

**Fact Sheet: February-2014**

## **Reforming Victoria's Water Legislation to meet Indigenous needs**

In December 2013, the Victorian Government released an exposure draft of a new Water Bill for Victoria. This act would replace the *Water Act 1989*. The exposure draft is part of the Water Law Review process, overseen by an advisory panel appointed by the Victorian Water Minister.

The Water Law Review process and the new Water Bill Exposure Draft represent an important opportunity to ensure that Victoria's water legislation is responsive to the needs and values of Traditional Owners and Indigenous people.

Indigenous Victorians have a right to access water resources on their Country and have a meaningful say in water planning. Indigenous participation in water management is important to ensure cultural sustainability, community development and environmental resilience. The Victorian government has a responsibility, under the National Water Initiative (NWI), to recognize and account for Indigenous needs in water planning.<sup>i</sup> The United Nations Declaration on the Rights of Indigenous People also requires Australian governments to safeguard Indigenous people's rights to manage natural resources on their Country.<sup>ii</sup>

### **What does the current *Water Act 1989* do?**

The current *Water Act 1989* does next-to-nothing to meet Indigenous needs or to satisfy the NWI requirements. The only concession under the Act is a provision (under Section 8A) for Traditional Owners with a Natural Resource Agreement to draw water from a river or bore for 'Traditional' purposes. This section does not provide Traditional Owners with access to water resources beyond what is already afforded under the TOS Act or that would be enjoyed by an ordinary person occupying land. The use of water resources under this section of the Act is limited to 'traditional', domestic, commercial non-commercial use. It rules out use of water for environmental management or commercial development. It also excludes all Traditional Owners who are not party to a natural resource agreement.

Section 8 is the only part of Victoria's water legislation that creates any water rights for Indigenous people. It does very little to meet the aspirations of Traditional Owners to manage water resources for cultural, environmental and economic purposes.

### **What does the new 'Exposure Draft' do?**

The new 'exposure draft' represents a once-in-a-generation chance to provide legislative recognition of Indigenous people's aspirations regarding water access

and management. Members of the advisory panel, responsible for drafting the exposure draft, were briefed by Traditional Owners and other stakeholders about practical ways to improve legislation. Yet there are no meaningful improvements contained in the exposure draft.

A reference to 'cultural' values has been included in the draft. The 'objectives' of the new act include to 'provide a system of water resource management that balances environmental, economic, social *and cultural values* over both the long term and the short term;<sup>iii</sup> The reference to 'cultural' values is intended to incorporate Indigenous heritage issues in water planning.<sup>iv</sup> However, 'cultural values' also covers non-Indigenous European heritage. As such, this addition provides no explicit recognition of Indigenous values in water planning.

The exposure draft installs Land Use Agreements, under the Traditional Owner Settlement Act, as the only basis for Indigenous water rights at law. It ignores the potential for alternative legal mechanisms to provide broader scope for allocation of Indigenous water use rights. Statutory allocations for cultural flows and economic development have not been considered in the exposure draft.

Victoria has, historically, shown leadership in water reform. However, the legislative recognition of Indigenous water rights remains deficient and lags significantly behind other states.

### **What have other States done?**

Victoria is lagging behind other states in implementing Indigenous water rights. The New South Wales Water Management Act 2000 and the Queensland Water Act 2000 both include explicit recognition of Aboriginal and Torres Strait Islander values in the 'purpose' of the legislation. The New South Wales Legislation requires mandatory Indigenous representation on water management committees for the development of water sharing plans.<sup>v</sup>

The Queensland legislation allows Aboriginal or Torres Strait Island parties to take or interfere with water for traditional activities or cultural purposes.<sup>vi</sup> Under regulations made pursuant to the *Water Management Act 2000* (NSW), Aboriginal people or communities can apply for specific purpose access licenses for cultural, community development or commercial purposes without needing to first establish native title. New South Wales also has an Aboriginal Water Trust, set up for the purposes of providing 'grants for Aboriginal community-owned commercially viable businesses where water is an essential component of the businesses' operations.'<sup>vii</sup>

### **Practical reforms for Indigenous futures.**

The Water Law Advisory Panel can draw upon a number of interstate precedents and practical proposals from Indigenous organizations to improve Victoria's water legislation.

The First People's Water Engagement Council (FPWEC) provides advice to the

National Water Commission (NWC) about Aboriginal issues in relation to water planning and management. The FPWEC and the NWC have developed clear policy advice to inform the State's legislation.

The Water Law Advisory Panel should give full consideration to the following policy proposals

#### Cultural allocations

- Dedicated access licenses for Traditional Owners and Indigenous communities
- A legislated allocation providing access which is not currently allowed under the provisions of native title
- Non-tradable, non-commercial allocations
- Could be taken from the environmental pool with conditions for maintaining environmental values

#### Commercial allocations

- Water for Indigenous economic development
- To increase the capacity for Aboriginal people to develop water-dependent enterprises
- Acquired from the consumptive pool through Strategic Indigenous Reserves, buy-backs or through an Indigenous Water Trust
- A statutory allocation providing access which is not currently allowed under the provisions of native title
- The National Water Commission has explicitly called on all Australian governments to make provision for Indigenous economic water: "All governments should implement approaches to provide water for Indigenous economic development, so that mechanisms exist to support Indigenous enterprises and related business opportunities."<sup>viii</sup>

#### Legislated requirements for Indigenous inclusion and consultation in decision-making

- To fulfill NWI requirements
- Legislation should require mandatory inclusion of Indigenous representatives in key decision-making bodies such as Catchment Management Council, the Boards of Catchment Management Authorities, expert panels overseeing regional resource assessments and advisory panels appointed for the development of water resource management orders.

#### Recognise Indigenous values

- *Indigenous cultural* values should be identified, as distinct from 'cultural' values, in order to acknowledge the specific values and uses relative to Indigenous communities
- Indigenous cultural values should be included in the 'objectives' and in the 'core considerations' under section 5 of the exposure draft.

#### Coordination with other legislation

- The Exposure Draft needs to be better coordinated with other Acts that involve Indigenous land use and water resources. Both the *Aboriginal Heritage Act 2006* and the *Conservation Forests and Lands Act 1987* involve the preparation of management plans which can potentially involve water resources.
- The Exposure Draft should stipulate that authorities have regard to such legislation in the preparation of regional waterway strategies.

Align with the Murray Darling Basin Plan (MDBP)

- The Exposure draft must give effect to requirements for Indigenous consultation included in the MDBP
- Requirements included in chapter 10 of the MDBP, covering the development of Water Resource Plans, must be incorporated into Victorian legislation, such as the rules covering water resource management orders.

To find out more:

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<sup>i</sup> Council of Australian Governments, 2004. *Intergovernmental Agreement on a National Water Initiative*. 52-54.

<sup>ii</sup> **United Nations Declaration on the Rights of Indigenous Peoples, March 2008.**

<sup>iii</sup> Government of Victoria. 2013, *Water Bill Exposure Draft*, Part 1.2, (4).

<sup>iv</sup> Waterway Management Strategy

<sup>v</sup> Government of New South Wales, 2013, *Water Management Act 2000*, Part 2, 13 (e).

<sup>vi</sup> Government of Queensland, 2014, *Water Act 2000*. Part 2, Division 1A, 20B.

<sup>vii</sup> First Peoples' Water Engagement Council, 2012. *Policy Framework*. p. 8.

<sup>viii</sup> Australian Government, National Water Commission, 2012. *Position Statement- Indigenous access to water resources*.