

**MODULE TO THE NATIONAL WATER INITIATIVE (NWI) POLICY  
GUIDELINES FOR WATER PLANNING AND MANAGEMENT**

**ENGAGING INDIGENOUS PEOPLES IN WATER PLANNING AND MANAGEMENT  
(2017)**

**A MODULE TO SUPPORT WATER PLANNERS AND MANAGERS DEVELOP AND IMPLEMENT  
NATIONAL WATER INITIATIVE CONSISTENT, INCLUSIVE WATER PLANNING AND  
MANAGEMENT PROCESSES THAT SUPPORT INDIGENOUS SOCIAL, SPIRITUAL AND  
CUSTOMARY OBJECTIVES.**



**Australian Government**

**This module was developed by the Australian and state and territory governments**

## **Acknowledgement of traditional owners and country**

We acknowledge Australia's traditional owners and pay respect to Aboriginal and Torres Strait Islander Elders past and present. We honour the deep spiritual, cultural and customary connections of Aboriginal and Torres Strait Island peoples to the Australian landscape, including Australia's waterways, land and sea country.

This document was prepared by the Australian Government and state and territory governments. It was not endorsed by all states and territories.

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## Preamble

The First People's Water Engagement Council's<sup>1</sup> advice to the National Water Commission (NWC) (FPWEC, 2012c) states:

*Water is central to life and is connected to all things. It is sacred to Australia's First Peoples<sup>2</sup>, essential to their identity and must be respected for its spiritual significance and its life-giving properties.*

Despite a number of significant events since the early 1990s that recognise the rights and importance of land and water to Indigenous peoples<sup>3</sup>, the NWC's *Second Biennial Assessment of Progress in the Implementation of the National Water Initiative* (2009 Biennial Assessment) reported that:

*It is rare for Indigenous water requirements to be explicitly included in water plans, and most jurisdictions are not yet engaging Indigenous people effectively in water planning processes (NWC, 2009).*

Since the 2009 Biennial Assessment, the NWC has undertaken reviews of Indigenous involvement in water planning in 2010 and 2013. The 2013 review (NWC, 2014a) informed the NWC 2014 Triennial Assessment of the National Water Initiative (NWC, 2014b), which concluded:

*Most jurisdictions have improved the amount and quality of consultations with Indigenous communities in water planning and management, but have generally failed to incorporate effective strategies for achieving Indigenous objectives in water planning arrangements.*

The NWC report, *A review of Indigenous involvement in water planning, 2013* (NWC, 2014a), concluded that most jurisdictions are taking action to engage Indigenous people more effectively in water planning, but efforts vary across Australia and many challenges remain (NWC, 2014b).

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<sup>1</sup> The First Peoples' Water Engagement Council (FPWEC) was established to provide advice to the National Water Commission on National Indigenous Water issues.

<sup>2</sup> The FPWEC fully recognises the status of Torres Strait Islanders as the traditional owners and managers of the lands and waters of the Torres Strait Islands in describing Aboriginal peoples as the First Peoples of Australia and the traditional owners of Australia's land and waters in their Advice to the National Water Commission.

<sup>3</sup> Key events include the recognition of native title at common law in the High Court's decision in *Mabo v Queensland [No 2]* 1992, and the subsequent passing of the *Native Title Act 1993* that afforded statutory recognition and protection of native title rights and interests to water as well as land; and Australian Governments signing the Intergovernmental Agreement to a National Water Initiative – the first intergovernmental water agreement that explicitly recognises Indigenous needs should be accounted for in water planning and management (NWI, 2004). In addition, the United Nations Declaration on the Rights of Indigenous Peoples (2008) emphasises the rights of Indigenous peoples to pursue activities, including managing natural resources, to meet their own needs and aspirations and strengthen their culture and traditions.

## Introduction

This module, *Engaging Indigenous peoples in water planning and management* (the module), is a Council of Australian Governments' (COAG) initiative in response to the 2009 Biennial Assessment Report (NWC, 2009). COAG's principal water policy agreement for national water reform is the [National Water Initiative \(NWI\)](#) where governments across Australia agreed on actions to achieve a more cohesive national approach to the way Australia manages, measures, plans for, prices, and trades water.

The NWI recognises that Indigenous needs for water should be incorporated into water planning and management.

25. *The Parties agree that, once initiated, their water access entitlements and planning frameworks will:*

*ix) recognise indigenous needs in relation to water access and management.*

This module intends to further assist jurisdictions in developing and implementing NWI consistent, inclusive water planning and management processes that support Indigenous social, spiritual and customary objectives. In particular, the module:

- provides guidance on recognising Indigenous values and needs in relation to water resource planning and management
- highlights innovative ways to facilitate effective representation and engagement of Indigenous peoples in water planning, and
- provides examples of the incorporation of Indigenous values, objectives and needs in water planning and management activities.

The module is a supporting document to the [National Water Initiative Policy Guidelines for Water Planning and Management 2010](#) (the Guidelines).

The NWI provides for the inclusion of Indigenous social, spiritual and customary objectives into water planning, and therefore the module focuses on these objectives. However, recognising the role of water in improving Indigenous economic outcomes, the module provides some discussion on economic water in Section 3.3.

Each state and territory has its own strategy and/or guidelines for engaging Indigenous peoples. The module is not intended to replicate jurisdictional approaches and does not prescribe:

- methods for engaging Indigenous peoples in water planning
- mechanisms for recognising Indigenous needs for water access and management, or
- methods to determine or mandate the allocation of water for Indigenous economic or cultural purposes.

The module is structured under the following sections:

**Section 1:** Recognising Indigenous values and needs in relation to water resource planning and management

**Section 2:** Native title and other Indigenous land rights - implications for water planning and management

**Section 3:** Options for improving Indigenous water access in water plans

**Section 4:** Concluding remarks

**Section 5:** Knowledge base

# 1. Recognising Indigenous values and needs in water resource planning and management

New and revised water plans should reflect Indigenous social, spiritual and customary objectives and include strategies for ongoing implementation, management and monitoring of these objectives throughout the life of the water plan. This section provides guidance for water planners on recognising Indigenous values, needs and objectives and provides options on how these can be incorporated during the water resource planning and management process.

The NWI states:

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.*

Section 1 is consistent with, and builds on, existing national good practice protocols and guidelines with regards to:

- engaging Indigenous peoples in water planning (e.g. Jackson et al, 2012b; Mackenzie, 2013b; NWC, 2012b),
- respecting Indigenous cultural heritage and values in natural resource management (e.g. The Burra Charter, The Australian Heritage Charter, Ask First: A guide to respecting Indigenous heritage and places of value), and
- Formal state legislative drivers for formal participation with traditional owners (e.g. the Traditional Owners Settlement Act 2010 in Victoria).

## 1.1 Assessing Indigenous values

Indigenous peoples in Australia have strong connections to country, which encompasses both the physical and spiritual place of origin for Indigenous peoples who are the traditional owners of that place. Country can be described as a culturally defined landscape that includes water, people, all living creatures and matter, as well as ancestors, mythical beings, sacred and heritage sites. Water is an essential part of country and considered an inseparable part of the living landscape (NWC, 2013).

When assessing Indigenous values, the following should be taken into account:

- Indigenous peoples have complex value systems, which underpin their traditional management of country, including rivers and ecosystems (Jackson, 2005; Collings, 2012)
- cultural values are associated with both ground and surface water sources (Moggridge, 2010; Barber & Jackson, 2011) and are sustained by water that is sufficient in both quality and quantity (SKM, 2013)
- water dependent cultural values, and strategies to protect them, can only be determined by local Indigenous peoples (NWC, 2012a)
- Indigenous values can be expressed in many ways, such as through narrative, dreaming tracks, songlines, performance, visual depiction, art and maps. Indigenous values presented in these formats should be considered of equal importance to information presented in standard water planning formats (Mackenzie, 2012b, pg 34, 39)
- Indigenous values may not always align with ecological values, although at times they may overlap or be complementary
  - It is important for water planners to ‘test’ the assumption that environmental flows can meet Indigenous objectives (e.g. Finn & Jackson, 2011; Jackson et al, 2015).
- Indigenous values include non-use values (such as the symbolic value of water evoking a sense of belonging and identity) (Barber & Jackson, 2011, refer sections 2.1 & 2.2) and indirect-use values (such as the benefits of improved water quality to downstream users derived from the protection of an upstream wetland) (Jackson, 2005; Venn & Quiggin, 2007)
- a range of techniques can be used to assess Indigenous water values, objectives and requirements, including but not limited to interviews, surveys, cultural and spatial mapping, analysis of artwork, historical documentation and other relevant data (Box 1)
  - It is important to maintain a flexible approach so techniques can be tailored to meet individual or community needs (Mackenzie, 2012b).
- the importance of respecting, protecting and maintaining the intellectual property rights of the Indigenous knowledge holder (Rea, 2008)
  - This includes storing information in a culturally appropriate manner so that it can be accessed by users in accordance with Indigenous tradition, while also protecting the intellectual property of the knowledge holder (Box 2), and
- cultural and environmental values (associated water requirements) should be determined independently and integrated for management purposes (NWC, 2012a).



### **Box 1: Techniques to assess Indigenous peoples water values, objectives and requirements**

There has been an increase in research over recent years into methods that can be used to assess Indigenous people's water values, objectives and requirements. For example, methods have been developed that enable environmental and Indigenous values to be determined independently, and then integrated into Environmental Flow Assessments (Jackson et al, 2015; Finn & Jackson, 2011). This approach improves understanding of:

- local Indigenous values, water management objectives and water requirements
- the relationship between Indigenous values and local water planning and management arrangements, and
- the benefits to Indigenous people from allocating water to meet social, cultural and customary objectives.

Another approach involves combining economic, hydrological and ecological models into an integrated model, and then assessing the effect of economic development on water resources, aquatic habitats and the incomes of Indigenous and non-Indigenous people (Stoeckl et al, 2013). This technique is used to generate estimates of the potential net impact of different development scenarios on local Indigenous people, and also enables qualitative assessment of potential social and cultural impacts associated with the degradation of water resources.

Research has also demonstrated the value of using a 'replacement cost method' to quantify the consumptive value of aquatic species and sites for Indigenous subsistence (Jackson et al, 2014b). This approach can be used to establish a baseline for assessing and monitoring the socioeconomic impact of hydrological and ecological changes from water resource development. Further, identification of economically valuable species and sites will facilitate targeted water management approaches to protect these high value species and sites.

### **Box2: NSW Aboriginal Water Initiative System Database (AWIS)**

The NSW Government's [Aboriginal Water Initiative](#) (AWI) has developed a secure (Aboriginal staff login) database to hold information on cultural values and water uses through the Community Engagement Process. This culturally important information is firstly protected by an Information Use Agreement and not listed in water sharing plans, but is accessible to various users in accordance with Aboriginal tradition and lore and the agreement. The collection and maintenance of this data in a culturally appropriate manner is key for WaterNSW to monitor the success of water sharing plans in meeting their statutory requirements for Aboriginal specific performance indicators and for:

- informing the development and review process of water sharing plan provisions
- informing changes to Aboriginal specific licensing application processes, and
- developing effective monitoring of cultural water values and uses for the life of the water sharing plan.

*Source: Bradley Moggridge, Aboriginal Water Initiative Program Manager (2014)*

## 1.2 Consideration of management scale and cultural values

Integrating and managing the scale of environmental and cultural assets in water plans poses complex challenges from both a water management and Indigenous perspective. The stories of Indigenous peoples often focus on the creation of the whole of landscapes, not just individual rivers or elements of the landscape. Interconnected water sources are believed to have the same spiritual energy, forming part of the same 'site'. Many waterways are considered dreaming tracks and songlines, which establish linkages between and connect different Indigenous groups (NWC, 2013). Other water resources, such as groundwater aquifers, freshwater springs and rockholes, may also have cultural, social and economic significance to Indigenous peoples.

Indigenous peoples' cultural and spiritual values are embedded within country across a range of spatial and temporal scales. For example, the Brewarrina Aboriginal fish traps (*Baiame's Nguunhu*) are an important historical inter-tribal meeting place for Aboriginal groups from the surrounding area. The Ngemba Old Mission Billabong, located upstream of the fish traps, is also culturally significant. In cultural terms the two sites are treated as one complex site. To meet the local Aboriginal peoples' water requirements, the two sites and the river section that connects them, should be managed together (Bark et al, 2015; Mclean et al, 2012).

Potential challenges associated with identifying and integrating cultural values for water planning and management include:

- Indigenous values are often not contained within a single, discrete water planning area, while water planning processes are focused on water resources within the relevant state or territory
  - Further, there is a need to consider how water management decisions may affect Indigenous water dependent values that cross state and territory borders.
- cultural values that exist at the landscape scale may be overlooked when water management is conducted on a regional basis, and regional management may not recognise wider cultural connectivity beyond the region being evaluated
- water planners may be unable to find out the appropriate knowledge for a certain site or type of water resource (e.g. groundwater, freshwater springs, rockholes), especially where operational resources are constrained
- the need to reconnect Indigenous peoples with country
  - This is of particular importance where people have been removed from country or do not have access to country, but still hold knowledge and responsibility for management of that country, including the management of waterways and water related sites.
- Indigenous perspectives, uses and values for water may vary significantly within small geographic areas, and
- it may be difficult to reflect local knowledge of country held by traditional owners in final regional water plans.

### 1.3 Inclusion of Indigenous representation in water planning

The inclusion of Indigenous representation in the water planning process recognises Indigenous peoples as traditional owners and self-determining peoples. Representation also provides a mechanism for Indigenous voices, values, knowledge, experience and priorities to be considered and incorporated in the water planning decision making process.

There are many stages to the water planning cycle (NWI Guidelines, 2010, pg. 7) where Indigenous views, objectives and values can be considered, including assessing water resources, deciding how to share limited water and monitoring outcomes (Jackson et al, 2012a; Mackenzie, 2013b). While the extent of Indigenous representation may vary depending on the scale and nature of the water planning task (Mackenzie, 2013d), water planners should work with Indigenous peoples to determine Indigenous representation at a scale that both parties deem appropriate.

To ensure genuine engagement of Indigenous peoples and their ongoing participation in water planning and management, this would ideally occur at the beginning of the water planning process. This would help ensure Indigenous values and water uses are understood and can be accommodated for prior to release of a water plan. However, for water plans that are currently underway there are opportunities for water planners to consider Indigenous representation ahead of revising existing water plans or developing new plans. Agreement between water planners and Indigenous peoples on the level and type of representation is essential to achieve Indigenous social, spiritual and customary objectives within water plans.

Indigenous representation in water planning may take many forms, including (but not limited to):

- contemporary advisory committee arrangements that promote equitable participation in decision making forums for water planning and management processes (Box 3)
- employing Indigenous water planners and/or Indigenous staff to enable meaningful consultation and provide a conduit for Indigenous views (including those for water-dependent cultural values) to be represented in the water planning process (Box 4)
- working with Indigenous community groups and organisations to define culturally appropriate ways to be engaged in water planning and decision making
- developing principle based equitable partnerships and co-management arrangements<sup>4</sup>, and
- investing in capacity building exercises for Indigenous peoples to develop their skills in water planning and management practices (Box 5), and reciprocal knowledge transfer from Indigenous peoples to water planners.

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<sup>4</sup> In this context, underlying principles could include mutual respect and a commitment to building trust through ongoing engagement.

### **Box 3: Victorian CMA Indigenous NRM Network**

The Australian Government established a Catchment Management Authority (CMA) Indigenous Natural Resource Management (NRM) Network to progress the engagement and participation of Indigenous peoples in Natural and Cultural Resource Management (N&CRM).

The Network aims to:

- provide a supportive forum for sharing knowledge and information on Indigenous engagement and participation in natural and cultural resource management
- provide a forum for identification of issues and solutions, project, policy and investment opportunities (including cross-regional opportunities)
- develop and maintain strategic linkages with internal and external stakeholders where these will progress Indigenous land, sea and water management, and
- provide cross-CMA project and policy implementation opportunities, including identification and recommendation to the CEO Group of efficiencies and cross-collaboration opportunities.

The Network has been involved in developing Indigenous content that is reflected in Victoria's [Regional Waterway Strategies](#) (RWSs). The RWSs will identify regional priorities for environmental water management over the eight-year planning period, together with complementary management activities required at those sites. This information will be used as a key input for Victorian environmental water planning arrangements.

*Source: CMA N&CRM Indigenous Facilitator Network Terms of Reference*

### **Box 4: Indigenous involvement and representation through the NSW Aboriginal Water Initiative**

The NSW Government's [Aboriginal Water Initiative](#) aims to improve Aboriginal involvement and representation in water planning and management within NSW. The program allows WaterNSW to build the capacity of the staff and community and *to monitor the success of water sharing plans in meeting their statutory requirements for Aboriginal specific performance indicators including providing water for Native Title rights and recognising spiritual, social, customary and economic values of water to Aboriginal people.* The AWI program is administered by the [Aboriginal Water Initiative team](#), which as of June 2015 consists of an Aboriginal Program Manager, two Senior Aboriginal Water Planning Coordinators, a Senior Project Officer and five Aboriginal Community Water Facilitators.

### **Box 5: Kimberley waterways recovery and education program**

The Western Australian Department of Water, in partnership with the University of Western Australia, has developed a [waterways education program for the Kimberley](#). The program aims to give remote communities, schools and Indigenous ranger groups the skills to examine, assess and ultimately manage their local waterways. Delivery of the program focuses on awareness, training, research, management and long-term monitoring.

Challenges for improving Indigenous representation in water planning may include:

- identifying the appropriate people to represent traditional owners and/or any Indigenous peoples who have rights in a certain area in accordance with complex Indigenous governance structures and customary law (Watts, 2012)
- differing views between water planners and Indigenous peoples as to what constitutes an appropriate 'level of Indigenous representation' and at what stages representation is possible
- achieving Indigenous representation at different levels, e.g. local or regional areas, community committees or executive steering committees (Jackson & Robinson, 2009), and
- overcoming constraints such as limited time and/or resources which impact on the provision of capacity building opportunities for Indigenous peoples. In this context, capacity building opportunities could include scholarships for training or higher education, traineeships and practical skill development in current water planning practices, and employment opportunities in implementing land and water management activities to improve water quality outcomes.

### 1.3.1 Partnerships

When engaging Indigenous peoples in partnership arrangements for water planning and management, agreements or operation protocols should be consistent with existing good-practise approaches, both domestically (e.g. the [Guidelines for Ethical Research in Australian Indigenous Studies, AIATSIS 2012](#)) and internationally (e.g. the [United Nations Declaration on the Rights of Indigenous Peoples, 2008](#)).

A collaborative, principle-based approach to water planning and management:

- a) *Ensures principles that define partnerships are jointly developed with and endorsed by Indigenous groups to which they will apply.*

The Murray-Darling Basin Authority (MDBA) uses a principle-based approach to engage with Indigenous peoples consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*. [A yarn on the river: Getting Aboriginal Voices into the Basin Plan](#) was developed to help Indigenous people understand relevant parts of the draft Basin Plan, and provided a means for Indigenous communities to comment on the Draft Basin Plan before it was passed into law. The document includes the MDBA's Indigenous engagement principles, including that partnerships between the MDBA and Indigenous peoples are based on respect, honesty, capacity to participate equally, with shared responsibility and clearly defined accountability and authority.

- b) *Works towards equitable partnerships that can navigate between complex Indigenous traditional knowledge systems and science-based evidence dependent knowledge systems (Maclean & Robinson, 2011).*

The [National Cultural Flows Research Project](#) aims to investigate appropriate, scientifically robust tools, to help Indigenous peoples clearly state their cultural perspectives with regard to particular sites. This research is guided by a number of high level principles to ensure equitable outcomes for all parties, including implementing a multidisciplinary approach that aligns with Australian Government strategies, as well as providing capacity building opportunities for Aboriginal groups in water resource management, governance and research methodologies and tools. As a result, this research also seeks to provide reciprocal benefits including the transfer of traditional knowledge and skills back to the non-Indigenous people and organisations involved in this research.

- c) *Recognise the value in cooperatively developing a consultation agreement or framework.*

In 2009, the South Australian Government and the Ngarrindjeri Regional Authority (NRA) entered into a [Kungun Ngarrindjeri Yunnan Agreement](#) (KNYA), an initiative of the Ngarrindjeri Elders and Leaders to build a new relationship with government based on respect and recognition of Ngarrindjeri as the traditional owners of their country. The KNYA, translated to '*listening to Ngarrindjeri people talking agreement*', established a consultation and negotiation framework between NRA and the South Australian Government.

Co-management and joint-management arrangements have been implemented in managing natural resources where Traditional Owner rights and interests in their customary estates are shared with other stakeholders (Box 6). Co-management is being explored as a partnership model for water planning and management to fulfil Indigenous aspirations, values and beliefs (Hoverman et al, 2012; Hoverman & Ayre, 2012; NWC, 2012a). In this context, co-management arrangements could provide a *continual solution-building process rather than a fixed state, involving extensive communication and negotiating between the parties, so that joint learning increases over time* (Hill et al, 2013).

In considering co-management or joint-management arrangements for water planning and management, common issues that need to be addressed include:

- managing potential differences in outcomes for co-management or joint-management arrangements in regulated and unregulated systems
- co-developing governance arrangements that meet the needs of all stakeholders and are considered appropriate by Indigenous leaders and communities
- ensuring traditional owners have the capacity to undertake leadership roles in implementing and monitoring co-management arrangements
- providing capacity building opportunities for Indigenous peoples to strengthen their skills in contributing to the implementation of management plans, and monitoring and evaluating water resource plans, and

- ensuring adequate time during the water planning process has been specifically allocated to:
  - develop a shared understanding of how to bring together different cultural views and knowledge systems, and
  - provide feedback on agreed approaches to both Indigenous communities and jurisdictional representatives.

#### **Box 6: Co-management and joint management in Victoria**

In Victoria, co-management may be an outcome of the recognition of native title, and/or traditional rights under Victorian law. Under this arrangement, title to parks and reserves is not transferred to the traditional owners, but traditional owners shape the ongoing management of specific parks by forming councils with representatives from state agencies and catchment management authorities. There are currently three co-management committees: Budj Bim Council, Winya Council and the Yorta Yorta Joint Body.

Joint management arrangements established under the [Traditional Owner Settlement Act 2010](#) may also be an outcome from the recognition of native title or traditional owner rights. This Act allows areas of public land to be transferred in Aboriginal title to a Traditional Owner group. Under this arrangement, the involvement of traditional owners occurs through Traditional Owner Land Management Boards (TOLMBs). These boards are responsible for setting the strategic direction for the management of specific areas of Aboriginal title and/or public land through the development of a joint management plan. In addition, a key outcome of the TOLMBs is enabling Traditional Owner knowledge and culture to be a key part of ongoing land management practices. There are currently three TOLMBs set up to jointly manage lands ([Gunaikurnai TOLMB](#), [Yorta Yorta TOLMB](#) and the Dhelkunya Dja LMB).

Source: [Improving Our Waterways: Victorian Waterway Management Strategy](#).

## **1.4 Quantifying Indigenous water requirements for cultural purposes**

Quantifying the volume, flow and timing of water required to realise cultural outcomes is fundamental if Indigenous peoples' needs for water are to be met through water planning and management processes. While there may be some alignment between cultural and environmental water needs, it is important to note that this is not always the case and there may be a need to differentiate cultural and environmental water requirements.

The term 'cultural flow'<sup>5</sup> has been developed by some Indigenous people over recent years as one way to describe how Indigenous cultural priorities can be realised in water planning and management. In addition to undertaking cultural activities, the provision of cultural flows can benefit Indigenous peoples by improving health and wellbeing and provide opportunities to care for country (*Water Act 2007* – Basin Plan 2012, Schedule 1: Section 31).

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<sup>5</sup> Cultural flows have been defined by a number of peak Indigenous groups, such as the Murray Lower Darling Rivers Indigenous Nations (MLDRIN), the Northern Basin Aboriginal Nations (NBAN) and North Australia Indigenous Land and Sea Management Alliance (NAILSMA). Other terminology can also be used to describe water for cultural purposes. For example, the First Peoples' Water Engagement Council's advice to the National Water Commission uses the term 'Aboriginal Water' rather than cultural flows. In this context 'Aboriginal Water' is an all-encompassing concept describing the water requirements that meets the needs of Aboriginal country and culture (FPWEC, 2012c).

In 2007 the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) developed the following definition of cultural flows:

*“Water entitlements that are legally and beneficially owned by the Indigenous Nations and are of a sufficient quality and quantity to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right.”*

This definition was endorsed by the Northern Basin Aboriginal Nations (NBAN) and has gained acceptance among Indigenous people and policy makers in the Murray-Darling Basin. It is important to note that a national definition for cultural flows has not been agreed and that Indigenous people’s views on what constitutes cultural flows may vary across Australia.

Quantifying the many aspects of Indigenous peoples water requirements is a new area of research, which is currently focused on developing good practice methodologies for describing and measuring cultural water uses, values and needs. For example, the National Cultural Flows Project (Box 7) aims to improve understanding of cultural flow requirements in the Murray-Darling Basin.

Multi-disciplinary research conducted by CSIRO through the Tropical Rivers and Coastal Knowledge Research Hub and the Murray-Darling Basin Authority has been advancing this area of water research over the past five years. Studies in the Daly River, Fitzroy, Mitchell Rivers in the north and in the Darling and Murray Rivers in the south has explicitly sought to identify links between Indigenous values and the flow regime of these rivers (Box 1). Recent research on the Werai Forrest (CSIRO, 2012), the Ngemba Old Mission Billabong, the Brewarrina Aboriginal Fish Traps and a related stretch of the Barwon River (Maclean et al, 2012) provide further examples where cultural values and the necessary water requirements to meet them have been identified.



### **Box 7: National Cultural Flows Research Project**

The National Cultural Flows Research Project is an Aboriginal driven initiative managed by the National Cultural Flows Planning and Research Committee and hosted by the National Native Title Council. The committee includes representatives from MLDRIN, NBAN and NAILSMA with an independent chair.

The [National Cultural Flows Research Project](#) primarily aims to equip Aboriginal leaders with information so that they are better placed to present the case for Aboriginal water entitlements. It is anticipated that the project will also yield knowledge that will make a significant contribution to water planning and management in this regard.

The project is drawing on a range of scientific methodologies along with cultural knowledge to:

- develop and use methodologies to describe and measure cultural water uses, values and needs of Indigenous communities
- quantify water volumes to meet cultural values and needs, including scientific assessment of trial flows
- develop and implement a monitoring methodology of the economic and socioeconomic, health and wellbeing outcomes of cultural flows and analyse how they compare with environmental flow outcomes
- recommend policy, legal and institutional changes that will enable cultural flows for the economic, social and cultural benefit of Indigenous communities
- build the capacity of Indigenous communities, and
- inform Indigenous communities of the process and activities related to the research program.

While the project is being undertaken in the Murray-Darling Basin, it has been established for the benefit of all Indigenous communities across Australia.

The project has completed the literature review, appointed a research team, identified trial sites to quantify cultural flows and identify the cultural outcomes. The project is expected to be completed by late 2017. A number of Australian Government agencies are supporting this project.

Factors to consider when quantifying water to meet Indigenous cultural requirements include:

- the need for ongoing Indigenous participation in the management of any water allocation specified for Indigenous use or benefit (Jackson et al, 2012a)
  - This may help address issues such as distributing water amongst Indigenous peoples.
- whether delivery or retention of water can address both environmental and cultural requirements
  - Where Indigenous objectives are not met through environmental water, there is a need to quantify environmental and cultural water requirements separately, and integrate for management purposes.

- assessing water requirements for maintaining ecological values and assets from an Indigenous peoples' perspective or using traditional methods e.g. identifying flow rates required to maintain fish populations and migration routes, or determining the necessary water requirements to minimise algal blooms or the impact of invasive plant species (Maclean et al, 2012; Jackson et al, 2014a)
- understanding the perspectives of Indigenous peoples when setting environmental flow rates, including setting the terms and criteria for the assessment of cultural flows that are maintained as part of the non-consumptive pool (Mackenzie, 2013a)
- understanding the challenges associated with balancing water requirements for Indigenous, consumptive and environmental use when faced with extreme climate events
- understanding that the type of challenges that need to be addressed may differ in fully developed, partially developed and over-allocated systems, and
- respecting Traditional Ecological Knowledge of culturally important sites in a contemporary setting (Jackson et al, 2014a), particularly where the landscape has changed and contemporary Indigenous land management and resource use may have different water requirements than those required in a pre-development scenario.

## 2. Native title and other Indigenous land rights - implications for water planning and management

The NWI requires water plans to take account of the possible existence of native title rights to water through the following clauses.

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.*

Consistent with NWI clause 53, water planners should take account of the possible existence of native title rights to water in developing water plans, and may do so by:

- ensuring appropriate water has been set aside to meet Indigenous needs in relation to water access and management in areas where native title rights to water have been recognised, and
- considering whether native title procedural rights under the future acts regime may be triggered during a new or revised plan's adoption or tenure.

Native title rights to water exist whether or not a claim has been lodged. Under the *Native Title Act 1993*, water planners are required to notify the affected Indigenous group(s) on matters that may affect their native title rights, ahead of taking any decision. Compensation may also be payable. Water planners should contact their local native title representative body or service provider early in the planning process to identify relevant groups and matters of mutual interest.

It is also important to note that:

- The *Native Title Act 1993* gives native title parties certain procedural rights concerning the development on land and water where native title may exist, whether or not determined.
- The law of native title has not, to date, recognised exclusive rights in relation to water for native title parties. The rights most commonly recognised are non-exclusive (in that native title holders cannot stop other people from exercising their rights and interests over the same water) and cover traditional uses only.
- To date, the most commonly recognised native title rights in relation to water have been for personal and domestic uses.
  - In the recent [Akiba case](#), the High Court recognised non-exclusive native title rights to take marine resources for commercial purposes in the Torres Strait. However, native title holders must comply with any applicable fishing regulations.
  - This does not preclude the recognition of rights for water for economic purposes in fresh water or estuarine systems, but such rights have not yet been recognised by the courts.

- Indigenous Land Use Agreements, are voluntary agreements made with native title parties may include the management of water resources.
  - For example, a land use agreement was negotiated in 2007 between the Northern Territory Government and traditional owners for part of the Pine Hill pastoral lease. The land use agreement provided the traditional owners with living, cultural and horticultural assets in return for extinguishing native title on land the government wanted to develop. Native title was recognised over the remainder of the area. Since the land use agreement was settled, at least one water licence has been granted to Indigenous landowners to develop horticultural enterprises (Tan & Jackson, 2013).
- Native title should not be solely relied upon to deliver Indigenous peoples the access and rights to their traditional waters. Water planners should consider other mechanisms for giving access and rights to water to Indigenous peoples.
- Water planners should also be aware of state / territory based land rights legislation.

Water planners considering water access and management issues in the Northern Territory should also remain alert to the existence of Aboriginal land rights arising from the [Aboriginal Land Rights \(Northern Territory\) Act 1976](#). As the representatives of traditional owners of Aboriginal land in the Northern Territory, Land Councils should be engaged in water planning processes as appropriate.

### 3. Options for improving Indigenous water access in water plans

When issuing entitlements under a new or revised statutory water plan, it may be appropriate to issue water entitlements or allocations to Indigenous groups, or identify in-stream water levels or delivery regimes to achieve Indigenous social, spiritual and customary objectives. Further, including explicit objectives in water plans can provide the basis for ensuring strategies to achieve the objectives are also included, and for creating monitoring and reporting obligations against these objectives. For example, the draft [Water Resource \(Warrego, Paroo, Bulloo and Nebine\) Plan 2014](#) includes the following outcomes for water in the plan area:

- availability of water for traditional owners in the plan area dependent on water resources to achieve their economic and social aspirations, and
- maintenance of flows that support water-related aesthetic, cultural and recreational values in the plan area, including the cultural values of the traditional owners.

The following are examples of approaches jurisdictions may consider when developing new or revising existing statutory water plans. These approaches provide a way for Indigenous peoples to access water to meet their social, spiritual and customary objectives. It is important to note that these are examples only, and do not preclude other approaches being developed or adopted.

#### 3.1 Rules-based approaches

Rules-based approaches are used in water plans to prescribe flow volumes and timing necessary for baseline social and ecological outcomes (for example, the minimum amount of water necessary for navigation or to export salt loads to maintain water quality). Such an approach could be used to provide protection for water dependent values and culturally significant sites (Box 8).

In regulated water systems, rules-based management is focused on delivering water through dam releases for consumptive, environmental and cultural water use. Rules-based management in unregulated water systems will often focus on retaining water (or limiting extraction) to meet environmental objectives. In this context, there may be close alignment with cultural water requirements. However, it is important to note that this is not always the case and there is a need to test the assumption that environmental water can meet Indigenous objectives.

Rules and conditions to protect culturally significant water dependent values are applicable to both groundwater and surface water plans. For example, in surface water systems, rules and conditions may be developed around in-stream water dependent cultural values (e.g. the minimum flow required to protect a fish trap in a specific area) or flow regimes (e.g. timing and volumes of water required to ensure water levels are adequate to meet ceremonial requirements).

### **Box 8: A rules-based approach for protecting water dependent culturally significant sites**

The NSW Government has established the [Water Sharing Plan for the Greater Metropolitan Region Groundwater Sources 2011](#) for the Greater Sydney region which includes rules to protect groundwater dependent culturally significant sites. This water sharing plan sets out rules for the implementation of buffer zones in water supply work areas to protect groundwater culturally dependent sites (Clause 42), and groundwater culturally significant sites which also have a high priority groundwater dependent ecosystem (Clause 43).

Another example involves the Water Sharing Plan for the [Barwon-Darling Unregulated and Alluvial Water Sources 2012](#), which provides that the access rules for the Boorooma to Brewarrina management zone may be amended during the life of the plan should a study find the current rules have an adverse impact on the Aboriginal cultural value of the Brewarrina fish traps (Clause 78). This provision was included based on consultation with Aboriginal stakeholders during the development of the plan.

The Aboriginal Water Initiative is currently identifying water dependent cultural values to enable water planners and Indigenous peoples to collaboratively develop appropriate rules for water sharing plans that ultimately protect culturally significant water dependent values.

## **3.2 Water licensing arrangements**

Water licensing arrangements provide one strategy that jurisdictions could explore as a means to provide Indigenous peoples with access to water in order to fulfil their social, spiritual and customary objectives. WaterNSW's licensing framework has been developed to provide opportunities for Aboriginal peoples to access water for both cultural and economic purposes (Box 9).

### **Box 9: Aboriginal Specific Purpose Access Licences (SPALs)**

WaterNSW's water access licence categories include Specific Purpose Water Access Licences, under which provision is made for an *Aboriginal Cultural and Community Development purposes*, which as specific purpose access licences, provides a high priority for water access when compared to licences for most commercial purposes.

There are two subcategories of licences for Aboriginal use:

1. *Aboriginal Cultural Access Licences* provide water for the benefit of an Aboriginal community for personal, domestic, cultural and spiritual purposes. They can be issued to Aboriginal people for all ground and surface water sources and are currently capped at 10 megalitres per year per application.
2. *Aboriginal Community Development Licences* provide water for Aboriginal communities for economic purposes e.g. irrigated cropping, aquaculture or manufacturing, as either the owner and/or operator. These can be issued up to a maximum of 500 megalitres per year per water source and can be traded under some circumstances e.g. permanently to other Aboriginal groups or individuals or temporarily without this restriction. These licences are not available for all water sources.

The Aboriginal Water Initiative and WaterNSW also identified that the fees associated with the Aboriginal Specific Purpose Access Licences were an impediment to Aboriginal people accessing water for cultural purposes in NSW. In 2014 the NSW Government (Treasury) waived all fees associated with obtaining these licences.

Source: WaterNSW: [Categories of water access licences](#)

In developing water licensing arrangements it is important to consider the following:

- approaches to manage the complex suite of issues that make up the concept of cultural flows, including different understandings and perspectives of Indigenous culture in relation to water use (Weir et al, 2013)
- how to define 'cultural use' parameters that apply to the licence or entitlement to provide clarity to all parties (Box 9)
- whether the application processes and fee payments inadvertently create barriers to Indigenous groups accessing water for social, spiritual and customary objectives (Box 9), and
- application and review processes that allow for long-term planning for enterprise development and achieve cultural outcomes (e.g. bi-annual or tri-annual application processes can create uncertainty for Indigenous organisations if they can only plan from year-to-year).

### 3.3 Water for economic purposes

State and territory water plans recognise Indigenous needs in relation to water access for a range of purposes, including social, spiritual, cultural and economic<sup>6</sup>. Indigenous people may wish to access water for a wide range of economic purposes, from ensuring that environmental flows sustain culturally significant species at rates that allow for a viable subsistence economy ( Jackson et al, 2012a; Jackson et al, 2014b) to developing commercially viable economic enterprises e.g. agriculture, aquaculture (Whitehead, 2012). Access to water for economic purposes can improve prosperity, create jobs and business opportunities, improve health outcomes, and help achieve financial security and independence for Indigenous communities.

In areas where water resources are fully developed, access to water through market mechanisms (where these exist) are available to Indigenous groups to access water for economic purposes. In some instances, governments may choose to provide financial assistance for this purpose (Box 10). As jurisdictions continue to progress the national water reform agenda under the NWI, governments may identify other ways of addressing Indigenous needs, for example through special purpose licences as in NSW (Box 11).

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<sup>6</sup> The National Water Initiative Policy Guidelines for Water Planning and Management (2010) note that although the range of Indigenous values related to water may be difficult to quantify, they are likely to cover both cultural and economic uses of water, and that these uses may overlap (refer section 3.6.2).

#### **Box 10: Indigenous Economic Water Fund**

The [First Peoples' Water Engagement Council](#) (FPWEC) proposed the creation of an Indigenous Economic Water Fund (IEWF) in their advice to the National Water Commission (FPWEC, 2012c). The IEWF options paper (FPWEC, 2012b) outlines the rationale and strategies to progress the establishment of an IEWF through the acquisition of water entitlements in fully allocated systems as well as outlining possible governance structures and providing recommendations for Indigenous peoples to pursue such opportunities.

#### **Box 11: NSW Water Management Act 2000**

The [NSW Water Management Act 2000](#) acknowledges the value of water to Aboriginal people and provides Aboriginal people opportunities to access water for cultural and economic purposes under the Act's Objects (Chapter 1, section 3):

*The objects of this Act are to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular:*

- c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including:*
  - iii) benefits to cultural and heritage*
  - iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water.*

Water for Aboriginal economic purposes can be accessed through an *Aboriginal Community Development Licence* (Refer Box 8).

### **3.3.1 Strategic Indigenous Reserves**

In water systems that are not yet fully developed establishing Strategic Indigenous Reserves could provide a way to ensure that Indigenous people can access water for economic purposes (NWC, 2012a). Strategic Indigenous Reserves involve setting aside or reserving water from the unallocated consumptive pool for Indigenous peoples to use in the future, noting that:

- Indigenous peoples may not yet have the capacity or infrastructure to use water for economic purposes, and
- when Indigenous peoples are ready to access water for economic purposes, it may be more expensive for them, or government, to buy into a fully allocated water market.

The concept of Strategic Indigenous Reserves as a means to provide water for Indigenous economic use is in its early stages, and Indigenous groups are developing their policy positions. For example, the [NAILSMA](#) have developed a Policy Paper on Strategic Indigenous Reserves (NAILSMA Indigenous Water Policy Group, 2012), to facilitate the use of water for economic purposes, outside of existing market mechanisms. Indigenous reserves are included in some water plans in Queensland. However, to date there has been very little take-up of these provisions (NWC, 2014a).



Identified challenges around the development and implementation of Strategic Indigenous Reserves include:

- issues may arise if the definition of Strategic Indigenous Reserves varies between state and territories, and these definitions may not meet the expectations of Indigenous groups to which they apply
- inconsistent methodologies for determining the volume of water to be set aside for future Indigenous peoples economic use may result in inequities in distributing water for Indigenous use (Nikolakis & Grafton, 2014)
- developing Indigenous governance arrangements (Sullivan & Stacey, 2012) to define and manage:
  - who has the right to access and make decisions about water held through a Strategic Indigenous Reserve
  - how the benefits from the use of the water held through a Strategic Indigenous Reserve should be distributed between groups and individuals, and
- ensuring that where water has been reserved for later use by Indigenous peoples that it is protected from future allocation for other purposes (NAILSMA Indigenous Water Policy Group, 2012; McKenzie, 2013c).

## **4. Concluding remarks**

Over recent years jurisdictions have made some progress towards engaging Indigenous people in water planning and management. However, additional work is required. Recognition of Indigenous water needs vary across Australia, and many of the complex challenges that have been previously identified still exist. This module provides guidance for water planners to assist them in overcoming these challenges. A range of options for water planners are provided to help identify cultural values, quantify Indigenous water needs and develop approaches to improve ongoing participation and involvement of Indigenous peoples in water planning and management.

The challenges faced by water planners are real, complex and require commitment by all parties. Integrating Indigenous cultural values and water needs into water planning and management will require a collaborative, culturally appropriate and innovative approach from jurisdictions.

## 5. Knowledge Base

### 5.1 Key Information Sources

There are a number of overarching policy documents and useful information sources that provide examples and protocols relating to the issues discussed in the module.

1. The [United Nations Declaration on the Rights of Indigenous Peoples \(2008\)](#) emphasises the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations.
2. The First Peoples' Water Engagement Council (FPWEC) was established in 2010 to provide advice to the National Water Commission on national Indigenous water. In March 2012, the First Peoples' Water Engagement Council developed a [Policy Framework](#) (FPWEC, 2012a) with the purpose of providing:
  - a mechanism that could serve the FPWEC in presenting its advice on national water policy matters, and
  - a model and a source of advice to support the independent policy needs of Aboriginal people in the areas of water planning, allocation and management.

In May 2012, the Council further refined the concepts in the Policy Framework into a set of recommendations and principles, which they presented as [Advice to the National Water Commission \(FPWEC, 2012c\)](#). The Commission responded to the FPWECs recommendations by issuing a [position statement on Indigenous access to water resources](#) (NWC, 2012a).

3. The most recent version of the Australian Institute of Aboriginal and Torres Strait Islander Studies [Guidelines for Ethical Research in Australian Indigenous Studies \(2012\)](#) embodies the best standards of ethical research and human rights. The GERAIS consists of 14 principles which are applicable when engaging Indigenous peoples in water planning and management.

Of note are two principles which provide information on respecting, protecting and maintaining a) the rights in the traditional knowledge and traditional cultural expressions of Indigenous peoples (Principle 4) and b) Indigenous knowledge, practises and innovations (Principle 5).

4. The [2010 Social Justice Report](#) (AHRC 2011, Appendix 4 pg 151-2) provides a list of elements for a common understanding of free, prior and informed consent for Indigenous peoples.

The report notes:

*Free, prior and informed consent should be sought sufficiently in advance of commencement or authorisation of activities, taking into account Indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.*

5. The [Akwé: Kon Guidelines](#) (CBD, 2004) provide a collaborative framework to ensure the full involvement of Indigenous and local communities in the assessment of cultural, environmental and

social impact of proposed developments on sacred sites and on lands and waters they have traditionally occupied.

6. [What Indigenous groups say about water reform](#) (Mackenzie, 2013a) highlights some important agreements and statements that traditional owners and Indigenous organisations around Australia have made about water reform and water planning.

Accessing water policy frameworks developed by Indigenous organisations may assist water planners in better understanding the vision, aspirations and priorities of particular Indigenous groups e.g. the Federation of Victorian Traditional Owner Corporations [Water Policy Framework \(2014\)](#) and [Summary Statement \(2014\)](#).

7. [Our Water Our Country](#) (NSW Office of Water, 2012) is an information manual published by the NSW Office of Water for Aboriginal people and their communities. *Our Water Our Country* aims to provide Aboriginal peoples with information about the water reform process and encourages their involvement in the water sharing process. The title of this manual, *Our Water Our Country*, reflects the deep spiritual appreciation that Aboriginal people have of water's role in sustaining life.
8. The NSW Aboriginal Land Council provides information to assist Indigenous peoples' understanding of land and water issues. Key facts sheets include:
  - a. [land rights and native title](#) that compares the two key mechanisms by which Aboriginal people can have their rights recognised in land in NSW (NSW Aboriginal Land Council, 2012), and
  - b. [water licences](#) that provides information about the laws and management regimes applying to water licences and water trading in NSW (NSW Aboriginal Land Council, 2013).
9. Consideration of water quality in water planning and management is critical to the achievement of Indigenous peoples' social, spiritual and customary objectives.

The [Characterising the relationship between water quality and water quantity](#) report provides information for water planners on the quality-quantity relationship of water in a range of systems (e.g. regulated river, unregulated rivers and urban streams). This report offers insight into key water quality issues experienced around Australia, to assist water planners in drawing these inter-related aspects of water management closer together.

The [National Water Quality Management Strategy](#) (NWQMS) was developed by governments and provides policies, processes and a series of national guidelines for water quality management. The NWQMS also provides specific guidance about how to improve water quality and provide water that is fit for purpose, for example for drinking, recycling, the environment, recreational use and primary industry use. Information has also been developed about [including Indigenous cultural and spiritual values](#) during water quality planning, including specific case studies.

10. The [Facilitators' guide to Indigenous water planning \(Mackenzie, 2012a\)](#) is a resource toolkit for water planners to support Indigenous communities to better understand and participate in water planning, management and decision-making. This work was developed by the Tropical Rivers and Coastal

Knowledge (TRaCK) research consortium and the North Australian Indigenous Land and Sea Management Alliance (NAISMA).

11. [The Burra Charter](#), the [Australian Natural Heritage Charter](#), [Protecting Natural Heritage: Using the Australian Natural Heritage Charter](#) and [Ask First - A Guide to Respecting Indigenous Heritage Places and Values](#) are regarded as guidelines for 'best practice' heritage management.

*Ask First (AHC, 2002a)* was developed by the Australian Heritage Commission, and outlines a principle-based approach to engaging with Australian Indigenous peoples. It is recommended that place owners and managers refer to these key publications when preparing plans and policies for any heritage place. The conservation philosophies presented in these guidelines have been developed to achieve sustainable and appropriate heritage outcomes.

12. Principle-based approaches and guidelines for good practice engagement with Indigenous peoples in water planning and management include:
  - The [Handbook for Practitioners – Water resource plan requirements](#) is intended to guide water planners during both the development and the assessment of water resource plans (WRPs), to meet the Basin Plan requirements for WRPs set out in Chapter 10 of the Basin Plan. Refer pg 104 – 107 for information on Indigenous values and uses.
  - [Engaging Aboriginal communities in water planning - Key Principles](#) (NWC, 2012b), which draws together lessons learnt by the NSW Office of Water on Aboriginal engagement in water planning.
  - [Principles and guidelines for good practice](#) in Indigenous engagement in water planning (Jackson et al, 2012).
  - Indigenous Engagement in Water Planning. Principles for good Indigenous engagement. TRaCK Module 3.3 (Mackenzie, 2013b).

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