and could establish that the relevant right had not already been extinguished. A particularly interesting version of this situation is where the legislation or some other regulatory instrument imposes not a licensing requirement but an outright restriction on how much water can be used for 'stock and domestic' purposes. For example, under Queensland legislation volumetric limits can be imposed on stock and domestic use in times of drought, and it is an offence to take water in contravention of these limits.¹⁰¹ Unfortunately for native title holders, s. 211 will not necessarily assist because it provides exemptions to *licensing requirements* but not to *outright prohibitions*.¹⁰²

The Winters doctrine in Australia?

A number of publications discussing Indigenous water rights in Australia have examined the situation in other former British colonies such as New Zealand, Canada and the United States, and suggested that comparable developments could be achieved in Australia through strategic litigation.¹⁰³ In particular, the so-called *Winters* doctrine from the United States has been a source of hope for some in Australia who seek greater water access rights for native title holders.¹⁰⁴ According to the *Winters* case¹⁰⁵ and subsequent decisions in the United States, native American tribes can in some circumstances access quite considerable volumes of water, including for commercial purposes, at a higher priority than most other water users. The legal basis is that when land was historically set aside by the Federal government for the benefit of native Americans — whether by treaty, legislation or executive order — the government was reserving not just the *land*, but also sufficient *water* to fulfil the purposes of the reservation.¹⁰⁶ The doctrine is also called 'implied reservation' because the Courts interpret the relevant government action (treaty, legislation or executive order) as



containing an implicit intention to reserve water for use by the relevant Indian tribe. The same rule also secures water for other Federal reserves such as national parks.¹⁰⁷ In the western United States, the reservation of lands for Indian tribes has generally been taken to carry with it a reservation of sufficient water to irrigate the 'practically irrigable area' of the reservation.¹⁰⁸

There are good reasons to doubt the possibility of any application of *Winters* in Australia, at least in the native title context.¹⁰⁹ Most crucially, in Australia native title rights do not derive from any positive action by which governments (state or Commonwealth) have reserved or granted land to Aboriginal people. Native title rights exist because they existed under Indigenous law and custom before the assertion of British sovereignty, and have not been extinguished by the exercise of colonial, state or Commonwealth sovereignty. Native title rights represent what is left over from colonisation. By contrast, *Winters* rights arise as a consequence of something that the United States government actively *did* — the rights exist because they are necessary to give effect to the government's intention in creating the reservation.¹¹⁰ Since the recognition of native title in Australia does not require any deliberate act by government, there is no executive or legislative act into which Courts can imply an intention to reserve water for native title holders.¹¹¹ Government intention (actual or imputed) simply has no relevance to native title at all, other than with respect to extinguishment.

The Native Title Act itself could arguably be considered to be a positive action capable of a *Winters*-type implication.¹¹² If in passing the Native Title Act the Commonwealth legislature had shown an intention to reserve or expand native title rights to water, to go beyond the recognition afforded at common law, then there might have been scope to argue that the Act performed a similar function to the reservations in *Winters*-type cases. Yet key aspects of the Act are inconsistent with such an interpretation: ss 19, 22F, 24HA, 44H, and 212 (some of which were discussed previously) all explicitly work to *prevent* native title from interfering with governmental power to regulate water resources. While some aspects of the Act do extend the recognition of native title to areas in which it might otherwise be extinguished (e.g. ss 47, 47A, 47B, 15, 22B) it does not guarantee that native title will be able to be *exercised* in those areas. The sole provision of the Act that bears any resemblance to a *Winters*-style reservation is s. 211. As discussed previously, its operation is very narrow indeed (assuming that it even applies to the taking of water). It is worth noting in this respect the difference in policy objectives between the Native Title Act and the relevant reservations and treaties that give rise to *Winters* rights in the United States. The United States government specifically sought to shift native American tribes *away* from traditional hunter-gatherer subsistence economies towards sedentary farming and pastoral activities,¹¹³ apparently on the basis that less land would be needed to sustain a tribe's population if they engaged in intensive farming rather than depending on extensive hunting tracts.¹¹⁴ By contrast, the Native Title Act (and s. 211 in particular) does not demonstrate any



intention to facilitate or encourage modern or commercial economic practices. If native title can be used to pursue such activities, it will not be by legislative design.

In short, Indian tribes have rights to water because the United States federal government actively wished the tribes to have certain rights to water, in particular so that they could engage in irrigated agriculture. In Australia, governments had no such policy goals, moved very early to regulate water use by *all* people, and did not consider it necessary or desirable to exempt Aboriginal people from that regulation.¹¹⁵ Arguably, the recognition of native title in the late 20th century was accompanied by a limited federal intervention into state water regulation in the form of s. 211 of the Native Title Act. But the exemption granted under this provision is far more limited than that contemplated by the *Winters* doctrine.

Summary

Regardless of the strength or breadth of the rights that might be recognised in a native title determination, the current law privileges the water management regimes established by state and territory governments.

The statutory obligations to obtain a licence and to comply with usage limits apply equally to native title holders and non-native title holders. Only New South Wales and Queensland make specific albeit limited, allowance for native title holders.¹¹⁶ Under statutory exemptions in those jurisdictions, native title holders could potentially engage in the flooding of culturally significant areas without a licence, while the operation of non-commercial communal irrigation is more doubtful.

Native title holders whose land is next to or above¹¹⁷ a water source are free to take and use water for domestic and stock purposes. In Victoria this is simply by reason of their lawful access; in other jurisdictions it is because they are 'owners' or 'occupiers'. This is a distinct benefit that they enjoy in their capacity as landholders and which they would not otherwise have as members of the general public. Importantly, these rights derive from the water legislation and its interaction with the native title holders' rights in relation to the *land* — it does not depend on them having any particular native title rights in relation to *water*.

Section 211 of the Native Title Act may in some circumstances allow native title holders to take water without a licence, so long as it is for personal, domestic or non-commercial purposes. This could theoretically be used to support community irrigation or horticulture projects, but not market-oriented enterprises. Watering of cultural sites could also potentially be supported under s. 211. Finally, if states or territories in the future introduce licencing requirements for personal and domestic use, s. 211 would exempt native title holders from those requirements.



Grant of licence as of right

The previous section concluded that the use of water for commercial activities (other than watering stock) requires a licence, even for native title holders. Could native title perhaps be used to *obtain* a licence in situations where a “mainstream” licence application would not succeed, for example, where the required fee is not paid or where demand for water is very high? The following discussion concludes that it could not — the prescriptive nature of Australia’s statutory licensing regimes means that there is no alternative way of gaining licenced access to water for commercial purposes.

When public authorities decide whether or not to grant licences (whether for owning a gun or a dog, operating a casino or driving a car), their decision-making is governed by a set of rules known as *administrative law*. A person who is affected by a decision can, in some circumstances, challenge the decision in court.¹¹⁸ The court will judge whether the administrative decision involved some legal error, but will not judge whether the decision was ‘good’ or ‘bad’ on its merits. The court can only intervene if the original decision failed to meet some mandatory legal requirement.¹¹⁹

If native title holders wish to obtain a licence to take water, they must first make an application.¹²⁰ There are a number of scenarios in which the decision-maker might refuse their application: for example, the applicants might be unable or unwilling to pay the required fee; or all of the water earmarked for consumptive uses under the relevant water plan has been allocated to other water users. If the licence application is refused then the native title holders could seek judicial review.¹²¹ The possible grounds of review include:

- The applicants for the water licence did not have a fair opportunity to put forward their case for a licence (this is called a denial of ‘procedural fairness’).
- The decision-maker did not bring a fair and impartial mind to the decision.
- The decision-maker failed to take a relevant consideration into account, or took an irrelevant consideration into account.
- The decision was influenced by some improper purpose, or reflected the inflexible application of a rule or policy.
- The decision-maker’s decision was illogical or ‘manifestly unreasonable’.¹²²

Assuming that the appropriate procedures set out in the legislation had been followed, the only remotely plausible ground of review is the failure to take a relevant consideration into account. The argument would be that the existence of native title (or, more broadly, the interests of Aboriginal people) should have been considered in determining whether or not to grant a licence.¹²³ Each of the states and territories sets out different procedures for deciding licence applications, including factors that may or must be taken into consideration. These procedures and factors are outlined in the second part of this paper (see ‘Consultations, submissions and administrative law’). Without going into them in any



detail at this point, it is at least plausible that in some cases the existence of native title could be considered to be a mandatory consideration for a licencing decision. Assuming that this was accepted by a court, and assuming that a decision-maker who had refused to issue a licence had failed to consider the relevance of native title to that decision, it is possible that the court might set aside that refusal.

Crucially, however, the only effect of setting aside the negative decision would be to return the applicant to their original position. Successfully challenging a refusal decision would not result in the grant of a licence — it would result in the decision-maker being required to re-make the decision, this time taking into account the fact that the applicant is a native title holder. But none of the states' or territories' water legislation imposes any clear and binding *requirement* to grant water licences to native title holders.¹²⁴ In addition, there are many *other* factors that decision-makers are also required to take into account in deciding whether or not to grant a licence. These include: whether granting the licence would be consistent with an applicable water plan, whether granting the licence would result in harm to the environment or the water system, and whether granting the licence would result in an over-allocation of the consumptive pool.¹²⁵ These considerations would be balanced against the native title holders' rights and interests, with the ultimate decision being in the decision-maker's discretion. That means there is no guarantee that a decision that took into account the relevance of native title would necessarily result in a decision favourable to native title holders.

Further, there may be additional requirements that would actually *prevent* the decision-maker from issuing a licence. In most states and territories, a licence must not be granted unless the necessary paperwork has been completed and the required fee is paid (and in some cases the applicant must win a tender or auction).¹²⁶ In some states and territories a licence is not able to be granted unless the applicable water plan allows it.¹²⁷ So if any of these mandatory requirements are not met, the decision-maker is not allowed to grant a licence. The existence of native title does not exempt native title holders from those requirements. And if all the requirements *are* met, then we are essentially back in the realm of 'mainstream' participation in the regulatory scheme. That is — if the native title holders are capable of paying the relevant fees and assembling the relevant paperwork, and if the licence application is consistent with the applicable water plan, then the extra influence of native title on the licencing decision will be quite limited.

It is clear from the forgoing that water planning¹²⁸ has a potentially decisive role in licencing decisions. By the time a given water system is fully allocated, such that new licences cannot be granted without damaging the environment or depriving existing users of their licensed entitlements, it is too late for native title holders to argue that they should be granted licences. This strongly suggests that native title holders should get involved in water planning processes *before* the water system is fully allocated, to ensure that water



plans make provision for them. Administrative law may be useful for native title holders in relation to water planning decisions in addition to water licensing decisions.

The legislation in each state and territory sets out procedural, and sometimes substantive, requirements for making water plans.¹²⁹ These generally involve consultation with the community at large, the consideration of the water needs of all land users, and in some cases specific attention to the interests of Aboriginal people. A number of jurisdictions have a requirement that water planners consider any submissions they receive — and native title holders are free to use this process to ensure that their rights and interests are brought to the decision-makers' attention.¹³⁰ More substantively, NSW water plans must identify water requirements to satisfy 'basic landholder rights' (which include native title rights),¹³¹ and in Queensland the legislation requires decision-makers to promote 'sustainable management', which is defined to include management that contributes to 'recognising the interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning'.¹³² South Australian water plans are required to 'take into account the present and future needs of the occupiers of land in relation to the existing requirements and future capacity of the land and the likely effect of those provisions on the value of the land'.¹³³ Depending on the jurisdiction, the substantive and procedural requirements for water plans may be more or less useful to native title holders.

If any of these legislative requirements were not complied with then there could be potentially solid grounds for a challenge. As with the licencing decisions, a successful judicial challenge to a water plan would result in the plan being set aside. A court could not re-write the plan to be more favourable to Aboriginal people, so the relevant government authority would have to begin again and re-make the plan. Although the decision-maker could be directed by the court to comply with the relevant legislative requirements, there is no guarantee that the substance of the new plan would be any more favourable after it was re-made.

There is an additional (and considerably weaker) procedural argument that could be used to challenge water licencing decisions and plans alike. Native title holders could argue that state and territory governments, by signing the National Water Initiative agreement, created a 'legitimate expectation' that they would provide water access for native title holders.¹³⁴ In the National Water Initiative, governments made the commitment that their water planning processes would 'take account of the possible existence of native title rights to water in the catchment or aquifer area' and acknowledged that 'plans may need to allocate water to native title holders following the recognition of native title rights in water'.¹³⁵ Native title holders reading the National Water Initiative might reasonably expect that water planners would do as their governments had promised. However, this legal argument faces two problems. First, the concept of 'legitimate expectation' as a valid and distinct basis for challenging a decision has been doubted by the courts.¹³⁶ Second, such a 'legitimate expectation',



however, could only give rise to a limited procedural right: the relevant water authority would simply be obliged to give native title holders an opportunity to put their case as to why the 'legitimate expectation' should be honoured.¹³⁷ Once that opportunity is provided (and once the native title holders' submissions are considered) there is no obligation on the decision-maker to comply with the legitimate expectation. They are free to depart from it. Native title holders do not have a legal right to any particular outcome in this respect.

Essentially, water planning and licensing decisions can lawfully fail to provide for native title holders, so long as the relevant state or territory legislation allows them to. As mentioned previously, the Native Title Act preserves the validity of state and territory water management laws regardless of their effect on native title. There is nothing in Australian law that can force state or territory parliaments to reflect the rights and interests of native title holders in water planning or licensing. As will be discussed below, failure to do so may have compensation implications for states and territories, which may in turn provide a point of leverage for native title holders either in lobbying for legislative change or negotiating with the executive government. But in strict legal terms, the courts have no power to compel the state and territory governments to allocate water entitlements to native title holders.

In summary, then, native title holders can use administrative law to insist that their rights and interests are *considered* in planning and licensing decisions, but the ability to secure a favourable outcome will depend on the particular state and territory legislation. Because the Native Title Act privileges state and territory water management regimes over native title rights, the most effective advocacy for native title holders wishing to engage in commercial water-dependent enterprises will be focused on the politics of local water planning and state/territory legislation, rather than on judicial challenges.

Bargaining Leverage

The argument made so far in this paper is that, subject to the limited exception of s. 211 of the Native Title Act, native title only assists traditional owners to access water resources to the extent that the relevant state or territory water legislation allows. This is a direct result of the comprehensive legislative approach to water regulation that has been adopted in Australian jurisdictions, and the failure of Commonwealth legislation to create stronger protections for native title. Only in the narrow and uncertain circumstances outlined earlier can native title holders insist on taking water *as of right*.

This does not mean, however, that native title holders are necessarily locked out of accessing water for consumptive purposes. As mentioned previously, native title holders might be able to obtain water licences through 'mainstream' avenues — applying for or purchasing water licences or entitlements.¹³⁸ In addition to this, it is possible for native title holders to use their native title rights as a form of leverage in order to gain access to water resources.¹³⁹



Sources of bargaining leverage

Although native title holders (like anybody else) can make agreements about anything at any time, there are four points at which their native title rights give them a distinct form of bargaining leverage:

1. when a third party wishes to do something to or on native title land
2. when a native title claim has been lodged and is moving towards resolution
3. when a native title compensation claim is made or threatened, and
4. when native title holders are involved in other kinds of legal proceedings, such as the administrative reviews or common law actions mentioned elsewhere in this paper.

In the first situation, depending on the type of activity that is proposed, the people who want to do the activity may be legally required to negotiate with the native title holders, or may otherwise find such negotiation prudent. This is because of procedural rights set out in the Native Title Act's 'future acts' regime,¹⁴⁰ and also because of the potential for compensation liability from doing the activity. This process is explained more fully in the second part of this paper but for now it is sufficient to note that there are circumstances where businesses, local councils or government agencies may have a reason to strike a bargain with native title holders or claimants in order to gain their support for a proposed activity. Native title holders can use this bargaining power to further their water-related objectives (see 'Uses of bargaining leverage' below). The proposed activity does not need to be related to water; all that is needed is that the proponent be willing and able to help the native title holders gain lawful access to water resources.

An additional source of leverage in the first situation arises if the relevant land is subject to exclusive possession native title. As mentioned earlier, some native title holders may have the right 'to the possession, occupation, use and enjoyment of the land and waters to the exclusion of all others'. The ability to refuse, allow or place conditions on land access puts exclusive possession native title holders in quite a strong negotiation position. However, this right does not exist in every case. Mining, for example, is given a privileged statutory status such that exclusive possession native title holders (along with other private landowners) do not have the absolute right to deny access.¹⁴¹ Even in those cases, though, the project proponents may require additional land for roads or other infrastructure, and this may give exclusive possession native title holders a stronger negotiating position.

In the second situation — where a native title claim has been lodged — the source of bargaining power is slightly more complex. Native title claims can be contested in court or resolved by agreement. Sometimes governments negotiate an indigenous land use agreement (ILUA) at the same time as negotiating a resolution to the claim. These settlement ILUAs may provide substantial benefits to native title holders, including



money, land swaps, or co-management arrangements for national parks. Why do governments provide these benefits? This paper can only offer speculative answers, but certainly the usual reasons for settling litigation out of court, such as avoiding the expense and prolonged uncertainty of contested proceedings, are likely to play their part. There may also be some recognition of the inherent issues of justice involved in native title claims, as well as the opportunity to promote the social and economic welfare of the native title holders. In addition to these reasons, governments may offer benefits in settlement ILUAs in exchange for various concessions or trade-offs. They may want claimants to drop their claim to certain rights in the ultimate native title determination, such as exclusive possession rights, rights to exploit resources commercially, or rights over the sea. They may also seek to 'streamline' the operation of future act and heritage regimes, for example by specifying certain low-level future acts that can be done without going through the standard notification and objection process. Linked to this is the government's interest in having a competent and functioning Prescribed Bodies Corporations to deal with — this objective can be served by funding PBC governance and administration as part of a settlement package. Finally, claimants may be offered benefits in lieu of compensation for previous extinguishment of native title. Again, the above analysis is essentially speculative, since the negotiation and substantive content of ILUAs are often confidential. The important point is that ILUAs negotiated during the claims process provide an opportunity for claimants to progress their water-related goals.

In the third situation, native title holders can seek compensation under the Native Title Act for actions that have extinguished their rights or prevented them from being exercised.¹⁴² The party liable for compensation could be the Commonwealth, a state or territory, or a private third party such as a mining company, depending on the circumstances. Native title holders might, in a given situation, choose to give up part of their compensation entitlement in order to gain access to water resources that they otherwise could not realise.

Finally, if native title holders litigate in order to access substantial water resources, there is a chance that governments may wish to settle out of court.¹⁴³ If, for example, a state or territory government considered that a native title holder's challenge to a water plan might succeed, they might wish to avoid the disruption that this would cause, as well as the expense of preparing a new water plan. It might seem more attractive simply to grant water rights to the native title holders within the existing system, rather than having that system put under scrutiny.¹⁴⁴ It must be said that this approach is fairly uncertain. It is plausible that a government may wish to take the matter to litigation as a test case in order to demonstrate the legal weakness of such arguments.



Uses of bargaining leverage

- To the extent that the problem is the cost of water licences or entitlements, funding to cover this cost, or alternatively a waiver of fees, could be included in agreements between native title holders and developers or governments.
- To the extent that overall scarcity (or over-allocation) is the issue, governments may help with buybacks or even compulsory acquisition. Native title holders may be able to negotiate with water planning authorities to use water reserved for environmental uses, where the proposed usage is consistent with the authorities' statutory obligations. Or, in negotiations with (say) a mining company that has obtained entitlements for its project, native title holders might ask the company to commit to transferring the entitlements after the project has finished.
- In water systems that are not yet fully allocated, guaranteed 'strategic Indigenous reserves' are a workable way of ensuring that Aboriginal people are not locked out of the water market. (See below for examples.) Governments may commit to such reserves in native title negotiations.
- Where the administrative or bureaucratic burden poses challenges, native title holders might negotiate the provision of support services in kind, or training and capacity building to help them bear this burden in future.
- If infrastructure requirements are an impediment (whether because of the cost or the need for technical expertise), then assistance may be funded or provided in kind through agreements.
- Governments could commit to changing the water management legislation to guarantee sufficient and culturally appropriate water access arrangements.

Example 1: Strategic Indigenous Reserves

Although it has not developed explicitly in the context of native title negotiations, the development of the 'strategic Indigenous reserve' concept in the Northern Territory (and northern Queensland) offers an example of the kinds of government action that native title negotiations might be directed towards.¹⁴⁵ Beginning around 2009, proposals were made for water plans in the Territory to set aside water entitlements from the consumptive pool for the exclusive use of local Aboriginal people.¹⁴⁶ Initial indications were that the amount of water to be included in strategic Indigenous reserves would be linked to the proportion of the catchment/aquifer land area recognised as native title land: for example, in the Katherine-Tindall water allocation plan 2% of the consumptive pool was to be reserved for native title holders in recognition that their native title claim is 2% of the land area covered by the plan.¹⁴⁷ This strictly proportional approach does not appear to be followed in areas with much larger proportions of Indigenous land — for example, the 2011 Mataranka water allocation plan allocated some 25% of the consumptive pool as strategic Indigenous reserve despite a much higher percentage of land area being under Indigenous ownership.¹⁴⁸ A change in Territory government in 2013 saw a move away from the policy of strategic Indigenous reserves,¹⁴⁹ but the new government elected in late 2016 campaigned on a platform of reinstating the policy.¹⁵⁰

Example 2: Ti Tree, NT

In the area around Ti Tree in Northern Territory (north of Alice Springs) the water allocation plan makes special provision for the allocation of groundwater entitlements to local Aboriginal horticulture enterprise.¹⁵¹ The plan sets aside 1000 ML/year for a horticultural project to be operated by Centrefarm, using pre-existing bore infrastructure. This outcome appears to be more closely tied to native title negotiations: Tan and Jackson report that the Northern Territory government negotiated an agreement with the native title holders under which the government would extinguish native title in some areas of their country, and grant various benefits in return including the water rights necessary to conduct the horticultural project.¹⁵²

Problems of this approach

Depending on the circumstances, it may be relatively inefficient to ‘purchase’ water rights through compromises in negotiations. In a given case it may well make more economic sense for native title holders to pursue monetary compensation and to use that money to purchase water licences and entitlements. (Of course, if a given system is fully allocated and there are no willing sellers, then native title holders may require the government’s active assistance in freeing up sufficient water.) Further, the negotiation power of native title parties may in many cases be quite weak, and so could be insufficient to convince other parties to deliver the desired commitments.

In addition, native title holders may resist compromising their existing legal entitlements in exchange for resources to which they are already morally entitled. Aboriginal people may consider that their moral claim to traditional lands also extends also to water resources. The general criticism that native title holders should not bargain with government in order to enjoy basic levels of service provision¹⁵³ applies here also.

Conversely, a model of Indigenous water reform that is predicated on native title trade-offs may be regarded as unfair to those Aboriginal people who are excluded from the native title regime. If the provision of substantial water rights to Aboriginal people is made essentially dependent on native title, then those without legally recognised native title may be locked out.

Some native title holders will not be satisfied by a government-granted allocation from some abstract communal consumptive pool. Negotiation theorists often distinguish between *substantive*, *emotional* and *procedural* interests, noting that successful negotiation involves all three.¹⁵⁴ In this case, the substantive interest is in accessing water resources, while the emotional and procedural interests may lie in the government party respecting the native title party’s special status and acknowledging previous wrongs. Some Aboriginal people view their claim to water as being based on a prior and superior right, and not something to be ‘given’ by or ‘bought’ from government.¹⁵⁵ Still, negotiations may generate creative solutions to this. For example, in the Pilbara there have been suggestions that water licences for traditional owners should be renamed ‘water agreements’ — on this approach, the government’s role would not be in *allowing* native title holders to access water but rather ‘recording’ or ‘monitoring’ their access (and, indeed, protecting it).¹⁵⁶



Summary

Native title holders have varying degrees of bargaining leverage when negotiating with governments and other parties, derived from a number of sources. This leverage may be used to obtain financial, administrative, or technical assistance; or the 'clawing back' of entitlements to be granted to native title holders; or the direct transfer of water rights from project proponents. Law reform is also another possible objective.

Taking and using water — summary

The Australian law does not allow the commercial exploitation of water without a licence. The environmental and economic objectives of state and territory water legislation are treated as paramount, and native title holders are unable to use their native title rights as a sword or a shield in pursuing commercial objectives. (The one possible exception to this is in Queensland, based on an untested and admittedly speculative legal argument.) Native title holders can, however, use those rights as a source of leverage to obtain the necessary licences, infrastructure and other assistance they might require for commercial operations.

Beyond the realm of commercial enterprise, there is more scope for native title holders to benefit. Their rights in relation to land give them the same rights as other landholders under state and territory water legislation — the use of water for domestic, stock and some garden purposes. In addition to this, the Native Title Act allows personal or non-commercial communal usage of water, which may extend beyond the normal landholder rights to include watering significant sites or non-market-oriented irrigation or aquaculture ventures. Finally, the water legislation in Queensland and New South Wales make specific allowance for native title holders to use water without a licence, but these exemptions do not add significantly to those available under the general law or the Native Title Act.



2. Protecting water and the things that depend on it

Native title holders can use their rights to protect things that are important to them from water-related harm. It may be the health of a river or lake; the availability or quality of drinking water in soaks, wells, bores, or rivers; the life-cycle of fish, turtles, lilies, yabbies, or the land-animals that also depend on water; significant pools, wetlands, or other sites with spiritual importance; or a range of other concerns. As mentioned earlier, and as many Aboriginal people often assert, there is no neat distinction between ‘economic’, ‘cultural’ and ‘environmental’ values in water.¹⁵⁷ Gaining physical sustenance from natural food sources has cultural, social, health and economic importance. Profitable eco-tourism ventures require the protection of ecosystems and aesthetic qualities. Protecting culturally significant sites is likely to have flow-on effects into ecology.

To many people, common sense might suggest that having ‘rights over water’ means being able to decide what happens to it — whether to use it for subsistence or profit, to keep it in the ground for environmental or cultural reasons, or to allow others to share it. Under Australian law, however, rights to *use* water are quite distinct from rights to *prevent others* from using water. In Australia the latter right has, for the most part, been monopolised by governments through state and territory water management legislation.¹⁵⁸ However, the law does provide some avenues for land-owners, and native title holders in particular, to protect their rights and interests against others’ water-using activities.

Below I examine five distinct legal pathways for native title holders to protect the aspects of their water-dependent environment that they value:

1. using exclusive possession rights to deny or impose conditions on physical access to a water source
2. using the Native Title Act’s ‘future acts’ process to prevent, or impose conditions on, various activities that might use or interfere with water
3. engaging in the consultation and advocacy processes under mining and environmental legislation that may influence government decisions to allow activities that would use or interfere with water, and (failing that) using administrative law to challenge those decisions
4. litigating and seeking damages or injunctions against harmful uses of land and water, and
5. using any of the above, or other aspects of the native title process, as bargaining leverage to obtain agreements limiting the impact of projects.

The value of each of these approaches is highly contingent on the specific scenario — in some cases some approaches will be more useful than others, and in others none will be fully effective. Importantly, these legal mechanisms do not generally rely on any native title ‘right to water’ in particular, but rather on the whole set of native title rights and interests that a group holds.



Exclusive possession

As mentioned earlier, some native title holders have the legal right to prevent other people from entering a particular area. One of the assumptions stated in the introduction to this paper is that there is virtually no chance that the current law will recognise an exclusive native title right over water itself. A longstanding principle of common law is that there can be no property in the actual liquid flowing through watercourses, although it may be owned once captured and stored.¹⁵⁹ This non-ownership principle applies also to groundwater.¹⁶⁰ The common law grants all landholders a freedom to take surface water (for certain prescribed purposes, and otherwise subject to the riparian rights of other landowners) and groundwater (without limit).¹⁶¹ Even where those common law freedoms have been removed or altered by state and territory water legislation, such legislation still specifically allows landholders to take water — either with or without a licence, depending on the circumstances.¹⁶² As explained below ('Common law defence of statutory authority'), the Native Title Act ensures that these common law or statutory rights can be exercised even where native title exists — even exclusive possession native title.¹⁶³

Still, exclusive possession native title *can* be recognised over a geographical area that includes water resources, and can be used in some circumstances to deny *access* to those resources. This is because the common law principle of non-ownership applies only to the water itself, and does not prevent a person from owning the *bed and banks* of a watercourse (except for tidal areas)¹⁶⁴ or the land overlying a groundwater resource. In practice, several native title determinations have recognised exclusive possession rights over the beds and banks of (non-tidal) watercourses and lakes,¹⁶⁵ and many have recognised exclusive possession over areas of land that overlie groundwater resources.¹⁶⁶ The Native Title Act defines such geographic areas as 'waters',¹⁶⁷ so native title determinations need to be drafted carefully to distinguish between rights in 'water' (which will be non-exclusive as explained above) and rights in 'waters' (which may be exclusive, except in tidal waters).

Where native title holders have exclusive rights to the bed and banks of a watercourse or lake, or to the area overlying a groundwater resource, they can use these rights to stop other people from using *that land area* to access the water or install water-use infrastructure. Of course, if potential water users have *other* ways of accessing the water (e.g. from a point upstream or downstream, or from another point above an aquifer) then the exclusive possession rights will not be able to prevent this. However, in some cases the exclusive possession area will be the only feasible way to access the water; in these cases, people who want to use the water will need to deal with the native title holders.

If native title holders hold exclusive possession over the area on either side of a watercourse, but not the bed or banks, a third party will still need to traverse the



exclusive possession area to access the water (whether they plan on extracting it using pipes, canals, or water trucks).¹⁶⁸ Nonetheless, again, if the third party can get physical access to the same water resource from some other point outside the exclusive possession area, then there is nothing the native title holders can do to stop this. The power to exclude applies to the land, not to the water itself.

The actual legal process by which native title holders can enforce their exclusive possession rights is the common law action of ‘trespass to land’ (explained in more detail below).¹⁶⁹ As a matter of general law, a person commits a civil wrong if they enter land that is subject to exclusive possession rights without permission from the landholder or some other lawful authority.¹⁷⁰ Such a person can be sued for trespass, and may be forced to pay damages. Alternatively, if the trespass is likely to be a problem in the future, the person in exclusive possession of the land can obtain an injunction against the potential trespasser. In the very short term, ‘reasonable force’ can be used to eject a trespasser.¹⁷¹ It should be noted, however, that no trespass case has yet been run in the native title context — legal advice should definitely be obtained before any action is taken in relation to an apparent trespasser.

Using the above legal mechanisms, exclusive possession native title holders can effectively prevent developers from coming onto the land at all, or alternatively can impose conditions on access. In the right circumstances, this ability can be used to protect water resources from interference or harm. For example, one group of traditional owners was successfully able to resist the establishment of an irrigated cotton plantation in their country in the West Kimberley.¹⁷² In that case, the Karajarri people were very concerned about the groundwater impacts of the project. Neither the cotton farm nor the water pumps would be on exclusive possession native title land, but the project would be using water from a groundwater system that extended into Karajarri country. The Water and Rivers Commission required the developers to conduct a feasibility study as part of the water licence application process. This required the developers to conduct tests within the Karajarri exclusive possession area. The native title holders refused them permission to enter, the study was never completed, and the project never went ahead.¹⁷³ The native title holders in this case had stronger leverage than normal because there was not much existing research on the region’s hydrology and the project was very large. The attitude of the regulator also played a part. Yet the case demonstrates the general mechanism by which exclusive possession can be used to protect water resources.¹⁷⁴

The ability to use exclusive possession native title to protect water resources will depend on the kind of development that is planned. For example, in most states and territories mining and exploration activities do not require the consent of the relevant landholder, unless the activities would interfere with ‘improvements’ such as buildings, crops, wells, springs, dams or cemeteries.¹⁷⁵ This applies equally to freehold or leasehold land and native title land (whether exclusive possession or not). So exclusive



possession native title cannot be used *directly* to prevent mining or exploration activities from interfering with water sources or water-dependent sites and systems. The *indirect* use of native title (whether exclusive possession or not) to influence mining and other development activities is addressed in the next section.

Future acts

The primary mechanism under the Native Title Act for the ongoing ‘protection’ of native title (or, from another perspective, the primary mechanism for regulating the orderly interference with native title) is called the ‘future acts’ regime. Roughly speaking, this regime covers any act¹⁷⁶ occurring after the passage of the Native Title Act¹⁷⁷ that ‘affects’ native title, meaning that it ‘extinguishes the native title rights and interests’ or ‘is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise’.¹⁷⁸ The ‘future acts’ regime sets out a series of rules and procedures that apply when governments, businesses or anyone else wants to do a future act. Some categories of future acts are allowed to go ahead with minimal input from native title holders;¹⁷⁹ at the other end of the spectrum are future acts that are subject to the statutory ‘right to negotiate’ process (explained below).¹⁸⁰ Note that the future acts regime is not just available to recognised native title holders — it also applies to registered native title claimants.¹⁸¹

There are too many potential future act scenarios to cover all of them in this paper; instead, I will address a few situations that are most directly relevant to water management issues. The main conclusion is that native title holders’ strongest pathway for protecting water resources within the future acts regime lies in the right to negotiate. However, this opportunity is imperfect and applies to only a narrow subset of future acts generally.

Making of water legislation, grant of water licences

As noted earlier, each state and territory has legislation regulating the taking, using, obstruction or diversion of water, and allowing people to use water under either a licence or a statutory exemption. Plainly, such legislation and the activities authorised by it have the capacity to create negative impacts for native title holders. The legislation itself affects the basic enforceability of native title rights, and activities authorised under the legislation could harm the sites, species and systems on which native title holders place high importance, and on which they may depend for economic, social, cultural or spiritual sustenance. So water legislation and the grant of water licences are each a type of future act.

Yet, as also mentioned in the first part of this paper, s. 24HA of the Native Title Act validates water legislation and water licences regardless of their impacts on native title holders.¹⁸² For legislative acts, this validation occurs without giving native title holders any procedural rights. For licensing decisions, s. 24HA(7) does oblige the relevant decision-maker to notify native title holders and claimants about what is proposed, and to give them an opportunity to comment,¹⁸³ but this obligation is quite weak. The



opportunity to comment does not imply a right to be involved in the decision-making process, and the government decision-maker can decide whether or not to take the comment into account.¹⁸⁴ Further, courts have held that a failure to comply with s. 24HA will not render the relevant future act invalid.¹⁸⁵ Theoretically, native title holders might be able to obtain a court order stopping the grant *until* the proper procedures have been followed.¹⁸⁶ This may only result in a slight delay to the ultimate outcome, but could prove useful in some cases.

Native title holders, then, have limited *procedural* rights under the Native Title Act with respect to water legislation or the grant of water licences. However, s. 24HA(5) confirms that governments are liable to pay compensation for any loss, diminution, impairment or other effect on native title rights and interests.¹⁸⁷

There has been only one successful litigated compensation claim under the Native Title Act to date, in relation to certain acts at Timber Creek in the Northern Territory.¹⁸⁸ Even with the benefit of this decision (which is the subject of a Full Court appeal, and may be further appealed to the High Court) there is considerable uncertainty as to the principles that would be applied by a court in determining liability and quantum of compensation for future acts related to water management. Nevertheless, the basic pathway for native title holders or claimants to leverage the threat of compensation liability is clear enough. Where a particular government act — be it the passage of new water legislation or the grant of a new water licence — would affect native title, native title holders should indicate to the relevant government agency their willingness to seek compensation in court, and highlight reasons why the amount of compensation might be high. From the native title holders' perspective, the hope is that the threat of liability may be enough either to dissuade the decision-maker from taking the relevant action, or else to convince them to work closely with the native title holders to minimise the impact of the decision. The greater the risk of damage, whether in terms of likelihood or seriousness, the more weight the government decision-maker should give to the native title holders' concerns. The opportunity to comment under s. 24HA(7) is the perfect time to take advantage of this leverage, but there is also nothing preventing native title holders and their advocates from taking a more general and proactive approach, engaging government authorities on water management issues ahead of time, using the compensation issue as a foot in the door.

Just how credible and serious the threat of compensation is in any particular case is a matter of considerable legal complexity and is highly dependent on the facts of each case. It is beyond the scope of this paper to address that question.

Creation of water plans

All Australian water legislation provides for the creation of water plans to inform licencing and environmental management decisions.¹⁸⁹ Arguably, this is where the real business of allocating risks, costs and benefits happens: a plan will identify the



environmental and other limits within which other activities must take place, and will thereby define the consumptive pool to be allocated between potential water users.

Creating a water plan would not fall within s. 24HA of the Native Title Act since it does not consist of the making of legislation nor the actual issuing of licences. Planning occurs in between these two processes. So neither the automatic validation provision nor the notification provision in s. 24HA would apply to the making of a plan. There is a prior question, however — is the making of a water plan a future act in the first place? It is almost certainly an ‘act’,¹⁹⁰ but not obviously one that ‘affects’ native title rights or interests. It is difficult to characterise the making of a water plan as being ‘wholly or partly inconsistent with [the] continued existence, enjoyment or exercise’ of native title rights,¹⁹¹ because the water plan itself has no direct effect on native title. Although the creation of a plan may make it more likely that interferences will occur in the future, if one considers the native title holders’ actual ability to exercise their rights the day after the plan is created, one will see no difference compared to the day before. A substantive effect will not come until a licencing decision or environmental management decision is actually made under the plan.¹⁹² I was not able to identify any situation where a water planning process had been treated as a future act. On this assumption, native title holders would be well advised to take a proactive interest in water planning processes affecting their country and ensure their views are heard — see below, ‘Consultations, submissions and administrative law’.

Physically taking and using water under a water licence

When irrigators, miners, and other developers take and use water under a valid water licence, entitlement or allocation, s. 44H of the Native Title Act provides that this activity can be done regardless of the impact on native title and without any compensation liability.¹⁹³ This means that native title holders must focus their advocacy on the relevant licensing decision rather than the subsequent activities. Of course, if the licensed water user took or used water *beyond* what is authorised by their licence, or in breach of the licence conditions, they would *not* be covered by s. 44H and could be subject to legal action by native title holders. There may even be scope for challenging the *manner* in which the authorised activity is done: see below, ‘Common law claims’.

Grant of mining or exploration tenement, conduct of mining or exploration operations

In many parts of the country, mining and petroleum projects are the most common situation where native title holders will attempt to protect their water-related interests. The grant of mining leases, petroleum exploration or production licences, and some mineral exploration licences¹⁹⁴ is subject to a protective procedure in the Native Title Act called the ‘right to negotiate’.¹⁹⁵ Where this procedure applies¹⁹⁶, the mining tenement (lease, licence, permit, etc.) can only be validly granted if *one* of the following happens:



- the native title party consents to the grant of the tenement, or
- the National Native Title Tribunal makes an arbitration determination allowing the tenement to be granted (either with or without additional conditions), or
- the tribunal determines that the tenement cannot be granted, but a Commonwealth, state or territory minister overrules the determination.¹⁹⁷

So either the parties reach agreement about the grant of the tenement (including any conditions, safeguards, payments, etc.) or the tribunal can be asked to make a binding decision.¹⁹⁸ An application for a tribunal determination can only be made at least six months after notice of the proposed future act was first given, and the tribunal is only able to make a determination if the parties have ‘negotiate[d] in good faith’ during that period and failed to come to agreement about the doing of the future act.¹⁹⁹ Note that there is nothing in the current law that requires any party to show that negotiations have stalled or that there is no reasonable prospect of reaching agreement.²⁰⁰

The tribunal is required to consider a number of matters in making its determination:²⁰¹

- the effect of the act on:
 - the enjoyment by the native title parties of their registered native title rights and interests; and
 - the way of life, culture and traditions of any of those parties; and
 - the development of the social, cultural and economic structures of any of those parties; and
 - the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and
 - any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;
- the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;
- the economic or other significance of the act to Australia, the state or territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;
- any public interest in the doing of the act;
- any other matter that the arbitral body considers relevant.

The tribunal has stated that native title holders do not have a veto on development, even where they have exclusive possession, and so a lack of consent is just one factor in the tribunal’s decision, rather than a primary consideration.²⁰² Having said that, in



certain circumstances, where the impacts of the proposed project are very great and are unlikely to be avoided even with the imposition of precautions and conditions, the tribunal may give greater weight to a lack of consent by the native title party.²⁰³

Native title parties wishing to protect their rights and interests in the tribunal will have to bring evidence of the potential negative impacts of the proposed operations. Such evidence may include the full range of values, meanings, uses and connections that are attached to the land or water to be affected. The tribunal will focus on how the proposed project is likely to affect specific rights or interests listed in the native title determination or claim. So evidence of harm to a river system would be relevant because it interferes with the rights to fish, to take water, to protect sites, and the like.

In bringing this material before the tribunal, the native title parties will be attempting to convince the tribunal either to decide that the act cannot go ahead at all, or else to impose protective conditions on the grant of the mining tenement to minimise or prevent the harmful impacts. However, only 3% of arbitral determinations to date have prevented the grant of the tenement,²⁰⁴ and the tribunal's protective conditions rarely add anything significant to the existing legislative environmental controls.²⁰⁵

The value of the 'right to negotiate' to native title holders can be better understood in light of this unfavourable arbitration environment. Native title holders are under strong pressure to reach agreement with project proponents because the other options for reducing project impacts are limited.²⁰⁶ The negotiation of future act agreements provides native title holders with an opportunity to seek detailed protective environmental conditions and/or to receive monetary compensation for a project's impacts (the kinds of conditions that might be sought are discussed below at 'Agreement-making').

Assuming that a mining tenement is granted — whether by agreement or under a tribunal determination — the proponent will then have rights to conduct whatever operations are authorised under the tenement, and will be bound by whatever conditions are attached to the tenement (as well as any other laws that may apply). Generally, the mining legislation requires miners to obtain separate water licences under the relevant water legislation if they wish to extract, use or divert water.²⁰⁷

Infrastructure projects generally

There are too many possible land dealings or administrative acts relating to infrastructure projects to deal with any in detail. However, two sections of the Native Title Act are worth noting.

Section 24KA of the Native Title Act validates future acts that permit, require, or consist of the construction, operation, use, maintenance or repair of various types of public infrastructure.²⁰⁸ The provision is concerned with things like roads, railways, bridges, jetties, power stations and lines, antennae and research stations, that are operated 'for the general public'. In relation to water specifically, s. 24KA applies to wells, bores,



pipelines, levees, irrigation channels, sewerage facilities, and other similar things. Where the construction (etc.) of these works is done after 1 January 1994,²⁰⁹ s. 24KA specifies several consequences:

- the act is valid: s. 24KA(3)
- the doing of the act does not extinguish native title, but merely ‘suspends’ or ‘displaces’ it: ss 24KA(4) and 238
- compensation will be payable in some circumstances: ss 24KA(5) and 17(2), and
- the native title holders²¹⁰ have the same rights as the holder of ordinary title would have (or, if the land is covered by a non-exclusive pastoral or agricultural lease, the same procedural rights as the leaseholder), and if those procedural rights include the right to have particular matters considered, the existence of native title is stipulated to be one such matter: s. 24KA(7) and (7A).

So the effect of s. 24KA is mixed: it confirms the power of state, territory and Commonwealth governments to construct public infrastructure even at the expense of native title rights, but it also ensures that native title holders are treated the same as other landowners. If the construction of the public work on freehold land would have required the consent of the landowners to proceed, then the native title holders would have a similar power of veto.²¹¹ But if not, s. 24KA leaves native title holders just as powerless to stop construction as any other landowner.²¹² They may have the right to be informed, or consulted, or compensated, but only to the extent that other landowners would be. If native title holders want to use s. 24KA to prevent or minimise harm arising from an infrastructure project, they must first identify a procedural right that a freehold landowner would have in the same circumstances.²¹³ They can then either exercise that right or, if the right has been breached, challenge the decision using administrative law (see below).

Some infrastructure projects that are proposed for freehold land require the Crown or another entity (such as a utility company) to first acquire full ownership of the land, either by sale or by compulsory acquisition. Section 24KA expressly does not apply to compulsory acquisition,²¹⁴ so these types of projects cannot rely on s. 24KA for validity. Nevertheless, another section of the Native Title Act, s. 24MD, *does* apply and has much the same effect as s. 24KA.²¹⁵ Section 24MD, which covers compulsory acquisition, guarantees that native title holders will be treated non-discriminatorily. So, if the legislation authorising the acquisition is targeted *only* at native title, or if *only* the native title rights are being acquired while other non-native title rights are left undisturbed, or if native title holders are disadvantaged by the practices and procedures used in connection with the compulsory acquisition, then the acquisition will be invalid. In addition, s. 24MD guarantees that a right of compensation will apply to the compulsory acquisition, regardless of whether the supporting legislation provides such a right: s. 24MD(2)(d) and (e). In this regard, and somewhat unusually, the position of native title holders is *better* than that of the general public — they will be compensated even where other landowners would not.²¹⁶



So, in relation to the construction of infrastructure or the compulsory acquisition of land for infrastructure we see the same general pattern as elsewhere: the Native Title Act ensures that native title does not pose a greater procedural barrier than other forms of land tenure, but also ensures that interference with native title will be compensated. For native title holders, this emphasises (as described earlier) the value of compensation liability in providing an opportunity to be heard and to minimise potential harms.

Summary

The future acts regime is the primary means of regulating the interaction between native title holders and developers, and does not provide strong *direct* mechanisms for native title holders to protect their rights and interests in relation to water.

In the case of mining or petroleum projects, including exploration in some cases, native title holders have an important but limited statutory right to negotiate. While native title holders have only rarely succeeded in using this right to *stop* a project, they can in every case compel the project proponents to *listen* to their concerns and *negotiate* in good faith about either minimising or compensating for impacts. Failing agreement, the native title holders can attempt to convince the tribunal to impose stricter controls on the project. This admittedly imperfect bargaining leverage can be used in a variety of ways.

Outside the mining context, the Native Title Act ensures that the making of water legislation, the grant of water licences, and the taking of water under a licence can all go ahead despite any impact on native title. In this regard, native title holders are in a similar position to other landholders, who must rely on other legal mechanisms (discussed in the next section) that regulate the environmental and economic impacts of development.²¹⁷ Similarly, infrastructure projects (even ones involving compulsory acquisition) are given special protection by the Native Title Act. Governments are required to treat native title holders as equivalent to other landholders, which may involve various statutory consultation or objection processes and ultimately the possibility of compensation. However, a government that is determined for a project to proceed will not in the end be *directly prevented* from interfering with native title holders' rights. The greatest tool the future acts regime offers to native title holders in this situation is the credible threat of compensation liability. If communicated effectively, this may convince governments to negotiate or reconsider before proceeding.

Consultations, submissions and administrative law

When governments construct new infrastructure or authorise third-party activities through licences, permits, mining tenements and the like, they generally do so under legislation. This enabling legislation might be fairly minimalist, giving government a broad discretion to do whatever it thinks best; or might be quite prescriptive, imposing procedural and substantive requirements and limitations on the decision-maker. In general, legislation authorising government decisions about land use will impose at least *some* procedural



requirements (such as notification or consultation with affected persons) and *some* substantive criteria for valid decisions (such as a requirement for the decision to be consistent with an existing plan or policy, or a requirement for the decision-maker to consider certain matters). Native title holders can take advantage of this fact in two ways:

1. they can participate in the process leading up to the decision, engage in consultations, make submissions, all in an attempt to influence the final decision; and
2. they can challenge the decision after it is made, for failure to comply with a substantive or procedural requirement.

In each state and territory the most relevant laws will be environmental protection legislation, mining legislation, and water planning and licencing legislation. Further, the Commonwealth's own environmental protection legislation, the *Environment Protection and Biodiversity Conservation Act 1999*, may also apply — this will depend on the location and nature of the proposed development.²¹⁸ In 2013 the Commonwealth act was amended so that coal seam gas and large coal mining developments will require Commonwealth approval if they are likely to have a significant impact on a water resource.²¹⁹

Although there are too many different legal regimes to consider any in detail, it is worth briefly summarising the four most common types of procedural and substantive requirements in State and Territory water legislation.

1. Express mandatory considerations: These vary considerably from jurisdiction to jurisdiction but in almost every case require decision-makers to consider the effects that granting a new water licence or entitlement would have on the environment and on other water-authorized water users in the area.²²⁰ This almost certainly includes native title holders. Further, Western Australia and the Northern Territory specifically require decision-makers to consider intergovernmental agreements about water.²²¹ This makes the *National Water Initiative* a mandatory consideration, and (as mentioned in the introduction to this paper) it is an agreement in which states and territories have committed to 'take account of the possible existence of native title rights to water' and possibly to allocate water to native title holders.²²²
2. Notification and submission process: In most jurisdictions, any application for a new water licence or entitlement must be publicly advertised.²²³ Any submissions received as a result must be considered by decision-makers.²²⁴ In New South Wales this latter obligation is even stronger: where an objection is made in relation to a licence application, the decision-maker 'must endeavour to resolve the issues raised by the objection by means of consultation with the applicant and the objector, with a view to reaching agreement on the matters raised by the objection'.²²⁵



3. Binding or semi-binding water management plan: Water plans, once made, are either fully binding²²⁶ on future water licencing decisions or else constitute a mandatory consideration.²²⁷ In the former case, where native title holders have succeeded in having their rights, aspirations and interests reflected in a water plan, this is guaranteed to translate through to actual water licensing and allocation decisions. By contrast, where the plan is only a mandatory consideration, decision-makers still have latitude to depart from the plan so long as they include it in the decision process.
4. Substantive and procedural requirements for management plans: In many cases water legislation prescribes detailed processes for the creation of water plans, and sometimes also substantive principles or objects that govern the content of such plans. Native title holders can take advantage of procedures for notification, consultation, and making submissions to ensure their concerns are heard.²²⁸ Their interests may also be protected and promoted through substantive objectives or principles that govern water plans.²²⁹

This brief summary demonstrates some clear avenues for native title holders to insert their interests and priorities into the decision-making processes under water planning and licensing legislation. Similar avenues exist in state and territory legislation governing the grant of mining tenure or environmental approvals. Native title holders' status as stakeholders — whether as potential water users, or owners/occupiers of land, or people with recognised rights to hunt and fish (etc.) — allows some scope to influence decisions or at least have their voice heard.

Where a decision has already been made, and the substantive or procedural requirements have not been followed, native title holders may be able to use administrative law to challenge the decision.²³⁰ Administrative law ensures that the executive arm of government acts within the limits of its authority. There are two distinct senses in which native title can help traditional owners to use administrative law. Most obviously, native title holders can argue in court that a decision they want to challenge is invalid because (for instance) the decision-maker failed to take account of the impact on their native title rights and interests, or failed to give the native title holders a sufficient opportunity to raise their concerns. However, before they can get to this point, they must first establish that they have the necessary *legal standing* to bring such a challenge. Providing the basis for legal standing is the second way native title can help traditional owners use administrative law to protect their water-related interests.

In general, to challenge an administrative decision a person must have a special right or interest (greater than the general public's) that is affected by the relevant decision. Environmental organisations have often struggled to establish their legal standing in administrative law proceedings,²³¹ and there have been proposals at the Commonwealth level to make this task even harder.²³² The law even as it stands now is quite complex, and varies from state to state. It is beyond the scope of this paper to outline the rules in



any detail, but the following factors are likely to make native title holders much more likely to have legal standing than other members of the public seeking to protect environmental or cultural heritage values.²³³

- Native title holders exist not as an assortment of individuals but as groups united by their possession rights and interests in relation to the land and waters of their claim area.²³⁴
- Because their rights are clearly stated in the native title determination, they can readily demonstrate in a given case how the proposed decision will impact on those rights and interests.
- Further, recognised native title holders have proved their connection to the land and waters under traditional law and custom.
- Finally, given that there can be only one native title determination for any given area of land, the recognised native title holders have a demonstrably *unique* connection with the area.²³⁵

All of these factors mean that native title holders are in a considerably stronger position than other people in asserting their right to challenge water management and planning decisions.²³⁶ Where there is a broad community campaign against a particular proposed development, native title holders may be better placed than environmental groups or other stakeholders to bring a legal challenge, and those other campaigners may wish to provide advice or financial assistance to native title holders as the ‘spearhead’ of the legal battle.

Common law claims

While the two previous sections examine legislative mechanisms for protecting water-related interests, this section assesses the potential for common law enforcement of native title rights. Rather than focusing on the government decision-makers who authorise developments, this approach targets the people who are actually using or interfering with water.²³⁷

Much of the common law’s application to issues of water use and environmental harm developed during England’s early industrial era. The torts of trespass and nuisance and actions for breach of riparian rights²³⁸ were frequently used by the occupiers or owners of land against people whose water use, pollution, earthworks, or other activities had detrimental impacts on the quality, quantity or location of water.²³⁹ Later, the tort of negligence was developed to the extent that it could be used by an even broader range of plaintiffs. The discussion below shows how these torts may be adapted to the native title context. While this application of the law is largely untested, and is subject to some considerable uncertainties and limitations, it offers some promising avenues for native title holders to be able to translate their rights into concrete, enforceable remedies.



Trespass

In addition to the usual sense of ‘trespass’ meaning to go onto somebody else’s land, the tort of trespass to land also encompasses any form of ‘direct interference’ with land. Direct interference generally involves bringing some object or substance into contact with the land — for example, dumping rubbish, erecting a building, or knocking down a wall.²⁴⁰ Trespass, however, does not extend to ‘indirect’ impacts on land, for example, noise or smell or smoke flowing from one person’s land to another.²⁴¹ These are instead caught by the tort of ‘private nuisance’, addressed below. A common water-related trespass in the early case law was where downstream landowners would dam or obstruct a waterway, causing flooding upstream.²⁴²

The majority of cases of trespass have dealt with breaches of a landholder’s right to exclusive possession.²⁴³ However, there are cases where people who held lesser proprietary rights have been able to sue people who have directly interfered with the exercise of those rights.²⁴⁴ In one case, for example, a person merely had the (exclusive) right to catch rabbits on a property, and was able to sue a person who damaged his rabbit snares.²⁴⁵ Indeed, in that case, the defendant was the tenant on the farm — the person who had (subject to the rabbit-catcher’s rights) the right to exclusive possession. It appears that a claim in trespass will be available to a person who has a *profit á prendre* (that is, a legal right to take and keep certain resources from an area of land) but not to someone who has an easement (a non-possessory property right, such as a right of way over another person’s land, or the right to have air, light, pipes, etc. cross another’s land).²⁴⁶ Interference with an easement can constitute a nuisance but not trespass.²⁴⁷ There does not appear to be a requirement that the person holding the *profit á prendre* is the *only* person with such a right in the land; instead it would seem that so long as the person holds an interest in the land they can seek a remedy in trespass if that interest is subjected to direct interference.²⁴⁸

The parallels to the native title context are immediately apparent: native title holders have particular rights, specified in their native title determinations (or, in a contingent sense, in their registered native title claims — or even simply by virtue of unwritten law and custom) whose exercise may be the subject of interference by other land users (whether using the same land as is subject to the native title or neighbouring land). The following scenario provides an illustrative example: A native title group has non-exclusive rights in an area of country that includes a river. The group’s native title determination includes a right to enter the land and to hunt on the land. A planned downstream dam will cause the area to be flooded. In the language of trespass, this would involve the introduction of a substance onto the land that directly interferes with the native title holders’ enjoyment of their interest in that land. On the face of it, the native title holders should be able to seek an injunction from the court to prevent the dam from being built (subject to the defence of statutory authority, addressed below).



Accordingly, there is a sound argument that where a native title holder's enjoyment of their native title rights and interests is compromised by someone else's activities (whether the activity actually takes place on the native title land or elsewhere), the native title holders may use the law of trespass to enforce their rights. The remedies available to native title holders in the face of such a breach of their rights will be discussed below. Also discussed below is an important defence that some defendants may be able to use to escape liability under trespass — that of statutory authority.

Private nuisance

In addition to the tort of trespass, the common law imposes legal liability on a person whose conduct interferes with another person's use or enjoyment of their land.²⁴⁹ Such interference is called a 'nuisance'.²⁵⁰ Whereas a trespass must involve direct interference with rights in land, the tort of nuisance deals with *indirect* (or 'consequential') interference.²⁵¹ A nuisance may exist even in the absence of a physical interference or even if it merely disturbs the plaintiff's comfort, health, or convenience. Nuisance cases tend to deal with things like smells, noise, glare, or aesthetics. Airborne and waterborne pollution are often framed in terms of nuisance.²⁵² There are four issues that must be addressed before a person may successfully sue in private nuisance: the person must have legal standing as a plaintiff; they must demonstrate that the interest in land that is being interfered with is one protected by the common law; the interference must cause actual damage (whereas a person can sue in trespass even if there is no damage); and the interference must be unreasonable. These issues will be dealt with in turn.

A person who has no right in the land cannot sue in private nuisance.²⁵³ Generally, the plaintiff must be a freehold owner, or tenant, or a licensee with exclusive possession, or even a person who is in actual possession of land without a legal right to be there.²⁵⁴ By extension, exclusive possession native title holders should fall into the same category, although there is no case law on the question. The position of non-exclusive native title holders is somewhat less sure, but still seems to fall comfortably within the legal principles for nuisance.²⁵⁵ In some cases people with only partial interests in land have successfully sued in nuisance — for example, the right to fish on another person's land.²⁵⁶ Many of these cases have dealt with exclusive rights (for example, a right to hunt on land to the exclusion of all others), but the element of exclusivity does not appear necessary to establish a right to sue in nuisance. The important principle is rather that the plaintiff must have a legal interest in the land, and not just a mere licence to be on the land.²⁵⁷ In a number of cases, easements that were held in common between a number of people were sufficient to ground a claim in nuisance.²⁵⁸ Although debate continues about whether native title is technically 'property',²⁵⁹ it clearly (and by definition) consists of rights and interests in relation to land and waters that go beyond a mere licence.²⁶⁰ One can be reasonably confident that native title holders are capable of bringing an action in nuisance to defend their rights and interests in the land and waters, in the same way as those with comparable common law rights have been able to do.



Once a plaintiff's right to sue is established, the next question is whether the defendant's conduct interferes with a legally protected interest in the plaintiff's land. Not every aspect of a person's enjoyment of their land will be protected from interference; examples of unprotected interests include an unobstructed view,²⁶¹ clear television reception,²⁶² or the ability to conduct sensitive manufacturing processes.²⁶³ Subsidence of the land caused by the extraction of groundwater has also been treated as a harm that does not involve any wrongdoing,²⁶⁴ although it is not clear whether this conclusion remains true even where the common law freedom to take groundwater without restriction has been removed.²⁶⁵ So at common law some interests are not legally protected, although the determination of which interests are or are not protected depends on context²⁶⁶ and often involves a process of weighing the value of the competing land uses.²⁶⁷

For native title holders it is straightforward to identify the kinds of land uses that might ground a claim in nuisance: the determination of native title provides a convenient list. Most relevantly to the freshwater resources context, we could point to a specific right to take water, or fish, or other plant or animal species.²⁶⁸ Such rights exist in most determinations. If the activities of a neighbouring or coexisting land owner were to interfere with the native title holders' ability to exercise such rights, there is a clear argument that the law of nuisance has a role to play in restraining those activities. The situation would be analogous to those cases where a person has a private common law right to fish (called a *profit à prendre*) or to travel over a piece of land (a type of easement called a 'right of way'): the legal rights and interests they have in the land define what it is that the law of nuisance will protect. There is no reason to assume that the common law will only protect the kinds of land uses and interests associated with a particular historical era, geographical area or social group. The law of nuisance has traditionally been flexible according to context.²⁶⁹ In addition to the protection of purely physical harm against utilitarian values (such as interfering with the quality of groundwater)²⁷⁰, or issues of 'amenity' such as smell, noise and glare,²⁷¹ the law has also sometimes restrained activities that are unreasonably offensive to the beliefs or aesthetics of the plaintiff (or the plaintiff's customers).²⁷²

Evidence presented in native title claims generally establishes that native title holders' spiritual relationships to land and water and the ecosystems they support are central to the 'enjoyment' and 'use' of the land. Whether it be a right to conduct ceremonies and other cultural or spiritual activities within the determination area, a right to teach on the area about the physical and spiritual attributes of the area, a right to protect and maintain places of importance, or simply a recognition of the interconnected nature of native title holders' 'connection' to country, there is ample room to find a sound legal basis for actions in nuisance to restrain conduct that damages these rights.

As mentioned, a plaintiff in nuisance must show that the defendant's conduct has had (or will have) some negative impact on them — that is, they must prove *damage* (even



if that damage is intangible).²⁷³ For native title holders, such proof would involve both expert evidence about the hydrogeological and ecological impacts of the defendant's activities, and evidence from the native title holders about the ways in which those activities have harmed their social, cultural, economic or spiritual interests.

Having established that their interests in land and water are protectable under the law of nuisance, and that interference with those interests was causing (or would cause) damage, the native title holders would then need to demonstrate that the defendant's interference with those uses or interests was *unreasonable*.²⁷⁴ The seriousness and type of harm caused are important factors. The law has traditionally required a higher degree of harm when the complaint is merely about personal discomfort or inconvenience, compared to material damage to property or health. Discomfort and inconvenience must also generally continue for an extended time or many repetitions to be considered a nuisance.²⁷⁵ In the native title context, this may mean that it will be easier for native title holders to prevent physical harm to land or water compared to less tangible harms (such as developments that disrupt songlines). Nevertheless, the latter should still be within the law's scope, and a *permanent* disruption to (for example) an important songline may well be sufficient.

The 'character' of the geographic neighbourhood is sometimes a relevant factor in determining whether interference is unreasonable.²⁷⁶ However, judges have tended to treat physical damage to land or people as being less open to justification by reference to the character of the neighbourhood.²⁷⁷

The public benefit of the defendant's conduct may be taken into consideration by courts, but there is a limit to how far this may excuse a nuisance.²⁷⁸ In a number of cases the court has recognised the public value in a particular enterprise yet has found its operations to cause an unreasonable interference.²⁷⁹ It may be that the broad economic benefit of a particular development would raise the bar on the degree of interference necessary to be characterised as unreasonable, but this would be a matter of degree only.²⁸⁰ It is still quite possible that native title parties could succeed in establishing that the interference with their rights and interests was unreasonable, even if it created economic benefits.

Riparian rights

The common law has historically provided a special category of tort that is available to the owners or occupiers of land bordered or traversed by a watercourse — this is called *riparian land*.²⁸¹ Such landholders can sue for breach of their riparian rights, which are first, the freedom to use water from the watercourse for ordinary purposes (domestic purposes or watering stock), and second, the right to the natural flow²⁸² of water onto and away from their property, subject to upstream owners' rights to use water for ordinary purposes.²⁸³ There is some overlap between breach of riparian rights, trespass



and nuisance — for example flooding and water contamination are well-established instances of nuisance as well as being breaches of riparian rights.²⁸⁴

I will not discuss the action for breach of riparian rights in any detail in this paper, primarily because it does not add anything to the actions in trespass and nuisance, and also because on an orthodox account of the legal nature of native title, the common law riparian rights are not necessarily imported into the ‘bundle’²⁸⁵ of rights held by any given group of native title holders. That is, the interpretation of native title that has prevailed in Australian courts since at least 2002 treats it as a collection of separate rights that must be proved individually (and which may be extinguished individually).²⁸⁶ Native title is not an all-or-nothing affair in which mere recognition as being an ‘owner’ carries with it a single standardised set of rights. So there is nothing to guarantee that native title holders necessarily possess the same riparian rights as a common law ‘owner’ or ‘occupier’ of land.²⁸⁷ Precisely *what* water-related rights a given group of native title holders might hold in a particular area must be established by proof; and whatever these rights are, they may be enforced using trespass or nuisance as described above. The particular rights may be more extensive or less extensive than the common law riparian rights; there is no logical reason (within the prevailing legal orthodoxy) that they would be identical.

Because the enforcement of common law riparian rights by native title holders will not be addressed here, there is no need to consider the thorny question of whether and to what extent the common law riparian rights have survived the legislative regulation of water use in Australian states and territories.²⁸⁸

Negligence

Last, native title holders may in some circumstances sue other land users for negligent conduct that causes them damage. The key legal requirements are that the defendant must have been under a duty to take reasonable care, must have breached that duty, and damage caused by the breach must have been reasonably foreseeable. These are all highly fact-dependent questions, so it is beyond the scope of this paper to discuss any scenario in particular. Nevertheless, environmental disasters such as fire²⁸⁹ or water pollution²⁹⁰ are among the situations where native title holders might seek a remedy via the tort of negligence.

Common law defence of statutory authority

A person who has been sued for trespass, nuisance or negligence can potentially rely on a number of defences to justify their conduct and avoid liability. For example, showing that the plaintiff consented to the nuisance or trespass is a defence.²⁹¹ Another defence in nuisance claims is that the defendant had already been doing the same thing for a long period without anybody complaining.²⁹²



The most relevant and widely applicable defence in the situations covered in this paper is that of 'statutory authority'. The statutory authority defence excuses a defendant from liability in trespass or nuisance if they can show that they are authorised by law to carry out the activity complained of.²⁹³ The logic behind this defence is that if Parliament authorised a particular activity, it must have also authorised the consequences of the activity.²⁹⁴

Given the high degree of statutory regulation of industrial, agricultural, and other development activities in Australia, this raises a serious difficulty for native title holders wishing to rely on trespass or nuisance to protect their rights and interests. Many of the activities that will impact on important places or species will be conducted under licences or permits granted under regulatory legislation.²⁹⁵ That is particularly true of extraction or interference with water — as explained earlier, these activities cannot be done lawfully without a licence. So assuming that developers are not willing to risk criminal charges for operating without the relevant statutory authorisations, it is likely that their activities will be done in accordance with the necessary licences, permits and the like.

There are two key issues that must be addressed to determine whether the defence of statutory authority is available to a defendant. First, one must examine the relevant legislation carefully to determine whether or not the Parliament intended to take away the right of landholders to sue in trespass or nuisance in relation to activities authorised or required by the legislation.²⁹⁶ This is an issue of statutory interpretation.²⁹⁷ Second, one must determine whether the trespass or nuisance complained of was an inevitable consequence of what the relevant legislation authorised or required the defendant to do. A person cannot rely on the defence if the relevant activity can reasonably be done in a way that avoids the relevant interference.²⁹⁸ The defendant must demonstrate that there was no reasonable alternative manner of carrying out the authorised activity so as to avoid the nuisance or trespass.²⁹⁹ That is, the defence only extends as far as the statute actually authorises,³⁰⁰ and does not cover unreasonable or unnecessary harms.³⁰¹

One important question is whether a licence or permit granted *under* legislation has the same effect as the direct authorisation of activities by a statute. By far, most of the cases dealing with statutory authority have concerned public agencies such as hospital boards, water and electric authorities, railways and docks — all of which were directly granted authority by the words of the relevant legislation itself. By contrast, there has been far less judicial consideration of nuisances committed pursuant to licences or permits granted by administrative bodies. Several cases concerning planning permission have firmly established that planning authorities (operating under the relevant legislation) have no authority to authorise a nuisance.³⁰² Planning permission can, however, alter the 'character' of a neighbourhood, which may have the effect of preventing the defendant's conduct being an *unreasonable* interference with others' use and enjoyment of land.³⁰³ In the case of *Wheeler v JJ Saunders Ltd*, the position was



explained in terms of a proper characterisation of the powers that had been given by the Parliament to the entity granting the permission:³⁰⁴

Parliament is sovereign and can abolish or limit the civil rights of individuals.... The planning authority on the other hand has only the powers delegated to it by Parliament. It is not in my view self-evident that they include the power to abolish or limit civil rights in any or all circumstances. The process by which planning permission is obtained allows for objections by those who might be adversely affected, but they have no right of appeal if their objections are overruled.

Courts have shown a strong tendency to guard the private rights of individual landholders against encroachment. This is particularly the case where the claimed statutory authority comes from a legislative provision stating that the activity *may* be done rather than *must* be done. In *Metropolitan Asylum District v Hill*, Lord Watson said:³⁰⁵

Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think that the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not confer licence to commit nuisance in any place which might be selected for the purpose'

Or, in a case dealing with trespass to land, the High Court of Australia put it as follows:³⁰⁶

Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct.^[307] But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended.

In litigation involving the Wik people and a mining company, Drummond J said:

[W]hen authority is conferred by statute on an organisation to carry out certain works, the extent of the immunity conferred on the organisation from legal action by persons injured as a result of the execution of the works will always be governed by the proper construction of the statute. Subject to that, if the execution of the works so authorised necessarily involves the creation of what would otherwise be an actionable nuisance, the statute will be read as depriving the persons injured thereby of their remedy in nuisance against the organisation, but it will not be read as depriving persons injured by the negligence of the organisation in carrying out the authorised work or injured by the carrying out of work outside the scope of the statutory authorisation.³⁰⁸

It will be necessary, therefore, to closely interpret each jurisdiction's legislation to determine whether the Parliament's intention was to empower its licence-granting agencies to exempt licence-holders from liability in nuisance or trespass. The position may vary from jurisdiction to jurisdiction and from statute to statute. For example, in



Western Australia s. 111 of the *Environmental Protection Act 1986* (WA) explicitly preserves civil liability: 'Nothing in this Act in any way affects any right any person has at law to prevent, control or abate pollution or environmental harm or to obtain damages'. The *Rights in Water and Irrigation Act 1914* (WA) contains a similar provision, but subject to a rider: 'except that a person shall not be liable to be proceeded against in respect of any diversion, taking, or use of water that is permitted by a direction under section 22 or authorised by a licence under section 5C or by a local by-law'.³⁰⁹ The *Mining Act 1978* (WA) goes even further, confirming the availability of civil remedies 'unless [the relevant] act or omission occurs in pursuance of any authority lawfully given under this Act'.³¹⁰ Depending on the particular legislation, native title holders may find it easier or harder to overcome the defence of statutory authorisation. In many cases it will be open for native title holders at least to argue that the legislation merely intended to control activities that might harm public interests while leaving private landholders free to sue in nuisance or trespass.

If the legislation *is* found to have been intended to authorise the removal of landholders' ability to sue in trespass for activities authorised by a licence, then the focus of the native title holders must shift towards identifying any sense in which the defendant has exceeded their authority or could have avoided the interference. For example, if a mining company is releasing toxic waste into a water system, contrary to a condition of the mining lease, then the nuisance would fall outside the scope of the authorisation and the native title holders could proceed against the mining company. Or, if a commercial fisher had a statutory right to take a certain number of fish but in fact caught more than their allowance, they would be unable to rely on the statutory authority defence.³¹¹ Or, if a company had a licence to divert a watercourse and there were multiple ways in which it could do so (not all of which would harm the interests of native title holders), then its choice to divert the watercourse in a way that *did* harm the native title holders would not necessarily be excused by the statutory authority defence.³¹² However, if the relevant harm is simply caused by the removal of water from a river or aquifer, and that removal is expressly authorised by a licence, then the defence of statutory authority would appear to prevent the native title holders from restraining the removal of water.³¹³

There is an additional consideration for native title holders that is not faced by other landholders. Section 44H of the Native Title Act states that a validly granted lease, licence, permit, or authority will prevail over any native title rights and interests (though without extinguishing them). It goes on to say that 'the existence and exercise of the native title rights and interests do not prevent the doing of' any activity that is 'done in accordance with' a valid lease, licence, permit, or authority, and native title holders will not have any right to compensation for such activities. The Explanatory Memorandum for the 1998 amendments that introduced s. 44H uses the example of an irrigation licence to indicate the intention that activities done 'in pursuance of' such a licence will not be 'impeded' by the existence of native title.³¹⁴ On its face it appears that



Parliament intended for native title rights not to disrupt government decision-making about permitted uses of land and water. However, it is not clear that s. 44H substantially alters the position at common law. Certainly, the language used in the secondary material surrounding the amendments suggests that the purpose of s. 44H is to ‘make it clear’ or ‘ensure’ that native title will give way to statutory authority.³¹⁵ Nonetheless, the secondary material also demonstrates an intention to expressly limit the effect s. 44H to the scope of the relevant statutory authority.³¹⁶

There is no indication that the intention was to go further and remove the ability of native title holders to restrain or be compensated for nuisances or trespasses that would otherwise be beyond the scope of the statutory authorisation defence (either because the conduct goes beyond what is authorised, or because there were ways of doing what was authorised that would not have caused the interference). Indeed, the wording in s. 44H(d) — ‘the existence and exercise of the native title rights and interests do not prevent the doing of the activity’ — says nothing about the *manner* in which the activity is to be done.

If a court did interpret s. 44H as creating a protection for defendants additional to the common law defence of statutory authority, there may be a question as to whether s. 44H in this respect would be consistent with the *Racial Discrimination Act 1975*. In 1997, a Commonwealth legal officer gave evidence to a Parliamentary committee that was considering the introduction of s. 44H. In explaining the rationale for s. 44H, the officer mentioned the general principle that native title should be treated as closely as possible to freehold title, but indicated that this principle could not cope adequately with situations such as where native title coexists with pastoral leases.³¹⁷ However, it is not clear why such coexistence of interests is materially different from the common law situation where one party holds a freehold or leasehold interest and another party holds a non-possessory interest in land such as an easement or *profit à prendre*. As mentioned earlier, such non-possessory interests are still protected by nuisance and (in the case of *profits à prendre*) trespass. If s. 44H has the effect of removing native title holder’s rights to protection through the law of nuisance, in circumstances where holders of equivalent non-native title interests would enjoy such protections, then arguably s. 10(1) of the *Racial Discrimination Act 1975* would operate to remove that effect of s. 44H.³¹⁸

Note that some native title determinations are worded so as to build statutory authorisation into the very fabric of the rights and interests, making it much harder to succeed in a nuisance claim. For example, one determination specifies that the right to ‘maintain and protect places of importance’ does not apply ‘with respect to...rights and interests validly granted by the Crown pursuant to statute or by any valid executive or legislative act affecting the native title of the common law holders’.³¹⁹ Native title holders would be well advised to avoid such clauses if possible, if they intend to rely on such rights in a nuisance action against the holders of permits, licences and the like.



So to summarise: native title holders who can prove that there has been (or will be) an unreasonable interference with their rights and interests will still have to deal with the defence of statutory authorisation. A water user who wishes to rely on this defence will have to show that:

1. they hold a valid licence or authorisation
2. the intent of the legislation is to deprive landholders of the ability to sue in nuisance or trespass in connection with the authorised activities
3. the activity complained of is squarely within the scope of the authorisation, *and*
4. the interference with native title holders' rights and interests is an inevitable consequence of the authorisation; that is, there is no reasonable alternative way of doing the authorised activity that would not cause the interference.

These hurdles are not insignificant, and so it is quite possible that native title holders may not succeed in restraining or gaining compensation for conduct that is done under a licence or other statutory authorisation.

Remedies

Where a native title group's rights and interests are being unlawfully interfered with, there are three types of remedy that may be available: abatement (self-help), compensation and injunction.

Abatement refers to physical action to remove or reduce the trespass or nuisance. The law allows a person to enter onto another person's land and use reasonable force to bring a trespass nuisance to an end — without any need to go to court first.³²⁰ There are a number of risks and restrictions governing this remedy. First, and most obviously, the person must be confident that they would actually succeed if they sued in court: if not, then their physical actions could constitute a trespass in their own right (or a criminal assault, if directed towards a person). Second, the situations in which abatement is available are generally limited to those where the response required is either fairly minor or sufficiently urgent.³²¹ Third, the action taken in abatement must not inflict unnecessary damage and must be proportionate to the harm caused by the nuisance or trespass.³²² Finally, the person proposing to abate the nuisance or trespass must generally give notice to the other person before going onto their land.³²³ It is clear that native title holders would face significant risks in attempting to use abatement in the face of new developments, and in most cases it would be more prudent to go to court first to determine the parties' respective legal rights. There may be some circumstances, however, where this remedy could be used effectively to protect important places from harm.

Compensation is a straightforward remedy. Where the plaintiff can prove that damage or harm was caused by the defendant's trespass, nuisance or negligence, and that damage or harm was reasonably foreseeable, then the defendant can be ordered to



pay compensation.³²⁴ The threat of a compensation claim may be an effective deterrent or source of bargaining leverage, and is therefore potentially useful in preventing or imposing conditions on proposed developments.

An injunction is an order from the court prohibiting or requiring something to be done. Breach of an injunction can constitute a contempt of court punishable by imprisonment or fine.³²⁵ It is therefore a powerful way of preventing a future or continuing nuisance or trespass. In general, a court will not grant an injunction unless it is satisfied that damages would not be an adequate remedy for the damage that would result from the trespass or nuisance.³²⁶ Where the evidence shows that the nuisance or trespass is likely to continue or be repeated, this requirement will not be difficult to satisfy.³²⁷ If no interference has occurred yet, the evidence will need to demonstrate that it is very likely to occur and that an injunction is necessary to prevent it.³²⁸ Merely temporary or trivial interferences with the enjoyment or use of land may be left to be compensated by damages rather than justifying an injunction.³²⁹ The law is reluctant, however, to allow a defendant to simply persist in a nuisance or nuisance so long as they are able to pay for it.³³⁰ In applying these principles to the case of native title holders trying to restrain a proposed development that would harm their rights and interests, there is quite a strong case for arguing that an injunction would be the appropriate remedy to prevent lasting damage to country. The conclusion will inevitably depend on the specific details, but if the proposed development involves an alteration to the underground or surface hydrology (whether by irrigation, diversion, damming or otherwise) then the argument that an injunction is the appropriate remedy should have strong prospects of success.

Summary

Although I was unable to identify any cases in which native title holders have used common law claims, the very logic of 'recognising' native title in the Australian legal system entails that the principles underlying the claims of trespass, nuisance and negligence should apply equally to the rights of native title holders. If that is correct, the common law gives native title holders the ability, subject to the defence of statutory authority, to protect a broad range of rights and interests from interference. The common law may enable native title holders to prevent activities that diminish the water available to support those rights, or pollute or flood or otherwise interfere with those rights, or at least to be compensated for the resulting harms. Unauthorised taking of water from a river or aquifer, or unauthorised obstruction or pollution of a watercourse, are some of the obvious things that could be stopped using this legal mechanism.

However, in any case where such interference is done pursuant to a mining lease, water licence or the like, native title holders will need to overcome the defence of statutory authorisation. Unless the other party exceeded their authority, or unless the authorised activity could have been done *without* interfering with the native title holders' rights and interests, native title holders will not be able to legally restrain or be



compensated for the other party's conduct. Nevertheless, the common law's tradition of protecting private rights against legislative interference means that polluters (or others interfering with native title holders' rights and interests) will need to clearly establish all the elements of their defence to escape liability. Native title holders and their legal advisers should carefully examine all of the relevant facts and laws before concluding that they have no claim.

Agreement-making

Native title holders can use a range of political, legal, moral and commercial bargaining leverage to push for agreements with governments or developers that protect their rights and interests relating to water. The legal sources of leverage may include:

- future acts procedural rights, particularly the 'right to negotiate'
- exclusive possession rights³³¹
- consent determination negotiations
- potential compensation liability for extinguishment, interference or impairment of native title rights and interests
- the threat of legal proceedings in administrative law or tort law.

There are many creative ways in which this bargaining leverage might be used. Without making any comment as to how likely another party might be to agree to such terms, some of the possibilities are as follows.

Native title holders negotiating a mining agreement can push for enforceable contractual clauses that impose procedural and/or substantive obligations on the miner in relation to water. Similarly, where native title holders have an arguable case against a developer in trespass or nuisance, or against a government licensing decision in administrative law, they may agree to settle out of court in return for similar contractual terms.

- The native title party could specify particular water sites (or a process for identifying sites) that must be avoided by the miner. The location of water-extraction points and other features of the project could be negotiated to avoid damage to significant sites.
- The miner could undertake a commitment to conduct cultural-environmental surveys either together with or additional to the standard heritage surveys, to identify the sites, species, systems or usages that depend on particular water resources.³³²
- The miner could commit to engage hydrological experts to assess the likely impact of activities on those identified values. Unacceptable impacts, if detected early enough, can be prevented or guarded against (alternatively, if they cannot be then that would be an important matter for the right to negotiate process outlined above).
- Compulsory consultation, liaison and reporting structures could be established, so that problems can be detected and communicated both ways.



- Volumetric limits on extraction of water could be agreed, or some other benchmark (such as the water level in a stream, billabong, spring or rockhole, or measures of water quality such as turbidity or concentration of particular contaminants) could be agreed.
- Royalty-style clauses can be used to incentivise efficiency and discourage waste (whereby the miner agrees to pay a certain amount of money for each megalitre of water extracted, or agrees to a maximum cap beyond which they must pay higher rates).

New large public infrastructure developments such as dams may involve state, local government and private parties. The future acts and heritage implications may lead these parties to consult and negotiate on ways to minimise impacts and maximise positive opportunities. Even if the ‘right to negotiate’ procedure does not apply in some cases, the threat of compensation liability may nevertheless be sufficient to draw other parties into negotiations. Negotiations may cover issues such as the size and location of dams, the placement of fish ladders, the procedures for releasing flows, and other matters. The negotiations may interact with environmental impact assessment processes.³³³

In the lead-up to a consent determination or other form of native title settlement, agreements with government can provide for the creation of new representative structures and processes:³³⁴

- State government, local councils and statutory agencies can commit to appointing certain numbers or proportions of native title holders to existing decision-making bodies.
- Alternatively, new bodies such as reference groups may be created and given institutional effect through settlement agreements.
- Alternative processes that take the place of the ‘right to negotiate’ process can be implemented through ILUAs.³³⁵ These could be tailored to be more responsive to hydrological concerns — different timeframes and processes, provision of experts, and the like.
- Co-management arrangements can be agreed between various government agencies, land users, and native title holders. Indigenous Protected Areas are one form of this kind of arrangement, and involve agreements with the Commonwealth government. Generally co-management or joint management will cover a range of land management issues, but protecting water systems can certainly be a strong part of it.

Agreement-making along these lines has been framed as a way of dealing with legal uncertainty and avoiding the ‘transaction costs’ that arise from conflict — particularly the damage to relationships and trust.³³⁶ Agreements may be capable of delivering more fine-grained and flexible mechanisms than the blunter instrument of legislation or litigation.³³⁷

Yet some of the same problems discussed in the first part of this paper apply equally to this situation:

- Depending on the circumstances, the negotiation position of native title holders may be quite weak, and may be insufficient to gain the desired outcomes.



- Native title holders may consider it unfair that they should have to sacrifice their legal entitlements (such as a right to compensation for extinguishment in other parts of their traditional country) in order to gain effective protection of what has already been proven as their legal rights under traditional law and custom.
- Conversely, Aboriginal people who have not been able to satisfy the legal requirements for native title will not be able to muster the same bargaining leverage, and so may lack the ability to protect water resources that are culturally important to them.

Protecting interests in water — summary

Many legal strategies are available to native title holders to protect water resources and water-dependent species, sites and systems. However, these methods are highly situational and contingent. The law offers occasionally strong, but not predictable, protections to native title holders.

Exclusive possession rights can help native title holders to deny access to a particular water resource, but only if such rights have been proven to exist over an area covering all locations from which the resource could be viably accessed. The Native Title Act's 'future acts' regime may allow native title holders to insert themselves in the processes by which governments allow different types of developments to proceed. This protection is strongest in the case of new mining projects, but even then is unlikely to prevent projects from proceeding (as opposed to ameliorating some of their worst impacts). The future acts regime does ensure that interference with native title rights is compensable, and advocacy strategies will be most effective when they bring this fact to the attention of decision-makers. Nonetheless, governments and businesses are still free to treat compensation as one of many 'overheads' — merely a cost of doing business. Native title can be a disincentive but not an absolute barrier.

Similarly, native title gives an opportunity to participate in the substantive environmental and social decision-making processes that lead to the grant or refusal of development approvals. Their status as the holders of interests in land gives native title holders a special platform from which to raise their objections. And if the proper processes are not followed, they can use the courts to challenge the resulting decision. Again, however, none of these legal mechanisms amounts to a reliable or consistent power to prevent actions that would harm native title holders' interests.

The common law actions of trespass, nuisance and negligence are significant means of protecting native title interests. Still, they are vulnerable to the defence of statutory authority. The common law claims cannot succeed where Parliament has expressly authorised the very conduct complained of, with the intention of taking away the right to sue. In many cases, statutory authority will completely defeat native title holders' attempt to enforce their rights using the common law. But the defence does not apply to all permits or approvals granted under legislation, nor to conduct falling outside the scope of the authorisation — including unnecessarily harmful ways of doing what is



authorised when reasonable alternatives exist. These limitations on the availability the defence mean that neither native title holders nor development proponents should ignore the possibility of protecting native title rights through common law actions.

The legal mechanisms described above create the opportunity for native title holders to protect water resources and the things that depend on them using negotiated agreements. Agreement-making offers the chance of greater predictability and more detailed focus in the way native title holders' interests are protected. However, the sometimes weak bargaining position of native title holders, together with considerations of equity, mean this approach cannot be regarded as a perfect or ideal solution.

Conclusion

This paper has attempted to outline in a fairly exhaustive way the various legal arguments and strategies that could be used within the native title context to promote Aboriginal people's diverse priorities with respect to water. As mentioned in the introduction, native title is not the only tool available to Aboriginal people in this regard. However, the complexity of the subject produces a risk that native title becomes either a blockage to further reform or a focal point for false hopes, simply because it is not well understood.

For native title holders, the conclusions in this paper present some bad news. The Native Title Act was designed to protect the integrity of state and territory regulatory regimes, and so long as the prescribed processes are followed there is little scope to challenge the validity of water legislation. There is no way to force governments to grant water licences to native title holders, and the exemptions from licencing regimes are quite limited. There is no hope under current legislation of claiming a North American-style entitlement to substantial volumes of water for commercial irrigation.

The bad news continues for native title holders seeking to prevent harmful developments. Exclusive possession rights do not apply to water itself, and can only be used to prevent physical access to water resources where potential water-users have no other means of access. The Native Title Act's future acts regime does not provide any means of preventing the grant of development approvals other than some mining and petroleum tenements. Administrative law promises procedural compliance but cannot guarantee a substantive outcome. Common law claims must overcome the defence of statutory authority. And agreement-making will inevitably involve a trade-off of other entitlements, and does not help in cases where the bargaining position is weak.

However, this bad news should not be allowed to overshadow the significance of what native title *can* offer to Aboriginal people concerned about their access to, or the protection of, water resources and water-dependent things. Aboriginal people seeking a water licence might not be able to force the government to grant them one, but they can ensure that their interests are accorded due consideration in water planning and



licencing decisions. The exemptions from licensing requirements may not allow commercial irrigation but they do give native title holders the same rights as other landholders: domestic uses, watering stock and (in some cases) gardens. Further, the exemptions for native title holders potentially go further, possibly allowing the watering of significant areas and even communal non-market food production.

Similarly, native title does afford some genuinely useful tools to native title holders wanting to protect against harmful developments. In the right circumstances, exclusive possession rights can be decisive in preventing or attaching conditions to the use of water resources. The future acts regime gives an opportunity to be heard, or in some cases to negotiate, and in any case presents a credible threat of compensation liability that can be leveraged towards the protection of things valued by native title holders. Administrative law treats native title holders as important players with voices worth hearing, instead of mere advocates or interest groups. This gives native title holders the chance to insert themselves into the process, whether by participating up front or challenging a decision after it is made.

The common law actions of trespass, nuisance, and negligence have not yet been employed in the native title context, but the lack of case law on the subject should not detract from the significance of this legal mechanism. If the legal recognition of native title rights means anything, it must involve the ability for traditional owners to enforce their rights through the judicial process. Although the defence of statutory authority will very often pose an obstacle for native title holders seeking to stop an industrial or infrastructure development, it is important to remember that this defence requires proof that the developer's statutory authorisation is valid, that the intent of the legislation is to take away the right to sue, that the activity complained of falls within the scope of the authorisation, and that there is no reasonable alternative way of doing the authorised activity that would not interfere with the native title rights. These hurdles are not insubstantial and should give native title holders cause for optimism and developers cause for caution.

The legal analysis in this paper demonstrates that the interaction between native title and other areas of water law is not nebulous or unknowable, and does not rest on any single broad statement of principle. Instead, it is a matter of examining the prevailing legal rules and mechanisms governing land and water use, and determining how native title affects each one. The dominance of the legislature in Australia's systems of water regulation means that this is frequently a task of statutory interpretation and administrative law. Even the common law claims must work in the shadow cast by Parliament.

Accordingly, governments should avoid getting bogged down in uncertainty or risk aversion when proposing new reforms to accommodate native title rights and interests. It should be possible to clearly separate those issues which raise concrete legal risks (principally, compensation liability) from matters of policy, politics and social justice. The



former can be fairly readily identified, even if not precisely quantified, leaving the field open for dealing with the latter questions with less confusion.

Conversely, where native title holders and their representatives are advocating for access to water for economic development, they may find it productive to focus their efforts primarily on clearly articulated policy goals and clearly identified barriers, rather than basing their claims principally on their legally recognised native title rights. Of course, where specific legal arguments do arise, these can be useful additions to the advocacy armoury.

By its nature, water is a tricky thing for the law to govern. Uses and impacts by one party can have flow-on effects for many others, even those a long way away. In English and Australian law, absolute rights over water are rare. The common law of water was replete with notions of reciprocity and standards of ‘reasonableness’, and the statutory regimes that have taken its place explicitly require the balancing of competing environmental, economic, social and cultural interests. Native title does not provide Aboriginal people with a trump card in this inherently political process; but it certainly does strengthen their hand.

¹ In this paper I will use ‘Australian legal system’ to refer to the interconnected legal systems established in the colonies and, after 1901, in the federation of Australia. The term is intended to distinguish this British-derived system from the Aboriginal and Torres Strait Islander legal systems that existed before colonisation, many of which continue today.

² This paper focuses on the water rights and interests of Australian Aboriginal people, and much of the cultural and hydrological context informing the analysis refers to Aboriginal rather than Torres Strait Islander country. Torres Strait Islanders of course hold native title rights, including rights over marine areas and freshwater resources, and most of the legal analysis in this paper will apply equally to their situation. However, the water objectives and priorities that the paper is directed towards were selected in light of statements made by Aboriginal people and organisations in recent years. There has been comparatively less scholarly and political emphasis on water planning and management in the Torres Strait, perhaps because the political, economic, and hydrological context is different. We note that the work of the First Peoples’ Water Engagement Council has frequently limited itself to Aboriginal rather than Torres Strait Islander issues (see e.g. First Peoples’ Water Engagement Council (2012) *Advice to the National Water Commission*, May 2012, online at http://nwc.gov.au/_data/assets/pdf_file/0004/22576/FPWEC-Advice-to-NWC-May-2012.pdf). See Torres Strait Island Regional Council, *Water Management*, online at <http://www.tsirc.qld.gov.au/our-work/water-management>.

³ *Intergovernmental Agreement on a National Water Initiative*, 2004. On integrated water resource management, see para. 78 in particular, 28 June 2017, online at https://www.nailsma.org.au/sites/default/files/publications/National_water_initiative%202004_1.pdf#overlay-context=hub/resources/publication/national-water-initiative-2004.

⁴ Para 25(ix), *Intergovernmental Agreement on a National Water Initiative*, 2004.

⁵ First Peoples’ Water Engagement Council (2012) *Advice to the National Water Commission*; Jackson, S and Morrison, J (2007) ‘Indigenous perspectives in water management, reforms and implementation’, in Hussey, K and Dovers, S (eds) (2007) *Managing Water for Australia: the Social and Institutional Challenges*, CSIRO Publishing at 23–41; Jackson, S and Langton, M (2011) ‘Trends in the recognition of indigenous water needs in Australian water reform: the limitations of “cultural” entitlements in

achieving water equity', *Journal of Water Law* 22:2/3: 109–123; Weir, J (2009) *Murray River Country: An Ecological Dialogue with Traditional Owners*, Aboriginal Studies Press; Tan, P and Jackson, S (2013) 'Impossible dreaming — does Australia's water law and policy fulfil Indigenous aspirations?', *Environmental and Planning Law Journal* 30: 132–149; Rumley, H and Barber, K (2004) 'We used to get our water free', *Report prepared for the Water and Rivers Commission of Western Australia*, April 2004; Morgan, M, Strelein, L and Weir, J (2004) 'Indigenous Rights to Water in the Murray Darling Basin', Research Discussion Paper No. 14, AIATSIS; North Australian Indigenous Land and Sea Management Alliance (2008) *An Overview of Indigenous Rights in Water Resource Management*, Lingiari Foundation; Duff, N, Delfau, K and Durette, M (2010) *A review of Indigenous involvement in water planning*, report prepared by Synexe for the National Water Commission.

⁶ First Peoples' Water Engagement Council (2012) *Summary of First Peoples' National Water Summit*, 29–30 March 2012, online at <http://studylib.net/doc/15326573/-doc-39kb>.

⁷ Tan, P (2009) 'A review of the legal basis for Indigenous access to water', *report prepared for the National Water Commission*, February 2009; Christina, S (2012) 'Water Reform and the Right for Indigenous Australians to be Engaged', *Journal of Indigenous Policy* 13: 3–23; O'Donnell, M (2011) 'Indigenous Rights in Water in Northern Australia', *Tropical Rivers and Coastal Knowledge*; North Australian Indigenous Land and Sea Management Alliance (2008); Duff, N, Delfau, K and Durette, M (2010) *A review of Indigenous involvement in water planning*.

⁸ The word 'need' here is ambiguous. Does it suggest the possibility that native title holders could compel water planners to allocate water to them, or does it signify some lesser need, such as moral necessity? The analysis in this paper will demonstrate that neither of these fully captures the situation accurately.

⁹ Duff, N (2013) 'Reforming the Native Title Act: Baby Steps or Dancing the Running Man?', *Australian Indigenous Law Review* 17(1): 56.

¹⁰ As discussed later in the paper, the Queensland legislation allows usage for 'traditional purposes', whose definition does not specifically exclude commercial usage.

¹¹ *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [290]–[327], [368]–[384].

¹² Note that the definition of 'native title' in s. 223 of the *Native Title Act* refers to rights and interests in 'land or waters', where 'waters' is defined in s. 253 to include 'sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters', 'the bed or subsoil under, or airspace over, any waters', and 'the shore, or subsoil under or airspace over the shore, between high water and low water'.

¹³ Sections 61, 225.

¹⁴ Section 223.

¹⁵ Note that the term 'waters' has a different meaning to 'water' in the *Native Title Act 1993*. Section 253 defines the term 'waters' to include: (a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or (b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in paragraph (a)); or (c) the shore, or subsoil under or airspace over the shore, between high water and low water. 'Water', by contrast, will be taken to refer only to the actual liquid substance: *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v State of Queensland* [2001] FCA 414 at [94].

¹⁶ Note the term 'non-exclusive' does not mean that there is any other person with the same right — it simply means that that right does not entail the right to exclude other persons from accessing the area.


¹⁷ For example, *Owens on behalf of the Tagalaka People v State of Queensland* [2012] FCA 1396.

¹⁸ For example, *Hayes v Northern Territory of Australia* [2000] FCA 671.

¹⁹ For example, *Hayes v Northern Territory of Australia* [2000] FCA 671.

²⁰ For example, *Wandarang, Alawa, Marra and Ngalkan Peoples v Northern Territory of Australia* [2004] FCAFC 187.

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- ²¹ This might be thought of as equivalent to a right of ‘exclusive possession’ over water itself, rather than just over the land next to, underlying or overlying the water source. On this distinction see *Griffiths v Northern Territory of Australia* [2006] FCA 903 at [742]–[771].
- ²² Under the common law, the restrictions on a landholder’s liberty to take water from a watercourse arise from the claims of downstream landowners, and there are no restrictions at all on the liberty to take groundwater: Gardner A, Bartlett R, Gray J, and Carney, G (2009) *Water Resources Law*, LexisNexis Butterworths Australia, at 151–182. An example of an unqualified water-use freedom in a native title determination is ‘the [non-exclusive] right to have access to and use the natural water of the determination area’: *Griffiths v Northern Territory of Australia (No 2)* [2006] FCA 1155.
- ²³ The reason that proving a minimum supply right may be difficult for a given claim group is that it may be difficult to identify in pre-colonial times the kinds of land-use competition that might have made such a right necessary. That said, in some cases this will not be a problem: for example, evidence of pre-colonial construction of dams or weirs would support the existence of laws and customs protecting the rights of downstream people: for an analysis of the interaction between traditional weir-building and British-derived riparian rights, see Barber, M and Jackson, S (2015) ‘Remembering “the blackfellows’ dam”’: Australian Aboriginal water management and settler colonial riparian law in the upper Roper River, Northern Territory’, *Settler Colonial Studies* 5(4): 282–301.
- ²⁴ The common law right to protection against water pollution is well established, both as an application of the law of nuisance (discussed in Part 2 below, ‘Common law claims’) or as part of the protection of riparian rights: Gardner A, Bartlett R, Gray J, and Carney, G (2009) *Water Resources Law* at 161 and 168. This common law right appears to have survived the introduction of regulatory legislation (other than in Victoria, which expressly abolishes it): Gardner A, Bartlett R, Gray J, and Carney, G (2009) *Water Resources Law* at 206. By extension, a native title right to a minimum level of water quality is likely to be both consistent with the common law and unextinguished by legislation. The proof of such a quality-protection water right may involve evidence of laws and customs regulating the protection of water resources and water-dependent significant sites. Note in *Lardil Peoples v Queensland* [2004] FCA 298 at [179] the claimants failed to establish a quality-protection water right within a tidal area, as Cooper J had found that such a right would merely be an application of the general right to control access to the area, a right that been lost when British sovereignty was first asserted. Although this could be taken to imply that a quality-protection water right in a non-tidal area would be similarly dependent on the right to control access to the water, that result does not necessarily follow. After all, the common law equivalent depends not on control of access but on an independent rule regulating acceptable land use.
- ²⁵ For the common law proposition that flowing and subterranean water cannot be property but belongs to all equally: *Liggins v Inge* (1831) 7 Bing 682l 131 ER 263 per Lord Chief Justice Tindal; Gardner A, Bartlett R, Gray J, and Carney, G (2009) *Water Resources Law* at 152 and 166. Under the common law, other landholders have specified rights that would be inconsistent with the existence of exclusive rights to flowing water: *Chasemore v Richards* [1843–60] All ER 77 at 82. (The situation is slightly more nuanced for groundwater: the common law does not provide any positive right to use groundwater, and so a landholder cannot restrain others from taking groundwater: *Acton v Blundell* (1843) 152 ER 1223; *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3 at [55] per Gummow and Crennan J.) For admittedly inconclusive applications to the native title context: *Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425 at [41]–[43]; *Attorney-General (NT) v Ward* [2003] FCAFC 283; (2003) 134 FCR 16 at 25; see also *Griffiths v Northern Territory of Australia* [2006] FCA 903 at [742]–[771].
- ²⁶ Gardner A, Bartlett R, Gray J, and Carney, G (2009) *Water Resources Law* at 257–266; *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at [263]. Shortly put: every right that another person has to take water from a particular water resource is, by its very nature, inconsistent with a native title right to the exclusive use of water. That is so whether the other person’s right exists under the common law or under state or territory water legislation.
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- ²⁷ Australian Cultural Heritage Management (2014) 'National Cultural Flows Research Project (Component 1)', *report for the National Native Title Council*, February 2014; Weir, J (2009) *Murray River Country: An Ecological Dialogue with Traditional Owners*.
- ²⁸ Other market-oriented consumptive uses might include the operation of a beverage or water bottling business, recycling plant, paper mill, or hotel, resort, restaurant, etc. See e.g. Brown, C 'Aboriginal community plans major horticultural development', *ABC News*, 6 May 2013, online at <http://www.abc.net.au/news/rural/2013-05-07/aboriginal-community-plans-major-horticultural/6143480>.
- ²⁹ Improving access to economically productive freshwater resources has been the subject of sustained and increasing advocacy and policy development by Aboriginal people over several decades, particularly in northern Australia. However, not all Aboriginal people wish to see the water resources in their traditional country used in this way: some may disagree with the idea that market-oriented development is the only or the most appropriate model for Aboriginal economic development. Some may prefer market-oriented enterprises that do not impact or change the landscape as much (such as tourism); and some may simply place more emphasis on protecting the spiritual and environmental values in the landscape than on how Aboriginal people might engage in such enterprises. See generally: First Peoples' Water Engagement Council (2012) *Advice to the National Water Commission*, May 2012. Further, Murray-Lower Darling Rivers Indigenous Nations, *Echuca Statement*, 14 November 2007, online at http://www.environment.sa.gov.au/files/sharedassets/public/corporate/about_us/aboriginal_partnerships/mldrin-echuca-declaration-2009.pdf; North Australia Indigenous Land and Sea Management Alliance, *Mary River Statement*, 6 August 2009, online at <https://www.nailsma.org.au/sites/default/files/publications/Mary-River-Statement%20text%20only.pdf>; North Australia Indigenous Land and Sea Management Alliance (2012), 'Towards resilient communities through reliable prosperity' *North Australian Indigenous Experts Forum on Sustainable Economic Development — First Forum Report*, 19–21 June 2012, online at <http://nailsma.grasslands.net/sites/default/files/publications/Towards-resilient-communities-KS013-web.pdf>; Barber, M and Jackson, S (2011) *Indigenous Water Values and Water Planning in the Upper Roper River, Northern Territory*, CSIRO: Water for a Healthy Country National Research Flagship, online at <https://www.environment.gov.au/system/files/resources/1701aae6-6b63-4268-b546-bd99ae7d6238/files/nawfa-indigenous-water.pdf>.
- ³⁰ We note also that native title holders may have rights to take water that derive not from their status as native title holders but from other sources, such as statutory land rights legislation, Aboriginal pastoral leases, and the like.
- ³¹ Note throughout the remainder of this paper, I will use the term 'native title holders' to refer to people who have native title rights over a particular geographical area, whether those rights have been formally recognised in a determination yet or not. In some cases, native title will need to be proved in court before it can be used to achieve the relevant outcome; in other cases (primarily those that rely on the 'future act' regime under the *Native Title Act*) native title claimants can achieve legal outcomes without first proving their rights.
- ³² Below I describe one possible, but untested, exception to this proposition: the Queensland legislation allows usage for 'traditional purposes', which do not specifically exclude commercial usage.
- ³³ Section 100, *Commonwealth Constitution*. The High Court has interpreted that prohibition as only applying to laws made under the Commonwealth's 'trade and commerce' power, and as only applying to flowing surface water and not groundwater: *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3.
- ³⁴ *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, though see Kirby J's judgment at [303]–[309].
- ³⁵ To the extent that a law regulating water use might be interpreted as taking away property, that law could be challenged if it were a Commonwealth law that did not provide just terms. Such a challenge was attempted in respect of New South Wales laws implementing the Murray Darling Basin Plan: *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51. The challenge failed on two bases: first,
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there was no property in the form of common law rights to take groundwater (which had been abolished previously and in any case were not property) — the only property that the landowners held in relation to water was a statutory right to extract groundwater under a licence (at [51]–[80], [142]–[147]); and second, when the New South Wales government cancelled the existing licences and replaced them with new licences (with a smaller entitlement), it did not thereby ‘acquire’ any property of the landowners because the government did not gain any additional rights or powers (at [81]–[86], [148]–[154]). The further issue — whether or not the Commonwealth’s involvement in the NSW government’s management of water (through funding and intergovernmental agreements) was sufficient to render the cancellation of the licences invalid — was not answered, since the court found there had been no acquisition of property and therefore no invalidity at the Commonwealth level (at [33]–[45], [141]).

³⁶ The exception is the *Water Act 2007* (Cth), which does have substantive regulatory operation in the Murray-Darling water basin.

³⁷ *Pye v Renshaw* [1951] HCA 8; (1951) 84 CLR 58 at 79–80; *Mabo v Queensland* (1988) 166 CLR 186 at 202 per Wilson J (Mason CJ and Dawson J agreeing), 213 per Brennan, Toohey and Gaudron JJ, 224 per Deane J. Note the controversy in *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51 over whether the Commonwealth constitutional prohibition extends to the making of an intergovernmental agreement under which a state agrees to acquire a third party’s property: at [33]–[46] per French CJ, Gummow and Crennan JJ, [136]–[141] per Hayne, Kiefel and Bell JJ. See also *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399. Note that state and territory legislation could not be challenged for inconsistency with an intergovernmental agreement such as the *National Water Initiative* mentioned in the Introduction to this paper. See *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 5; *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3.

³⁸ See s. 50 *Northern Territory (Self-Government) Act 1978* (Cth), s. 23 *Australian Capital Territory (Self-Government) Act 1988* (Cth). So too are Commonwealth laws made about the territories: *Wurridjal v The Commonwealth of Australia* [2009] HCA 2.

³⁹ See *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51 for an example of how a court goes through the three steps of determining whether there is property, whether there is an acquisition and whether there were just terms. See also e.g. *Wurridjal v Commonwealth* (2009) 237 CLR 309; [2009] HCA 2.

⁴⁰ *Ward* HCA at [114]–[117], [309]–[321]; *James v State of Western Australia* [2010] FCAFC 77 at [39]–[55]; generally *Mabo v Queensland* [1988] HCA 69; (1989) 166 CLR 186.

⁴¹ Support for the proposition that water legislation took away common law riparian rights, by vesting the ‘the right to the use and flow and to the control’ of freshwater in the Crown, is found in *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51 at [54] and [72] per French CJ, Gummow and Crennan JJ; [116], [144] per Hayne, Kiefel and Bell JJ; [196] per Heydon J. By comparison, the Full Court in *Western Australia v Ward* (2000) 170 ALR 159; [2000] FCA 191 held that the equivalent provisions in WA did not extinguish native title rights to use water: at [400] per Beaumont and von Doussa JJ and [861] per North J. On appeal in *Ward*, the High Court did not disturb this conclusion: in *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at [263] the majority implicitly concluded that only a right to the *exclusive* use of water would be extinguished by the vesting of use, flow and control in the Crown. This suggests that other native title rights relating to water would remain, with the result that the same legislation would remove the common law riparian rights but leave the equivalent native title rights in place. In those circumstances it would be difficult to argue that the legislation is discriminatory against native title holders. Aside from the ‘vesting provision’ just discussed, there are other provisions in state and territory water legislation that more clearly remove the common law rights relating to water: Gardner A, Bartlett R, Gray J, and Carney G (2009) *Water Resources Law* at 201–206. To the extent that these other provisions extinguish native title rights, they would do so in a non-discriminatory manner.

⁴² Section 212(1)(a) and (b). The same section stipulates that such confirmation does not extinguish any native title rights and interests: s. 212(3).



⁴³ Section 13, *Titles (Validation) and Native Title (Effect Of Past Acts) Act 1995* (WA); s. 12, *Validation (Native Title) Act* (NT); s. 17, *Native Title (Queensland) Act 1993* (Qld); s. 17, *Native Title (New South Wales) Act 1994* (NSW); s. 14, *Land Titles Validation Act 1994* (Vic); s. 39, *Native Title (South Australia) Act 1994* (SA).

⁴⁴ Section 233 *Native Title Act 1993*.

⁴⁵ Note that many state and territory water laws contain certain provisions that only apply to geographical areas that have been 'declared' or 'proclaimed' for that purpose: see e.g. s. 26B, *Rights in Water and Irrigation Act 1914* (WA), s. 125, *Natural Resource Management Act 2004* (SA); s. 6A, *Water Act 1983* (Vic). This introduces some uncertainty, since s. 24HA applies only to the 'making, amendment or repeal of legislation' or the 'grant of a lease, licence, permit or authority'. The making of a declaration or proclamation does not appear to fall within these categories — the declaration or proclamation is the thing that causes existing legislative provisions to apply to a given part of the state or territory. It seems arguable that the declaration or proclamation would not be automatically validated by s. 24HA. However, it might not assist native title holders to make such an argument: the declaration or proclamation would be caught in any case by s. 24MB or possibly s. 24LA, and would not benefit from the right to negotiate under Subdivision P (see s. 26). So, whether the validation is done under s. 24HA or elsewhere, the outcome will effectively be the same.

⁴⁶ It is noteworthy that s. 207(1) of South Australia's *Natural Resource Management Act 2004* states that nothing done under that Act 'will be taken to affect native title', but that this exclusion will not apply if the relevant effect on native title 'is valid under a law of the State or the Native Title Act 1993': s. 207(2). In relation to water regulation under the *Natural Resource Management Act 2004*, it is difficult to see what effect s. 207(1) could have, given the validating effect of s. 24HA *Native Title Act 1993*.

⁴⁷ Section 24HA(5) *Native Title Act 1993*.

⁴⁸ Section 228 *Native Title Act 1993*. A separate but similar set of provisions applies to 'intermediate period acts' — occurring between 1 January 1994 and 23 December 1996: ss 22F, 22B, 22C and 232A.


⁴⁹ *Titles (Validation) and Native Title (Effect Of Past Acts) Act 1995* (WA); *Validation (Native Title) Act* (NT); *Native Title (Queensland) Act 1993*; *Native Title (New South Wales) Act 1994*; *Land Titles Validation Act 1994* (Vic); *Native Title (South Australia) Act 1994*.

⁵⁰ Sections 19, 15 and 238; 20 and 17 *Native Title Act 1993*. See also ss 18 and 22E.

⁵¹ Section 5C, *Rights in Water and Irrigation Act 1914* (WA); ss 44, 59, *Water Act* (NT); s. 808, *Water Act 2000* (Qld); ss 60A, 91A-91I, *Water Management Act 2000* (NSW); ss 33E, 63, *Water Act 1989* (Vic); s. 124, *Natural Resources Management Act 2004* (SA). There are some exceptions to this regulatory scheme, for example in Western Australia there are some geographic areas where the statutory prohibition on taking water does not apply (see s. 5C(2), *Rights in Water and Irrigation Act 1914* (WA)). However, in these circumstances native title holders are as free to take water as any other person; their native title rights afford them no greater right to access the water than they would have without native title.

⁵² Although the requirement of clear statutory 'intention' refers to the 'objective' intention evident in the legislation rather than the subjective intention of the Parliamentarians (see Spigelman, J (2005), 'The Principle of Legality and the Clear Statement Principle', Opening address to the NSW Bar Association Conference, 18 March 2005, Sydney), it is nevertheless instructive to note that early drafters of Australian water legislation had a clear intention for the Crown to exercise 'supreme control' over the use of freshwater, but gave no consideration to the rights or interests of Aboriginal people: Tan, P (1997) 'Native Title and Freshwater Resources', in Young, S and Horrigan, B (1997) *Commercial Implications of Native Title*, Federation Press, 157-199 at 188.

In relation to fishing rights, it has occasionally been suggested that a clearer and more explicit statutory intention is required to extinguish a private right (common law or native title) than to abrogate a public right (such as the common law public right to fish). In such a situation, a law that removed public rights to fish might have left in place private native title rights to fish. No such argument could apply in the case of water rights since the relevant common law rights were private in nature, and the legislature plainly intended to diminish, regulate, replace or remove them.

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- ⁵³ Section 55 *Water Management Act 2000* (NSW). Note that Victoria makes some provision for ‘traditional owner group entities’ (which include native title holders) but this only applies where a ‘natural resource agreement’ is in place, meaning that it is the agreement and not the native title *per se* that gives rise to the right to take water: s. 8A *Water Act 1989* (Vic). The Victorian Act anticipates that traditional owner group entities may have rights under the standard ‘domestic and stock’ provision, which would require that they have access to the water by public road or reserve or that they ‘occupy’ land adjoining or above the water source: s. 8, 8A(2) *Water Act 1989* (Vic). Note that some water sharing plans under the NSW Act also make special provision for Aboriginal people without any reference to native title: e.g. the *Water Sharing Plan for the Kangaroo River Water Source 2003* provides for ‘Aboriginal cultural’ licences, which allow water for ‘personal, domestic and communal purposes including the purposes of drinking, food preparation, washing, manufacturing traditional artefacts, watering domestic gardens, cultural teaching, hunting, fishing, and gathering, and for recreational, cultural and ceremonial purposes’.
- ⁵⁴ Note that the NSW Act defines a ‘native title holder’ as someone who has native title rights and interests ‘pursuant to a determination under the *Native Title Act 1993*’: s. 3, *Water Management Act 2000* (NSW). This means that native title holders cannot benefit from the native title provisions of the NSW Act unless a determination has already been made (while it may be possible to ask the court to make a determination at the outset of a hearing about the use of water, there are complex procedural requirements and difficult matters of proof that may make this unrealistic). Compare *Yanner v Eaton* [1999] HCA 53, where it was held that native title rights could be used in a defence based on s. 211 of the *Native Title Act 1993* (see below) even if no formal determination had been made yet.
- ⁵⁵ Section 55(1). This section provides a defence to the criminal offence of unlicensed taking of water: s. 91M(2).
- ⁵⁶ Section 55(2). It is not clear whether ‘own’ is intended to refer simply to land in respect of which the person has native title rights or interests, or whether exclusive possession is intended.
- ⁵⁷ Section 4(1) and Dictionary, *Water Management Act 2000* (NSW).
- ⁵⁸ Section 55(3). Note the limit applies to the taking of water for ‘domestic and traditional purposes’. It is not clear whether this reference to ‘domestic and traditional purposes’ is intended to act as a restriction on the general authorisation to take water in the ‘exercise of native title rights’. A literal reading would suggest not. In that case, water for ‘non-commercial communal purposes’ such as a community horticulture project, would not be caught within the maximum cap.
- ⁵⁹ Perhaps the most beneficial aspect of the New South Wales regime for native title holders is that it accords native title rights (limited as they are) the highest possible security — these must be satisfied prior to any other consumptive uses: s. 60, *Water Management Act 2000* (NSW).
- ⁶⁰ In fact, the term used is ‘Aboriginal party or Torres Strait Islander party’, defined in ss 34 and 35 of the *Aboriginal Cultural Heritage Act 2003* (Qld) to include registered native title claimants and determined native title holders.
- ⁶¹ Section 109 of the Commonwealth Constitution provide that: ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’. Territory laws are not covered by that section, but may nevertheless be overridden by Commonwealth laws: *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 279; *Western Australia v Ward* [2002] HCA 28 at [128]–[134].
- ⁶² Section 211 also applies to ‘any other kind of activity prescribed’ (s. 211(3)(e)), but no other activities have been prescribed in regulations made under the Act.
- ⁶³ The section does not apply if the relevant regulatory law restricts licences to research, environmental protection, public health or public safety purposes: s. 211(1)(ba). For example if a law protected a particular marine species from being killed or captured, except pursuant to a permit issued for research purposes, s. 211 would not operate to allow native title holders to hunt that species.
- ⁶⁴ Section 211(2).
- ⁶⁵ Section 211(2)(a).
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⁶⁶ *Yanner v Eaton* [1999] HCA 53.

⁶⁷ Since that time there have been four determinations involving the Gangalidda people (*Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland* [2008] FCA 1855; *Gangalidda and Garawa People v State of Queensland* [2010] FCA 646; *Taylor on behalf of the Gangalidda and Garawa Peoples #2 v State of Queensland* [2015] FCA 730; *Taylor on behalf of the Gangalidda and Garawa Peoples #1 v State of Queensland* [2015] FCA 731.

⁶⁸ *Karpany v Dietman* [2013] HCA 47.

⁶⁹ This was despite the fact that the relevant prohibition was not against taking abalone without a licence, but rather against taking undersize abalone *at all*. The reason s. 211(1)(b) still applied was that the relevant fisheries legislation contained a general power of the Minister to 'exempt a person or class of persons, subject to such conditions as the Minister thinks fit and specifies in the notice, from specified provisions' of the legislation. This was found to be sufficient to characterise the prohibition on undersize abalone as a law that 'prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law': *Karpany v Dietman* [2013] HCA 47 at [45]–[49].

⁷⁰ Note that the restriction is for personal, domestic or non-commercial needs. So as long as the purposes were non-commercial, they would not need to be personal or domestic.

⁷¹ For example, Mr Yanner was using an aluminium dinghy and outboard motor: *Yanner v Eaton* [1999] HCA 53 at [68], [132]. The modern trend in water regulation is towards 'unbundling' the water rights – that is, separating out the rights to take, use, and build infrastructure for water. Some of the relevant legislation specifies that a right to take water (such as for domestic and stock use) does not imply a right to install dams, bores, pumps, etc. Although this may appear to be a strong impediment to the application of s. 211, so long as the activity can still be characterised as 'gathering' in the exercise of a native title right, then s. 211 may be available.

⁷² For example, *Water Act 1983* (Vic), ss 67, 75.

⁷³ Section 211(2)(b).

⁷⁴ See *Karpany v Dietman* [2013] HCA 47.

⁷⁵ It may be fruitful to explore whether purposive rights, as opposed to activity-based rights, might be accommodated in native title determinations. For example, a right of native title holders 'to gain their sustenance from water and living things found in the Determination Area' may be broad enough to cover a right to gain that sustenance by means of irrigation, whereas a right 'to gather and use the natural resources of the Determination Area' would be more limiting.

⁷⁶ For example, *Yanner v Eaton* [1999] HCA 53 at [68], [132].

⁷⁷ Note that such a broad right has not, to my knowledge, been recognised in a determination to date. However, there is no reason in principle that it could not be recognised.

⁷⁸ Note that a community irrigation project that relied on water infrastructure such as pumps, canals or bores may also require separate licencing for those works.

⁷⁹ *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 at [29]–[34], [77]–[99].

⁸⁰ In general, these exemptions apply to both groundwater and surface water, although groundwater is often treated somewhat differently. For example, a licence may be required to construct a new bore or well or the legislation may grant different rights over artesian and non-artesian aquifers: e.g. s. 25A, *Rights in Irrigation and Water Act 1914* (WA).

⁸¹ Section 8, *Water Act 1989* (Vic).

⁸² In Queensland, these are: camping purposes, watering travelling stock, and (in emergency circumstances) 'public purposes' and firefighting: s. 20, *Water Act 2000* (Qld). In South Australia, these are the right to take water for any purpose but not so as to detrimentally affect the ability of another

person to exercise a right to take water or to detrimentally affect a riparian occupier's enjoyment of the amenity of water in the watercourse or lake: s. 124(3), *Natural Resource Management Act 2004* (SA). These rights are only for non-prescribed sources and areas; the public has no right to take without a licence in prescribed areas or from prescribed sources unless specifically authorised: ss 124(3), 128.

- ⁸³ Meaning land that borders on the relevant surface water-source, or has the surface water-source running through it, or else land that is above the relevant aquifer.
- ⁸⁴ Section 20A, *Water Act 2000* (Qld); s. 124, *Natural Resource Management Act 2004* (SA).
- ⁸⁵ Section 3, *Natural Resource Management Act 2004* (SA).
- ⁸⁶ In Queensland, 'owner' includes 'the person or body of persons who, for the time being, has lawful control of the land, on trust or otherwise': Sched. 4, *Water Act 2000* (Qld). This might not be broad enough to cover non-exclusive possession native title holders, who may need to rely on the 'camping' right mentioned above in note 83 above.
- ⁸⁷ Section 10(1) of the *Racial Discrimination Act 1975* reads: 'If, by reason of [a law of] a State or Territory, persons of a particular race [...] or ethnic origin [...] enjoy a right to a more limited extent than persons of another race [...] or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race [...] or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race [...] or ethnic origin'. Note that the relevant 'rights' are those found in Article 5 of the Convention on the Elimination of all forms of Racial Discrimination — among these, pertinent to the water rights of occupiers, are the right to own property alone as well as in association with others, the right to inherit, and perhaps the right to housing. (See *Western Australia v Ward* [2002] HCA 28 at [119].)
- ⁸⁸ See *Western Australia v Ward* [2002] HCA 28 at [113]–[126] in particular [122].
- ⁸⁹ Meaning land that borders on the relevant surface water source, or has the surface water source running through it, or else land that is above the relevant aquifer.
- ⁹⁰ Gardens must be of 2 hectares and 0.5 hectares maximum area respectively: s. 9, *Rights in Water and Irrigation Act 1914* (WA); ss 11, 14, *Water Act* (NT).
- ⁹¹ See s. 10, compare s. 14. Note that the groundwater right does not allow the construction of a bore or well without a permit: ss 56 and 57.
- ⁹² Under the statutory definition of 'owner', the Territory is the owner of any land that is not alienated or leased from the Crown or subject to a sale agreement from the Crown: s. 4, *Water Act* (NT). It appears that the WA Act previously defined 'occupier', but that definition has been removed: *Ward v Western Australia* [2000] FCA 191 at [403].
- ⁹³ The term has taken on a specific meaning within the context of s. 47B of the *Native Title Act 1993*, which is not directly applicable but which may have some bearing: *Moses v State of Western Australia* [2007] FCAFC 78 [207]–[218]; *Banjima People v State of Western Australia* [2015] FCAFC 84 [88]–[121].
- ⁹⁴ The scope of the term 'occupier' may variously depend on whether the person has a legal right to be on the land, or a legal right to control activities on the land, or it may depend on whether the person is in actual physical occupation of the land regardless of their legal rights: Duff, N and Weir, J (2013) *Weeds and native title: law and assumption*, Rural Industries Research and Development Corporation, Canberra, at 20–25.
- ⁹⁵ *Ward v Western Australia* [2000] FCA 191.
- ⁹⁶ *Ward v Western Australia* [2000] FCA 191 at [403] per Beaumont and von Doussa JJ. This view was not addressed by the High Court on appeal, though the majority High Court judgment did briefly consider whether native title holders were 'occupiers' for the purposes of the *Public Works Act 1902* (WA) and the *Mining Act 1978* (WA): *Western Australia v Ward* [2002] HCA 28 at [279], [317]–[320]. The High Court majority did not come to a concluded view either way.
- ⁹⁷ The definition was a 'person by whom, or on whose behalf, any land is occupied, and if there is no occupier the person entitled to possession'.

⁹⁸ Dictionary, *Water Management Act 2000* (NSW).

⁹⁹ Note that some jurisdictions' water legislation makes specific provision for gardens as part of 'domestic and stock use', but generally impose a maximum area and require the garden to be connected with a dwelling: ss 9, 20 *Rights in Water and Irrigation Act 1914* (WA); s. 3 *Water Act 1989* (Vic); s. 3 *Natural Resources Management Act 2004* (SA); s. 6 *Water Act 2000* (Qld).

¹⁰⁰ This applies to any legislation passed after 1993. As mentioned earlier, water legislation of general application is unlikely to be invalid by reason of the existence of native title. This means pre-1993 water legislation is unlikely to fall within the 'non-extinguishment' provisions of the 'past acts' regime of the *Native Title Act 1993* (ss 15, 19). However, any water legislation passed after 1993 will be subject to the 'non-extinguishment principle' under s. 24HA.

¹⁰¹ Section 24, *Water Act 2000* (Qld).

¹⁰² *Karpany v Dietman* [2013] HCA 47; *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA 53. Note in *Karpany* a provision that appeared on its face to be an outright prohibition was instead treated as equivalent to a licensing requirement because the legislation allowed the Minister to issue special exemptions: see [45]–[49]. However, the *Water Act 2000* (Qld) contains no such provision, and there does not appear to be scope in s. 24 for limiting which people are affected by a water limitation notice. Accordingly, once a notice is issued, it would appear to constitute an outright prohibition (albeit a temporary and partial one, and so not one capable of extinguishing the relevant native title right).

¹⁰³ Durette, M (2010) 'A comparative approach to Indigenous legal rights to freshwater: Key lessons for Australia from the United States, Canada and New Zealand', *Environment and Planning Law Journal* 27: 296; Tan, P (1997) 'Native Title and Freshwater Resources'; Kauffman, P (ed.), *Water and Fishing: Aboriginal Rights in Australia and Canada*, ATSIC, Canberra.

¹⁰⁴ Lombardi LM (2004), 'American Indian water rights: some observations and their implications for Australia', *Indigenous Law Bulletin*, 29(5): 24; Behrendt, J and Thompson, P (2004) 'The Recognition and Protection of Aboriginal Interests in New South Wales Rivers', *Journal of Indigenous Policy*, 3: 37–140 at 80; Jackson, S and Morrison, J (2007) 'Indigenous Perspectives in Water Management, Reforms and Implementation' at 29–30; McKay, J (2002) 'Onshore water project: briefing paper', in Lingiari Foundation (2002) *Background Briefing Papers*, February 2002, 25–42; Yu P and Yu S (1999) 'Living waters', *Habitat Australia*, June: 24–26; Pearce, M et al. (2008) *A response to the National Water Initiative from Nepabunna, Yarlilena, Scotdesco and Davenport Aboriginal settlements*, DKCRC Research Report 36, Desert Knowledge Cooperative Research Centre, Alice Springs at 13.

¹⁰⁵ *Winters v United States*, 207 US 564 (1908).

¹⁰⁶ *Winters v United States*, 207 US 564 (1908); see Tarlock, AD (2010) 'Tribal Justice and Property Rights: The Evolution of *Winters v United States*', *Natural Resources Law*, 50: 471–499; and Babcock, HM (2006) 'Reserved Indian Water Rights in Riparian Jurisdictions', *Cornell Law Review* 91: 1203–1260 at 1226.

¹⁰⁷ Rowbury, R (2013) 'Drinking from the Same Cup: Federal Reserved Water Rights and National Parks in the Eastern United States', *Georgia State University Law Review* 29(4): 987–1023; Babcock, HM (2006) 'Reserved Indian Water Rights in Riparian Jurisdictions' at 1220, citing *Cappaert v United States*, 426 US 128 (1976), at 147. That case found that when a particular fish habitat was proclaimed a national monument by presidential proclamation, the proclamation was to be interpreted as reserving sufficient water to protect the endangered fish.

¹⁰⁸ *Arizona v California*, 373 US 546 (1963); Babcock, HM (2006) 'Reserved Indian Water Rights in Riparian Jurisdictions' at 1224.

¹⁰⁹ Certainly, in the case of statutory land rights (such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or *Aboriginal Land Rights Act 1983* (NSW)) there is greater scope for the implication of a statutory or executive intention to grant (or reserve) rights to water.

¹¹⁰ As one US judge put it: 'Water is impliedly reserved to an Indian tribe...when necessary to effectuate a purposeful act relating to Indians...': *Mattaponi Indian Tribe v Commonwealth of Virginia*, Circuit

Court No 3001-RW/RC, 2007 at 14. The same judge quotes the original *Winters* judgment in citing an additional basis for implying the reservation of water into treaties and reservations: the unlikelihood of the Indian tribes agreeing to give up their productive lands in exchange for arid land without good hunting *unless* they believed they would be able to use that land for agriculture by irrigation.

¹¹¹ In the United States, treaties provide a further source of water rights in addition to *Winters* rights. In the United States any ambiguity in treaties must be resolved in favour of the Indian tribe. This means that where a treaty does not explicitly state that the tribe surrenders particular rights, those rights are assumed to be retained. So any treaty that does not expressly give up the right to develop water resources is interpreted such that the tribe retains that right: Durette M (2010) 'A comparative approach to Indigenous legal rights to freshwater' at 299–300.

¹¹² It will be recalled that, prior to the passage of the *Native Title Act 1993*, native title was recognised under the common law. After 1993, native title is recognised by, and in accordance with, the *Native Title Act 1993: Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [75].

¹¹³ Babcock, HM (2006) 'Reserved Indian Water Rights in Riparian Jurisdictions' at 1222–1224.

¹¹⁴ Tarlock, AD (2010) 'Tribal Justice and Property Rights: The Evolution of *Winters v United States*' at 480–481; Babcock, HM (2006) 'Reserved Indian Water Rights in Riparian Jurisdictions' at 1222–1223.

¹¹⁵ The conclusions reached in this section are supported by the analysis in Getches, DH and Van de Wetering, SB (2005) '*Protecting Indigenous Rights and Interests in Water*', in Kenney, DS (ed.) (2005) *In Search of Sustainable Water Management: International Lessons for the American West and Beyond*, 102–130.

¹¹⁶ Section 8A *Water Act 1989* (Vic) provides for access rights to 'traditional owner groups' who have made a natural resource agreement under the *Traditional Owner Settlement Act 2010* (Vic). Although traditional owner groups may in fact be native title holders, s. 10 of the *Traditional Owner Settlement Act 2010* prevents them from obtaining a determination of native title under the *Native Title Act 1993*. For the purposes of this paper this means that native title rights have no explicit role in the Victorian water legislation.

¹¹⁷ As noted, groundwater may be treated differently according to whether it is 'declared'/proclaimed', or whether it is artesian or non-artesian. Further, licences may still be required to build infrastructure such as bores or wells.

¹¹⁸ An option other than judicial review is to ask the original decision-maker to reconsider their decision (internal review), or else (if the legislation allows) take the matter to an administrative tribunal. In this case the person challenging the decision has the opportunity to establish why a decision should be made in their favour — this is called 'merits' review because the reviewer decides on the merits of the case whether the original decision was 'good' or 'bad'. Merits review involves a 're-making' of the original decision: Cane, P and McDonald, L (2009) *Principles of Administrative Law: Legal regulation of governance*, Oxford University Press, at 216–247.

¹¹⁹ Cane, P and McDonald, L (2009) *Principles of Administrative Law: Legal regulation of governance* at 44–51

¹²⁰ See ss 63(2)(a) *Water Management Act 2000* (NSW); s. 147 *Natural Resource Management Act 2004* (SA); Sched. 1 *Rights in Water and Irrigation Act 1914* (WA); s. 51 *Water Act 1989* (Vic); s. 206 *Water Act 2000* (Qld). Note that, in the Northern Territory only, a licence can be granted on the government's 'own motion', meaning an application is not required: ss 45, 60 *Water Act* (NT). Note that some jurisdictions also allow water licences or entitlements to be traded between people rather than granted directly from government.

¹²¹ Again, this is assuming that an internal or tribunal review is unsuccessful.

¹²² See generally Cane, P and McDonald, L (2008) *Principles of Administrative Law: Legal Regulation of Governance* at 122–185 (covering both statutory and common law grounds for judicial review).


¹²³ See e.g. McKay, J (2002) 'Onshore water project: briefing paper' at 28–31.


¹²⁴ The closest I could find was in Queensland's *Water Act 2000*: s. 12 requires decision-makers to 'perform [their] function or exercise [their] power in a way that advances this chapter's purpose', and



that purpose includes ‘recognising the interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning’: s. 10(2)(c)(v).

- ¹²⁵ These requirements are described in the second part of this paper, under the heading ‘Consultations, submissions and administrative law’.
- ¹²⁶ For example, s. 147(1), *Natural Resource Management Act 2004* (SA); Cl. 4(1), Sched. 1, *Rights in Water and Irrigation Act 1914* (WA); s. 206(5), *Water Act 2000* (Qld). Many licences are also subject to annual charges as well as the initial application fee, and the licence may be cancelled if these are not paid: e.g. s. 78, *Water Management Act 2000* (NSW).
- ¹²⁷ See ss 48, 61(1), *Water Management Act 2000* (NSW); s. 205(1), *Water Act 2000* (Qld).
- ¹²⁸ Water plans assess the environmental and hydrological factors that determine how much water can be taken for consumptive purposes, identify the kinds of values that should be protected in water allocation and management and make decisions about the kinds of water use that will be allowed within the plan area.
- ¹²⁹ See below, ‘Consultations, submissions and administrative law’.
- ¹³⁰ See ss 50-51, *Water Act 2000* (Qld), s. 80(2), *Natural Resource Management Act 2004* (SA). This could also be used to ensure that water planners actively consider their commitments under the *National Water Initiative* to allocate water for native title holders.
- ¹³¹ See ss 20(1)(b), 35–44, *Water Management Act 2000* (NSW), which relate to ‘basic landholder rights’. The definition of ‘basic landholder rights’ in the Act’s dictionary expressly includes ‘native title rights’.
- ¹³² Section 10(2)(c)(v), *Water Act 2000* (Qld).
- ¹³³ Section 76(4)(c), *Natural Resource Management Act 2004* (SA).
- ¹³⁴ *Minister for Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273; Cane, P and McDonald, L (2008) *Principles of Administrative Law: Legal Regulation of Governance* at 130–133.
- ¹³⁵ Paras 53–54, quoted above in the introduction to this paper.
- ¹³⁶ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at [35] per Gleeson CJ, [84]–[102] per McHugh and Gummow JJ, [121]–[122] per Hayne J, [140]–[148] per Callinan J; *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31 at [64]–[66] per Gummow, Hayne, Crennan and Bell JJ; *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [28]–[32] per Kiefel, Bell and Keane JJ.
- ¹³⁷ *Minister for Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273; Cane, P and McDonald, L (2008) *Principles of Administrative Law: Legal Regulation of Governance*, at 139–141.
- ¹³⁸ A desktop study in 2009 identified a range of Indigenous enterprises using water, and a range of Indigenous entities holding water licences or allocations: Altman and Arthur (2009) *Water licences and allocations to Indigenous people for commercial purposes: An Australia-wide scoping exercise*, report prepared for the National Water Commission, February 2009, Centre for Aboriginal Economic Policy Research, ANU, Canberra. It is not clear from the report whether any of the licence-holders were corporations holding or managing native title rights.
- ¹³⁹ As was noted by Jackson and Morrison: ‘Agreement-making is perhaps the most commonly referred to means of satisfying the range of co-existing interests in Australian water management’: Jackson, S and Morrison, J (2007) ‘Indigenous Perspectives in Water Management, Reforms and Implementation’ at 30. See also Craig, D et al. (2009) *An Agreement-Based Approach to Customary Law Governance in Water Resource Management*, Land and Water Australia, Canberra; Sheehan, J (2001) ‘Indigenous property rights and river management’, *Water Science and Technology* 43: 235–242; Altman, J (2004) ‘Indigenous interests and water property rights’, *Dialogue (Academy of the Social Sciences in Australia)*, 23(3): 29–34.
- ¹⁴⁰ Part 2, Div. 3, *Native Title Act 1993* (Cth).

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- ¹⁴¹ See e.g. ss 18, 23, 27, *Mining Act 1978* (WA). Note that in WA the grant of a mining tenement on private land requires the consent of the owner and occupier where the proposed tenement would cover land that is under cultivation or used as a stockyard, garden, orchard, vineyard, nursery, plantation or cemetery, or where there is a well, bore, spring, dam, or a 'substantial improvement' such as a building: s. 29(2), *Mining Act 1978* (WA).
- ¹⁴² Sections 17, 20, 22D, 22G, 24HA(5), 24ID(1)(d), 24JAA(8), 24JB(4), 24KA(5), 24MD(2)(e) and (3), *Native Title Act 1993*.
- ¹⁴³ Jackson, S (2007) *Indigenous Interests and the National Water Initiative — Background paper and literature review*, North Australian Land and Sea Management Alliance, Darwin at 88.
- ¹⁴⁴ Royster, J (2000) 'Winters in the East: tribal reserved rights to water in riparian states', *William and Mary Environmental Law and Policy Review*, 25: 169–201 at 199.
- ¹⁴⁵ Indeed, in identifying the relevant source of leverage in the Northern Territory, and possibly in northern Queensland, the relatively greater electoral significance of Aboriginal people should not be overlooked, nor the wider effect on political discourse that this electoral significance may have.
- ¹⁴⁶ *Draft Water Allocation Plan: Ooloo Aquifer* (2012); *Katherine (Tindall Limestone Aquifer) Water Allocation Plan* (2009); *Mataranka Tindall Limestone Aquifer Draft Water Allocation Plan* (2011).
- ¹⁴⁷ *Katherine (Tindall Limestone Aquifer) Water Allocation Plan* (2009) at 78.
- ¹⁴⁸ *Mataranka Tindall Limestone Aquifer Draft Water Allocation Plan* (2011) at 13; Barber, M and Jackson, S (2011) *Indigenous water values and water planning in the Upper Roper River, Northern Territory*.
- ¹⁴⁹ Stewart, P (2013) 'Indigenous water reserve policy tap turned off', *ABC News*, 10 October 2013, online at <http://www.abc.net.au/news/2013-10-09/nt-indigenous-water-reserve-policy-dropped/5012152>; Gibson, J (2013) 'Indigenous group attacks water allocation changes', *ABC News*, 26 March 2013, online at <http://www.abc.net.au/news/2013-03-26/mataranka-group-on-indigenous-water-decision/4595784>; ABC News (2013) 'Smoke on water as CLP candidate taps aquifer', *ABC News*, online at <http://www.abc.net.au/news/2013-03-22/stylo-station-water-permit-licence-mcfarlane-country-liberals/4588832>.
- ¹⁵⁰ Brann, M (2016) 'Northern Territory Labor unveils water policy including plans to review all water licences granted since August 2012', *ABC News*, 4 March 2016, online at <http://www.abc.net.au/news/rural/2016-03-04/nt-labor-water-policy/7221286>.
- ¹⁵¹ *Ti Tree Region Water Allocation Plan* (2009) at 25–30. Although the plan was due for review and renewal in 2015, it does not appear that an updated plan has been published: see Northern Territory Department of Environment and Natural Resources, *Ti Tree Water Allocation Plan, Reports and Publications*, last updated 8 February 2017, online at <https://denr.nt.gov.au/land-resource-management/water-resources/water-allocation-plans/ti-tree-water-allocation-plan-multi/publications>.
- ¹⁵² Tan, P and Jackson, S (2013) 'Impossible dreaming — does Australia's water law and policy fulfil Indigenous aspirations?' at 141.
- ¹⁵³ See Bradfield, S (2004) *Agreeing to Terms: What is a 'Comprehensive' Agreement?*, Issues Paper No 26, Native Title Research Unit, AIATSIS, Canberra at 10–11; Wall, DR (2010) 'Development, Cultural Maintenance and Traditional Owners: The LNG Development Proposal at James Price Point in the Kimberley', PLATFORM: *Journal of Media and Communication*, ANZCA Special Edition (April): 24–36; O'Faircheallaigh, C (2003) 'Financial Models for Agreements between Indigenous Peoples and Mining Companies', *Aboriginal Politics and Public Sector Management Research Paper No. 12*, Centre for Australian Public Sector Management, Griffith University, Queensland at 17–18; Calma, T (2009) *Native Title Payments Discussion Paper — Optimising Benefits from Native Title Agreements*, 4 March 2009, Australian Human Rights Commission, at [70]; Calma, T (2004) *Native Title Report 2004*, Australian Human Rights Commission, Chapter 1.
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- ¹⁵⁴ Bauman, T and Williams, R (2004) *The Business of Process Research Issues in Managing Indigenous Decision-Making and Disputes in Land*, Discussion Paper No 13, Native Title Research Unit, AIATSIS, Canberra.
- ¹⁵⁵ For example, a traditional owner in the Northern Territory gave the following view: ‘That water should be 50:50 split, between Indigenous and government. People can have the water from us if they want it. We will give the permit’: Barber, M and Jackson, S (2011) *Indigenous water values and water planning in the Upper Roper River, Northern Territory* at 47.
- ¹⁵⁶ Rumley, H and Barber, K (2004) ‘*We used to get our water free*’: *Identification and Protection of Aboriginal Cultural Values of the Pilbara Region*, Water and Rivers Commission of Western Australia, Perth at 57. Similarly, water utilities servicing discrete Aboriginal communities can adjust their billing practices to make it clear that customers are being charged for water services (that is, pumping and piping the water and keeping it safe to drink) rather than for the water itself.
- ¹⁵⁷ See Preamble, First Peoples’ Water Engagement Council (2012) *Advice to the National Water Commission*.
- ¹⁵⁸ Gardner A, Bartlett R, Gray J, and Carney G (2009) *Water Resources Law* at 201–206.
- ¹⁵⁹ *Liggings v Inge* (1831) 7 Bing 682; 131 ER 263 per Lord Chief Justice Tindal, cited in Gardner A, Bartlett R, Gray J, and Carney G (2009) *Water Resources Law* at 152; see also *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51 at [55]–[57]; *Neowarra v Western Australia* [2003] FCA 1402 at [609]; *Yanner v Eaton* [1999] HCA 53; 201 CLR 351 at [24]. This principle of non-ownership seems partly to be a consequence of the conceptual difficulty of imagining what ‘ownership’ of such a ‘fugitive resource’ might actually mean, but it is also, as will be seen, a consequence of the fact that the common law grants other landholders certain rights to access the water.
- ¹⁶⁰ *Chasemore v Richards* [1859] EngR 894; (1859) 7 HLC 349 [11 ER 140]; *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51 at [56]–[57] per French CJ, Gummow and Crennan JJ, [110]–[111] per Hayne, Kiefel and Bell JJ.
- ¹⁶¹ Gardner A, Bartlett R, Gray J, and Carney G (2009) *Water Resources Law* at 152–160, 166–169.
- ¹⁶² See above, ‘Exemption from limits and licensing requirements’.
- ¹⁶³ Sections 19, 22F, 24HA, 44H, 238 *Native Title Act* for statutory rights; s. 223(1)(c) for common law rights.
- ¹⁶⁴ Indeed, the definition of ‘riparian owner’ is one who owns land *through which* or next to which a watercourse flows: *Chasemore v Richards* (1859) 11 ER 140; *Embery v Owen* (1851) 6 Ex 353, 155 ER 579 at 585–586. Similarly, the common law states that where a non-tidal watercourse forms the boundary between two properties, each neighbouring owner owns the bed of the water course up to its midline: *In re White* [1927] NSWSR 6; 27 S.R. (N.S.W.) 129; *H Jones & Co Pty Ltd v Kingborough Corporation* [1950] HCA 11; (1950) 82 CLR 282 per Fullagar J. Tidal watercourses are treated differently: McHugh J in *Commonwealth v Yarmirr* [2001] HCA 56 at [213] considered that the Crown’s ownership of tidal rivers at common law is ‘absolute and untrammelled’, and this view was adopted by Cooper J in *Lardil Peoples v Queensland* [2004] FCA 298 at [221]. The public right to fish and navigate (travel by boat) in tidal waters: William Howarth *Wisdom’s Law of Watercourses*, 5th edn, at 21–23 and 133, citing *Marhsall v Ulleswater Steam Navigation Co* (1863) 3 B&S 732; *Micklethwait v Vincent* (1892) 67 LT 225; *Blower v Ellis* (1886) 50 JP 326; and *Bourke v Davis* (1889) 62 LT 34. See also Winterbourne, K. (Water and Rivers Commission) (1998) *Rights to Water and Associated Land: A review*, Water Reform Series, Report No. WRS 6 at 17.
- ¹⁶⁵ See e.g. *Graham on behalf of the Ngadjju People v State of Western Australia* [2014] FCA 1247 at Schedule 3, Enlargement 4 of the determination, showing areas of exclusive possession over part of the bed and banks of Lake Cowan in Western Australia. The determination states at clause 5(b) that there are no ‘exclusive rights in relation to water in any watercourse, wetland or underground water source’. In *Ngalpil v Western Australia* [2001] FCA 1140, the determination contains an unqualified right of exclusive possession over land and water, albeit with an ambiguous statement that the native title holders only have ‘such rights in relation to flowing and subterranean waters as exist at law’. The following determinations recognise exclusive possession over certain ‘land and waters’ but do not recognise
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exclusive rights over 'water': *Johnson on behalf of the Tableland Yidinji People 3 v State of Queensland* [2013] FCA 280; *Owens on behalf of the Tagalaka People v State of Queensland* [2012] FCA 1396; *Billy Patch and Others on behalf of the Birrilburu People v State of Western Australia* [2008] FCA 944; *Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland* [2008] FCA 1855. No exclusive possession has been recognised over tidal areas: *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory of Australia* [2000] FCA 923; *Commonwealth v Yarmirr* [2001] HCA 56. See Strelein, L (2009) *Compromised Jurisprudence: Native title cases since Mabo*, 2nd edn, at 49–54.

¹⁶⁶ For example, the Karajarri People's determination, *Nangkiriny v Western Australia* [2002] FCA 660, which overlies a portion of the Broome Sandstone Aquifer: see *La Grange groundwater allocation plan*, February 2010, Department of Water (Western Australia).

¹⁶⁷ Section 253, *Native Title Act 1993* (Cth).

¹⁶⁸ See O'Brien, K (2007) 'Issues in natural resource management — Inland water resources — Implications of native title and the future of Indigenous control and management of inland waters', *Murdoch University E Law Journal*, 2(2): 280–335 at 305.

¹⁶⁹ In the *Mabo* case Brennan JJ (with whom Mason CJ and McHugh J agreed) held at [68] that 'native title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence'; see also Deane and Gaudron JJ at [65].

¹⁷⁰ The classic statement of the rule that a claim in trespass does not require proof of damage is Lord Camden CJ in *Entick v Carrington* (1765) 2 Wils KB 275 at 291: 'Our law holds the property of every man so sacred that no man can set foot upon his neighbour's close without his leave. If he does, he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground he must justify it by law'.

¹⁷¹ See Luntz H and Hambly D (2006) *Torts: cases and commentary*, rev. 5th edn, LexisNexis Butterworths Australia, at 748–751.

¹⁷² Weir, J, Stone, R and Mulardy, M (2012) 'Water Planning and Native Title: A Karajarri and Government Engagement in the West Kimberley', in Weir, J (ed.) *Country, Native Title and Ecology*, ANU E-Press, 81–104.


¹⁷³ At the time there was an access agreement in place with the traditional owners — in the pre-determination period — but it appears that the agreement lapsed without being renewed, so that later when exclusive possession native title was recognised, there was no access agreement in operation: Weir, J, Stone, R and Mulardy, M (2012) 'Water Planning and Native Title: A Karajarri and Government Engagement in the West Kimberley', in Weir, J (ed.) *Country, Native Title and Ecology*, ANU E-Press, 81–104 at 90.


¹⁷⁴ A simpler application of the same principle would be in a situation where it was surface water rather than groundwater that would be diverted for the irrigation project. If the project required pipes or canals to be installed across exclusive possession land, this would allow native title holders to withhold consent or to grant it only on stringent conditions.


¹⁷⁵ For example, ss 18, 20, 27 and 29, *Mining Act 1978* (WA); *BHP Billiton Pty Ltd & Ors v Karriyarra Native Title Claimants & Ors* [2005] WAMW12; ss 9, 9AA, 34, Part 9B, *Mining Act 1971* (SA). Note that in the Northern Territory, holders of statutory Aboriginal land rights (which are distinct from native title rights) do have the legal ability to prevent mining absolutely: ss 40, 45, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

¹⁷⁶ 'Act' in this context is not limited to legislation, but covers the grant of licences, the creation of interests in land or waters, or any other act with legal consequences: s. 226, *Native Title Act 1993*.

¹⁷⁷ For legislative future acts, the relevant date is 1 July 1993; for all others it is 1 January 1994: s. 233, *Native Title Act 1993*. In some circumstances the date of an act, and the determination of whether it is a past act, intermediate period act or future act, is a matter of some legal complexity: see e.g. ss 241B and 241C, and *Graham on behalf of the Ngadju People v State of Western Australia* [2014] FCA 700; *State of Western Australia v Graham on behalf of the Ngadju People* [2016] FCAFC 47; *Graham on Behalf of the Ngadju People v St Ives Gold Mining Company Pty Limited & Ors* [2016] HCATrans 241.

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- ¹⁷⁸ Sections 233, 227, *Native Title Act 1993*.
- ¹⁷⁹ For example, ss 24KA, 24LA, 32 *Native Title Act 1993*.
- ¹⁸⁰ The only sense in which any category of future act is 'off limits' is that future acts cannot be validly done if they treat native title holders less favourably than they would if the native title holders held freehold title (though there are exceptions to this). See ss 24OA, 26, 24MD, 24FA-24LA.
- ¹⁸¹ See in particular s. 29, *Native Title Act 1993*.
- ¹⁸² Section 24HA, *Native Title Act 1993* provides specific and automatic validity to legislation made after 1 July 1993 and licences, etc. issued after 1 January 1994. For acts previous to this, states and territories have passed validating legislation under s. 19, *Native Title Act 1993*.
- ¹⁸³ Section 24HA(7). Native title representative bodies must also be notified.
- ¹⁸⁴ *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603 at [49], [50], [51]; see also [38].
- ¹⁸⁵ *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v State of Queensland* [2001] FCA 414 per French J at [52], [58]. See also *Lardil* per Merkel J at [72] and Dowsett J at [117]–[120]. Although that part of the judgment was not a strictly binding precedent, the later case of *Daniel* adopted the same view: *Daniel v Western Australia* [2004] FCA 1388 at [63]. There was no appeal against this decision. See discussion in O'Bryan, K (2007) 'Issues in Natural Resource Management: Implications of Native Title and the Future of Indigenous Control and Management of Inland Waters', *Murdoch University E Law Journal* 14(2): 280–335 at 296–297.
- ¹⁸⁶ *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v State of Queensland* [2001] FCA 414 per French J at [58].
- ¹⁸⁷ See also s. 51 *Native Title Act*.
- ¹⁸⁸ *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900. Two other compensation cases have been commenced, but one reached a confidential negotiated settlement that did not produce any precedent or guidance for future cases (*De Rose v State of South Australia* [2013] FCA 988) and the other was discontinued before finalisation (see *Ward v State of Western Australia (No 4)* [2016] FCA 358). In *Jango v Northern Territory of Australia* [2007] FCAFC 101 the Full Court upheld the decision of Sackville J, who held that the claimants had not made out their claim to hold native title in the area and so could not prove they were entitled to compensation. This was merely a dismissal of their claim, not a finding that they definitely were not native title holders entitled to compensation.
- ¹⁸⁹ Part III, Division 3D, *Rights in Water and Irrigation Act 1914* (WA); s. 22B, *Water Act* (NT); Part 2, *Water Act 2000* (Qld); Part 3, Div. 8, *Water Management Act 2000* (NSW); Part 3, *Water Act 1989* (Vic); s. 76, *Natural Resources Management Act 2004* (SA); Part 4, *Water Management Act 1999* (Tas.); ss 12, 17, *Water Resources Act 2007* (ACT).
- ¹⁹⁰ Under s. 226(2), the making of a plan might be treated as the 'issue' of an 'instrument', or the 'exercise of[...]executive power of the Crown[...]under legislation', or even simply an 'act having...effect at common law or in equity'.
- ¹⁹¹ Section 227, *Native Title Act 1993*. Certainly, s. 33, *Water Act 2007* (Cth) stipulates that the Murray-Darling Basin Plan is a legislative instrument.
- ¹⁹² In *Walmbaar Aboriginal Corporation v State of Queensland* [2009] FCA 579 the court held that a decision to lodge a native title compensation application was not an act affecting native title. While not directly relevant, the case illustrates the logical process by which a court will decide whether a particular act is an 'act affecting native title'.
- ¹⁹³ The operation of this provision does not depend on characterising the relevant activity as a 'future act'. The definition of 'act' in s. 226(2)(f) covers 'any act having any effect at common law or in equity', which theoretically could cover merely physical activities. However, it is not clear that the bare exercise of rights validly granted under legislation would have any such legal effect. Note that if the activity *did* constitute a future act, it would not be the kind of act validated by s. 24HA, because it consists neither the making of legislation nor the grant of a licence.
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- ¹⁹⁴ Some activities are exempt from the right to negotiate and instead go through the 'expedited procedure': ss 29(7), 32, *Native Title Act 1993*. In most cases, mineral exploration falls within the expedited procedure on the basis that it is not considered likely to 'interfere directly with [native title holders'] community or social activities' or to 'interfere with areas or sites of particular significance' or "involve major disturbance to any land or waters": s. 237, *Native Title Act 1993*. Oil and gas exploration, however, is much less likely to meet this standard, as is mineral exploration occurring in the vicinity of sensitive groundwater systems or sites of cultural or ecological significance. Where native title holders consider that the proposed activity is too risky or significant for the expedited procedure to apply, they can lodge an objection and present evidence to the National Native Title Tribunal about why the right to negotiate should apply to the act: s 32, *Native Title Act*.
- ¹⁹⁵ The actual mining or exploration activity would be covered by s. 44H of the *Native Title Act*, as discussed above in the context of water licences.
- ¹⁹⁶ Section 28(1)(a)–(e) of the *Native Title Act 1993* set out a number of scenarios where the right to negotiate will not apply to the grant of a mining tenement.
- ¹⁹⁷ Sections 28, 31, 38, 41, 24OA, *Native Title Act 1993*.
- ¹⁹⁸ Note that the determination is binding on the parties, but there is a power for a minister to overrule the determination: s. 42, *Native Title Act 1993*.
- ¹⁹⁹ Sections 31, 35, 36, *Native Title Act 1993*. Note that this does not equate to a requirement that the negotiations themselves occur over 6 months, just that they occur at some point during the 6 months: *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49.
- ²⁰⁰ *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49.
- ²⁰¹ Section 39, *Native Title Act 1993*.
- ²⁰² *Australian Manganese Pty Ltd v State of Western Australia & Others* [2008] NNTTA 38 at [55]–[57], [71]–[72].
- ²⁰³ *Western Desert Lands Aboriginal Corporation v Western Australia and Anor* [2009] NNTTA 49 at [162]–[163]; *Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji* [2011] NNTTA 172 at [310] and [343].
- ²⁰⁴ Search of National Native Title Tribunal determinations as at 20 June 2017. There have been 100 decisions that have proceeded to a substantive determination, of which only 3 were to the effect that the proposed act must not be done.
- ²⁰⁵ Indicative examples can be found in *State of Queensland and Another v Eileen Beryl Peglar & Others on behalf of the Widi People of the Nebo Estate #1* [2016] NNTTA 56 at [30]; *FMG Pilbara Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/ Western Australia* [2012] NNTTA 142 at [64]. An uncommon exception is in *Jax Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/Queensland*, [2011] NNTTA 46, where financial and employment benefits were included.
- ²⁰⁶ O'Faircheallaigh, C (2007) 'Native Title and Mining Negotiations: a seat at the table but no guarantee of success', *Indigenous Law Bulletin* 6(26): 18–20; Burnside, S (2009) 'Negotiation in good faith under the Native Title Act: A critical analysis', *Land, Rights, Laws: Issues of Native Title* 4(3), AIATSIS; McGrath, P and Lee, W (2016) 'The fate of Indigenous place-based heritage in the era of native title', in McGrath, P (ed.) (2016) *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title*, AIATSIS Research Publications; Corbett, T and O'Faircheallaigh, C (2006) *UWA Law Review* 33: 153–177; Langton, M and Mazel, O (2012) 'The resource curse compared: Australian Aboriginal participation in the resource extraction industry and distribution of impacts', in Langton, M and Longbottom, J (eds) (2012) *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom*, Routledge 23–44; Langton, M and Webster, A (2012) 'The "Right to Negotiate" the Resources Industry Agreements and the Native Title Act' in Bauman, T and Glick, L (eds) *The Limits of Change: Mabo and Native Title 20 Years On*, AIATSIS Research Publications.
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- ²⁰⁷ See e.g. s. 85(1)(c), *Mining Act 1978* (WA); s. 235(3) *Mineral Resources Act 1989* (Qld). South Australia's *Mining Act 1971* does not mention water, and nor relevantly does New South Wales' *Mining Act 1992* — in which case it must be assumed that a mining company is simply bound as usual by the general water legislation.
- ²⁰⁸ Note that s. 24KA does not apply to the compulsory acquisition of native title rights by government: s. 24KA(1A). Compulsory acquisition is covered by s. 24MD and in many cases will be subject to the right to negotiate: s. 26. However, compulsory acquisition for the purpose of providing an infrastructure facility is exempt from the right to negotiate: s. 26(1)(c)(i) and (iii)(B).
- ²⁰⁹ Section 233 — note if the relevant act consisted of the making or amendment of legislation, then the relevant date is 1 July 1993.
- ²¹⁰ Section 24KA(8) and (9) provide that if there is no prescribed body corporate for an area affected by such an act, then the registered native title claimants or, failing that, the relevant native title representative body can exercise those procedural rights.
- ²¹¹ Or, where the infrastructure is proposed for land covered by a non-exclusive pastoral or agricultural lease, the native title holders would have the same rights as the leaseholder does: s. 24KA(7)(a).
- ²¹² For example, *Ngunawal People v Australian Capital Territory* [2004] FCA 785 at [11].
- ²¹³ See e.g. *CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2015] FCA 204 at [942].
- ²¹⁴ Section 24KA(1A).
- ²¹⁵ As a general rule, the *Native Title Act* requires governments to go through the 'right to negotiate' procedure before using their compulsory acquisition powers: s. 26(1)(c)(iii). So, for example, where a government wants to grant new freehold blocks to a housing developer, this requires a compulsory acquisition and the government will need to negotiate with the native title holders (or claimants) in good faith. (Of course, if the native title holders were willing to do so, the acquisition could be achieved through an indigenous land use agreement (ILUA) rather than by compulsory acquisition.) But compulsory acquisition for the purpose of an infrastructure facility is exempt from the right to negotiate: s. 26(1)(c)(iii)(B).
- ²¹⁶ This distinction applies only to acquisition under state legislation. As mentioned, the Commonwealth and territories are bound to provide just terms for any compulsory acquisition.
- ²¹⁷ The supremacy of state legislation over private interests was demonstrated in two recent cases: *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51; *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3.
- ²¹⁸ Because the Commonwealth Constitution gives the Commonwealth Parliament power to make laws only about certain things, the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) only applies to certain types of activities that are connected with those Commonwealth powers. These are set out in Part 3, Division 1 of the Act, and include activities affecting Australia's international environmental commitments (including international agreements protecting RAMSAR wetlands), or the marine environment (which is the responsibility of the Commonwealth government).
- ²¹⁹ The *Environment Protection and Biodiversity Conservation Amendment Act 2013*.
- ²²⁰ Clause 7(2), Schedule 1, *Rights in Water and Irrigation Act 1914* (WA); s. 90, *Water Act* (NT); s. 210, *Water Act 2000* (Qld); ss 33J, 40, 53, 55 *Water Act 1989* (Vic).
- ²²¹ Clause 7(2)(h)(iii), Schedule 1, *Rights in Water and Irrigation Act 1914* (WA); s. 90(1)(f), *Water Act* (NT). See also (arguably) s. 47, *Water Act 2000* (Qld) which refers to national, state and regional objectives and priorities for promoting sustainable development.
- ²²² Clauses 53–54, Intergovernmental Agreement On A National Water Initiative 2004.
- ²²³ Reg. 23, *Rights in Water and Irrigation Regulations 2000* (WA); s. 208, *Water Act 2000* (Qld); ss 61(3), 62, *Water Management Act 2000* (NSW). See also s. 49(2), *Water Act 1989* (Vic), which
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allows the Minister to require notification of applications. In the Northern Territory, applications must be brought to the attention of owners or occupiers of neighbouring land: s. 71B, *Water Act* (NT).

²²⁴ Reg. 23(5), *Rights in Water and Irrigation Regulations 2000* (WA); s. 71C, *Water Act* (NT); s. 210(1)(b), *Water Act 2000* (Qld).

²²⁵ Section 62(5), *Water Management Act 2000* (NSW).

²²⁶ For example, s. 205, *Water Act 2000* (Qld).

²²⁷ For example, s. 90(1)(ab), *Water Act* (NT).

²²⁸ For example, s. 79, *Natural Resource Management Act 2004* (SA); ss 26GZA–26GZF, *Rights in Water and Irrigation Act 1914* (WA); ss 36–41, *Water Management Act 2000* (NSW); ss 39–52B, *Water Act 2000* (Qld).

²²⁹ For example, s. 6(2), *Water Management Act 2000* (NSW).

²³⁰ This section will focus on judicial review of administrative decisions, though in many cases there will be an intermediate step between the original decision and judicial review: substantive merits review by an administrative tribunal. An administrative tribunal puts itself in the shoes of the original decision-maker and ‘remakes’ the decision; by contrast a court reviews the original decision for legal error. The availability of tribunal review differs according to each jurisdiction and type of decision.

²³¹ For example, *Australian Conservation Foundation Incorporated v Commonwealth* (1980) 146 CLR 493; *Animals’ Angels v Secretary, Department of Agriculture* (2014) 228 FCR 35. It should be noted, however, that the prospects of environmental organisations establishing their standing have been improving: e.g. *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70; *North Coast Environmental Council v Minister for Resources* (1994) 127 ALR 617.

²³² Taylor, L (2015) ‘Coalition unexpectedly pushes on with “green lawfare” legislation plan’, *The Guardian (Australia)*, 18 November 2015, online at <<https://www.theguardian.com/australia-news/2015/nov/18/coalition-unexpectedly-pushes-on-with-green-lawfare-legislation-plan>>. The government’s proposal was to remove an existing provision, s. 487, that made it easier for environmental groups to establish their standing than would otherwise be the case.

²³³ That is not to say that Aboriginal people or groups cannot establish their standing without reference to native title: see *Onus v Alcoa of Australia Ltd* [1981] HCA 50; 149 CLR 27; 36 ALR 425.

²³⁴ It is true that under some systems of traditional law and custom, rights are held at an individual level rather than a group level. Nevertheless, from the perspective of administrative law, the people described in a native title determination have a common cause rather than multiple disparate interests.

²³⁵ Section 68, *Native Title Act 1993*. Although multiple different groups may be recognised in a single determination, there will only ever be a small number of such groups and they cumulatively hold all of the traditional rights and interests for that area.

²³⁶ For example, *Burrabungba v Minister for Natural Resources and Mines* [2016] QSC 273, albeit the challenge was unsuccessful in substantive terms. It should be noted that similar considerations apply to the ability of native title holders to use environmental legislation such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and, for example, the *Environment Protection Act 1986* (WA) to protect aspects of the environment that they value. Under the Commonwealth act, s. 487 extends the definition of ‘aggrieved person’ for the purposes of determining standing, and injunctions for contravention of the legislation can be sought by ‘interested persons’, whose ‘interests have been, are or would be affected by the conduct or proposed conduct’: s. 475, *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

²³⁷ In *Mabo v Queensland (No 2)* [1992] HCA 23 at [68] Brennan J stated some general principles about native title, including that ‘native title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in

nature and whether possessed by a community, a group or an individual'. See also Deane and Gaudron JJ at [65]. The joint judgment in *Fejo v Northern Territory* [1998] HCA 58 at [22] noted that the *Native Title Act 1993* does not deal with the enforcement of native title: 'It provides for the establishment of native title and recognises and protects it in the manner we have outlined. [...] If actual or claimed native title rights are sought to be enforced or protected by court order, the party seeking that protection must take proceedings in a court of competent jurisdiction.'

²³⁸ It is not clear whether an action for breach of riparian rights is a separate cause of action distinct from trespass, or whether it is a special case of trespass. In any case there are specific elements that must be proven to establish breach of riparian rights.

²³⁹ See generally, Giliker, P (2011) 'Nuisance', in Sappideen, C and Vines, P (eds) (2011) *Fleming's The Law of Torts*, Law Book Company, Australia, 487–525. For a discussion of the same period in the United States, see Rosen, CM (2003) "'Knowing" Industrial Pollution: Nuisance Law and the Power of Tradition in a Time of Rapid Economic Change, 1840–1864', *Environmental History* 8(4): 565–597.

²⁴⁰ Luntz, H and Hambly, D (2006) *Torts: cases and commentary* at 727. For examples see *Kelsen v Imperial Tobacco Co* [1957] 2 QB 334; *Goodson v Richardson* (1893) LR 9 Ch App 221; *Phillips v Homfray* (1871) LR 6 Ch App 770; *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538.

²⁴¹ Luntz, H and Hambly, D (2006) *Torts: cases and commentary* at 727.

²⁴² See *Menzies v Earl of Breadalbane* (1828) 3 Bli NS 414, 4 ER 1237; *Thorpes Ltd v Grant Pastoral Co Pty Ltd* [1955] HCA 10; (1955) 92 CLR 317 at 329.

²⁴³ For example, *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334.

²⁴⁴ Luntz, H and Hambly, D (2006) *Torts: cases and commentary* at 740. In *Finesky Holdings Pty Ltd v Minister for Transport for Western Australia* [2001] WASC 87, the holder of a mining sub-lease (giving the sublessee the exclusive right to remove limestone) was able to sue in trespass another party that took limestone from the area.

²⁴⁵ *Mason v Clarke* [1955] AC 778.

²⁴⁶ Luntz, H and Hambly, D (2006) *Torts: cases and commentary* at 740.

²⁴⁷ *Paine & Co v St Neots Gas & Coke Co* [1939] 3 All ER 812.


²⁴⁸ Buckley, R (2011) 'Intentional Invasion of Land', in Sappideen, C and Vines, P (eds) (2011) *Fleming's The Law of Torts*, Law Book Company, Australia, 49–62 at 54. *Vaughan v Shire of Benalla* (1891) 17 VLR 129; *Nuttall v Bracewell* (1866) 159 ER 51; *National Trust Co Limited v Miller* 46 S.C.R. 45. In *Hill v Tupper* (1863) 159 ER 51, the court held that a mere contractual licence (an exclusive right to rent out boats on a canal owned by another person) was insufficient to ground a claim in trespass, but commented that if the plaintiff could establish that he had some novel type of property right he may have succeeded.


²⁴⁹ Giliker, P (2011) 'Nuisance' at 496. See *Hunter v Canary Wharf Ltd* [1997] AC 665; [1997] 2 All ER 426; also *Howard v Walker* [1947] 2 All ER 197 at 199; *Hargrave v Goldman* (1963) 110 CLR 40.


²⁵⁰ This paper will only discuss the common law action of *private nuisance*. There is a separate action — *public nuisance* — that can be brought against activities endanger the health, property or comfort of the public generally or obstruct the public in the exercise of their rights: *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169. Native title holders may have standing to sue under public nuisance also: *Walsh v Ervin* (1952) VLR 361.


²⁵¹ Luntz, H and Hambly, D (2006) *Torts: cases and commentary* at 727.


²⁵² For example, *Pride of Derby Angling Association v British Celanese Ltd* [1953] 1 All ER 179; *Munro v Southern Dairies Ltd* [1955] VR 332; *Oldham v Lawson (No 1)* [1976] VR 654; *Baulkham Hills Shire Council v AV Walsh Pty Ltd* [1968] 3 NSW 138; *Cohen v City of Perth* [2000] WASC 306; *Cosentino v Medich* [2003] NSWSC 606. Note the lack of importance attached to the distinction in *Fitzgerald v Firkbank* [1897] 2 Ch 96 and *Nichols v Ely Beet Sugar Factory* [1913] 2 Ch 84.

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- ²⁵³ *Malone v Laskey* [1907] 2 KB 141.
- ²⁵⁴ *Hunter v Canary Wharf Ltd* [1997] AC 665; *South Australian Co v Port Adelaide City* [1914] SALR 16. Also Kodilinye, G (1989) 'Standing to sue in private nuisance', *Legal Studies* 9(3): 284–290.
- ²⁵⁵ The availability of common law remedies for native title holders was suggested in *Taylor v North Queensland Electricity Commission* (Unreported, FCA, Drummond J, 18 October 1996).
- ²⁵⁶ *Wickham v Hawker* [1835–42] All ER 1; *Fitzgerald v Firkbank* [1897] 2 Ch 96; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84. See also *Marsh v Baxter* [2014] WASC 187 at [351].
- ²⁵⁷ See *Webber v Lee* (1882) 9 QBD 315. Preston CJ in *Robson v Leischke* [2008] NSWLEC 152 outlined the broad nature of nuisance in this respect: 'Private nuisance involves an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of his or her ownership or occupation of land or some easement, profit or right used in connection with the land' (at [42] citing *Clerk & Lindsell on Torts*, 19th edn, Sweet & Maxwell, London, 2006, [20–01], at 1162 and *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903). On a mere licensee's lack of standing see *Malone v Laskey* [1907] 2 KB 141; *Oldham v Lawson (No 1)* [1976] VR 654; though the Queensland Court of Appeal has adopted a more flexible approach to legal standing than the traditional insistence that mere licensees cannot sue in nuisance: *Deasy Investments Pty Ltd v Lanestar Pty Ltd* [1996] QCA 466.
- ²⁵⁸ *Dawes v Adela Estates Ltd* (1970) 216 EG 1405 and *Geoghegan v Henry* [1922] 2 IR 1 are both cases where nuisance was available to people who held easements over land in common with others. On easements and nuisance generally: *Finlayson v Campbell* [1997] NSWSC 374.
- ²⁵⁹ See Brennan, S (2004) 'Native Title and the "Acquisition of Property"', *Murdoch University Law School*, 28: 28–79; Gray, J (2002) 'Is Native Title a Proprietary Right?', *Murdoch University Electronic Journal of Law* 9(3).
- ²⁶⁰ Section 223; also see *Western Australia v Ward* [2002] HCA 28, at [57]–[61]; *Neowarra v State of Western Australia* [2004] FCA 1092.
- ²⁶¹ *Victoria Park Racing and Recreation Grounds Company Limited v Taylor* [1937] HCA 45; 58 CLR 479.
- ²⁶² *Hunter v Canary Wharf Ltd* [1997] AC 665.
- ²⁶³ *Robinson v Kilvert* (1889) 41 Ch D 88.
- ²⁶⁴ *Chasemore v Richards* (1859) 11 ER 140. See New South Wales Law Reform Commission (1992) *The Right to Support by Adjoining Land*, Discussion Paper 27, NSWLRC, Sydney. Note that where the extraction of groundwater is by a non-landowner who merely holds a statutory authority, subsidence caused by groundwater extraction may fall within negligence or nuisance: *The Mayor, Councillors & Citizens of Perth v Halle* (1911) 13 CLR 393; *Metropolitan Water Supply and Sewerage Board v R Jackson Ltd* [1924] QSR 82.
- ²⁶⁵ In *Bradford Corporation v Pickles* [1895] AC 587, the relevant legislation was interpreted not to limit the landowner's unrestricted common law right to take groundwater. The position under the Australian water legislation is quite different: Gardner A, Bartlett R, Gray J, and Carney G (2009) *Water Resources Law* at 201–206.
- ²⁶⁶ Compare *E & S African Telegraph v Cape Town Tramways* [1902] AC 381, where electromagnetic interference with telegraph signals was held not to be a nuisance (the technology being quite new at that time and therefore considered abnormally sensitive) with *Network Rail Infrastructure Ltd v Morris (t/a Soundstar Studio)* [2004] WECA Civ 172, where electromagnetic interference with electric guitar amplifiers was held to be a potential nuisance (subject to a determination of whether the interference was unreasonable).
- ²⁶⁷ Giliker, P (2011) 'Nuisance' at 503–506.
- ²⁶⁸ See McKay, J (2002) 'Onshore water project: briefing paper' at 34.
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- ²⁶⁹ Giliker, P (2011) 'Nuisance' at 503–506. The culturally-specific nature of the inquiry is emphasised in the following quote from Lord Wright in *Sedleigh-Denfield v O'Callaghan* (1940) AC at 903: 'A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.'
- ²⁷⁰ *Ballard v Tomlinson* (1885) 29 Ch D 115; *Cambridge Water Company v Eastern Counties Leather PLC* (HL(E)) [1994] 2 AC 264 at 278–279; *Rylands v Fletcher* (1866) LR 1 Ex 265; note the latter seems to have been integrated into the law of nuisance, which requires reasonable foreseeability of damage.
- ²⁷¹ *Munro v Southern Dairies Ltd* [1955] VR 332; *Oldham v Lawson (No 1)* [1976] VR 654; *Baulkham Hills Shire Council v AV Walsh Pty Ltd* [1968] 3 NSW 138; *Cohen v City of Perth* [2000] WASC 306; *Cosentino v Medich* [2003] NSWSC 606.
- ²⁷² *Thompson-Schwab v Costaki* [1956] 1 WLR 335 (the nuisance was constituted by the presence of a brothel and the sight of prostitutes and their clients); *Laws v Florinplace* [1981] 1 All ER 659 (the nuisance was constituted by the operation of a shop selling pornography). Though: *St Helen's Smelting Co v Tipping* (1865) 11 HL Case 642; *Walter v Selfe* (1851) 4 De G & Sm 315: 'more than fanciful, more than one of mere delicacy or fastidiousness...an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people' at 322.
- ²⁷³ Note that interference with defined property rights such as easements or *profits à prendre* are actionable *per se* without the proof of damage. By analogy this would suggest that native title holders with defined rights and interests could establish their case without proving damage, so long as those rights or interests were the subject of interference. Giliker, P (2011) 'Nuisance' at 520; Stuhmcke, A (2001) *Essential Tort Law*, 2nd edn, Cavendish Publishing, Sydney at 125.
- ²⁷⁴ A useful summary of the principles is provided in *Cohen v City of Perth* [2000] WASC 306 at [158]. Note that there is no nuisance where water flows naturally from one property to another: *Neath RDC v Williams* [1951] 1 KB 115; *Rouse v Gravelworks Ltd* [1940] 1 KB 489, but there may be a nuisance where the natural drainage of water has been disrupted by drainage works or other interference with the land: *Bennetts v Honroth* [1959] SASR 170.
- ²⁷⁵ Giliker, P (2011) 'Nuisance' at 501–502.
- ²⁷⁶ Giliker, P (2011) 'Nuisance' at 502–503. In *Sturges v Bridgman* [1879] 11 Ch D 852 at 865 it was said: 'What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey'. Zoning laws may be relevant but not conclusive: *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343; compare *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ 15.
- ²⁷⁷ *Halsey v Esso* [1961] 1 WLR 683 at 690; *Wheeler v JJ Saunders* [1995] 2 All ER 897; Giliker, P (2011) 'Nuisance' at 501.
- ²⁷⁸ Giliker, P (2011) 'Nuisance' at 504–505.
- ²⁷⁹ See *Monro v Southern Dairies* [1955] VLR 332 at 337; *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 at 535.
- ²⁸⁰ The analogy may be drawn to the relevance of public interest matters to future act determinations by the National Native Title Tribunal: the tribunal takes into account the potential economic benefits of a proposed development but balancing it against other considerations. Section 39(1)(e), *Native Title Act 1993*. See *Western Australia v Thomas* [1996] NNTTA 30; *Evans v Western Australia* [1997] 741 FCA; *Western Desert Lands Aboriginal Corporation (Jamukunu — Yapalikunu)/Western Australia/Holocene Pty Ltd* [2009] NNTTA 49. Compare *Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji* [2011] NNTTA 172.
- ²⁸¹ The term riparian landowner is often also used to refer to landowners whose land abuts a lake or wetland, although the rights of such landowners are sometimes called 'littoral rights'.
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- ²⁸² The concept of ‘natural flow’ includes water quality as well as quantity: *Chasemore v Richards* [1843–60] All ER 77 at 85; *Stollmeyer v Trinidad Lake Petroleum Company* [1918] AC 485; *Van Son v Forestry Commission of New South Wales* (1995) 86 LGERA 108; *Scott-Whitehead v National Coal Board* (1987) 53 P&CR 263; *Tipping v Eckersley* (1855) 2 K&J 264; 69 ER 799.
- ²⁸³ *Chasemore v Richards* [1843–60] All ER 77 at 85; *Embrey v Owen* (1851) 6 Ex 353; 155 ER 579 at 368 (Ex), 585 (ER); *Miner v Gilmour* (1859) 14 ER 861, 871; *Jones v Kingborough* (1950) 82 CLR 282, 324 and 342; Gardner A, Bartlett R, Gray J, and Carney G (2009) *Water Resources Law* at 157–161. So if an upstream water user took water for non-ordinary purposes and thereby caused a noticeable decrease in the flow available for downstream owners, this would be a breach of the downstream owners’ rights: *Attwood v Llay Main Collieries Ltd* (1926) Ch 444; *Young & Co v Bankier Distillery Co* [1893] AC 691; *Nagle v Miller* (1904) 29 VLR 765. And if a person dammed or diverted a watercourse in a way that altered the flow through their downstream neighbour’s property, this would be a breach of riparian rights: *Menzies v Earl of Breadalbane* (1828) 3 Bli NS 414, 4 ER 1237; *Nalder v Commissioner for Railways* (1983) 1 Qd 620; *Miner v Gilmour* (1859) 14 ER 861; *Pring v Marina* (1866) 5 SCR (NSW) 390.
- ²⁸⁴ In *Thorpes Ltd v Grant Pastoral Co Pty Ltd* [1955] HCA 10 at [7] the nuisance relating to flooding, independent of whether the plaintiff’s common law riparian rights had survived legislative regulation. (The High Court’s comments about *Thorpes* in *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51 at [54] and [116] do not detract from this point.) In *Vaughan v Shire of Benalla* (1891) 17 VLR 129, the nuisance related to the contamination of water which would be drunk by cows — again, not related to riparian rights (the relevant water was rainwater collected in a quarry).
- ²⁸⁵ Although it is sometimes remarked that native title is treated uniquely as a ‘bundle of rights’, this is not precisely true. Property in land has long been described as a ‘bundle of rights’ (see e.g. *Minister of State for the Army v Dalziel Claimant* [1944] HCA 4; (1944) 68 CLR 261).
- ²⁸⁶ *Ward* 2002 HCA at [82], [95]; *Akiba* HCA [59]
- ²⁸⁷ This is to be contrasted with the situation for s. 24KA and s. 24MD, which guarantees that native title holders will be treated as if they were freehold owners. Importantly, however, that guarantee only covers the specific circumstances mentioned in those particular provisions.
- ²⁸⁸ On which, see *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51 at [54], discussing *Hanson v The Grassy Gully Gold Mining Co* (1900) 21 NSWLR (L) 271 and *Thorpes Ltd v Grant Pastoral Co Pty Ltd* [1955] HCA 10; (1955) 92 CLR 317 at 331. See also discussion in Gardner A, Bartlett R, Gray J, and Carney G (2009) *Water Resources Law* at 183–206.
- ²⁸⁹ For example, *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; (1994) 179 CLR 520.
- ²⁹⁰ For example, *Scott-Whitehead v National Coal Board* (1987) 53 P&CR 263.
- ²⁹¹ *Lyttelton Times Co Ltd v Warners Ltd* [1907] AC 476 at 481.
- ²⁹² For example, *Harvey v Walters* (1873) LR 8 CP 162; *Hulley v Siverssprings Bleaching Co* [1922] 2 Ch 268.
- ²⁹³ *Hammersmith Railway v Brand* (1869) LR 4 HL 171; *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430 at 455–456.
- ²⁹⁴ Kneebone, S (1986) “Nuisance and the Defence of Statutory Authority: Inferring the Intention of Parliament” *Adelaide Law Review* 10(4):472 at 474
- ²⁹⁵ Bates, G (2006) *Environmental Law in Australia*, 6th edn, Lexisnexis, Sydney, at 176.
- ²⁹⁶ Bates, G (2006) *Environmental Law in Australia* at 176–177. *Lester-Travers v City of Frankston* [1970] VR 2; *Managers of The Metropolitan District Asylum v Hill* (1881) 6 App Cas 193.
- ²⁹⁷ See generally, *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28.
- ²⁹⁸ *Wheeler v Saunders* [1996] Ch. 19; *Managers of Metropolitan Asylum District v Hill* (1881) LR 6 App Cas 193 at 212; *Lester-Travers v City of Frankston* [1970] VR 2; *York Bros (Trading) Pty Ltd v The Commissioner for Main Roads* (1983) 1 NSWLR 391.
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- ²⁹⁹ *Manchester Corporation v Farnworth* [1930] AC 171; *Fullarton v North Melbourne Electric Tramway & Lighting Co Ltd* [1916] HCA 12; *Cohen v City of Perth* [2000] WASC 306 at [154]–[155]; *Edwards v Blue Mountains City Council* (1961) 78 WN (NSW) 864. Though see *Benning v Wong* [1969] HCA 58. For a discussion of how the ‘inevitability’ of consequences is related to the practical feasibility of the alternatives, see Kneebone, S (1986) ‘Nuisance and the defence of statutory authority: Inferring the intention of Parliament’, *Adelaide Law Review* 10(4): 472–491.
- ³⁰⁰ *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Case 430 at 455-6; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011.
- ³⁰¹ *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 at [97]; *Puntoriero v Water Administration Ministerial Corp* (1999) 104 LGERA 419; *Lawrence v Kempsey Shire Council* (1995) 87 LGERA 49.
- ³⁰² *Robert Duncan Bell v. Minister For Urban Affairs & Planning* [1997] NSWLEC 98, citing *Gilligham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343; see also *Hunter v Canary Wharf Ltd* [1997] AC 655; *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536.
- ³⁰³ *Gilligham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343.
- ³⁰⁴ *Wheeler v JJ Saunders Ltd* [1994] EWCA Civ 8.
- ³⁰⁵ (1881) 6 App Cas 193. Cited with approval in *Lester-Travers v City of Frankston* [1970] VR 2.
- ³⁰⁶ *Coco v R* [1994] HCA 15 at [8].
- ³⁰⁷ *Plenty v Dillon* (1991) 171 CLR at 648 per Gaudron and McHugh JJ; *Morris v Beardmore* (1981) AC 446 at 455, 463; *Colet* (1981) 119 DLR (3d) at 527–528.
- ³⁰⁸ *Wik Peoples v Queensland* [1996] FCA 1205 at [178].
- ³⁰⁹ Section 24.
- ³¹⁰ Section 160.
- ³¹¹ See Cooper J Lardil 2004 at [148].
- ³¹² An example of this is *Manchester City Council v Farnworth* [1930] AC 171, where it was conceded that the Manchester City Council had statutory authority to burn coal for a power station, but held that its choice to use high-sulphur-emitting coal instead of lower-emitting alternatives was nevertheless an actionable nuisance.
- ³¹³ See, e.g., s. 24, *Rights in Water and Irrigation Act 1914* (WA): ‘Nothing contained in, or done under, this Division affects any remedy to which a person would otherwise be entitled in civil proceedings except that a person shall not be liable to be proceeded against in respect of any diversion, taking, or use of water that is permitted by a direction under section 22 or authorised by a licence under section 5C or by a local by-law’.
- ³¹⁴ Explanatory Memorandum, *Native Title Amendment Bill 1997*, 71–72. Reference to water licences was also made during the debates: Evidence to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia, Canberra, 23 September 1997 (Robert Orr).
- ³¹⁵ Evidence to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia, Canberra, 23 September 1997 (Robert Orr); Explanatory Memorandum, *Native Title Amendment Bill 1997* at [6.21]–[6.24].
- ³¹⁶ Commonwealth, Parliamentary Debates, Senate, 7 April 1998 at 2267, 2270–2271; Explanatory Memorandum, *Native Title Amendment Bill 1997* at [6.21]–[6.24].
- ³¹⁷ Evidence to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (Robert Orr).
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- ³¹⁸ I recognise that s. 7, *Native Title Act 1993* may limit the effect of the *Racial Discrimination Act 1975*, but even so the outcome I am suggesting could equally be achieved by applying s. 7(2)(b) — that is, using the *Racial Discrimination Act 1975* to assist the interpretation of an ambiguous term.
- ³¹⁹ *Wandarang, Alawa, Marra and Ngalkan Peoples v Northern Territory of Australia* [2004] FCAFC 187. Note that in such situations it may be possible to bring an action for breach of statutory duty (a different kind of tort), in addition to the nuisance claim.
- ³²⁰ See *Jones v Williams* (1843) 152 ER 674; *Farley & Lewers Ltd v A-G* 1962] SR (NSW) 814 at 817.
- ³²¹ *Lonsdale v Nelson* (1823) 107 ER 396 at 399; *Young v Wheeler* (1987) Aust Torts Reports ¶180-126 at 68, 970.
- ³²² *Burton v Winters* [1993] 3 All ER 847 at 852; *Roberts v Rose* (1865) LR 1 Ex 82; *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226 at 245.
- ³²³ Giliker, P (2011) ‘Nuisance’ at 524–525.
- ³²⁴ See Giliker, P (2011) ‘Nuisance’ at 520–521. See *Robson v Leischke* [2008] NSWLEC 152 at [42]–[53] on the requirement of foreseeability.
- ³²⁵ For a recent example in the environmental protection context, see *Chief Executive Officer, Department of Environment and Conservation v Szulc* [2010] Western Australian Supreme Court 195 (Unreported, Martin CJ, 30 July 2010).
- ³²⁶ *Irving v Emu & Prospect Gravel & Road Metal Co Ltd* (1909) 26 WN (NSW) 137; *Anderson v Pender* [2002] NSWSC 1005; *London & Blackwell Railway Co v Cross* (1886) 31 Ch D 354, at 369.
- ³²⁷ *Beswicke v Alner* [1926] VLR 72 at 76–77; *Madden v Coy* [1944] VLR 88; *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 451. There appears to be a higher bar for injunctions where no harm has occurred yet: *Fletcher v Bealy* (1885) 28 Ch D 668.
- ³²⁸ *A-G v Manchester Corp* [1893] 2 Ch 87; *Hooper v Rogers* [1975] Ch 43; *Grasso v Lore* [1980] VR 163.
- ³²⁹ *A-G v Sheffield Gas Co* (1853) 43 ER 119; *Swaine v Great Northern Railway* (1864) 46 ER 899.
- ³³⁰ Giliker, P (2011) ‘Nuisance’ at 523.
- ³³¹ An additional source of leverage could be found in the now-diminished Carbon Farming Initiative under the *Carbon Credits (Carbon Farming Initiative) 2011* (Cth) <<https://www.legislation.gov.au/Series/C2011A00101/Amendments>>. Depending on the State or Territory, proposed carbon sequestration projects could give native title holders significant leverage arising from their ability to give or withhold their approval. This was not dependent on the future acts regime or exclusive possession, but instead was a consequence of the carbon farming legislation itself, which placed a high value on long-term certainty: Dore, J et al. (2013) ‘Native title, land rights and natural resources: practical considerations relevant to Australia’s carbon farming initiative and carbon markets’, Paper presented at the National Native Title Conference, 4 June 2013, Alice Springs.
- ³³² See e.g. Collins, N and Woodley, A (2013) ‘Social water assessment protocol: a step towards connecting mining, water and human rights’, *Impact Assessment and Project Appraisal* 13(2): 158–167.
- ³³³ In 2009 the Ngadjon-Jii and Wanyurr Majay Peoples made agreements with the Cairns Regional Council in relation to the construction of drinking water reservoirs. Benefits secured included input into the placement of the reservoirs and opportunities for traditional owners to be involved in the management of the catchment areas: Water and Waste Committee, Cairns Regional Council, *Endorsement of cultural heritage agreements for drinking water infrastructure*, 18 February 2009, online at <http://www.cairns.qld.gov.au/_data/assets/pdf_file/0016/12229/18feb09_water-and-waste_cl1.pdf>.
- ³³⁴ Examples include the settlements that the Western Australian government reached with the Yawuru people and the Miriuwung-Gajjorong people; and the Gunditjmarra settlement in Victoria.
- ³³⁵ The effect of s. 24AB, *Native Title Act 1993* appears to be that if a class of future acts are covered by an ILUA, s. 24HA (among others) will not apply to the future act. That is, if the relevant future acts
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include water legislation or water licences, etc., they will be valid by virtue of ss 24AB and 24EB rather than s. 24HA, and so additional conditions may be put on such future acts.

³³⁶ Jackson, S and Morrison, J (2007) 'Indigenous Perspectives in Water Management, Reforms and Implementation'; Jackson, S (2007) *Indigenous Interests and the National Water Initiative — Background paper and literature review*.

³³⁷ O'Faircheallaigh, C & Corbett, T 2005, 'Indigenous Participation in Environmental Management of Mining Projects: the Role of Negotiated Agreements', *Environmental Politics*, 14(5): 629–647.



“What rights do native title holders have in relation to freshwater resources?” — a question tackled by legal scholars, lawyers and native title holders for decades. This paper asks a different question: “Assuming they have rights relating to freshwater, what can native title holders do with those rights to promote or protect the things they value?”. It examines the interaction between native title and other areas of law that may impact on freshwater, including water legislation; approvals for mining, petroleum and infrastructure projects; and common law torts that govern land use.

The paper deals with two distinct types of situation. First, where native title holders want to do something with water, be it commercial irrigation or aquaculture, or the flooding of culturally significant ecosystems. Second, where native title holders want to protect freshwater resources from the impacts of other people’s activities, such as mine dewatering, fracking, dam projects, groundwater irrigation, or industrial pollution.

For the first scenario, the paper concludes that the *Native Title Act 1993* privileges governments’ environmental and economic objectives over the claims of native title holders. Native title affords only limited exemptions to water licencing regimes and provides no legal basis to force governments to grant water licences. It does not provide any mechanism to use water for commercial purposes without a licence, other than for watering stock. Nevertheless, native title does provide some opportunities for leverage with government or industry, leverage that can be used creatively to gain legal access to water resources.

The outlook is slightly better in the second scenario. Here, native title provides much more tangible and direct legal tools to traditional owners: exclusive possession rights over land; the procedural rights under the future acts regime; the ability to participate in or challenge administrative decisions to approve new developments; the common law torts of nuisance, trespass and negligence; and various types of bargaining leverage, most significantly the right to compensation under the *Native Title Act*.

Water is an inherently tricky thing for the law to govern. The common law of water was replete with notions of reciprocity and standards of ‘reasonableness’, and the statutory regimes that have taken its place explicitly require the balancing of competing environmental, economic, social and cultural interests. Native title does not provide traditional owners with a trump card in this inherently political process, but it certainly does strengthen their hand.

ISBN 978-1-922102-67-6 (pdf)
ISBN 978-1-922102-68-3 (ebook)



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