THE NATIONAL WATER INITIATIVE AND VICTORIA'S LEGISLATIVE IMPLEMENTATION OF INDIGENOUS WATER RIGHTS

by Katie O'Bryan

INTRODUCTION

For Indigenous people around Australia, and indeed the world, water is an essential part of country, culture and identity. In Australia, the National Water Initiative ('NWI') is currently the primary vehicle for recognising this relationship. Recently, how well the NWI has been implemented by the states has been the subject of a national assessment. This article seeks to review Victoria's legislative implementation of the NWI as it applies to Indigenous rights to water. Of concern is the fact that a number of statements in the recent assessment do not match the reality, thus casting doubt on Victoria's commitment to the legal recognition of the water rights of Indigenous Victorians.

BACKGROUND TO THE NWI

It is widely acknowledged that Australia is the driest inhabited continent on Earth.[1] But up until recently, Australia did not have a coordinated approach to the use and management of its scarce water resources. This was largely due to the fact that control and management of water resources is a state responsibility. However, that all changed in 1994 with agreement by the Council of Australian Government ('COAG') on a water reform framework.[2] This led to the 2004 Intergovernmental Agreement on the NWI.[3] These reforms have been described as 'the most significant since Australian water resources statutes were first enacted over a century ago'.[4] Although the COAG framework agreement was silent on Indigenous water rights, the NWI contains a number of objectives recognising the need to address Indigenous interests in water. Those objectives and how they have been addressed by the Victorian Government is the subject of this article.

Under the NWI, the states and the Commonwealth agreed to set up the National Water Commission ('NWC'), which was subsequently established pursuant to the *National Water Commission Act 2004* (Cth). The role of the NWC is to advise COAG on the progress of the NWI and on national water issues generally. The NWC has recently released its third Biennial Assessment of the NWI ('2011 Biennial Assessment'), which contains a summary of the states' implementation of the objectives of the NWI – including in relation to Indigenous water rights.

RELEVANT SECTIONS OF THE NWI

The main clauses of the NWI relating to Indigenous interests are clauses 52-54,[5] which state:

> 52. The Parties will provide for indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, through planning processes that ensure:
>
> i) inclusion of indigenous representation in water planning wherever possible; and
>
> ii) *water plans* will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.
>
> 53. Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the *Commonwealth Native Title Act 1993*.
>
> 54. Water allocated to native title holders for traditional cultural purposes will be accounted for.

The NWC has a requirement to report to COAG on progress on the implementation of the NWI, including the objectives contained in clauses 52-54 above. This requirement is contained in clause 106 of the NWI, which states:

> 106. The NWC will, commencing in 2006-07, undertake:
>
> (a) biennial assessments of progress with the NWI Agreement and State and Territory implementation plans, and advice on actions required to better realise the objectives and outcomes of the Agreement;
>
> (b) a third biennial assessment in 2010-11 in the form of a comprehensive review of the Agreement against the indicators developed by the NRMMC referred to in paragraph 104(ii) above, and an assessment of the extent to which actions undertaken in this Agreement

contribute to the national interest and the impacts of implementing this Agreement on regional, rural and urban communities; and

(c) biennial assessments of the performance of the water industry against national benchmarks, in areas such as irrigation efficiency, water management costs and water pricing.

As noted earlier, the NWC has recently released its third (2011) Biennial Assessment.

VICTORIA'S IMPLEMENTATION OF THE NWI, AS REPORTED IN THE 2011 BIENNIAL ASSESSMENT REPORT

A summary of progress by the Commonwealth and the states on the implementation of the NWI is contained in Appendix B of the 2011 Biennial Assessment. That part of Appendix B sets out Victoria's implementation of clauses 52-54 states (in part) as follows:

> Vic. has advised that it has a range of policies and legislation aimed at progressing Indigenous involvement in water issues.[6]

Those policies include a number that relate to Indigenous involvement in natural resource management generally, such as the *Indigenous Partnership Framework*[7] and the *Indigenous Partnership Strategy and Action Plan*.[8] Other water specific strategies which refer to or have sections relating to Indigenous water issues include the *Victorian River Health Strategy;*[9] *East Gippsland Regional River Health Strategy* (2005-10);[10] the *Gippsland Region Sustainable Water Strategy;*[11] and the *Western Region Sustainable Water Strategy.*[12] The Department of Sustainability and Environment, Parks Victoria and a number of catchment management authorities also have Indigenous reference groups to provide input and advice towards their decision making processes.[13]

However, when it comes to legislative implementation by Victoria of the NWI, there are some troubling statements in the 2011 Biennial Assessment about what has actually occurred.

In relation to the *Water Act 1989* (Vic) ('*Water Act*'), as stated in Appendix B of the 2011 Biennial Assessment, Victoria advised as follows:

> ++Section 8 (Rights) of the *Water Act 1989* (Vic) has recently been amended to include rights to water for ceremonial and spiritual uses.
>
> 53—In Vic., native title rights to water are recognised in section 8 of the *Water Act 1989*.'[14]

However, if one turns to section 8 of the most recently amended version of the *Water Act*,[15] one will find that there is no reference to rights to water for ceremonial and spiritual uses. Nor are native title rights to water recognised. In fact, there is no reference anywhere in the *Water Act* to either 'ceremonial or spiritual uses' or 'native title'. Section 8 merely provides a right for a person to take water from a bore or any waterway to which they have access – for domestic or stock use.

However, section 8A refers to 'traditional owner rights' under the *Traditional Owner Settlement Act 2010* (Vic) ('*TOS Act*'). If this is the amendment to which the Victorian Government was referring in its advice to the NWC, then it too is inconsistent with that advice. Like section 8, section 8A does not recognise native title rights to water, nor does it refer to water for ceremonial or spiritual uses. It states as follows:

> 8A. Traditional owner rights
>
> (1) If a traditional owner group entity has a natural resource agreement under Part 6 of the *Traditional Owner Settlement Act 2010* in relation to an area of land any member of the entity has the right to take and use water under and in accordance with an authorisation order given under section 85 of the *Traditional Owner Settlement Act 2010*.
>
> (2) Nothing in subsection (1) is to be taken as derogating from any right a member of the traditional owner group entity has to take and use water under section 8.
>
> A natural resource authorisation given under s 85 the TOSA can be made for traditional purposes.

There are a couple of things to note about this section. Firstly, a traditional owner group entity must have a natural resource agreement under Part 6 of the *TOS Act*. And secondly, the authorisation order can be made for 'traditional purposes', which appear to be the only purposes under the *TOS Act* for which an authorisation order will be given. 'Traditional purposes' is defined in section 79 of the *TOS Act* as follows:

> ... in relation to a traditional owner group entity, means the purposes of providing for any personal, domestic or non-commercial communal needs of the members of the traditional owner group entity.

So neither 8A, nor any other section of the *TOS Act,* include a specific right to water for ceremonial or spiritual uses.

In addition, given that section 8 allows any person to take water from a bore or waterway to which they have

access for domestic and stock purposes, an authorisation order under section 85 of the *TOS Act* would seem to add very little to rights which traditional owners may already have under section 8 as an ordinary person. Indeed the similarity between rights under the *TOS Act* and section 8 rights under the *Water Act* is explicitly acknowledged in the Gippsland Region Sustainable Water Strategy.[16]

So what was the nature of the advice that the Victorian Government gave to the NWC? Were they amendments that the Government was hoping to get through parliament prior to the State election (held in November 2010)? Was it simply sloppy reporting by Victoria, or a case of miscommunication between government departments? Or, was it a combination of some or all of these possibilities? Given that under clause 107 of the NWI the Biennial Assessments are intended to be publicly available, it is odd that such a definitive statement was made to the NWC about legislative reform that has not actually occurred.

There is other advice given to the NWC by Victoria that does not provide a fully accurate picture. In relation to the *TOS Act*, the Victorian Government advised the NWC as follows:

> ++The *Traditional Owner Settlement Act 2010* (Vic) provides that agreements under the Act can include handing back parks and reserves of significance to the traditional owner group. The parks and reserves are to be jointly managed with the state and increase access to and the sustainable use of natural resources, including water. This legislation has enabled the establishment of traditional owner management boards, which advise on the management of the parks, including water management. A recent example is the establishment of the river red gum boards of management of traditional owners, which jointly manage the river red gum forests of the Barmah National Park and Nyah–Vinifera Park.[17]

It is true that the *TOS Act* allows for the hand back of parks and reserves to traditional owner groups. The title transferred is known as 'Aboriginal title' and a condition of transfer is that the park or reserve be jointly managed as a public land reserved for a particular purpose.[18] It is under these provisions that, for example, a traditional owner board of management is being set up for 10 areas of land being transferred with Aboriginal title to the Gunaikurnai people pursuant to their native title settlement agreements. However, it was actually the *Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009* (Vic) (which amended various Acts relating to land management)[19] not the *TOS Act* which initially enabled the establishment of the boards of management of traditional owners for the Barmah National Park and Nyah-Vinifera Park. The *TOS Act* then further amended those land management Acts to take into account additional land related outcomes available under the *TOS Act*.

It is important to highlight that such joint management arrangements will not necessarily include water management as the advice would appear to suggest: as the water bodies within the joint management area are not automatically included. This may have to be specifically negotiated depending on the circumstances, with the scope for that negotiation being potentially very limited. By way of example, one of the parks being transferred with Aboriginal title to the Gunaikurnai people and for which a traditional owner board of management will be responsible is the Lake Tyers Forest Park. This joint management area, however, does not include the lake itself, despite the recognition of native title over both the park and the lake.[20]

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

Finally, what the Victorian Government neglected to advise the NWC in relation to the *TOS Act,* is that apart from authorisations made under section 85 (which appear to do little more than provide for rights similar to those which they already have under section 8 of the *Water Act*), there is no other scope for recognition of traditional owner interests in water.[21]

CONCLUSION

What the above discussion shows is that there has been minimal, if any, legislative implementation of the NWI in relation to Indigenous interests in water, despite the Victorian Government's assertions to the contrary. It is not enough to simply implement the NWI by way of policy initiatives. For Indigenous groups to have any confidence that their interests in water will be both recognised and enforceable, they need to be supported by legislation.

The matters raised above occurred during the tenure of the Brumby Labor Government,[22] which lost office in the November 2010 state election. Thus, we may never know why the erroneous advice was given to the NWC.[23] What is worth considering, however, is that in advising the NWC of amendments to the *Water Act* (even if they haven't actually occurred), the Victorian Government created the impression that it was its intention at some stage to amend

the *Water Act* to recognise Indigenous interests in water. It is not clear whether the Baillieu Coalition Government is aware of this, as it has been slow to show its hand on any matters relating to Indigenous land justice, native title or Indigenous natural resource management. Therefore, Victoria's Indigenous community will need to advocate strongly for amendments to the legislation to implement the NWI, as suggested in the 2011 Biennial Assessment, and not allow the current Government to simply maintain a focus on implementation via policy.

Katie O'Bryan is a native title solicitor, currently undertaking a PhD at Monash University looking at Indigenous legal rights to water. The views expressed in this article are her own. *The author would like to thank Melissa Castan and David Yarrow for their comments on the draft.*

1 Alex Gardner, Richard Bartlett and Janice Gray (eds), *Water Resources Law* (LexisNexis Butterworths, 2009) 3.

2 Environment Australia, Marine and Waters Division, *The Council of Australian Governments' Water Reform Framework - Extracts from the Council of Australian Governments: Hobart 25 February 1994, Communiqué*, (Environment Australia, 1994) Attachment A <http://www.environment.gov.au/water/publications/action/pubs/policyframework.pdf> at 26 February 2012.

3 National Water Commission, *The National Water Initiative - Securing Australia's Water Future: 2011 Assessment* (National Water Commission, 2011) <http://www.nwc.gov.au/__data/assets/pdf_file/0019/18208/Intergovernmental-Agreement-on-a-national-water-initiative2.pdf> at 26 February 2012.

4 Gardner et al, above n 1, vii.

5 Other relevant clauses include clause 25(ix), Schedule E clause 1(vi), and Schedule G clause 3(v); 'Indigenous and Cultural Values' also fall within the definition of *environmental and other public benefit outcomes.*

6 National Water Commission, above n 3, Appendix B, 294.

7 Department of Sustainability and Environment, *Indigenous Partnership Framework* (2007) <http://www.dse.vic.gov.au/__data/assets/pdf_file/0011/96680/Indigenous_Partnership-final.pdf>.

8 Parks Victoria, *Indigenous Partnership and Strategy Action Plan* (2005) <http://nla.gov.au/nla.arc-82409>.

9 Department of Natural Resources and Environment, *Victorian River Health Strategy* (2002) <http://www.dse.vic.gov.au/__data/assets/pdf_file/0012/102603/VRHS_Introduction.pdf>; DNRE is now the Department of Sustainability and Environment.

10 East Gippsland Catchment Management Authority, *Protecting and Improving Our River Health: The East Gippsland Regional River Health Strategy 2005-2010* (2006) <http://www.egcma.com.au/file/EGCMA-2935(1).pdf>.

11 Department of Sustainability and Environment, *Gippsland Region Sustainable Water Strategy* (2011) <http://www.water.vic.gov.au/__data/assets/pdf_file/0003/127848/DSE_GRWS_accessible_linked.pdf>; This strategy refers to Willington, D, *Technical Paper No 1 – Indigenous Engagement Summary* (Eagle Dreaming Cultural Services, 2011) <http://www.water.vic.gov.au/__data/assets/pdf_file/0007/129067/Technical-Paper-1-Indigenous-engagement-summary.pdf>.

12 Department of Sustainability and Environment, *Western Region Sustainable Water Strategy* (2011) <http://www.water.vic.gov.au/__data/assets/pdf_file/0010/127648/WRSWS_accessible_linked_final.pdf> at 25 February 2012.

13 Department of Sustainability and Environment, above n 11, 85.

14 National Water Commission, above n 3, Appendix B, 294.

15 Incorporating amendments as at 17 November, 2011.

16 Department of Sustainability and Environment, above n 11, 82.

17 National Water Commission, above n 3, Appendix B, 294.

18 Part 3, Division 4.

19 *National Parks Act 1975* (Vic); *Conservation Forests and Lands Act 1987* (Vic); *Crown Land (Reserves) Act 1978* (Vic); *Forests Act 1978* (Vic).

20 Note that it also does not include the land on which the Lake Tyers Community is located, which was transferred to the Lake Tyers Trust pursuant to the *Aboriginal Lands Act 1970* (Vic).

21 Section 9 of the *TOS Act* which sets out the traditional owner interests that can be recognised in a Recognition and Settlement Agreement relates only to land.

22 Details of consultations (by way of meetings and written responses to requests for information) with parties to the NWI are contained in Appendix C of the 2011 Biennial Assessment.

23 Following the change of government at the 2010 election, the incoming Baillieu Coalition government was given an opportunity to comment on both an initial and a near final draft of the 2011 Biennial Assessment. Although not commenting on the initial draft, it apparently provided comments via the Department of Sustainability and Environment on the near final draft. See Appendix C of the 2011 Biennial Assessment, 324.

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