



National
Native Title
Council

*spirit
of
Change*

RECOGNISING INDIGENOUS WATER INTERESTS IN WATER LAW

**A SUBMISSION BY THE NATIONAL NATIVE TITLE COUNCIL
TO THE 2014 REVIEW OF THE *WATER ACT 2007***

ACKNOWLEDGEMENT OF TRADITIONAL OWNERS AND COUNTRY

The National Native Title Council (NNTC) acknowledges Australia's Traditional Owners and pays respect to the past and present Elders of the nation's Aboriginal communities. The NNTC honours the deep spiritual, cultural and customary connections of Traditional Owners to the Australian landscape.

Note: The terms 'Indigenous' and 'Aboriginal' have been used interchangeably throughout this document. The NNTC acknowledges that there exists several different preferences from various Aboriginal and/or Indigenous Nations across Australia and the Torres Straits in how they would like to be referred to.

KEY RECOMMENDATIONS

To meet the obligations and objectives of the National Water Initiative and the Murray-Darling Basin Plan, the Review into the *Water Act 2007* (the 'Act') should seek the statutory implementation of mechanisms for recognising the inherent rights of Indigenous people to water, including:

1. Involvement of Indigenous people at all levels of water planning and management.
2. Provision for specific cultural flows entitlements.
3. Provision for specific economic entitlements.
4. Investment in further research.
5. Investment in capacity building.
6. Provision of irreversible legislation and safeguards against inconsistent application of planning and management provisions.

1. BACKGROUND TO THE NATIONAL CULTURAL FLOWS RESEARCH PROJECT

Historically, Indigenous people's rights to water have largely been excluded from Australia's complex water planning and management regimes.

Although the *Native Title Act 1993 (Cth)* includes water rights as a part of native title rights, only rights to use water for domestic and personal purposes have been recognised by the courts. The *Native Title Act 1993 (Cth)* does not provide for a right to negotiate over water.

In 2004, the National Water Initiative was the first instance in which Indigenous rights to water had been formally recognised in national water policy.

In 2009, Australia endorsed the United Nations Declaration on the Rights of Indigenous Peoples, which acknowledges Aboriginal peoples' rights related to water, including:

- the right to maintain their distinctive spiritual connection to water;
- the right to access the resources required to maintain cultural heritage and undertake traditional practices;
- the right to determine priorities and strategies for the development or use of their resources;
- the right to conserve and protect the environment and the productive capacity of their lands; and
- the right to improve their economic and social conditions.

The National Cultural Flows Research Project (NCFRP) is being hosted by the NNTC and is a ground breaking research project developed by Indigenous people, for Indigenous people. It is delivering the research outcomes required to underpin the necessary changes to policy, legal and management frameworks to secure a future where Indigenous water allocations are embedded within Australia's water planning and management frameworks.

The NCFRP was initiated by representatives of the Murray Lower Darling River Indigenous Nations¹ (MLDRIN) and the Northern Murray-Darling Basin Aboriginal Nations² (NBAN). In 2010, at a joint meeting of these two agencies, representatives from 43 Indigenous Nations across the Murray-Darling Basin met in Echuca and called for recognition of their water interests, formally adopting an earlier declaration by MLDRIN from 2007, which called for the incorporation of Cultural Flows into Australia's water planning and management regimes.

The Echuca Declaration defines Cultural Flows as follows:

'Cultural Flows' are water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right.

In 2011, the National Cultural Flows Research Committee was established, comprising representatives of MLDRIN, NBAN, the Northern Australian Indigenous Land and Sea Management

¹ www.mldr.org.au

² www.nban.org.au

Alliance³ (NAILSMA) and the First Peoples Water Engagement Council (which became the Indigenous Water Advisory Council). The NCFRP is responsible for the oversight of the research and reports to the Research Committee and coordinates inputs from the Technical Advisory Panel. (For more details go to www.culturalflows.com.au).

The purpose of the NCFRP is to provide rigorous and defensible knowledge on Indigenous water interests for the benefit of Indigenous people. The project is drawing on a range of scientific research methodologies and generations of cultural knowledge to:

- provide Australia with a greater understanding of Indigenous values relating to water and other natural resources;
- provide Aboriginal people with information to ensure that Aboriginal water requirements and preferences are reflected in water planning and management policy; and
- inform the development of new governance approaches to water management that incorporate aspects of Aboriginal governance and capacity building.

While the focus of the NCFRP is on the Murray Darling Basin, the project has been established for the benefit of all Aboriginal nations across Australia. The project will develop a framework, principles and a solid evidence base that can be applied outside of the Basin, to inform the recognition of Aboriginal water rights in different jurisdictions. It will do this through the use of a diverse suite of case study sites that consider cultural flows in different cultural, social, economic and ecological settings.

Over four years, 2012-2016, the NCFRP will:

1. Describe the current Indigenous cultural water values, knowledge and needs across Australia using scientific literature including existing case studies, and local and regional forums.
2. Develop a methodology to articulate the cultural water values and needs of Indigenous communities with an emphasis on the Murray-Darling Basin to inform water planning processes (i.e. through water volumes and water quality).
3. Quantify water volumes and identify watering and management regimes to meet those values and needs identified by the Aboriginal Nations at the case study areas through:
 - hydrological and ecological modelling; and
 - on the ground watering trials.
4. Measure the multiple, ongoing and overlapping benefits of cultural flows for the Aboriginal Nations.
5. Recommend policy and legal tools and reform for the effective implementation of cultural flows through water planning processes as well as institutional and governance arrangements, legal strategies and reform.

The outcomes from the research will ensure that the objectives of the Basin Plan and, in particular, Part 14—Indigenous values and uses, can be effectively delivered.

³ www.nailsma.org.au

2. INTRODUCTION

This submission has been developed by the NNTC to ensure that the independence and views of the numerous Aboriginal Nations contributing to the NCFRP are not compromised.

For Indigenous people, water carries great cultural, spiritual, environmental, social and economic significance. Water is a sacred and elemental source and symbol of life and aquatic resources constitute a vital part of the Indigenous customary economy.⁴ This statement is confirmed by the findings in the desktop literature review completed in January 2014 by the NCFRP⁵. The desktop literature was Component One of the NCFRP and provides a systematic reference of what is currently known about Indigenous uses and values of water. It draws on existing literature from across Australia as well as internationally. The report highlights the consistent views held by Indigenous people across Australia in relation to water and cultural flows and provides a sound basis from which the ensuing research components can build.

The NNTC welcome this review into the Act and acknowledge the Terms of Reference. The NNTC draws attention to the management objective of this review 1)a)i) noting that the review “will conduct an assessment of the extent to which... the management objectives and outcomes of the Basin Plan are being met...”. The NNTC further notes the reference in Part 14 of the Basin Plan stating that *“If a water resource plan is prepared by a Basin State, it is expected that the Authority will consult with relevant Indigenous organisations in relation to whether the requirements of this Part have been met, for the purposes of paragraph 63(3)(b) of the Act.”* Section 63(3)(b) of the Act relates to accrediting water resource plans prepared by Basin States and says that *“The Authority must: ...prepare recommendations for the Minister on whether the proposed water resource plan should be accredited...”*.

When reading these provisions of the Act in conjunction with the recently released report by the National Water Commission “A review of Indigenous involvement in water planning” (2013), it is clear 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 the NNTC believes the Act is failing in its management objectives for Aboriginal people and should be amended to:

- facilitate a framework which ensures the allocation and licensing of water rights for Aboriginal people; and
- ensure Indigenous communities participate fully in water planning and management.

⁴ Marcia Langton, ‘Freshwater’ in *Background Briefing Papers: Indigenous Rights to Waters*, Lingiari Foundation and Aboriginal and Torres Strait Islander Commission (2002) 43

⁵ A copy of the report can be found at http://www.culturalflows.com.au/images/documents/Component%201_Desktop%20Literature%20Review.pdf

3. CURRENT WATER LAW DOES NOT ADEQUATELY RECOGNISE AND PROTECT INDIGENOUS WATER INTERESTS

The current Act contains little reference to Indigenous people and inadequate provisions to ensure consistent engagement with Aboriginal people by all States and Territories who are parties to the Basin Plan. While some provisions with the Basin water market and trading objectives and principles are detailed in Schedule 3 Clause 4 (e) which states that “*Restrictions on extraction, diversion or use of water resulting from trade can only be used to manage: ... features of major indigenous, cultural heritage or spiritual significance...*” few examples of these restrictions being applied or resulting in benefits to Aboriginal people are apparent to date.

In Section 21 of Part 2 - Management of Basin water resources, Division 1 - Basin Plan 4) c) v) states that the “Basis on which the Basin Plan [is] to be developed...[must] have regard to... social, cultural, Indigenous and other public benefit issues...”

As noted by the National Water Initiative:

In general, this review⁶ has found that Indigenous participation in water management decision-making continues to vary regionally. Indigenous needs for water in over-allocated catchments are still not accounted for in water planning, and a gap remains in the actual provision of water to Indigenous people to be managed by them. Further work also needs to be undertaken to better incorporate Indigenous knowledge into water planning. (NWC 2014)

The National Water Initiative

In 2004, the Victorian Government committed under the Intergovernmental Agreement on the National Water Initiative (NWI) to provide for Indigenous access to water resources. 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:
 - 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.

⁶ National Water Commission, *A review of Indigenous involvement in water planning, 2013*. Australian Government 2014, p.5.

Implementation of the principles contained in the National Water Initiative has been inadequate across all states and territories to date. Amendments to the Act should aim to redress this situation.

First Peoples' Water Engagement Council

The First Peoples' Water Engagement Council was formed as an advisory group to the NWC and to speak on behalf of Australian Aboriginal peoples on inland water issues. It was also instrumental in developing the NCFRP. The Council completed its term in 2012, at which time it convened the First Peoples' National Water Summit, bringing together around 70 Indigenous delegates from across Australia, and provided its final advice to the NWC, including the following recommendations:

1. There must be an Aboriginal water allocation in all water plans.
2. 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.
3. 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.⁷

The provisions of the Act should be reviewed to identify where provisions to achieve these recommendations can be incorporated.

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.

All WRPs must identify the objectives and desired outcomes of Indigenous people in relation to managing the water resources of the plan area.⁸

In identifying the objectives and outcomes, the water resource plan must consider the social, spiritual and cultural values of Indigenous people that relate to the water resources of the plan area (Indigenous values); and the social, spiritual and cultural uses by Indigenous people of the water resources of the plan area (Indigenous uses). These values and uses will be determined through

⁷ Australian Government. 2011. *Indigenous Economic Development Strategy 2011-2018*. Australian Government, Canberra.

⁸ Clause 10.01 (m), 10.52 (1)

consultation with relevant Indigenous organisations, including the Murray Lower Darling Rivers Indigenous Nations and the Northern Murray–Darling Basin Aboriginal Nations, where appropriate.⁹

A water resource plan may identify opportunities to strengthen the protection of Indigenous values and Indigenous uses in accordance with the objectives and outcomes identified.¹⁰

WRPs must be prepared having regard to:

- a) native title rights, native title claims and Indigenous Land Use Agreements provided for by the *Native Title Act 1993 (Cth)* in relation to the water resources of the water resource plan area;
- b) registered Aboriginal heritage relating to the water resources of the water resource plan area;
- c) inclusion of Indigenous representation in the preparation and implementation of the plan;
- d) social, cultural, spiritual and customary objectives, and strategies for achieving these objectives;
- e) encouragement of active and informed participation of Indigenous people; and
- f) to Indigenous values and Indigenous uses arising from the use and management of the water resources of the water resource plan area.¹¹

The various policy, planning and management frameworks of many states and territories do not consistently comply with these requirements. The reform process should ensure that there is legislative provision to ensure compliance moving forward.

⁹ Clause 10.52 (2)

¹⁰ Clause 10.53 (3)

¹¹ Clause 10.53

4. REQUESTS TO THE PANEL

To meet the obligations and objectives of the National Water Initiative and the Murray-Darling Basin Plan, the Review into the Act should seek the statutory implementation of mechanisms for recognising the inherent rights of Indigenous people to water, including:

- Involvement of Indigenous people at all levels of water planning and management;
- Provision for specific cultural flows entitlements;
- Provision for specific economic entitlements;
- Investment in further research;
- Investment in capacity building; and
- Provision of irreversible legislation and safeguards against inconsistent application of planning and management provisions.

4.1. INVOLVEMENT OF INDIGENOUS PEOPLE AT ALL LEVELS OF WATER PLANNING AND MANAGEMENT

Federal water law should include provision 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.

Importantly, this should include involvement of Indigenous people in this review process, through further consultation and a designated position on the advisory panel.

4.2. PROVISION FOR SPECIFIC CULTURAL FLOW ENTITLEMENTS

“‘Cultural Flows’ are water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right”¹²

Provision for the incorporation of Cultural Flows in water legislation should be a key component of this reform. Cultural flows should be incorporated into water plans, on advice by Indigenous organisations, and should include aspects of quantity, quality, frequency and delivery.

Infrastructure details for cultural flows delivery should be considered and implemented.

4.3. PROVISION FOR SPECIFIC ECONOMIC ENTITLEMENTS

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 well-being is fundamental and must be respected.

¹² Echuca Declaration

Cultural economies based on traditional subsistence livelihoods have non-extractive water needs that must be protected through the principles of cultural flows. However, this historical allocation framework will not meet the consumptive economic needs of Aboriginal people. Cultural Flow allocations must provide for the economic, social, and cultural benefit of Indigenous communities.

Allocations of water should be made available to Aboriginal people who wish to engage in commercial enterprises. Aboriginal people who wish to use water for economic development must be given necessary capacity-building, training and infrastructure support. In particular, assistance in establishing sound and appropriate governance mechanisms must be provided. In addition, the NNTC would urge the Government to consider the establishment of an Indigenous Water Fund that could be utilised by Indigenous peoples to use water to undertake commercial activity. The NNTC would be willing to enter into discussions with the Department to discuss the establishment of such a fund.

4.4. INVESTMENT IN ONGOING RESEARCH INTO INDIGENOUS WATER INTERESTS

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 NCFRP 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. Another essential element of the research will be the quantification of the volume of water required for cultural flows and understanding the intersection between ecological and cultural outcomes.

Further investment in this research is critical to ensure that provisions for the delivery of cultural flows translate into meaningful allocations for the benefit of indigenous people.

4.5. INVESTMENT IN INDIGENOUS WATER PLANNING AND MANAGEMENT CAPACITY

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

To this end, the NCFRP will deliver:

- Workshops or short courses that build capacity on technical aspects of water science, research and terminology for clearly defined audiences (e.g. MLDRIN and NBAN delegates; Aboriginal communities at study areas; Indigenous water planners; and Component Teams);
- Empowered participating Aboriginal organisations that are currently providing leadership to the community, Governments and scientists;

- Identification of ongoing learning and capacity building opportunities, including post-graduate scholarships, for Aboriginal people involved in the research program; and
- Workshops on culturally appropriate water governance to assist all parties implement recommendations for improved local and national water management, planning, policies and laws.

Further investment in these initiatives is an integral part of ensuring the full participation of Indigenous people in water planning and management regimes.

4.6. PROVISION OF IRREVERSIBLE LEGISLATION

Cultural water allocations must be specifically identified and provided for through legislation that cannot be over ridden or repealed or applied differently in various states and territories. As noted by Joe Morrison, Chief Executive Officer of the Northern Land Council:

The government cannot claim that it is giving Aboriginal development a fair go with water allocations when a small number of licences will potentially lock out Aboriginal people forever, especially when the aquifers in question are located mostly or partly under Aboriginal land or where Aboriginal people have significant Native Title interests.

5. CONCLUSION

The NNTC welcomes the opportunity to provide suggestions to the Expert Panel on the ways in which current Water Law can be reformed to ensure the full participation of Indigenous people in water planning and management regimes.

To date, statutory recognition of Indigenous rights to water have been inadequate. Current water law does not meet obligations to recognise and protect Indigenous water interests under the NWI or the Final Murray Darling Basin Plan.