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## **Water Act 2007 (Cth) Review**

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### **1 INTRODUCTION**

The framework of Australian water laws and policy has, over time, significantly shaped demographic and land use change. Aboriginal Nations in the Murray Darling Basin have noted the impact of these changes to water resources since colonisation, resulting from the diversion and manipulation of water flows through irrigation development and water storages.

The Basin no longer functions according to ecological principles alone and relies predominantly on western scientific knowledge, legal instruments and political (institutional) arrangements to meet the needs of all human stakeholders, as well as land, water and biodiversity assets. Without adequate recognition of Indigenous water rights and interests, history has shown that this situation presents enormous risks to Indigenous culture, in particular the ability to:

- exercise traditional rights;
- fulfil cultural responsibilities;
- pursue social and economic interests; and
- protect culturally sensitive sites and burial grounds from decreased water levels.

In recent years, the Commonwealth and Victorian State Governments have undertaken a number of important water reform processes. While some of these have been concluded and are now at the implementation stage, others are in development. This review of the *Water Act 2007* (Cth) is considered by Victorian Traditional Owners to be the most important of these processes as it sits at the top of the legislative framework for water in this Country.

Victorian Traditional Owners have invested considerable time and resources in participating in these processes; through representative peak bodies such as the Murray Lower Darling River Indigenous Nations, the Victorian Traditional Owner Land Justice Group (VTOLJG) and the Federation of Victorian Traditional Owner Corporations; through Registered Aboriginal Party and Native Title bodies; through Clan groups and as individuals.

The products of this participation include a series of comprehensive submissions that clearly outline the importance of water for Indigenous Australians; the threats to Aboriginal culture and society from current water management regimes; Traditional Owner aspirations for water and the reforms deemed necessary to deliver on these aspirations. We strongly encourage the Expert Panel to take the time to review NTSV, VTOLJG and Federation submissions to the Murray Darling Basin Plan and Victorian Water Law Reform processes in particular.



## 2 TERMS OF REFERENCE

It is noted that this review includes an assessment of the extent to which the management objectives and outcomes of the Basin Plan are being implemented. We assume all of *Part 14: Indigenous values and uses*, and therefore water resource plans, are included in the assessment under (v) *other key elements of the Basin Plan* of the Terms of reference.

It is also noted that the Terms of Reference include an examination of the effectiveness of the Act in achieving its objects, which we consider to be manifestly inadequate without any reference to Aboriginal objectives, cultural values or outcomes. We assume that object (b) *to give effect to relevant international agreements* includes other relevant instruments such as the United Nations Declaration on the Rights of Indigenous Peoples. We also assume that the reference to ecosystem services in (d)(ii) *to protect, restore and provide for the ecological values and ecosystem services*.. is based on the globally accepted definition of ecosystem services which includes cultural services and their contribution to human wellbeing<sup>i</sup>.

We consider these elements to form a critical part of this review process as they represent the only elements of the legislation and Basin Plan that allow for Indigenous water interests to be considered. Consistent with finding from the recent review of the National Water Commission<sup>ii</sup> we are strongly of the opinion that despite significant advances being made in recognising the need to address Indigenous water issues; and some progress being made on engaging Indigenous people in water planning and management processes; little progress has been made in the allocation or licensing of water for Indigenous social, economic, spiritual or cultural purposes.

Therefore, in order for the Water Act (Cth) to be fulfilling its management objectives for Aboriginal people, it must be:

- a) amended to establish a framework for the allocation and licensing of water rights for Aboriginal people; and
- b) strengthened to ensure that relevant sections supporting comprehensive Indigenous engagement in water planning and management are implemented at state and regional levels.

The following outlines a number of key issues that can be grouped around the need to resolve Indigenous water rights and have them explicitly built into an amended Water Act (Cth); and the need to ensure that current enabling aspects of the legislation can be effectively implemented.



### 3 KEY ISSUES

#### 3.1 THE STATUS OF INDIGENOUS WATER RIGHTS REMAINS UNRESOLVED

##### 3.1.1 Access to and allocations of water remain limited for Indigenous Peoples

The status of Indigenous water rights, particularly native title water rights remains unresolved and limits Indigenous peoples' access and allocation to water resources. In enacting the Native Title Act 1993 (NTA), the High Court held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands<sup>1</sup>. However, while the NTA specifically contemplates the recognition and protection of native title rights and interests in inland waters<sup>2</sup>, they must be capable of being recognised by the common law. Given that the common law does not recognise ownership of water, the courts will not recognise a native title right to 'own' [or to 'speak for'] water.

[Recommendation 1](#): The *Water Act* (Cth) provide statutory recognition of Indigenous water ownership, equivalent to native title common law recognition of traditional lands as an appropriate remedy to this issue.

##### 3.1.2 Protection of cultural values in and around water-dependent ecosystems is inadequate

To ensure culturally sensitive and water-dependent sites are managed effectively into the future, water must be made available, separate from environmental allocations, to enable Indigenous organisations to meet their cultural obligations for managing Country.

Even with the existence of laws protecting Indigenous peoples' cultural heritage in all states, territories and the Commonwealth (e.g. the *Aboriginal and Torres Strait Islander Protection Act 1984* (Cth) gives preservation and protection to areas or objects in Australian waters that are of particular significance to Indigenous peoples), they have to fight for recognition, protection and a role in resource management.

An example, although not from within the Basin, is the Budj Bim National Heritage Landscape in Victoria which is sacred to the Gunditjmarra people and is possibly the world's oldest aquaculture venture. However, due to the ownership of water vested with the Crown, Indigenous peoples' engagement in cultural heritage protection of water places has been a further point of negotiation and compromise<sup>3</sup>.

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<sup>1</sup> Native Title Act (1993) Preamble pg 2

<sup>2</sup> Native Title Act (1993), s223, s225 and s253

<sup>3</sup> Australian Government, Department of the Environment, Water, Heritage and the Arts, Budj Bim National Heritage Landscape, Victoria. At <http://environment.gov.au/heritage/places/national/budj-bim/index.html>



Recommendation 2: The *Water Act* (Cth) establish cultural water entitlements that are legally and beneficially owned by Aboriginal Nations; and are of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations<sup>iii</sup>.

Recommendation 3: The *Water Act* (Cth) includes statutory provisions for incorporating cultural water flows into all water resource plans.

Recommendation 4: The *Water Act* (Cth) establish a statutory Traditional Owner role in the governance of the Commonwealth Environmental Water Holder.

### **3.1.3 Rights to water for economic development or commercial use are scarce or non-existent<sup>4</sup>**

The separation of water from the land, and the importance given to its consumptive use and economic values has resulted in limiting water use and regulation for the benefit of industries or individuals with well-established economic and political power. The challenges faced by Indigenous people in seeking to develop water-dependent businesses and enterprises is illustrated by the fact that while Indigenous people own almost 20% of the country's land mass, Indigenous-specific water entitlements are estimated at less than 0.01 per cent of Australian water diversions<sup>iv</sup>.

In addition, the principles that underpin Victoria's water legislation - to protect existing entitlements and require all stakeholders to compete for a fully allocated resource in the market place, now represent an insurmountable structural barrier to equitable access and use of water for Traditional Owners.

Achieving the aims of the Closing the Gap strategy will require Aboriginal people to have access to water for Aboriginal economic development. The freedom for Aboriginal people to choose how to define and pursue economic wellbeing is fundamental and must be respected. The historical allocation framework will not meet the consumptive economic needs of Aboriginal people.

Recommendation 5: The *Water Act* (Cth) establishes a statutory regime giving legal authority to Aboriginal Nations to take water from a water body and to retain the benefits of its use for the purposes of pursuing their own development goals.

Recommendation 6: The *Water Act* (Cth) require the establishment and implementation of a National Aboriginal Water Strategy; and establish an Aboriginal Economic Water Fund in cooperation with the states and territories to facilitate the strategy<sup>v</sup>.

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<sup>4</sup> Native Title Report (2008) pg 171



[Recommendation 7](#): The *Water Act* (Cth) enshrine preferential access to new water for Aboriginal Nations as it becomes available, either from groundwater or other sources.

## 3.2 VARIABLE IMPLEMENTATION OF THE WATER ACT 2007 AND BASIN PLAN

### 3.2.1 Areas of policy and policy advice relating to Indigenous water are yet to be implemented

#### The National Water Initiative (NWI)

The 2004 Council of Australian Governments Intergovernmental Agreement on a National Water Initiative (National Water Initiative) goes some way towards recognising Aboriginal Australia's inherent right to water. It commits the Governments of Australia to recognise Indigenous needs in relation to water access and management in their water access entitlements and planning frameworks. The NWI states that:

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:

- inclusion of Indigenous representation in water planning wherever possible; and
- 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.

Implementation of the NWI has been inadequate to date.

#### First Peoples' Water Engagement Council

The First Peoples' Water Engagement Council (FPWEC) was formed as an advisory group to National Water Commission (NWC) and to speak on behalf of Australian Aboriginal peoples on inland water issues. The council convened the First Peoples' National Water Summit in 2012, bringing together over 70 Indigenous delegates from across Australia to inform its final advice to the NWC<sup>vi</sup>, which strongly aligns with recommendations, made in this submission and includes:

- There must be an Aboriginal water allocation in all water plans.
- All Australian governments should review existing legislation related to the management of water resources and enshrine in future legislation:
  - Indigenous engagement in decision-making, planning and management
  - Indigenous access to water for cultural and economic purposes



- the provision of necessary research, support and capacity building to allow Indigenous Australians to participate fully and effectively in water planning and management.
- The Council of Australian Governments (COAG) should establish and implement a National Aboriginal Water Strategy. An Aboriginal Economic Water Fund or funds should be established in cooperation with the states and territories to facilitate the strategy.

[Recommendation 8:](#) The Water Act (Cth) includes a statutory requirement to take account of the advice of the FPWEC, and that the FPWEC continued play a leading water policy role on behalf of Aboriginal Nations.

### **The Murray Darling Basin Plan**

The Murray-Darling Basin Plan, signed into law in November 2012, places requirements on state and regional water planners to identify and provide for Indigenous uses and values. By 2019, the Murray–Darling Basin Authority (MDBA) will work with states to ensure that water resource plans (WRPs) are consistent with the Basin Plan. This includes recognising indigenous interests, including regard to:

- native title rights, native title claims and Indigenous Land Use Agreements provided for by the Native Title Act 1993 in relation to the water resources of the water resource plan area;
- registered Aboriginal heritage relating to the water resources of the water resource plan area;
- inclusion of Indigenous representation in the preparation and implementation of the plan;
- social, cultural, spiritual and customary objectives, and strategies for achieving these objectives;
- encouragement of active and informed participation of Indigenous people; and
- Indigenous values and uses arising from the use and management of the water resources of the water resource plan area.

The Victorian water law reform process is at an advanced stage, and while the state and regional planning framework has been strengthened around water resource governance for Traditional Owners, the draft legislation remains unacceptably weak with regard to Indigenous water rights and interests. It is our strong belief that the Victorian State Government is not committed to these requirements and Traditional Owners will have little recourse where there is low compliance.

[Recommendation 9:](#) The *Water Act* (Cth) include binding safeguards to prevent inconsistent application of planning and management provisions outlined in the National Water Initiative and the Basin Plan.

### **International rights instruments**

In accordance with human rights principles, Indigenous peoples must be actively engaged in all levels of management and decision-making that directly or indirectly impacts their livelihoods and communities. Effective participation in decision-making about water resources is essential to ensuring non-discriminatory treatment and equality before the law<sup>vii</sup>.



The Australian Government has ratified a number of international human rights instruments, including the UN Declaration of the Rights of Indigenous Peoples (UNDRIP), International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention of the Elimination of all forms of Racial Discrimination (CERD). As an example, under the ICCPR Indigenous peoples' special connection to land and waters is protected under international law which provides for the right to practice, revitalise, teach and develop culture, customs and spiritual practices and to utilise natural resources<sup>viii</sup>.

As a signatory to these instruments, the Australian Government has an obligation to its citizens, including Indigenous Australians, to respect, protect and fulfil the rights contained within them.

Recommendation 10: The *Water Act* (Cth) implement the principles contained within key international human rights instruments, in particular the UNDRIP, in a practical and equitable way.

Recommendation 11: The *Water Act* (Cth) include provisions for the meaningful involvement of Indigenous people at all levels of water planning and management, from policy development and planning decisions to the operational processes that involve on the ground activities that manage water directly.

Recommendation 12: The *Water Act* (Cth) review process include involvement of Indigenous people through further consultation and a designated position on the advisory panel.

### **3.2.2 Lack of direction for State and regional decision-making**

In order to ensure effective implementation at state and regional levels, the *Water Act* (Cth) must provide additional direction and interpretation on important aspects of Indigenous water.

Recommendation 13: The *Water Act* (Cth) enable informed consideration of water management trade-offs and better priority setting by:

- Defining cultural values, paying particular attention to Aboriginal cultural values
- Including Aboriginal objectives in the purposes of the Act
- Including principles in the Act that enable surplus environmental water to be used as cultural flows

### **3.2.3 Important information gaps remain**

Provision for the allocation of cultural and economic water entitlements will only translate into meaningful outcomes for Indigenous people if there is adequate investment in research to support water planners to make allocations for the benefit of Indigenous people. Currently, there is insufficient research to support jurisdictions to fulfil this requirement in a way which is meaningful for Aboriginal people.





The purpose of the National Cultural Flows Research Project is to ensure that Aboriginal water requirements and preferences are understood sufficiently to enable the delivery of cultural flows through Australian water resource planning frameworks. This will include the quantification of the volume of water required for cultural flows, understanding the intersection between ecological and cultural outcomes, and the ability to measure the multiple, ongoing and overlapping benefits of cultural flows for Aboriginal Nations.

[Recommendation 14:](#) The Water Act (Cth) commits to ongoing support for the National Cultural Flows Research Project; and mandates the systems and resources required to include Aboriginal cultural information in decision-making processes.

#### **3.2.4 Low technical and administrative capacity of Indigenous individuals**

Indigenous people and water planners themselves have identified constraints on the technical and administrative capacity of Indigenous individuals and communities in relation to water management.

[Recommendation 15:](#) The Water Act (Cth) commits to further investment in initiatives that enable full participation of Indigenous people in water planning and management regimes over time.



#### 4 SUMMARY OF RECOMMENDATIONS

Recommendation 1: The *Water Act* (Cth) provide statutory recognition of Indigenous water ownership, equivalent to native title common law recognition of traditional lands as an appropriate remedy to this issue.

Recommendation 2: The *Water Act* (Cth) establish cultural water entitlements that are legally and beneficially owned by Aboriginal Nations; and are of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations<sup>ix</sup>.

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Recommendation 6: The *Water Act* (Cth) require the establishment and implementation of a National Aboriginal Water Strategy; and establish an Aboriginal Economic Water Fund in cooperation with the states and territories to facilitate the strategy<sup>x</sup>.

Recommendation 7: The *Water Act* (Cth) enshrine preferential access to new water for Aboriginal Nations as it becomes available, either from groundwater or other sources.

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- <sup>i</sup> *Millennium Ecosystem Assessment: Ecosystems and Human Well-Being* (2005); World Resources Institute, Island Press.
- <sup>ii</sup> National Water Commission, (2014); *A review of Indigenous involvement in water planning*, (2013). NWC, Canberra
- <sup>iii</sup> Murray and Lower Darling Rivers Indigenous Network and Northern Basin Aboriginal Nations, 2007. Echuca Declaration: <http://www.savanna.org.au/nailsma/publications/downloads/MLDRIN-NBAN-ECHUCA-DECLARATION-2009.pdf>
- <sup>iv</sup> 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 quality*. The Journal of Water Law, Vol. 22,2/3.
- <sup>v</sup> Australian Government, (2011). *Indigenous Economic Development Strategy 2011-2018*. Australian Government, Canberra.
- <sup>vi</sup> First Peoples' Water Engagement Council, Advice to the National Water Commission, May 2012.
- <sup>vii</sup> Native Title Report (2008): *Climate change, water and Indigenous knowledge - A Community Guide to the Native Title Report*. Australian Human Rights Commission. Pg. 208. <https://www.humanrights.gov.au/publications/native-title-report-2008-climate-change-water-and-indigenous-knowledge-community-guide>
- <sup>viii</sup> International Covenant on Civil and Political Rights, arts. 1, 27; International Covenant on Economic Social and Cultural Rights, arts, 15; Declaration on the Rights of Indigenous Peoples, arts 11-13
- <sup>ix</sup> Murray and Lower Darling Rivers Indigenous Network and Northern Basin Aboriginal Nations, 2007. Echuca Declaration: <http://www.savanna.org.au/nailsma/publications/downloads/MLDRIN-NBAN-ECHUCA-DECLARATION-2009.pdf>
- <sup>x</sup> Australian Government, (2011). *Indigenous Economic Development Strategy 2011-2018*. Australian Government, Canberra.