CULTURAL FLOWS

A MULTI-LAYER PLAN FOR CULTURAL FLOWS IN AUSTRALIA: LEGAL & POLICY DESIGN

NATIONAL CULTURAL FLOWS RESEARCH PROJECT

For First Nations People, water is a sacred source of life. The natural flow of water sustains aquatic ecosystems that are central to our spirituality, our social and cultural economy and wellbeing. The rivers are the veins of Country, carrying water to sustain all parts of our sacred landscape. The wetlands are the kidneys, filtering the water as it passes through the land.

First Nations Peoples have rights and a moral obligation to care for water under their law and customs. These obligations connect across communities and language groups, extending to downstream communities, throughout catchments and over connected aquifer and groundwater systems.

The project partners acknowledge all of the First Nations across Australia who care for the waterways that sustain our Country. We pay deepest respects to their Ancestors and Elders who have protected and maintained water resources for thousands of years, and passed on the knowledge, stories and lessons through the generations. We recognise the deep spiritual, cultural and customary connections of Traditional Owners to Country throughout Australia.

We acknowledge the nations of Murray Lower Darling Rivers Indigenous Nations and Northern Basin Aboriginal Nations who continue to fight for their inherent right to water, and who had a pivotal role in creating and directing the National Cultural Flows Research Project.

We thank the Murrawarri and Nari Nari Nations who worked tirelessly as part of the research team to develop the cultural flows assessment approaches for this project.

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Cover photo: Murray River near Mildura, courtesy of the Murray-Darling Basin Authority. Artwork 'Cultural flows' by Luke Penrith. Cover graphic design by Mazart Design Studio.

Executive Summary

Cultural flows are an important strategic component of a pathway of reform in water law and governance that are leading to more robust participation by Aboriginal peoples and Torres Strait Islanders (First Nations) in water management across Australian jurisdictions. That pathway aims to achieve distinct recognition of the traditional relationships that First Nations have with water, to better acknowledge and value First Nations' interests and roles in water management, and to provide equitable and sustainable outcomes for Indigenous Australians through engagement in water management. Governments across Australia are undertaking significant work through partnerships with First Nations' organisations and other interests to re-set water management.

As part of re-setting water law and management, this report provides a suite of legal models and tools for giving effect to cultural flows. It details a three-pronged Approach pathway for achieving those aims. The focus on practical and feasible legal measures for cultural flows is designed to capture a range of opportunities for more effective recognition of First Nations' interests and roles in water law and management.

Cultural Flows Research Project and the Role of Component Five in this Report

This Final Report forms part of Component 5 of the National Native Title Council (NNTC) National Cultural Flows Research Project (NCFRP). The NCFRP aims to secure a future where Indigenous water allocations are embedded within Australia's water planning and management regimes, 'to deliver cultural, spiritual and social benefits as well as environmental and economic benefits, to communities in the Murray-Darling Basin and beyond'. Components 1-4 of the NCFRP:

- reviewed existing knowledge about Indigenous values and uses of water (Component 1);
- developed and used methodologies to describe and measure the cultural water uses, values and needs of specific Australian Indigenous communities with a focus on the Murray-Darling Basin (Component 2);
- quantified water volumes to meet cultural values and needs and scientific assessment of trial cultural flows (Component 3); and
- developed and implemented a monitoring methodology of the ecological and socio-economic, health and wellbeing outcomes of cultural flows and analysed how they compare with environmental flow outcomes (Component 4).

Component 5 examines policy, legal and institutional changes that will enable the implementation of cultural flows for the economic, social and cultural benefit of First Nations, and which will contribute significantly to ecologically sustainable water management across Australia.

This Report presents an integrated model of three major law and policy approaches to cultural flows intended to guide analysis and implementation. These approaches build on the wide range of options discussed in Nelson, Godden and Lindsay, *Working Paper 1: Law and Policy Options for Advancing Cultural Flows* (NNTC, 2017) and the models advanced in Nelson, Godden and Lindsay, *Working Paper 2: Law and Policy Models for Advancing Cultural Flows* (NNTC, 2017). Both Working Papers were prepared with the benefit of iterative feedback from meetings of the Project Reference Group, comprising First Nations representatives, and meetings of the Project Research Committee, comprising First Nations and government representatives.

Summary of Three Law and Policy Approaches for Advancing Cultural Flows

In this report, 'cultural flows' comprise a package of legal rights and policy platforms designed to enhance the control that First Nations can exercise over water on Country through measures that provide water rights and allocations, as well as better supporting First Nations' participation in the broader legal, regulatory and institutional facets of water management. From a practical point of view, cultural flows form a significant part of an overall program for delivering First Nations' role in water management partnerships.

A positive, collaborative partnership around cultural flows will enhance honourable reconciliation between the state and First Nations, bring traditional ecological knowledge more clearly into water management and assist First Nations in meeting cultural responsibilities. In turn, cultural flows can be the platform for First Nations to participate in the modern water economy in a manner that respects their contribution, while furthering the health of ecosystems, waterways, communities and cultures.

Each of the three law and policy approaches presented here—which we term '**Water Rights'**, '**Increase Influence'**, and '**Transform Foundations**'—would advance cultural flows. Each approach, however, has different legal outcomes and effects, and each approach offers specific opportunities to build cultural flows objectives along a broader pathway of legal and policy reform. Each approach, therefore, is an essential, integral dimension of any overarching cultural flows program.

1. **Approach 1: Water rights:** Water rights are the core of the package of legal and policy measures to give effect to cultural flows. Water rights models are centred on water laws. This approach accords closely with First Nations' responsibilities for on Country management by providing models of water rights at various scales from water shares to statutory reserves. These measures will strengthen First Nations' capacity to control water to fulfil cultural responsibilities, to make decisions about water management, and to participate in water resources partnerships. This approach links with strengthening First Nations' water values in native title and other land rights. To distinguish this package of measures from Approach 2, First Nations' influence over water here relates to water rights held by First Nations entities, rather than to water rights held by other water holders.

2. **Approach 2: Increase influence in water landscapes**: This approach delivers expanded First Nations' influence over water landscapes by strengthening existing laws and policies that broadly affect water management, outside of the formal water rights systems. It also delivers greater consideration of cultural flows through influencing water rights held by non-First Nations water users. Many policies and legal rules currently impose conditions and obligations on actors whose actions or conduct affect water resources and landscapes. These sets of rules relate to water planning, environmental protection, cultural heritage protection, agreements and partnerships, and consultation/participation mechanisms. Of the three reform 'layers' presented, this would require the least degree of 'deep' law and policy reform, though lesser reforms or expanded policies would be desirable across a relatively large number of areas. This would require more governmental coordination.

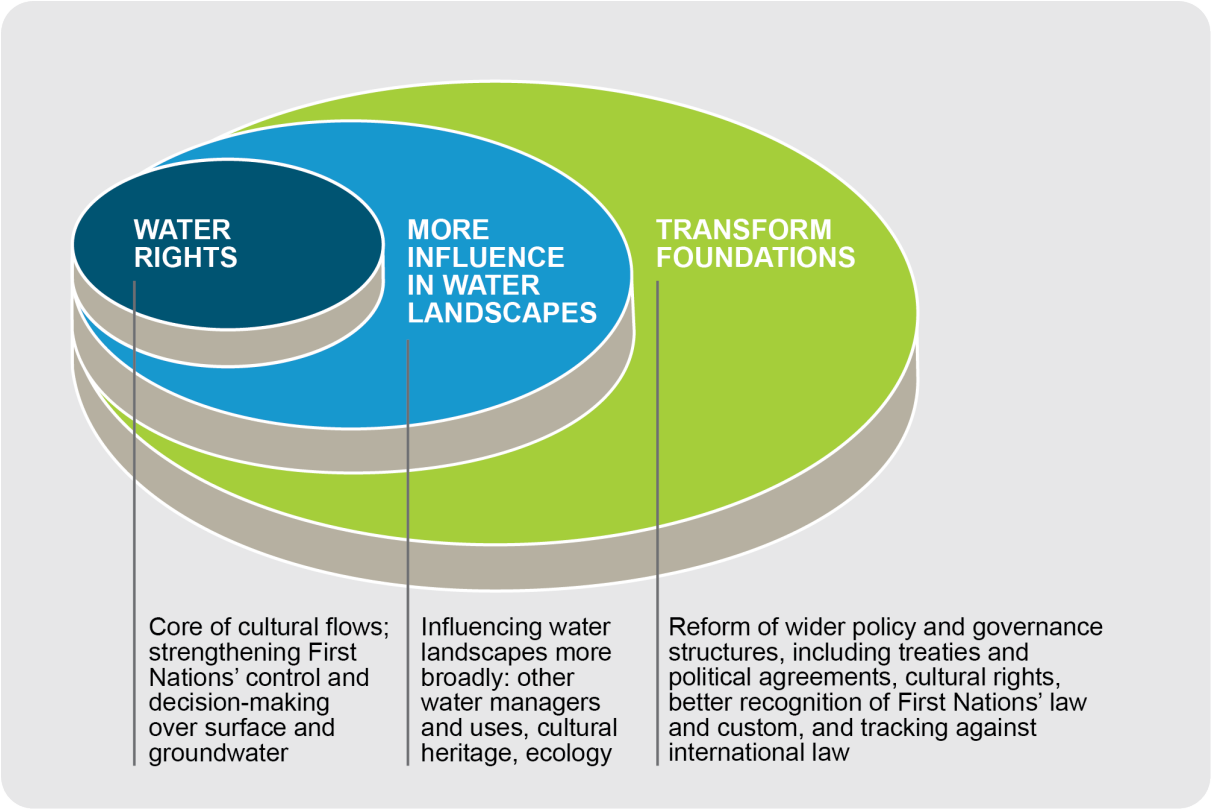
3. **Approach 3: Transform foundations**: This approach recognises the imperative for governance measures to be effectively aligned and, as necessary, reformed and reappraised for cultural flows arrangements to work. A range of governance tools are considered that not only derive from contexts of water governance but also advert to political, institutional, human rights, cultural and environmental law thinking. Cultural flows are situated within broader transformative legal frameworks designed to enable more effective co-existence of Indigenous and 'settler' voices in water management, within trajectories of 'co-governance' arrangements.

Integration Between the Three Approaches

The relationships between these approaches are presented in Figure 1 below. Water rights lie at the core of cultural flows, providing capacity to facilitate First Nations' participation in water management over broader water landscapes, primarily by using statutory regimes. Increasing First Nations' influence in these broader regimes would assist in, and encourage the use of, a water rights approach. Both approaches would be strengthened by, and encourage the development of, a more transformative governance approach, including those measures that are based on political agreements and international legal principles.

To a high degree, the three approaches are mutually reinforcing. In combination, the three approaches provide multiple 'entry points' for First Nations and governments to advance cultural flows in order 'to deliver cultural, spiritual and social benefits as well as environmental and economic benefits, to communities in the Murray-Darling Basin and beyond'.

Figure 1: Three major law and policy approaches to cultural flows



Individual First Nations have diverse circumstances, and Australia's different jurisdictions have varied laws relating to water. This means that it is not possible to recommend one universal pathway for implementing a program of cultural flows. We propose, however, ten key principles to guide efforts to structure and implement a cultural flows program:

1. All approaches are necessary constituent features of any cultural flows program.
2. Partnerships and agreements are a central strategy for implementing cultural flows.
3. Water governance recognises and protects cultural knowledge about water.
4. Governments clearly and demonstrably consider and account for First Nations' diverse values, objectives and capacities relating to water.
5. Sustainable, ongoing resourcing is critical to a long-term strategic program of implementation of cultural flows measures.
6. Shifted perspectives of water management support First Nations and benefit non-Indigenous society.
7. All elements of reform should enhance First Nations' independence in water decision-making.
8. First Nations have active and informed involvement in all aspects of water management and operations, including monitoring, reviewing and auditing.
9. Government has clear lines of responsibility for implementing and achieving cultural outcomes in an efficient and timely manner, including via a statutory review mechanism.
10. Implementation is scoped broadly but applied with regard to context, and individual First Nations' priorities, taking into account existing First Nations' organisational structures.

Contents

Introduction and Guide to this Report

In recent years, a pathway of reform of water law and governance has emerged across all jurisdictions in Australia. That pathway leads to achieving distinct recognition of, and outcomes for First Nations' rights in water management.[1] Governments across Australia have established partnerships with First Nations' bodies and other interests to re-set water management. This is an ongoing project to begin a trajectory of reform aimed at strengthening First Nations' interests and roles in water. This report focuses on a central strategic direction in that project: the concept of cultural flows.

This report proposes a 'toolbox' of legal and policy approaches directed to advancing and enabling the concept of 'cultural flows'. 'Cultural flows' are defined in the Echuca Declaration 2007 (as amended in 2010), as:

> ***'Water entitlements that are legally and beneficially owned by 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.'***

This definition is based on key first principles, including that rights-based mechanisms:

- are a component of any cultural flows model; and
- are central to First Nations' control over waters with which they have traditional connection, and their exercise of self-determination in relation to those waters.

This report proposes three broad 'approaches' to policy, legal and institutional change to advance the development of legal models and tools to facilitate implementation of cultural flows. These approaches are termed 'Water Rights', 'Increase Influence', and 'Transform Foundations' (see Figure 2 below). In brief:

- **Approach 1: Water Rights** Water rights are the core of the package of legal and policy measures to give effect to cultural flows and they are centred on water laws. This approach accords most closely with First Nations' responsibilities for on Country management by providing water rights models that strengthen First Nations' capacity to control water to fulfil those responsibilities and to participate in water resources partnerships. This approach links with native title and other land rights. Water rights are the core of the package of legal and policy measures to give effect to cultural flows. Water rights models are centred on water laws. To distinguish these measures from those under Approach 2, First Nations' influence over water here relates to water rights held by First Nations entities, rather than to water rights held by other individuals and organisations.
- **Approach 2: Increase influence over water landscapes** This approach would deliver First Nations greater and broader influence over water by strengthening existing laws and policies that impact on water but lie outside of the conventional water rights system. This approach integrates water planning with environmental protection, cultural heritage protection, agreements and partnerships, and increased consultation/participation mechanisms.
- **Approach 3: Transform foundations** This approach recognises the need for framing of tools and institutions of water governance by situating cultural flows models within broader, supporting legal and institutional systems, better designed to advance First Nations' control of and functions in decision-making over water. The 'Transform foundations' approach recognises that viable models

of cultural flows rely on appropriate and adapted machinery for the administration and management of water systems, as well as including emerging principles for the relationship of First Nations and settler state-society in water management.

The legal models and tools presented in this report proceed from key starting points, namely:

- that First Nations' rights and interests, laws, and traditional ecological knowledge relating to water pre-exist the assertion of British sovereignty over the continent and that these traditional connections to water continue; and
- that these rights, interests, laws and knowledge inform First Nations' objectives for cultural flows.

'Cultural flows' can be thought of as creating a space of intersection between First Nations' laws and customs in relation to water and settler concepts and models of water management.

The legal models and tools that are discussed in Component 5 primarily adopt non-indigenous law and legal techniques, while acknowledging that these must be flexible enough to give expression to First Nations' traditional, intergenerational responsibilities for water on Country.

Accordingly, there is less likely to be a single, definitive cultural flows 'model' than multiple variations and versions of 'cultural flows' derived from a common and integrated set of 'tools' and techniques that are adapted to a particular set of circumstances. An important determinant is whether the water systems are surface water or groundwater, and classed as 'regulated' (with large on-stream dams) or unregulated (no large on-stream dams).

Addressing the Land/Water Disparity

Indigenous peoples' rights to land now cover approximately one third of Australia. The extent of these rights can be contrasted with the negligible Aboriginal water holdings under Australian water law. This disparity highlights the urgency of developing appropriate cultural flows models. Australian 'settler' law captures only part of the traditional relationship between First Nations and the myriad forms of water on Country—a connection that has existed for many thousands of years. Water is conceived in an integrated way by First Nations rather than being divided up as it is in Australian water laws.

Water laws typically divide water into consumptive water (typically amounts drawn out of the water resource and used, for example, for irrigation purposes) and non-consumptive water sources, such as environmental water. Water laws often distinguish between surface water and groundwater. Cultural flows models and programmes always should actively consider groundwater as a culturally significant water source for First Nations.

Development of this Report

This Report is based on the technical analysis developed in Nelson, Godden and Lindsay, *Research Scoping Document* (NNTC 2017), *Working Paper 1: Law and Policy Options for Advancing Cultural Flows* (NNTC, 2017) (**WP1**) and the analysis and integration of options advanced in Nelson, Godden and Lindsay, *Working Paper 2: Law and Policy Models for Advancing Cultural Flows* (NNTC, 2017) (**WP2**). This final report is informed by input from the project Reference Group, comprising First Nations representatives, and the findings from the earlier National Cultural Flows Research Project (**NCFRP**) components, and analysis of relevant literature and publicly available legal and policy documents. Feedback and guidance from the relevant First Nations organisations and representatives and the Cultural Flows Research Committee has informed this Report. In this regard, we gratefully acknowledge the members of the Reference Group and Research Committee (Appendix 1).

Structure of this Report

This Report uses the following structure for each of the three approaches identified:

- **summary of the approach** and its major components, advantages and disadvantages;
- **key elements** and **model provisions** for implementing the approach in statutes, regulations or agreement-based mechanisms (with necessary modifications to suit the context), based on current leading examples; and
- **pathways** from leading examples to broader adoption of the approach.

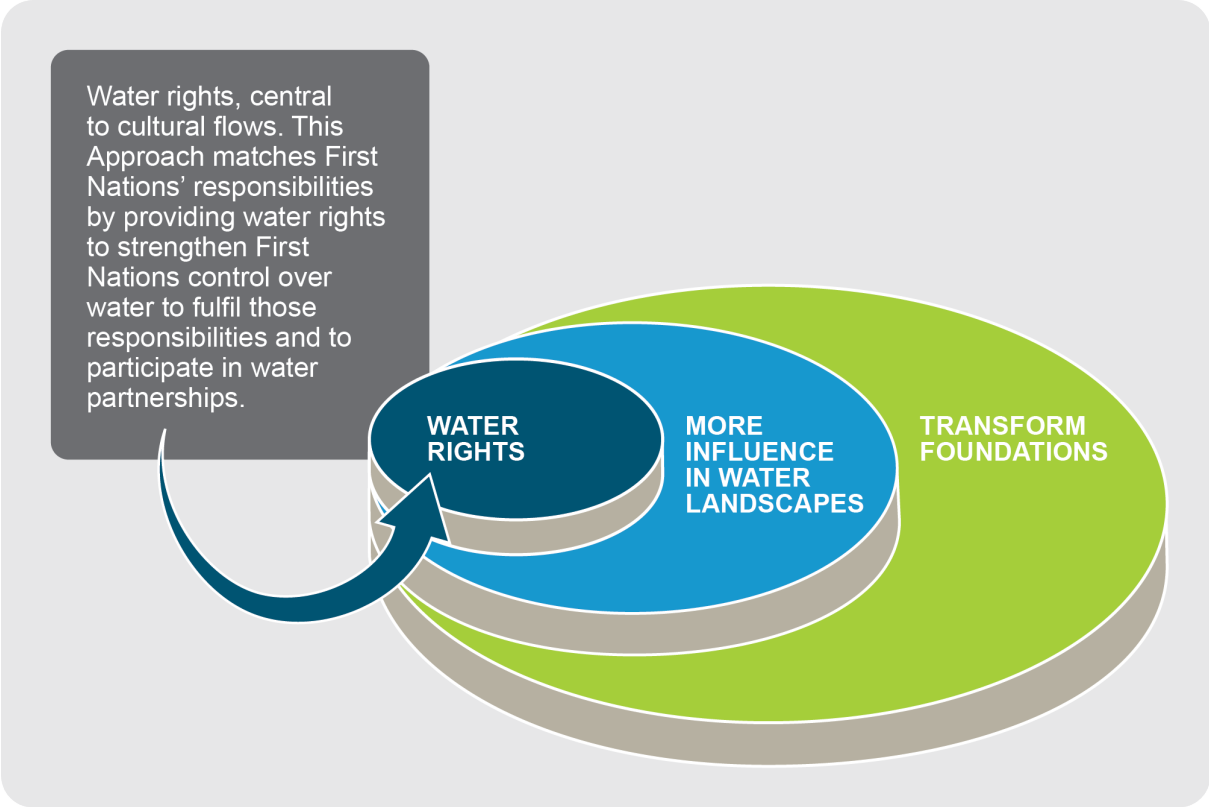
After presenting these three approaches, the final section of the Report discusses **prospective strategies for giving effect to a coherent, planned, multi-layered approach to cultural flows**. It highlights the availability of multiple 'entry points' to implementation using a comprehensive, plan-based approach that is familiar to government, First Nations, and other water stakeholders**.**

> We acknowledge that First Nations' laws and customs may deal with most or all the issues discussed in this Report. Our focus is on how First Nations' objectives relating to cultural flows can be advanced through the Anglo-Australian legal system. As such, we acknowledge and honour traditional law in dealing with these issues, but recognise that our role and primary focus is to analyse the limitations and opportunities of Anglo-Australian law and policy.

APPROACH 1

Water Rights and Enhancing Control

Figure 2: Water rights as a central approach to cultural flows



This diagram illustrates how Water Rights are the primary part of cultural flows legal tools and models.

- Water rights are given effect through water laws and land laws specific to Aboriginal and Torres Strait Islanders, such as native title.
- Water Rights are integral to the two other spheres of cultural flows in Approach 2 & 3.
- They work in conjunction with the laws and policies that build the influence of First Nations in water management.
- They form a foundation for models and tools such as partnerships, agreements and treaties that are a necessary part of resetting water governance to better achieve cultural flows objectives for First Nations in water management.

Summary of the Approach

Water is integral to connection to Country for First Nations. Water is not separated from land under Aboriginal and Torres Strait Islander law and custom as occurs in non-Indigenous (settler) legal systems. Under First Nations' law and custom, traditional rights to land and waters underpin obligations to care for waters.

Australian 'settler' laws that regulate water do not fit with this holistic concept. These laws divide up water into separate parts and allocate rights to access and use water. Approach 1 plays an important role in translating First Nations' objectives for Cultural Flows into water laws and policies. It explores:

- how water law (water rights, rules, entitlements, obligations and plans) can give effect to water rights controlled by First Nations, to be used in culturally appropriate ways
- how First Nations' water-related values can be strengthened in native title and statutory land rights

Summary checklist: Water rights and Enhancing First Nations' Control and Capacity for Water Management

- ✔ Scope of laws addressed reflects statutory water laws and land rights and native title laws and governance
- ✔ Build First Nations' control and decision-making around water rights to facilitate equitable and sustainable participation in water management
- ✔ Depending on type of water right, it may require rights to, or access to land
- ✔ Generally, measures will require law reform or institutional reorganisation for implementation
- ✔ Water rights will require significant financial resources and capacity building for implementation
- ✔ Water rights may be implemented in partnerships with other organisations and other First Nations groups
- ✔ Measures in Approach 1 require robust consultation and participation and should be integrated within pathways that are designed to achieve measures in Approaches 2 and 3

This approach mainly uses:

- legal tools and concepts from water legislation and associated statutory schemes (e.g. water authorities and institutions);
- common law water and property doctrines; and
- laws that govern Indigenous peoples' relationships with land and waters

to provide cultural flows for First Nations in terms of sustainable and legally effectual water rights that enable First Nations to fully participate in water management and fulfil obligations on Country.

In developing water rights measures, Approach 1 takes as its starting point the Echuca Declaration 2007 (as amended in 2010), which states that:

> ***'Water entitlements that are legally and beneficially owned by 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.'***

Importantly, the Echuca Declaration unifies what is known as 'legal and beneficial' ownership of a water right by First Nations. In legal terms, this concept supports a more direct form of First Nations' control and decision-making over water. In turn, funding measures also are necessary to support the adoption and implementation of First Nations' water rights (see governance below).

Finally, the Water Rights model reflects human rights values of equality while giving effect to First Nations' special relationships with traditional land and waters (see also Approach 2 & 3).

The legal tools and measures outlined in Approach 1 build on the following principles:

- Water rights, as the central element of cultural flows, should enable First Nations to have access to suitable water (including groundwater) to allow them to undertake current and intergenerational cultural responsibilities on Country;
- Cultural flows models should recognise the rights of First Nations to use, develop and control the management of water on Country, and, where relevant, to co-operate across Traditional Owner groups for these purposes;
- Cultural flows models should incorporate both water laws and land-based laws relevant to water; and
- A cultural flows water right is a vital part of a broader pathway to achieving comprehensive legal and policy models for First Nations to participate in water, land and natural resource management in an equitable and culturally appropriate manner. The programmes must allow First Nations to provide for the cultural, economic and social needs of current and future generations, while contributing to enhancing the value of water for all Australians.

Overview: Considering Cultural Flows Across the Water Law Spectrum

Water rights to give effect to cultural flows form an integral part of First Nations' intergenerational responsibilities for managing water on Country. Therefore, it is important that the First Nations' water rights are not seen as confined to water laws. The rights must be supported and reinforced by other laws, such as cultural heritage and enabled though laws that can transform the institutions and agreements that structure water law and policy. Consultation and participation measures for water rights should apply to the full range of water law decision making, from assessments of water resources, to water planning, water allocation and grant of water rights and reserves, implementation, monitoring, and decision-making about water allocations and operations that deliver water.

Water laws, such as water rules and water plans, can protect cultural flows 'in situ' and associated riverine and groundwater uses. In turn, these statutory instruments can provide the mechanisms to realise cultural flow water rights. Water law planning processes are strategic measures for determining and allocating water uses in a catchment or aquifer (groundwater area). The planning process presents opportunities for reserving water rights for First Nations and in making entitlements available for First Nations where systems are not fully allocated or for exploring measures to grant cultural flows in over-allocated systems. Examination of cultural flow water rights must be embedded into the overall water planning systems (See Approach 2, and WP 1 and WP 2).

The integrity of First Nations' cultural flows rights can be relevant when a decision-maker is considering whether to grant a water entitlement to another person. In some circumstances, there may be adverse effects on cultural flows or First Nations' values. Similarly, the interaction of cultural flow and water rights with water trading systems requires careful consideration where those trading systems operate i.e. particularly in the southern-connected Murray-Darling Basin (see Approach 2).[2]

Current Models for Acknowledging First Nations Water Rights

Currently, there are only limited measures in water laws that provide any form of water rights for First Nations. Some Australian states, such as NSW, have legislated to allow for special purpose or cultural water licences. More generally, water laws distinguish between water entitlements for cultural purposes and those available for commercial purposes and/or water trade.

In line with First Nations' aspirations for more direct control over water on Country, an 'any purpose' designation should apply to First Nations' water rights. The 'any purpose' model would allow First Nations greater control in decision-making over water on Country.

First Nations Groups as Water Rights Holders and Managers

The development of measures for water rights raises the important question of the most appropriate arrangements for holding and owning the water rights. These important questions should be ones for First Nations to determine (i.e. decisions around the First Nations' peoples and organisations that will be the designated legal holders and have responsibility for, and management of, the rights). In law, a water right must be allocated, granted or assigned to a specific person or organisation such as a corporation that has 'legal personality'.

Legal Language: What Does a Water Right Mean?

In Approach 1, the legal models and tools that are available to develop First Nations' cultural flows draw on the legal language of water rights, entitlements and allocations, grants and reserves, as well as other legal terms that come from native title laws and land rights. The language is complex. Any one term in law can have several different meanings. This is very true of the term 'right'. A right often means what the law enables people to do or to have, or it can be quite specific about what is owned and available for use. Water rights, such as a licence to pump water from a river is an example of a specific use of the term.

The term 'water right' in this report is used in both ways. First, it refers to a broad class of legal measures, i.e. the group of water rights in Approach 1. The second way is to refer to the way that water gets 'divided up' into legally identifiable 'shares'. These rights or shares can be called many different things in water legislation, for example, 'water licence' in NSW but water share in Victoria. Whatever term is used it relates to a similar underlying concept but rights to water may be implemented differently where groundwater is concerned.

Policy efforts have sought to unify the language around water rights. The National Water Initiative (NWI), which sets national water policy, adopted two generic terms to refer to the specific water rights in 'consumptive' or regulated systems: water entitlements and allocations. Water entitlements refer to the legal ownership of a water right (see Table of Legislation). Legally, these style of water entitlements are separate from land title. The right gives a share in a 'consumptive pool' that is defined under a water resource plan (there are many water resource plans across the Murray Darling Basin that add up to one big Murray-Darling Basin Plan). Water allocations are linked to entitlements. An allocation refers to the 'real' amount of water that is made available to a person who holds a water entitlement in any one season. This amount can vary, as legally it is a share of a commonly-held water resource. There are policy moves to progressively roll out NWI water law models across all Australia. Therefore, it is important that cultural flows water rights models can 'fit' with these concepts.

Types of Water Rights

The Table below identifies the four types of water rights developed in Approach One.

Approach 1 Element	Definition	Examples
A. Water right or share (take and use approval) in water laws	The legal right (ownership) to a defined share of an available water source.	Water licence (NSW); water share (Vic)
B. Water rights in native title and in statutory land rights.	Legal recognition of Indigenous peoples' interests in land that include water, or where Indigenous peoples' rights and interests comprise rights to land and water.	*Native Title; Aboriginal Land Rights (NT) Act 1976*); Aboriginal Title under *Traditional Owner Settlement Act 2010* (Vic).
C. Cultural flow and statutory reserves	The setting aside (or grant) of water of adequate quantity and quality for cultural flows purposes (could be allocation within an existing reserve).	*Cape York Peninsula Heritage Act 2007* (Qld)
D. Cultural water 'holder'	The identification of an organisation or legal entity with responsibilities for holding and/or managing water for cultural flows. Could comprise water entitlements and/or reserves.	No current Australian examples, can adapt Australian models for Environmental Water Holders. Internationally- Chilean Indigenous Water Fund.

Key Elements and Model Provisions

Approach 1 has four main elements or models for water rights and one section which identifies institutional, financial and governance measures to implement and support the water rights. More complete descriptions, with examples of current leading practice, are set out in WP1 and WP2.

The four cultural flows elements in Approach 1 draw on existing legislation and laws (including common law) as well as developing some new conceptual models for laws to give effect to cultural flows. The proposed models are:

A. Water rights (entitlements and shares);

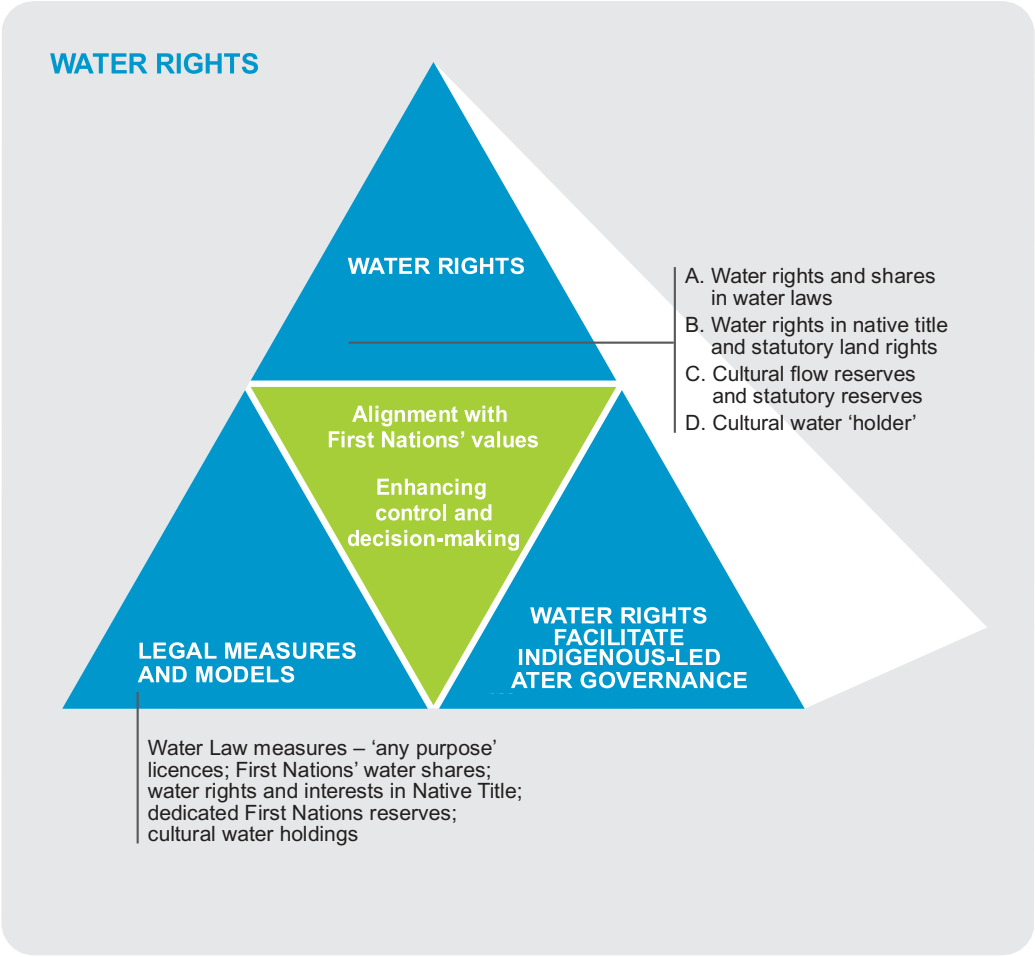
B. Water rights as part of native title and statutory land rights;

C. Cultural flow reserves and statutory reserves; and

D. Cultural water 'holder'.

Water legislation at a Commonwealth, state and territory level should support these measures by including statutory objectives that recognise the rights of First Nations to access, use and sustainably manage water resources by reference to traditional ecological knowledge.[3]

Figure 3: Key aspects: Water Rights and Enhancing Control



Element 1: Water Rights (Shares)

First Nations' Water Rights and Shares

Water rights (shares) can secure cultural flows in a way that enables First Nations to actively manage and control the water as a cultural flow. Water rights of adequate amounts and quality (what is 'adequate' will depend on the on Country context) will allow First Nations to fulfil cultural responsibilities for Country and to meet the cultural, social and economic needs of Traditional Owners and future generations. Water rights (and shares) are a common form of water law instrument used in water laws across the nation.

The most feasible models are an allocation or grant of a First Nations' water right as determined under relevant state and territory water legislation. The exact term and whether the water rights (share) operated in a 'regulated' or 'unregulated' water system would vary for each Australian jurisdiction. This model takes advantage of existing state and territory legislation that already distributes water entitlements and rights to private parties and agencies.

To more effectively meet cultural flows objectives, the water right (share) should be for 'any purpose' (i.e. at the option of First Nations to choose the purposes to further First Nations' objectives). To accord equality to First Nations with other water holders, these purposes should canvass the

spectrum of cultural and economic development purposes – including water trade where that is established.

Currently, there is no First Nations' water entitlement in any state or territory that is designated for 'any purpose'. Existing legislation, such as that in New South Wales which already provides for special-purpose cultural licences could be modified. Amendments would be required to establish the water rights under legislation where special purpose licences are not established. It is a relatively low-impact and flexible option.

Statutory confirmation of this measure for First Nations would be helpful, particularly to confirm that First Nations' water rights can be held communally by a First Nations organisation. This model can provide significant cultural, social and economic benefits in the longer term in respect of participation in water management for First Nations.

These legal measures for cultural flows use general water law frameworks. All state and territory water legislation vests rights of control and management of water resources in the respective Crown (governments). This is the source of powers for governments, acting through relevant ministers to grant water rights of various sorts to individuals, organisations and water authorities.

Model Provisions: Representative Legislative Models from NSW and Victoria

Legislation for each jurisdiction appears in the Table of Legislation.

NSW Water Management Act 2000
Section 56 Access licences

(1) An access licence entitles its holder:
  (a) to specified shares in the available water within a specified water management area or from a specified water source (the "**share component**"), and
  (b) to take water:
    (i) at specified times, at specified rates or in specified circumstances, or in any combination of these, and
    (ii) in specified areas or from specified locations,
    (the "**extraction component**").

(2) Without limiting subsection (1) (a), the share component of an access licence may be expressed:
  (a) as a specified maximum volume over a specified period, or
  (b) as a specified proportion of the available water, or
  (c) as a specified proportion of the storage capacity of a specified dam or other storage work and a specified proportion of the inflow to that dam or work, or
  (d) as a specified number of units.

(3) Shares in available water may be assigned generally or to specified categories of access licence.

The provision above could be amended in (3) to indicate that shares in available water may be assigned generally, including to First Nations. For clarity, the specified categories of access licence could make express reference to Aboriginal peoples as among the specified categories. A more complete picture of laws for water entitlements and allocations is given in the Table of Legislation.

Below, is a representative example of how water rights are identified under NWI-style water laws.

***Water Act 1989* (Vic)**
33F Water Shares

(1) The Minister may issue a water share in respect of a declared water system.

(2) Subject to this Act, a water share authorises the taking of water under the water allocation for the share during the water season for which the water allocation is allocated.

The Victorian Minister for Water has general powers under these provisions to issue water shares that could be amended to specify that Aboriginal groups can participate in 'declared water systems'. Declared water systems typically refer to water systems for irrigation, agriculture, or similar uses. Further, s 33G of the *Water Act 1989* (Vic) could be amended to direct the Minister's consideration of Aboriginal values and interests in water in relation to the issue of a water share (see Approach 2).[4]

Special Purpose Water Rights

Alternatively, special purpose water rights (shares) could be created by legislation in all states and territories and allocated to First Nations groups.[5] In general, special purpose water entitlements set legislated uses and purposes, which typically include rights to use water for personal, domestic, communal and cultural benefits. A key limitation of this type of water instrument in the past has been that the designated special purpose, limits the use of these water rights for commercial, trading or general economic development purposes. If confined in this way, special purpose water entitlements do not fully capture aspirations of 'legal and beneficial ownership of water' by First Nations as given in the Echuca Declaration. Yet, as an important first stepping stone to more substantial participation in water management for First Nations, special purpose water entitlements do provide clear legal status for such water rights. As an initial step in a pathway of stronger measures, these water rights can provide valuable support for First Nations' objectives in managing water on Country.

Model Provisions: Special Purpose Water Licences

Special purpose Aboriginal water rights have featured in water management legislation in NSW; for example, cultural access licences are provided for under the *Water Management Act 2000* (NSW).

The *Water Management Act 2000* (NSW) established a regime of water access licensing under Chapter 3 Part 2, which operates in the context of statutory water planning (water sharing plans, made under Chapter 2 of the Act). A water access licence under s 56 of the Act is a form of entitlement comprising a share of water in a system and a right to take the share subject to conditions.

Under s 57 of the Act, various categories and sub-categories of water access licence exist or may be prescribed by regulation. Under Water Management Regulations, sub-categories of water access licence include:

(3) An Aboriginal commercial licence;

(4) An Aboriginal community development licence; and

(5) An Aboriginal cultural licence.

(6) Each sub-category of licence may be established as a high security or general security access licence, as an unregulated river access licence, or as an aquifer access licence.

Water sharing plans in NSW allow for specific-purpose cultural licences for Indigenous people to access water for hunting, fishing, manufacturing traditional artefacts and ceremonial purposes. The cultural licences can be available for all water sources, including rivers, lakes and groundwater, where there is a Water Sharing Plan in place. For example, there is a cultural access licence for the Dorrigo Plateau, although the licences are capped at 10 mL/year per application. The cultural access licence for the Murrumbidgee had a full allocation of 1250 mL/year and was subject to annual water determinations. There was also a cultural water licence for a culturally significant wetland managed by the Nari Nari at Hay in NSW. Experience with these cultural access licences has been mixed. These models have proved difficult to manage in a way that derives comprehensive benefits for on Country water management for First Nations.

Model Provisions: Water Sharing Plans

In NSW water sharing plans can allow for specific-purpose 'community development' licences to support commercial enterprises owned by Indigenous people.

The relevant purpose is to support commercial enterprises owned by Indigenous people. An Aboriginal environmental licence is an additional sub-category of access licence that may apply to ‘supplementary water.’ (Water Management (General) Regulation 2011 (NSW), sub-reg 4(2), Schedule 3).

Water Sharing Plans establish rules and conditions for the exercise of rights and obligations attached to water access licences, including special purpose Aboriginal licences. See for example, Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2016, reg 23(a).

While the licences are not able to be traded, the licence is given priority over general use commercial water access.

Traditional Cultural Water Protections

Legal protections for traditional activities associated with water do not comprise specific water entitlements within the Australian water law system. In effect, the measures reflect the intersection between water laws and the legal protections found in statute and/or common law for First Nations' cultural activities on traditional land and waters. The measures protect the traditional values that water provides for First Nations by allowing access without a permit to water sources such as rivers for cultural purposes. The purposes include passing on traditional ecological knowledge and cultural (non-commercial) activities.[6] To this extent, the measures provide protective rather than proactive controls for First Nations' on Country water management. There is overlap between these water rights under water legislation and land rights and native title laws. We detail these water rights more fully in WP1 (see below in Approach 2).

These cultural access and activity 'rights' may be difficult to establish in some circumstances and, at a practical level, are often open to challenge. Such protections take priority over environmental (endangered species) legislation. Recent High Court jurisprudence has confirmed that position.[7] Despite problems with the scope of traditional cultural protections and their enforcement, they serve important cultural, social and economic purposes for First Nations. Depending on context, these protections also provide a safety net for maintaining Traditional Ecological Knowledge and associated activities. Although constraints exist, the measures do deliver some degree of control over water management and decision-making for First Nations.

Amendments to state, territory and Commonwealth legislation could strengthen rights for cultural access and use of water for traditional activities for First Nations, especially in conjunction with cultural heritage legislation (see Approach 2) and settlement and/or agreement models (Approach 3).

Model Provisions: Strengthening Cultural Protections

State and Territory legislation could be amended or introduced where relevant laws do not already exist to strengthen water-based traditional cultural activity protections. Note: these protections typically exist under common law, irrespective of statutory formulation. The current Queensland law represents a basis for introducing similar statutory protections in those Australian jurisdictions that do not already have such legislation.

Section 95 of the *Queensland Water Act* 2000

An Aboriginal party or Torres Strait Islander party may, in the area of the State for which the person is an Aboriginal or Torres Strait Islander party, take or interfere with water for traditional activities or cultural purposes.

'Aboriginal party' and 'Torres Strait Islander party' are defined by reference to s 35 Aboriginal Cultural Heritage Act 2003 and the *Torres Strait Islander Cultural Heritage Act* 2003.

The scope of protection is set by the definition of traditional activities - for an Aboriginal party or Torres Strait Islander party, this means any of the following activities the party carries out in accordance with Aboriginal tradition or Island custom—

- hunting, fishing, gathering or camping;
- performing rites or other ceremonies;
- visiting sites of significance.

In the Queensland context, the definition of 'Aboriginal tradition or Island custom' could be extended to include other traditional water management practices that protect cultural values, utilise traditional ecological knowledge, and which transmit the values sustained through these activities to future generations.

The definition of cultural purposes in this type of legislation could give effect to cultural flows objectives more readily where the provisions more adequately reflect the communal rather than domestic scope of Traditional Owners' obligations in respect of traditional hunting, fishing and gathering activities that are related to water.

Element 2: Native Title and Tenure-Based Models

Bringing Together Land and Water

A key challenge in developing cultural flows models for First Nations is that many potential water rights measures need to take into account land and water interactions. Water laws have progressively separated land and water across many parts of south-eastern Australia. Increasingly water is regulated independently of land within the settler legal system. This is counterintuitive to the value system of connection to Country for many First Nations.

Further, across much of Australia, but not in all areas, the primary means for First nations to access water, for example in creeks and rivers is through various land-based laws, such as native title and/or the statutory tenure system. There has been a significant increase in First Nations' land-holdings over time, but this has not been matched by similar participation by First Nations in water-holdings.[8] Currently, approximately one third of continental Australia is subject to Aboriginal 'tenure'.[9] Almost without exception, Aboriginal and Torres Strait Islander land holding is a collective form of right over land and waters,[10] and typically only alienable to the Crown. 'Tenure' can range from:

- non-exclusive native title rights that coexist with third party rights, for example, miners and pastoralists (non-exclusive native title);
- exclusive possession native title (a collection of rights in respect of traditional Country, including the right to exclude others from the land;
- state-based statutory land and water claims-based systems such as the *Traditional Owner Settlement Act* 2010 (Vic); and
- exclusive possession 'ownership', such as the fee simple (freehold) titles under land rights legislation.

In some circumstances, Aboriginal land holdings may be overlaid by native title, or in others, Indigenous landholdings are surrounded by native title land but are not themselves subject to native title. Also, there are various forms of Aboriginal lands held in trust, special reserves, private land holding and special leases, as well as forms of co-management of lands and waters (see agreement-making and Indigenous Protected Areas).

Various tenures and forms of landholding generally will still be subject to state and federal government regulation. Thus, each form of Aboriginal tenure will have its own set of legal rights and constraints with respect to water and offer different potential for developing cultural water flows models. The complex nature and diversity of First Nations' tenure (or in some instances the lack of tenure) is a significant factor when considering the development of cultural flows, water rights models.

Native Title and Common Law: This report does not provide a comprehensive overview of native title laws. Instead, it highlights significant ways in which native title can be a vehicle for giving legal form to cultural flows and how these laws can strengthen cultural flows objectives for First Nations. For some First Nations groups, especially in the more densely populated areas of Australia, native title law or state equivalents may not be an available measure to secure water rights due to the constraints imposed by the claims process at a legal and practical level.

Any native title claim and/or determination will be fact-specific and relate to specific traditional connections to land and water for the claim and/or determination areas. Therefore, the interactions between native title and water laws and water management will be highly specific to local contexts. This local diversity could not be captured in detail in this summary report. Further, recent analyses have examined the strategic directions available to First Nations in respect of native title and water law, and this analysis is referenced in WP1 and WP2.[11]

In turn, various forms of Aboriginal tenure will intersect with water legislation and common law water doctrines, such as riparian rights, to the extent that these have not been displaced by statutory schemes.[12] More generally, traditional land and water holdings will be subject to the broad regulatory frameworks governing Aboriginal peoples, for example the *Native Title Act 1993* (Cth) (NTA) itself, but also legislation such as the *CATSI Act*,[13] and planning and environmental laws. The following outlines the main land-based elements and provides indicative model provisions.

Native Title and Rights to Water

'Native title' and 'native title rights and interests' are defined in s 223(1) of the NTA to include rights and interests in land or waters. The content of native title rights and interests is determined in accordance with the traditional laws and customs of the native title claim group. Section 223(2) of the NTA provides an indicative list of native title rights and interests, which includes hunting and fishing rights. Section 225 of the NTA requires a determination of the nature and extent of the native title rights and interests that are recognised.[14]

On current law, native title rights and interests comprise a non-exclusive right to water where the evidence of traditional law and custom is proved to support such rights and interests.[15] There is general acknowledgment that native title rights may comprise a right to take resources of the relevant determination area for any purpose[16] (see WP1 and WP2). An area of increasing importance in native title law is the extent to which compensation may be available to Traditional Owners for impacts (including extinguishment) upon native title rights and interests.[17]

The following outlines suggested principles and measures for strengthening the water components of native title rights and interests.

Model Provisions: Native Title and Agreements

The NTA has provisions for determining native title claims through the courts and by consent (agreement). There are provisions for agreements around future 'acts' (third party activities) that impact on native title rights and interests, such as mining and infrastructure development. The main avenue for agreements in respect of future impacts on native title are Indigenous Land Use Agreements (ILUAs - see detail in WP1).

Agreements in relation to statutory land rights/native title

ILUAS and similar agreements could be strengthened to recognise, secure and protect a variety of cultural flows outcomes and be the platform for further negotiation of specific water rights, and co-management of cultural water and environmental protections.

These measures could adopt or extend models in:

- consent determinations and Indigenous Land Use Agreements under the NTA; and/or state-specific regimes, for example, the *Traditional Owner Settlement Act 2010* (Vic) (TOS Act); and
- various forms of co-management agreements under environmental legislation, for example, *Environment Protection and Biodiversity Conservation Act 1999* (C'th) and state and territory equivalent laws (see also Approach 2).

Reshaping the Tenure/Water Rights Interface

To date, the recognition of native title rights to water under the *Native Title Act* 1993 typically has been restricted to traditional, cultural and subsistence purposes. Recent cases have recognised a right to take resources for 'any purpose' (including commercial uses).[18] In accordance with human rights principles and to achieve greater equity, there is clear potential to address the exclusion of First Nations from water management on Country across the nation by legislative amendments to address gaps in native title laws and Indigenous tenure-based legislation, and the interpretation of these laws by the courts. The following provides some indicative measures, but these will require further, more intensive investigation and refinement of the models prior to implementation.

Model Provisions and Legal Developments: Native Title Reform

- Legislative amendment of ss 223, 225 NTA (and consequent amendments) feasibly could establish that native title may comprise an exclusive possession right to water, independent of land, where the connection evidence supports that outcome.
- Judicial recognition of pre-existing native title rights and interests based on connection evidence presented by claimants may extend the degree to which trading and exchange of water-related resources is established.
- Native title claimants may negotiate a native title right that allows for recognition of a culturally appropriate commercial water 'right' or robust co-management arrangements for water under consent determinations.
- Native title claimants and holders pursuant to ILUAs may negotiate an access to commercial water 'rights' or robust co-management arrangements for economic development for indigenous communities centred on water.
- Legislative amendments could establish a 'right to negotiate' pursuant to ILUAs where future acts affecting native title trigger substantial water use by third parties.
- Native title holders (exclusive possession rights) may take action at common law to protect water quality and traditional values in water sources on Country. (A tortious or statutory duty to prevent water pollution that affects First Nations' values in water needs to be explored further).

State and Territory Legislation

Example: Traditional Owner Settlement Act 2010 (Vic)

The *Native Title Act* 1993 is Commonwealth law covering Australia, but some states and territories have passed their own legislation on this matter. In Victoria, the *Traditional Owner Settlement Act* (TOS Act) was adopted in response to the perceived limitations of the NTA in respect of Aboriginal claimant groups whose traditional Country is in the heavily colonised areas of south-eastern Australia (see WP1).

Section 9 of the TOS Act allows Traditional Owner groups to enter into a recognition and settlement agreement for recognition of Traditional Owner rights and interests (see WP1). The focus is on 'land' and there are limited avenues for Aboriginal peoples to be involved in water management or to acquire water rights under the TOS Act.[19] A Traditional Owner group entity may enter a 'natural resource agreement'[20] as part of a 'recognition and settlement agreement'.[21] Such an agreement can include taking and using water from a waterway or bore as an agreed activity,[22] although only for 'traditional purposes', meaning 'the purposes of providing for any personal, domestic or non-commercial communal needs of the members of the traditional owner group'.[23] The taking and use of water under these provisions is enabled by s 8A of the *Water Act 1989* (Vic) working in conjunction with the relevant provisions of the TOS Act.

Under Part 3 of the TOS Act, the Minister may recommend the grant of land (as an estate in fee simple or Aboriginal title) under a land agreement, but this does not include any grant of a water entitlement or right. Because water rights have been unbundled from land title, consistent with the NWI, land title granted under the TOS Act does not include any corresponding right to take water on the land for commercial or economic purposes (there may be an entitlement to take water for traditional or cultural (native title) or domestic and stock purposes 'as of right').

Corresponding law reform: Amend TOS Act to refer to land and water; allow grant of water title; enable funding agreements for water acquisition and management; enable natural resource water authorisation for any purpose; strengthen Traditional Owner water management.

There is currently an increased emphasis on agreement-making with First Nations in Victoria and other parts of Australia, as governments progress treaties and agreements in reconciliation efforts. This provides a receptive political environment for agreement-making about cultural flows and to strengthen existing laws.

Model Provisions: Strengthening the Traditional Owner Settlement Act

- While many statutory definitions of land include water, the Traditional Owner Settlement (TOS) Act could be amended to specifically refer throughout to land *and water* (see Native Title Act). This amendment includes the preamble, purposes section, land agreement provisions, and land use activity agreement provisions;
- Amend Part 3 of the TOS Act to refer to 'Land and Water Agreements' and enable the Minister to recommend the grant of an unbundled water entitlement or right independent of land title (consider whether the water right should be subject to any restriction on alienation (see TOS Act s 15));
- Amend the provisions on funding agreements in part 5 to empower the Minister to enter an agreement with a Traditional Owner group to finance the grant or acquisition (buy-back) of water entitlements or rights or the construction and maintenance of infrastructure;

- Amend the provision for Natural Resource Agreements in Part 6 of the TOS Act to specifically refer to the right to take and use water;
- Amend the provision for natural resource water authorisations in s 85 to enable authorisation for Traditional Owner group entities with a natural resource agreement to take and use water from a waterway or bore for *any purposes*; and
- Amend the TOS Act to strengthen opportunities for Traditional Owners to be involved in water management.

Section 211 of the Native Title Act 1993 and equivalent state laws

As well as the substantive provisions for establishing native title, as noted above, s 211 NTA operates such that certain activities by native title holders—that otherwise would be contrary to a law of the Commonwealth, state or territory—are not prohibited or restricted. Thus, section 211 NTA puts in place a general exemption for Indigenous peoples when undertaking traditional water-related activities. The section should be amended to confirm that domestic purposes can support and include robust protections for traditional ecological (cultural) knowledge in relation to, for example, hunting; fishing and water-related on Country activities.

In addition, while s 211 of the NTA has been held to override inconsistent state legislation, there are equivalent exemptions for traditional activities under some state water laws.

Model Provisions: Strengthening Cultural Protections in State Laws

NSW - *Water Management Act 2000*, Division 3 – s 55 Native title rights

The section provides:

(1) A native title holder is entitled, without the need for an access licence, water supply work approval or water use approval, to take and use water in the exercise of native title rights.

(2) This section does not authorise a native title holder:

  (a) to construct a dam or water bore without a water supply work approval, or

  (b) to construct or use a water supply work otherwise than on land that he or she owns.

(3) The maximum amount of water that can be taken or used by a native title holder in any one year for domestic and traditional purposes is the amount prescribed by the regulations.

This type of state legislative provision should be adopted in jurisdictions that do not have equivalent laws. Further amendments are needed in this type of legislation to take out the limitations around domestic and traditional purposes in order to allow First Nations to undertake water supply work such as providing relevant infrastructure for cultural flows purposes.

ALRA and Statutory Land Rights

The *Aboriginal Land Rights (Northern Territory) Act* 1976 (C'th) (ALRA) and state equivalents offer the most comprehensive form of tenure for First Nations. The rights conferred under the legislation

equate in most respects to a fee simple title (ownership), giving First Nations related decision-making rights. Although the statutory land rights model provides the most extensive protection for Aboriginal tenure and associated rights to water, First Nations' rights to control access over these land and waters have been contested. There is a need to retain and strengthen the viability of these legislative models for land and water management.

This type of title, with clear statutory protections for Aboriginal land and water rights is unlikely however, to be extended from the existing statutory land rights models from northern Australia and inland South Australia. In addition, while a robust tenure model is an important first step, First Nations must be more adequately supported to undertake the long-term, culturally appropriate management of land and waters within this statutory model. Such measures must include considerations of culturally appropriate economic development where these lie within First Nations' objectives for managing water on Country.

There is considerable scope to build on the stability of the ALRA model, but to give greater attention to addressing the disparity between the significant land holdings by First Nations (particularly in Northern Australia) and the relative lack of access to water entitlements (see WP1). The consideration of cultural reserves of water and/or reservation of a collective pool of water rights for First Nations is pertinent here.

More broadly, this issue may be best addressed as a matter of compensation and settlement between First Nations and respective governments.[24] As well as land rights legislation, the relevant areas should include consideration of native title claims and holdings (see Approach 3 and the pathways section).

Indigenous Protected Areas

Indigenous Protected Areas (IPAs) have significant potential to strengthen First Nations participation in sustainable water management. The Agreements are representative of a significant change in conservation planning and management within Australia over the last two decades. The main governing legislation is the *Environment Protection and Biodiversity Conservation Act* 1999 (C'th) working in conjunction with Aboriginal tenure laws. IPAs occur over areas of land, waters or sea held by Traditional Owners where the Indigenous communities have entered an agreement with the Australian government to promote biodiversity and cultural resource conservation. These measures, which bring together First Nations' traditional ecological knowledge, environmental law protections through the national reserve system, and Aboriginal tenures (both terrestrial and marine), offer a robust model that could be reproduced in many areas; especially where culturally significant water sites are located.

The model need not be limited to Australian government partnerships, although it is likely that Commonwealth funding would be necessary in most instances to ensure ongoing viability of the initiatives. More generally, co-management and joint management arrangements in Commonwealth, state and territory legislation could allow for integrated land, water and natural resource management and biodiversity protection as a comprehensive form of cultural flows (including groundwater). See further, Approach 2 and 3 and Table of Legislation.

Model Provisions: Representative Indigenous Protected Area Agreements

There is a wide range of agreements that create IPAs that involve water. For inclusion in the IPA program, Aboriginal and Torres Strait Islander communities commit to manage their land

and waters to maintain biological diversity, according to internationally recognised IUCN standards. Communities must already have native title or other forms of "ownership" over areas that are brought voluntarily into the IPA Programme.

An indicative agreement is given below, remarkable for involving water in a desert region.

Warlu Jilajaa Jumu Indigenous Protected Area: IPA was declared on November 9, 2007. It covers a 16,430 sq. km area in the Great Sandy Desert, in the north-eastern section of Ngurrara Country in WA.

The name for the IPA is derived from the Walmajarri words Warlu, the fire used to keep Country healthy, Jila meaning living water, permanent waterholes, and Jumu, seasonal soaks.

Urban Water Entitlements: Surface and Aquifer

Many First Nations have traditional Country that is now occupied by major urban areas. This exclusion of First Nations from access to traditional waters in urban areas has received relatively limited attention. Therefore, it is vital to consider laws and specific statutory provisions that can enable First Nations to participate more directly in water management and to accord water rights to First Nations in urban areas. Ideally, such water rights would include access to groundwater and water in sites of important surface/groundwater interactions, such as springs and sources for culturally significant wetlands areas. In addition to dedicated urban water entitlements, there should be robust engagement with First Nations about environmental flows for urban rivers, and the protection of culturally significant values in urban waterways. Improved rules for consultation with First Nations should complement such provisions (see Approach 2 & 3).

Model Provisions: Urban Areas

Currently there are no water laws in Australia that provide a cultural flows water right or a water reserve for First Nations in urban centres.

The following provides potential models:

- Water allocations to urban water agencies, which form the basis for municipal water supply, could include a component reserved for cultural purposes. For example, under the Victorian *Water Act 1989*, an entitlement (water right or share) could be made available to Traditional Owners of the Melbourne Municipal Area for cultural purposes, such as enhancing the cultural and environmental attributes of culturally significant wetlands.
- Alternatively, water authorities in urban regions, such as Melbourne Water, could be required by statute to make available a percentage share of the water that they hold under the relevant bulk entitlement to achieve cultural flows for Traditional Owners.

Element 3: Cultural Water and Statutory Reserves

A. Statutory Reserves, Water Plans and Rules

A First Nations' water right (entitlement or reserve) can be provided under a statutory reservation or water planning process that dedicates a certain share of the available water in the relevant water resource (including unallocated water, where available) to First Nations' water rights. This model is

most readily put into effect where water resources in a catchment or groundwater aquifer are not fully allocated but it can operate over all catchments and groundwater regions. This process will become increasingly significant as water plans to 'share water' are developed across many parts of Australia.

The critical component for these legal and policy tools is the means by which to determine the 'formula' for water sharing for First Nations that is set aside as a grant or reservation (See WP 1 & WP 2 for examples). The statutory reservations under the water plans need not be limited to cultural purposes. An 'any-purpose' designation to the reserve would most clearly align to the animating principles in the Echuca Declaration.

Other potential mechanisms for consideration in more fully allocated systems include placing caps on existing water allocations to provide a cultural flow, water right (in both surface and groundwater), or to implement a form of cultural 'passing flow', that would provide a minimum flow in watercourses for First Nations' water rights (see also Approach 2 in regard to protection of First Nations values in water in water plans).

Model Provisions: Statutory Reserves for First Nations

There have been several models put forward for statutory reserves for First Nations (see WP1 and WP2). The following model has been implemented in Queensland under statute. While the Cape York model is context-specific, similar models for strategic reserves could operate in other Australian jurisdictions.

***Cape York Peninsula Heritage Act 2007* (Qld)**

27 Special provision about water reserve

(1) This section applies to a water plan made—

(a) in relation to an area in the Cape York Peninsula Region; and

(b) after the commencement of the section.

(2) The water plan must provide for a reserve of water in the area to which the plan relates for the purpose of helping indigenous communities in the area achieve their economic and social aspirations.

(3) In deciding the reserve for a water plan, the Minister administering the *Water Act* 2000 must consider the purposes of chapter 2 of that Act.

(4) In this section—"water plan" means a water plan under the *Water Act 2000*.

Element 4: Cultural Water Holdings

Overview and Rationale

If a broader perspective is taken on cultural water and water rights, it would highlight the need for a transformative approach to cultural flows. Such models better accord with human rights and equality principles and reflect the special relationship that First Nations have with traditional land and waters. In turn, this requires consideration of governance and institutional designs that can best support cultural water management, in addition to the specific water rights. This element includes some broad models for consideration.

Portfolios of water entitlements, licences and water rights of varying scope and scale could be acquired, managed and allocated by a dedicated agency/organisation (a 'Cultural Water Holder' or similar) on behalf of First Nations groups for First Nations to participate equitably in the distribution and governance of water. This model is similar to the water recovery for the environment that occurred in the Murray-Darling Basin. Under that model, water is held by statutory environmental water holders (Commonwealth Environmental Water Holder (CEWH) enabled under the Water Act 2007 and the Victorian Environmental Water Holder (VEWH) enabled under the Water Act 1989).

Features of a Cultural Water Holder

A Cultural Water Holder could operate at the scale of individual First Nations, or it could represent multiple First Nations groups across regions. Important questions of governance will need to be addressed, such as how the First Nations groups will be represented in the decision-making, and how individual First Nations people generally can participate in any Cultural Water Holder organisation.

A Cultural Water Holder could adapt established legal rules for managing environmental water via statutory environmental water holders (for example, CEWH or VEWH) and use similar sets of rules for distinct cultural purposes. A Cultural Water Holder could hold entitlements to water in surface water systems, such as rivers with large on-stream dams (regulated rivers) and unregulated rivers, as well as groundwater 'rights' on behalf of First Nations.

The Cultural Water Holder could hold entitlements in systems that are not fully allocated (such as in northern Australia), as well as the fully-allocated systems of southern Australia. The rights can enable First Nations to maintain Country, and the ecosystems which support cultural values; and produce economic returns in culturally appropriate ways. The Cultural Water Holder could operate within existing water market systems and allow the trade of water entitlements where consistent with First Nations' aspirations. Any design of a Cultural Water Holder needs to take into account water planning systems (see Approach 2) and should form part of reforms to reset water management (Approach 3).

Creation of a Cultural Water Holder:

To date there is no First Nations' water holder in any state or territory within Australia; although Victoria has recently made an appointment of an Indigenous representative to the existing Environmental Water Holder institution. The water holder could be established by amending existing legislation around environmental water holders or by enacting new enabling legislation.

Model Provisions: Cultural Water Holder

Specific measures may include:

- Establishment of a Cultural Water Holder (for example, as a statutory corporation) by amendment to the relevant state and territory legislation and *Water Act 2007* (Cth) or by stand-alone enabling state and territory legislation;
- Legislation should set out key functions, values, objectives and governance of the Cultural Water Holder, including clearly stating the purpose of the Cultural Water Holder, and the process for determining rules for participation and representation of First Nations in the governance of the Cultural Water Holder;
- Funding should be provided from public and private sources to purchase water rights held by the Cultural Water Holder;
- The Cultural Water Holder also could acquire and hold water rights via purchase, gift and

savings from water infrastructure 'improvements';

- Cultural Water Holdings should include cultural flows 'in situ' as an instream component for cultural and environmental purposes as well as water entitlements exercisable for any purpose;
- The Cultural Water Holder should hold a portfolio of water entitlements/licences/rights on behalf of First Nation groups, in accordance with relevant state/territory water legislation and plans;
- The Cultural Water Holder should be empowered to allocate Cultural Water Holdings to First Nations representative bodies (for example, Land Councils, Traditional Owner Groups, Native Title Representative Bodies or First Nations Organisations) for further distribution within the group, consistent with First Nations' values and objectives;
- The Cultural Water Holder could buy, sell and transfer Cultural Water Holdings within catchments where consistent with statutory functions, and the values and objectives and the interests of First Nations;
- Enabling legislation/policies/plans should include provisions for monitoring and reporting on the outcomes achieved by the Cultural Water Holder to ensure accountability; and
- The Cultural Water Holder should have dedicated public funding for ongoing administration and participation of First Nations in the model.

Comparable Models

A similar mechanism to provide funding for acquisition of indigenous water rights operates in Chile: The Indigenous Land and Water Fund (see WP1, 46). The fund was created under the *Indigenous Law 1993* (Chile) to acquire water for indigenous people.[25] This fund finances the acquisition of water use rights, exercisable for any purpose, for indigenous landholders via a judicial regularisation processes, administrative grant or purchase in water markets.[26] The fund also finances water infrastructure construction and maintenance projects.

The Cultural Water Holder could also adapt the institutional and governance measures established for the statutory environmental water holders, using this model as the basis for creating a Cultural Water Holder. Alternatively, First Nations also could acquire Cultural Water Holdings by entering water use agreements with an environmental water holder, as the Ngarrindjeri have done with the CEWH (see WP2). These agreements can assign a volume of water allocation each year from the CEWH to a First Nations group to manage, giving First Nations greater control over where and how the water is used. These agreements would need to comply with the statutory purpose of the environmental water holder as set out in the relevant water laws.

Element 5: Financial and Governance Measures

Fiscal and non-fiscal legal measures necessary to support First Nations' water rights (see WP1 and Approach 3). An initial list for consideration includes:

- Water Planning reforms: Introduce a cultural flows component for routine inclusion in the water planning process as a cultural water reserve. The measures would address the historic exclusion of First Nations from the water allocation and water law reform process.
- Statutory Grant or Reservation: It is open to governments in jurisdictions across Australia to develop a statutory model that grants or reserves water that is transferred to and available for First

Nations, which is ‘of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations’. There are models of historic water reservations in jurisdictions such as the western USA (see WP1 part 7).

- Contract: A First Nations water right could be the subject of a contract between First Nations and relevant government agencies.
- Market Purchase: It is open for First Nations to have assistance to purchase water rights/ water shares (allocation and entitlement) in a regulated water law system such as in the Murray-Darling Basin. The entitlement could be purchased through various forms of finance; including philanthropic sources (see WP1 in parts 6, 7 and 8).
- A Water Fund could be developed on a statutory basis to give effect to cultural flows, particularly where there are limited prospects for a successful native title claim due to dispossession of First Nations from traditional Country.
- The effective achievement of cultural flows requires ongoing financial viability for First Nations’ water rights. These issues are canvassed in WP1 and WP2. It is noted here that the introduction of water markets into Australian water law (a move that largely excluded First Nations) has seen a strong escalation of the financial value of water rights. It is vital to address the human rights and equity implications of these escalations in the value of water entitlements to ensure culturally appropriate and sustainable outcomes for cultural flows for First Nations.

Model Provisions: Water Trusts and Water Funds

The NSW Government operated a Water Trust from 2002-2009. The trust was designed to assist First Nations' businesses for which water is a core component. The current policy position in Victoria is given as a model capable of more general application.

Victoria Water Plan 2016

There are options for Traditional Owners to access water entitlements within the existing framework, including:

- buying water from entitlement holders on the water market in areas where entitlements or use is capped at sustainable limits;
- acquiring water entitlements from water corporations in areas where this is allowable within sustainable limits, including access to unallocated water resources; and
- investing in water savings projects that create new entitlements.

These processes do not affect the rights and obligations of existing entitlement holders.

Aboriginal water objectives may also be achieved through investment in works and measures to deliver water to specific areas of importance to Traditional Owners. Any investment in infrastructure, works and measures will need to be consistent with Country Plans and the *Aboriginal Heritage Act 2006* (see further Approach 2).[27]

Pathways to Broader Reform

The water rights tools and measures discussed in Approach 1 are designed to cover a broad range of situations for First Nations groups. There is no uniformity of experience in participation in water management for First Nations across Australia. Some First Nations organisations, such as NAILSMA, will bring a long history of involvement in land and water management. For other groups, robust participation in water management will be a comparatively recent experience (or yet to be achieved). Approach 1 allows a staged, multi-entry approach to water rights, while maintaining the centrality of the water rights model and tools for achieving cultural flows and moving along the pathway to reset water management.

Some First Nations groups may already hold or have access to water rights and be actively engaged in applying traditional ecological knowledge in managing water on Country. For such groups, there should be consideration of comprehensive water rights models, such as partnerships, reserves or a cultural water holder. For other groups, it may be important to build capacity via specific water rights and entitlements models that can progressively build cultural flows objectives over time. Thus, water rights legal and policy measures need to take into account the situation of First Nations groups at a given point in time (noting geographical location and contextual factors). For some groups, the feasibility of higher-end water rights models, such as cultural reserves and a cultural water holder, may be realised in the future, as First Nations are afforded greater opportunities for on Country water management. It is important that water planning processes set aside sufficient water to ensure that these groups have access to the full range of the four types of water rights explored in Approach 1.

Measures in respect of water rights will generally require First Nations' governance arrangements for effective implementation. This involves internal and external governance arrangements that are flexible enough to accommodate First Nations-specific needs, but which are targeted to allow for effective interaction with external agencies. Other governance measures, which facilitate linking and

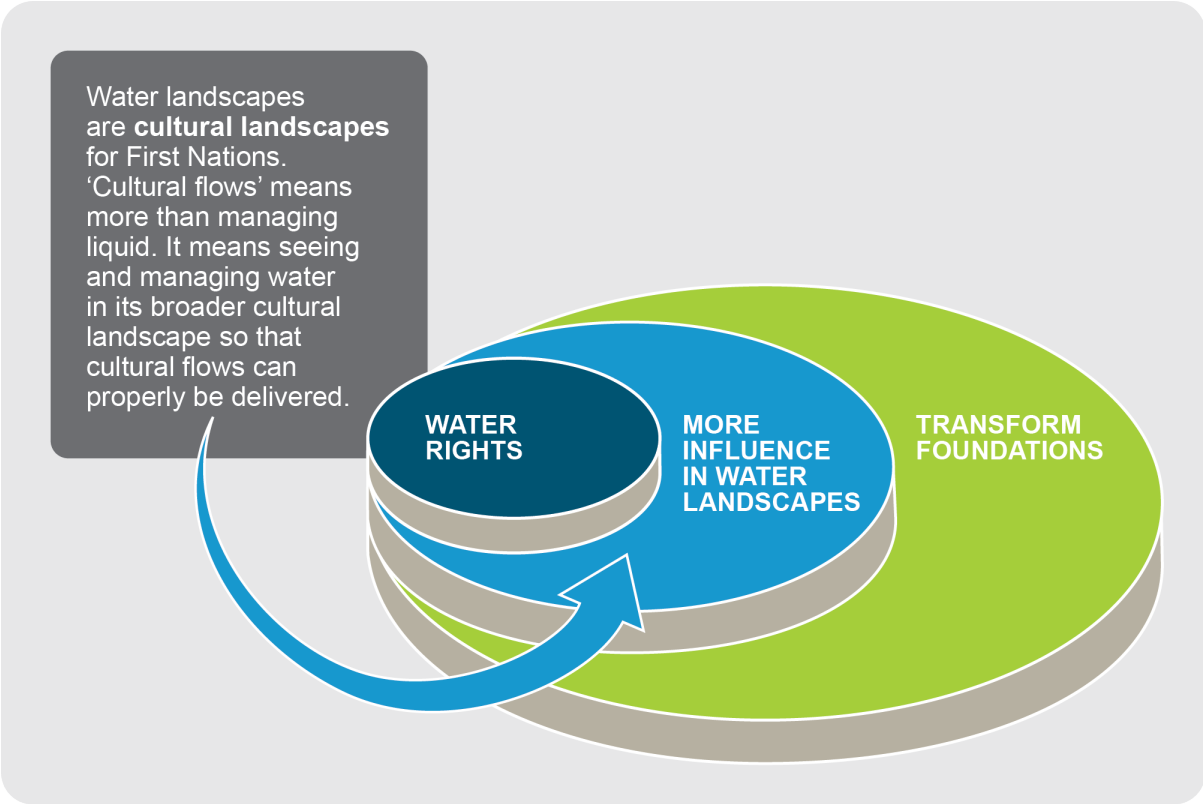
coordination between First Nations groups should be considered, given the integrated character of cultural water.

Approach 1 will require robust consultation and participation measures outlined in Approach 2 to be in place for their effective adoption. Many measures, such as a water right held by a First Nations group, will be a necessary part of Approaches 2 and 3.

APPROACH 2

Increase Influence in the Water Landscape

Figure 4: Achieving more influence in water landscapes—a broader view of laws related to cultural flows



Although water rights are the core of cultural flows, many laws affect water rights and water landscapes. Those wider laws deal with animals and plants, water quality, water flows, soil and catchments, and cultural heritage.

As well as controlling water, First Nations need more influence in water landscapes to:

- **Ensure that cultural water rights have the best chance of achieving First Nations' objectives**: water rights will not deliver First Nations' outcomes if poor water quality harms the health of culturally important fish, or if culturally important wetland species have disappeared, or if cultural knowledge (intangible cultural heritage) is not protected and respected.
- **Influence actions that others take in a way that complements water rights to deliver cultural flows outcomes**: this might include, for example, influencing rules about when and how a water authority releases water from a dam; or using environment protection laws to influence how a mine fences a riverbank or spring; or, using a water plan, prohibiting extraction of water from a culturally important billabong at a particular time of year.

Summary of the Approach

Water landscapes are cultural landscapes for First Nations. To help see and manage water in its cultural landscape, this approach seeks to increase the influence that First Nations may exercise over water and water landscapes by:

- **improving existing approaches to water law** that focus on involvement through planning and rules that govern the use of water generally; and by
- **improving a broad range of legal mechanisms that affect water landscapes** in areas that are allied to water law, such as environmental law (including catchment management laws), land use laws, and cultural heritage.

Each of the improvements outlined here could be pursued alone or in combination with others, allowing a Nation to lobby for change in areas that it sees as most relevant or feasible at a point in time. However, Approach 2 will work best to implement cultural flows if pursued through a coordinated package of comprehensive reforms.

Summary: Increase Influence

- ✔ Broad scope of laws addressed reflects connections between land, water quantity and water quality, and heritage rather than a settler conception of water quantity in isolation from water quality or from the broader water landscape
- ✔ Allows influence over broad range of water resources (not just those that First Nations control or own directly)
- ✔ Does not require access to land
- ✔ Does not necessarily require a high degree of law reform (though this would usually be desirable)
- ✔ Maximises influence within a partnership approach
- ✔ Mechanisms can be combined with Approach 1 and/or 3
- ✔ Creates influence over broad subject matter, but not a high degree of control
- ✔ Relies on incremental improvements to many areas of law administered by different agencies, which may pose a coordination challenge if not pursued as a 'package' of reforms

This approach mainly uses:

- procedural and participatory rights and/or norms;
- established protective statutory schemes that directly or indirectly benefit First Nations by protecting the environment and heritage, both of which may have cultural significance to First Nations; and
- agreement-based (consent) devices.

The approach is constructed by asking, in relation to these laws: **Which existing laws are at the leading edge of facilitating First Nations' influence over water landscapes? Going further, how can First Nations push the boundaries of existing laws to further increase their influence?**

This approach explores those leading-edge mechanisms and methods of pushing those boundaries in a way that does not assume direct control over land or water resources, and is therefore likely to be applicable to the widest range of First Nations people. For example, this approach does not require or assume that a Nation group has native title or other title to land, or a water right.

Although this approach does not involve creating or adopting fundamentally different new laws or concepts, the improvements to existing mechanisms that would be required to constitute 'leading practice' may still be controversial.

Generally speaking, this approach provides a relatively low degree of direct control over water for First Nations in the absence of owning a water right (entitlement). However, certain elements of laws in this approach have a higher chance of reflecting the spiritual values and ecological being of water (relative to many settler laws), for example:

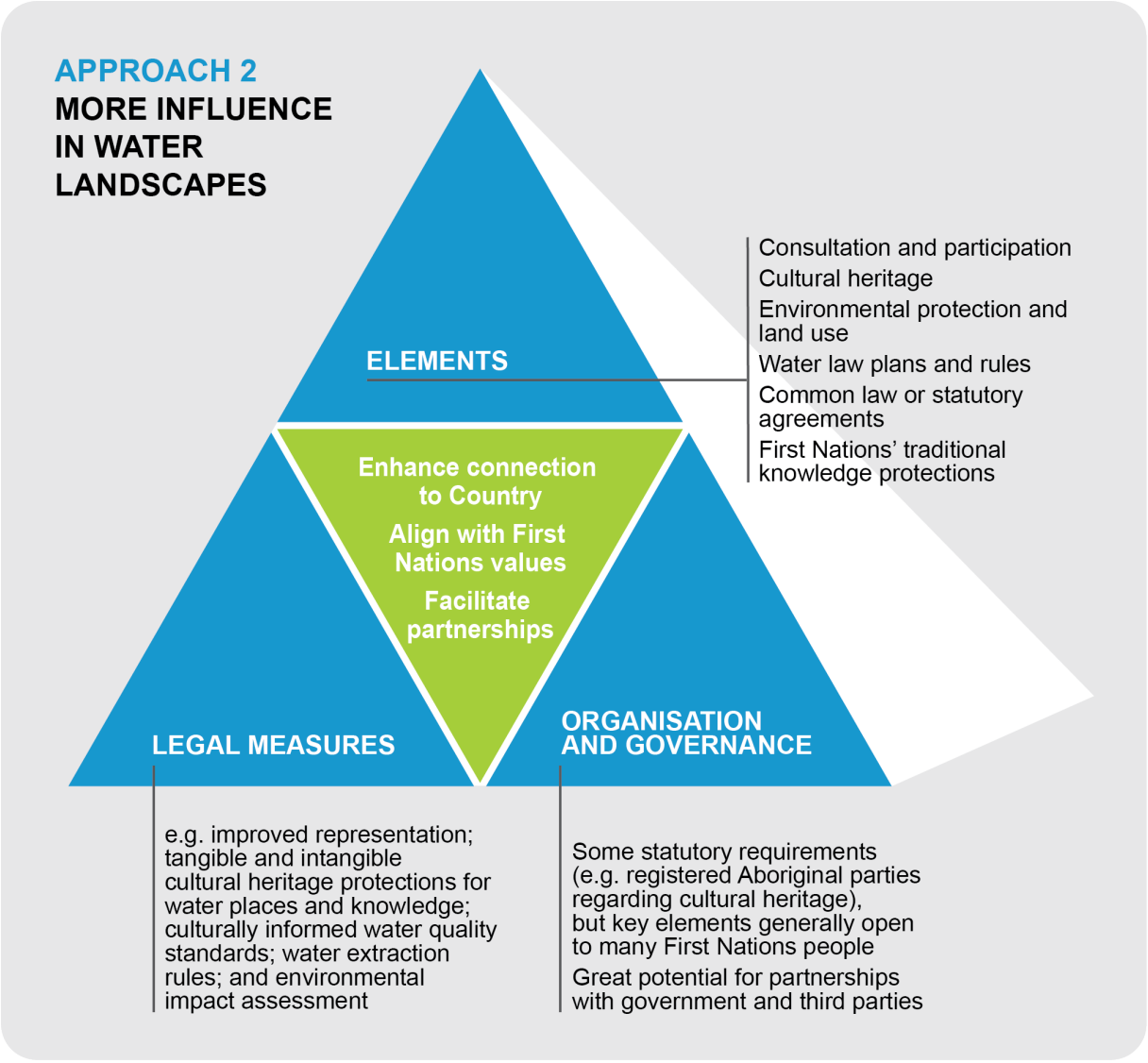
- cultural heritage laws that conceive of heritage at the scale of water *landscapes* rather than individual elements disconnected from the surrounding Country; and
- aspects of water laws and catchment protection laws that control the flow of water from one place to another, which could provide for First Nations' cultural obligations to ensure the flow of water between Nation groups.

It is also notable that intangible cultural heritage laws provide one option for protecting First Nations' traditional knowledge about water. This approach provides many opportunities to partner with government agencies (environmental protection, water, cultural heritage, etc.) through advisory involvement in decision-making processes and formal agreement-making mechanisms, as well as with third parties (for example, private land owners and NGOs working in these spheres).

Key Elements and Model Provisions

This section summarises key elements of Approach 2. Each element is accompanied by 'model provisions' that set out sample text (generally in the context of legislation, but also relevant to agreements) and issues that would need to be dealt with in accompanying provisions. Fuller descriptions of these elements, with examples of current leading practice and areas for improvement, are set out in WP2. Figure 5 summarises the key elements, key mechanisms within those elements, and key institutional aspects. The central triangle emphasises important advantages of the Approach with reference to the assessment criteria (see Appendix 3).

Figure 5: Approach 2: More influence in water landscapes



Element 1: Consultation and Participation

Consultation and participation mechanisms relate to all the areas of law that comprise this approach. The strongest form of consultation and participation mechanisms are legally mandated and enforceable procedural rights, rather than mere policy or government practice. It is important that consultation applies to the full range of water-related decision making, from assessments of water resources, to planning, allocation of rights, implementation, and monitoring.

It is also important to note that urban as well as regional water authorities' operations may affect cultural flows. This may occur, for example, through their waterway management or drainage functions. It may also occur through undertaking infrastructure works such as routine piping projects in greenfields areas, which may affect culturally significant water-related sites (for example, streams, springs, or wetlands).

Specific consultation and participation mechanisms include:

- explicitly recognising the role of First Nations in implementing the kinds of laws outlined below and the corresponding significance of traditional knowledge;

- requiring First Nations to be represented on water advisory bodies and management committees;
- requiring specific notice to be given to an appropriate First Nations body at the start of a general comment period/invitation for the public to participate in a legislative process;
- requiring more than 'having regard' to information obtained from First Nations consultation processes; and
- respecting and protecting traditional knowledge provided by First Nations through consultation mechanisms. This could include requiring adherence to the Akwé: Kon guidelines under the Biodiversity Convention and principles of free, prior and informed consent under the UN Declaration on the Rights of Indigenous Peoples. These are relevant both to government agencies and relevant third parties (for example, project proponents undertaking consultation). Traditional knowledge protections could be developed using intellectual property or contractual models, or extended from existing cultural heritage requirements (or similar). Alternatively, an independent legal basis for protection of traditional knowledge could be explored.

Currently, there is a high degree of fragmentation in statutory provisions for involving First Nations in the administration of laws that are important for cultural flows. That is, different areas of legislation provide for different advisory bodies, but there is little or no provision for coordination between different areas. To some degree, this may be informally addressed because the same people may be involved as representatives on different advisory bodies. However, further coordination could provide synergies and perhaps reduce workloads for First Nations representatives (see further discussion in Approach 3).

Model Provision: Representing First Nations' Persons on Water Advisory Bodies

A [name of advisory body] consists of at least [number], but not more than [number], members appointed by the [Minister or other appropriate official], of whom:

(a) at least [number] are to be Aboriginal or Torres Strait Islander persons nominated by [insert appropriate First Nations entity] and appointed to represent the interests of Aboriginal or Torres Strait Islander persons;

(b) [other provisions for representation of other groups, e.g. water user groups, local councils, etc.].

NB: This model provision is based on a modified s 13(1) of the *Water Management Act 2000* (NSW). Note that the provisions for First Nations representation on the Birrarung Council [see further Approach 3] are similar: s 49 of the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic).

An additional approach to establishing an advisory body with First Nations representation is to establish a First Nations subcommittee (see the 'Indigenous water subcommittee [of the Basin Community Committee] to guide the consideration of Indigenous matters relevant to the Basin's water resources' under s 202(3)(c) of the *Water Act 2007* (Cth)).

Model Provision: Representing First Nations Persons on Water Advisory Bodies

(1) A regional NRM board consists of up to 9 members appointed by the Minister being persons who collectively have, in the opinion of the Minister, knowledge, skills and experience necessary to enable the board to carry out its functions effectively.

(2) Before appointing a person or persons under subsection (1), the Minister—

(a) must place a notice in a newspaper circulating generally throughout the region inviting expressions of interest for appointment to the relevant board within a period specified in the notice; and

(b) must give to—

(i) each peak body; and

(ii) such other bodies representing the interests of persons involved in natural resources management, or Aboriginal people, as the Minister considers to be appropriate in the circumstances,

notice of the fact that an appointment or appointments are to be made and give consideration to any submission made by any such body within a period (of at least 21 days) specified by the Minister.

(3) The Chief Executive of the Department must ensure that a copy of a notice under paragraph (a) of subsection (2) is published on the Department's website within 2 business days after being published under that paragraph.

(4) For the purposes of subsection (1), the Minister must (as far as is reasonably practicable in the circumstances)—

(a) give consideration to appointing persons so as to provide a range of knowledge, skills and experience across the following areas:

…

(ix) Aboriginal interest in the land and water, and Aboriginal heritage; and

(b) appoint persons who are able to demonstrate an interest in ensuring the sustainable use and conservation of natural resources and an awareness of natural resource issues across the relevant region; and

(c) ensure—

(i) that a majority of the members of the board reside within the relevant region; and

(ii) that a majority of the members of the board are engaged in an activity related to the management of land.

(c) At least 1 member of a regional NRM board must be a person who identifies as an Aboriginal or Torres Strait Islander person.

NB: This model provision is based on a modified s 25 of the *Natural Resources Management Act 2004* (SA). Note that s 202 5(c) of the *Water Act 2007* (Cth) requires the Basin Community Committee for the Murray-Darling Basin to have 'at least 2 Indigenous persons with expertise in Indigenous matters relevant to the Basin's water resources' (that is, using an apparently cumulative requirement of identification as an Indigenous person and having expertise in Indigenous matters).

Model Provision: Water Authority's Policy Statement on Collaborating with First Nations in the Urban Water Setting

Action:

Work collaboratively across the water sector to develop long term meaningful relationships with the Traditional Owners in the [x] region – the objective being to better integrate cultural water needs into water resource management, and ensure their contribution to the future of water management. We aspire to create relationships and actions that enable the co-design, co-development and co-management of water resources.

These actions should be accompanied by concrete measures that, for example, foster employment and business opportunities, promote respect for First Nations' relationship with water, and recognise and implement First Nations' values for water.

NB: This model provision is based on Action 31 of the *City West Water Urban Water Strategy 2017*.

Element 2: Cultural Heritage

Cultural heritage laws provide opportunities to use:

- **intangible heritage provisions** to formally protect traditional knowledge in relation to water; and
- **tangible heritage provisions** to formally protect broader water related *landscapes* and individual *sites* themselves.

To maximise the effectiveness of cultural heritage laws in relation to water and cultural flows, **laws should explicitly refer to water-related areas and water diversion activities**. In particular, water should be explicitly mentioned in relevant definitions, for example, definitions relating to Aboriginal 'places' or 'landscapes', traditional knowledge, and areas of cultural heritage sensitivity.

Specific protection mechanisms in relation to both tangible and intangible heritage, which could benefit cultural flows and water-related culturally significant places, include:

- *registration* of both tangible and intangible heritage;
- *protection declarations* in relation to heritage that allow for restricting water use to protect heritage;
- water-related areas to be considered as areas of cultural heritage sensitivity by default, and large water diversion activities to be considered as high impact activities by default, so that large diversions of water would require the preparation of a *cultural heritage management plan;*
- *cultural heritage funds* to provide grants and loans to protect and manage heritage (so that, for example, a First Nations group might make an application for a grant or loan to acquire a water entitlement or undertake management works, for example, control of aquatic invasive species for the purposes of protecting a culturally significant water-related place);
- *power to voluntarily acquire land or water* to protect heritage, extending to compulsory acquisition if this is necessary to protect irreplaceable heritage;
- *management agreements with public agencies* managing water or land closely related to water, to ensure heritage is protected, and a formal program for doing this for all agencies (see below, Element 5); and
- *heritage to be considered* before a person carries out functions under water legislation (for example, granting a licence or adopting a plan) (see below, Element 4).

Model Provision: Protection of Intangible Cultural Heritage

Definitions relevant to Aboriginal intangible heritage

Definition of Aboriginal intangible heritage:

(1) Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.

(2) Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to in subsection (1).

Definition of environmental and ecological knowledge:

- Environmental and ecological knowledge, in relation to Aboriginal tradition, includes knowledge of medicinal and other properties of flora and fauna, minerals and other elements of the environment, including water.

Protection mechanisms relating to Aboriginal intangible heritage:

- Ability for a registered Aboriginal party, registered native title holder or a traditional owner group entity to apply for the details of any Aboriginal intangible heritage to be recorded on a formal register, with appropriate consultation to be undertaken by the applicant and the person responsible for registering the heritage (for example, the Secretary of the relevant Department);
- Aboriginal intangible heritage agreements and offences in relation to these agreements and using registered knowledge without consent (dealt with below in relation to protecting First Nations' traditional knowledge).

NB: This model provision is based on ss 4(1) and 79B of the *Aboriginal Heritage Act 2006* (Vic).

Model Provision: Presumption of Certain Water-Related Land as Culturally Significant

The following areas are areas of cultural heritage sensitivity:

(a) a river, creek or other natural watercourse (whether modified or not) in which water is contained or flows (whether permanently or from time to time), or land within 200 metres of the same;

(b) an ancient lake or land within 200 metres of an ancient lake [where ancient lakes are specifically named];

(c) a declared Ramsar wetland or land within 200 metres of a declared Ramsar wetland; and

(d) an area in which groundwater rises to the land surface, or land within 200 metres of such a location.

Protection mechanisms relating to areas of cultural heritage sensitivity include requirements to prepare and comply with cultural heritage management plans (CHMPs) for certain types of activities (for example, 'high impact activities' in Victoria) that occur in these areas.

Including certain categories of water diversion activities within the definition of 'high impact activities' would enable protection of flows that benefit areas presumed to be of cultural heritage sensitivity by requiring the preparation of CHMPs. Alternatively, rather than triggering a CHMP under cultural heritage laws, certain categories of diversions might require consideration of cultural heritage elements under water laws (see below).

NB: This model provision is based on a modified regulation of the *Aboriginal Heritage Regulations 2007* (Vic) (in relation to categories (a) to (c) of areas of cultural heritage sensitivity).

Model Provisions: Options for Resourcing Cultural Flows Implementation: Funds, Grants, Loans and Acquisition in Relation to Aboriginal 'Places' that are Related to Water

The provisions below relate to the making of payments (as grants or loans) from a cultural heritage fund that is established under cultural heritage legislation, into which fees payable under that legislation must be directed. They also relate to the ability of a statutory cultural heritage council to accept gifts of assets that would help protect cultural heritage related to water, and acquire land and water to protect cultural heritage related to water.

1. Payments out of the Aboriginal Cultural Heritage Fund

(1) For the purposes of this section, Aboriginal cultural heritage includes:

(2) The Secretary may pay out of the Aboriginal Cultural Heritage Fund any money—

- (a) to provide assistance generally for the protection and management of Aboriginal cultural heritage; or
- (b) to provide assistance generally for the conservation, protection and management of an area to which a protection declaration relates; or
- (c) to make grants for the purposes of protecting and managing Aboriginal cultural heritage; or
- (d) to do anything else authorised by this Act.

(3) The Council may pay out of the Aboriginal Cultural Heritage Fund any money—

- (a) to make loans for the purposes of protecting and managing Aboriginal cultural heritage; or
- (b) to acquire any land or other assets, including entitlements to water; or
- (c) to do anything else authorised by this Act.

2. Power of Council to accept gifts

(1) The Council may accept a gift of money, land, entitlement to water or any other asset for the purposes of protecting and managing Aboriginal cultural heritage.

(2) Any gift accepted by the Council under subsection (1) is vested in the Crown.

3. Acquisition and sale of land by Council

The Council may, with the approval of the Minister, acquire any land on which an Aboriginal place is located for the purposes of protecting and maintaining Aboriginal cultural heritage.

The Council may, with the approval of the Minister, acquire any water entitlement, the management of which may benefit an Aboriginal place for the purposes of protecting and maintaining Aboriginal cultural heritage.

4. Acquisition of Aboriginal place

(1) The Minister may acquire, by agreement or compulsory acquisition, any land that contains an Aboriginal place, or any entitlement to water, the management of which may benefit an Aboriginal place, if the Minister is satisfied that—

(a) the Aboriginal place is of such cultural heritage significance to Aboriginal people that it is irreplaceable; and

(b) no other practicable arrangements can be made to ensure the proper protection and maintenance of the Aboriginal place.

(2) Land acquired by the Minister under this section vests in the Crown.

(3) The [relevant state compulsory acquisition legislation] applies to a compulsory acquisition by the Minister under this section.

5. Grant of land

The Governor in Council, on behalf of the Crown, may grant to any registered Aboriginal party or other Aboriginal person or body for an estate in fee simple any land acquired under section 3 or 4, or any entitlement to water acquired under section 3 or 4.

6. Definition of Aboriginal place

(1) For the purposes of this Act, an Aboriginal place is an area in [state] or the coastal waters of [state] that is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in [state].

(2) For the purposes of subsection (1), area includes any one or more of the following—

(a) an area of land;

(b) an expanse of water;

(c) a natural feature, formation or landscape;

(d) an archaeological site, feature or deposit;

(e) the area immediately surrounding any thing referred to in paragraphs (c) and (d), to the extent that it cannot be separated from the thing without diminishing or destroying the cultural heritage significance attached to the thing by Aboriginal people;

(f) land set aside for the purpose of enabling Aboriginal ancestral remains to be re-interred or otherwise deposited on a permanent basis;

(g) a building or structure.

NB: This model provision is based on a modified regulation of the *Aboriginal Heritage Act 2006* (Vic) ss 5, 31, 32, 158D, 158F, and 158G.

Element 3: Environmental Protection and Land Use Laws

Environmental laws can sometimes be in tension with First Nations' cultures and objectives, particularly where they do not recognise the importance of First Nations' roles in the landscape. However, environmental and broader land use laws also offer numerous opportunities for increasing the influence of First Nations in relation to water-related aspects of the environment. At the same time, they can protect the ecological knowledge that First Nations bring to the implementation of these laws.

A range of laws related to environmental protection and land use are relevant here, including:

- **Biodiversity laws and land clearing laws** that focus on protecting particular aquatic or riparian species that may have cultural significance;
- **Catchment management and planning laws** that set out a permitting process for building or undertaking other works in or near waterways (for example, building bridges, diverting rivers, or allowing development on floodplains), or that seek to manage catchments and rivers together in a culturally appropriate way, such as the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) (see further discussion in Approach 3).

Specific mechanisms under such laws that may contribute to advancing cultural flows include:

- Recognising cultural significance in assessments of the environmental significance of an action that must be assessed under environmental laws or in assessments of the value of a species or place to be protected under environmental or planning laws;
- Considering a requirement to provide cultural flows as a management action under environmental planning mechanisms and environmental permits, as relevant;
- Ensuring that water quality standards reflect First Nations' requirements, and are 'activated' in relation to listed cultural heritage, culturally significant species or aquatic places, and developments that may affect these things; and
- Requiring the consideration of the cultural significance of granting approvals for undertaking works in waterways, on floodplains, or close to groundwater-dependent ecosystems.

Note that impact assessment processes need to consider the protection of traditional knowledge (see Approach 3).

Model Provision: Water Quality Requirements that Respond to Cultural Value

New Zealand's National Policy Statement for Freshwater Management (as amended in 2017) presents one approach to recognising a First Nations-influenced view of water quality management.

New Zealand's National Policy Statement for Freshwater Management provides that regional councils must apply processes to develop freshwater objectives that consider all 'national values' and how they apply to local and regional circumstances (Policy CA2). This must include the compulsory values and 'other values'. Both of these sets of values, set out below, have a cultural component.

National significance of fresh water and Te Mana o te Wai

… Te Mana o te Wai is the integrated and holistic well-being of a freshwater body. Upholding

Te Mana o te Wai acknowledges and protects the mauri of the water. This requires that in using water you must also provide for Te Hauora o te Taiao (the health of the environment), Te Hauora o te Wai (the health of the waterbody) and Te Hauora o te Tangata (the health of the people). Te Mana o te Wai incorporates the values of tangata whenua [Maori people of a particular locality] and the wider community in relation to each water body.

Compulsory national values and uses for fresh water

… Human health for recreation – In a healthy waterbody, **people are able to connect with the water** through a range of activities such as swimming, waka, boating, fishing, **mahinga kai** and water-skiing, in a range of different flows. Matters to take into account for a healthy waterbody for human use include pathogens, clarity, deposited sediment, plant growth (from macrophytes to periphyton to phytoplankton), cyanobacteria and other toxicants.

Other national values

Natural form and character – Where people value particular natural qualities of the freshwater management unit. Matters contributing to the natural form and character of a freshwater management unit are its biological, visual and physical characteristics that are valued by the community, including:

…

(v) the presence of culturally significant species…

Mahinga kai – Kai are safe to harvest and eat. Mahinga kai generally refers to indigenous freshwater species that have traditionally been used as food, tools, or other resources. It also refers to the places those species are found and to the act of catching them. Mahinga kai provide food for the people of the rohe and these sites give an indication of the overall health of the water. For this value, kai would be safe to harvest and eat. Transfer of knowledge would occur about the preparation, storage and cooking of kai. In freshwater management units that are used for providing mahinga kai, the desired species are plentiful enough for long-term harvest and the range of desired species is present across all life stages.

Mahinga kai – Kei te ora te mauri (the mauri of the place is intact). For this value, freshwater resources would be available and able to be used for customary use. In freshwater management units that are valued for providing mahinga kai, resources would be available for use, customary practices able to be exercised to the extent desired, and tikanga and preferred methods are able to be practised.

Wai tapu – Wai tapu represent the places where rituals and ceremonies are performed, or where there is special significance to iwi/hapū. Rituals and ceremonies include, but are not limited to, tohi (baptism), karakia (prayer), waerea (protective incantation), whakatapu (placing of raahui), whakanoa (removal of raahui), and tuku iho (gifting of knowledge and resources for future generations). In providing for this value, the wai tapu would be free from human and animal waste, contaminants and excess sediment, with valued features and unique properties of the wai protected. Other matters that may be important are that there is no artificial mixing of the wai tapu and identified taonga in the wai are protected.

NB: These model provisions are extracts from New Zealand's National Policy Statement for Freshwater Management (as amended in 2017).

Model Provision: Thresholds of Environmental Significance that Include Cultural Components

Some statutory thresholds of environmental significance—that is, levels of environmental impact above which special assessments, and potentially mitigation measures, are required—may be construed as including a cultural component. That is, they require assessment of some form of cultural impact. The findings of this assessment could have implications ranging from whether the project will be approved to the conditions it will be subject to if approved and/or the structure of the arrangements for obtaining Free, Prior and Informed Consent that will be used. In most cases, the consideration of cultural impact should be made more explicit in environmental legislation.

Some environmental legislation includes cultural matters through the concept of the 'environment' or 'environmental value', or considerations that are relevant to determining the significance of an impact. In New South Wales, for example, 'the environment' for the purposes of its Environmental Planning and Assessment Act 1979 is defined as 'all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings' (s 4).

Sometimes the connection between cultural elements and environmental significance can be more indirect, as below:

Requirement for approval of developments with a significant impact on water resources

(1) A constitutional corporation, the Commonwealth or a Commonwealth agency must not take an action if:

(a) the action involves:

(i) coal seam gas development; or

(ii) large coal mining development; and

(b) the action:

(i) has or will have a significant impact on a water resource; or

(ii) is likely to have a significant impact on a water resource.

…

Such a provision is accompanied by:

- A provision that states that this prohibition does not apply if the action is approved under the environmental impact assessment provisions of the legislation;
- A definition of the environment (or in the case above, water resource) that includes a cultural component, for example:

environment includes:

(a) ecosystems and their constituent parts, including people and communities; and

(b) natural and physical resources; and

(c) the qualities and characteristics of locations, places and areas; and

(d) heritage values of places; and

(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).

water resource means:

(a) surface water or ground water; or

(b) a watercourse, lake, wetland or aquifer (whether or not it currently has water in it);

and includes all aspects of the water resource (including water, organisms and other

components and ecosystems that contribute to the physical state and environmental value of the water resource). [NB: 'environmental value' arguably includes cultural value, given the definition of the environment above].

- A policy statement that sets out the way that cultural value is considered, for example:

  [5.2] An action is likely to have a significant impact on a water resource if there is a real or not remote chance or possibility that it will directly or indirectly result in a change to:

  • the hydrology of a water resource,

  • the water quality of a water resource,

  that is of sufficient scale or intensity as to reduce the current or future utility of the water resource for third party users, including environmental and other public benefit outcomes, or to create a material risk of such reduction in utility occurring…

  [5.2.1] It is important to consider the value of the water resource in determining whether the impacts of a proposed action on a water resource are likely to be significant. The key factor that will be relevant in determining the value of a water resource will be its utility for all third party uses, including environmental and other public benefit outcomes … Such outcomes include:

  - provisioning services (e.g. use by other industries and use as drinking water);
  - regulating services (such as the climate regulation or the stabilisation of coastal systems);
  - cultural services (including recreation and tourism, science and education); and
  - supporting services (e.g. maintenance of ecosystem function).

  Definition:

  environmental and other public benefit outcomes – environmental and other public benefit outcomes are defined as part of the water planning process, are specified in water plans and may include a number of aspects, including:

  - environmental outcomes: maintaining ecosystem function (e.g. through periodic inundation of floodplain wetlands); biodiversity, water quality, river health targets; and
  - other public benefits: mitigating pollution, public health (e.g. limiting noxious algal blooms), indigenous and cultural values, recreation, fisheries, tourism, navigation and amenity values.

NB: This model provision is based on *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 24D and 528, and *Significant Impact Guidelines 1.3: Coal Seam Gas and Large Coal Mining Developments—Impacts on Water Resources* (December 2013) [5.2.1], available at http://www.environment.gov.au/system/files/resources/d078caf3-3923-4416-a743-0988ac3f1ee1/files/sig-water-resources.pdf.

An expanded understanding of a threshold of impact for the purposes of environmental legislation could build on the Australian Panel of Environmental Experts' recommendation that environmental law include an obligation to assess the impacts of a proposed action on First Nations' interests, and depending on the extent of the predicted impact, provide an obligation to seek consent that ranges from consultation and accommodation to a veto right:

> Australian environmental law should include the principle of Free, Prior and Informed Consent by Aboriginal communities in actions significantly affecting them or their interests. The operation of that right might be framed in the following manner:
>
> …
>
> - An obligation operating along a spectrum from consultation to accommodation or veto, depending on the circumstances (such as the nature of rights and interests affected, the scale of actions, and so on).
> - A right attached to environmental actions at key points of decision-making cycles, such as the referral stage of proposals, the bioregional assessment and planning stages of landscape management, or nomination for heritage listing.
> - A right attached to those stages where an Aboriginal community can show their interests are likely to be affected significantly, specifically as those interested are expressed in impacts on connections to land or resources. 'Connection' should be understood in a wide, rather than narrow, sense.

NB: This model provision is based on a recommendation on p 29 of Australian Panel of Experts on Environmental Law, *Democracy and the Environment: Technical Paper 8* (April 2017), available at http://apeel.org.au/papers.

Model Provision: Conditions on Approvals Under Environment Protection Laws

This model provision aims to suggest the possible form of a condition of an environmental approval that could result from an assessment of environmental significance that included consideration of cultural matters.

Note that this model provision assumes that FPIC has been obtained pursuant to appropriate and comprehensive environmental impact assessment procedures, and that the project's impacts are broadly acceptable to affected First Nations. Here, the project is assumed to be a resources extraction operation requiring a water management plan, where:

- the 'water resource' has very high value due to its indigenous and cultural values; therefore
- even a moderate and uncertain impact to the water resource is deemed to be 'significant'; and
- the result of the assessment of this impact, which led to the approval, was that this impact was ultimately only acceptable to relevant First Nations on the basis of ongoing monitoring of impacts not only to the water resource directly, but to the cultural values that characterised that water resource.

Water management and monitoring plan

At least 12 months prior to commencing [operational activities], the approval holder must submit to the Minister for approval a Water Management and Monitoring Plan (WMMP). The WMMP must contain the following:

(1) details of a groundwater monitoring network that includes:
   (a) control monitoring sites;
   (b) sufficient bores to monitor potential impacts on the [aquifer] (whether inside or outside the Project Area);
   (c) a rationale for the design of the monitoring network with respect to the nature of potential impacts and the location and occurrence of Matters of National Environmental Significance (whether inside or outside the Project Area); and
   (d) details of consultation undertaken with relevant Aboriginal and Torres Strait Islander persons to ensure that the design of the monitoring network could capture impacts to the cultural value of water resources.

(2) baseline monitoring data;

(3) details of proposed trigger values for detecting impacts on [characteristics of water resources] and a description of how and when they will be finalised and subsequently reviewed in accordance with state approvals and in consultation with relevant Aboriginal and Torres Strait Islander persons;

(4) details of the management actions and corrective measures, including cease-work and commencement of activities to remediate aspects of the water resource with cultural values (as appropriate), which will occur at each identified trigger value

(5) details of the Aboriginal or Torres Strait Islander persons responsible for overseeing implementation of monitoring and management activities directed at the cultural value of the water resource;

(6) details of the timeframe for a regular review of the WMMP in accordance with the requirements of the environmental authority issued under the [legislation] and in consultation with relevant Aboriginal and Torres Strait Islander persons;

(7) provisions to make monitoring data available to [relevant government agencies] and relevant Aboriginal and Torres Strait Islander persons;

(8) provisions to make monitoring results publicly available on the approval holder's website for the life of the project; and

(9) a peer review by a suitably qualified independent expert approved by the Minister in writing, and a table of changes made in response to the peer review.

Funding for protection of Aboriginal and Torres Strait Islander cultural values in water resources

(10) The approval holder must establish and/or contribute to a pool of funds established for the better protection of the cultural values to Aboriginal or Torres Strait Island persons of water resources, including the protection of water-related places protected under [cultural heritage legislation];

(11) The mechanism to establish and/or contribute to a pool of funds, including terms of reference to support a regional approach, funding mechanisms and an initial work plan, must be provided to the Minister for approval three months prior to commencement of [operations]. The mechanism may be in the form of a trust fund, or other mechanism/s as agreed by the Minister in writing, in consultation with relevant Aboriginal and Torres

Strait Islander persons; and

(12) The approval holder must contribute $100 000 (GST exclusive) per annum for 10 consecutive years to the pool of funds beginning from commencement of [operations]. The approval holder must provide notice of the establishment of and/or contribution to the pool of funds to the Department in writing prior to commencement of mining activities. Documentary evidence must be provided to the Department showing that the annual financial contributions to the pool of funds have been provided within 30 calendar days of each payment.

NB: This model provision is based on the approval of the Carmichael Coal Mine and Rail Infrastructure Project, Queensland (EPBC 2010/5736), which provides for development of certain components in consultation with state government agencies, and provides for obligations to fund biodiversity protection activities, but does not apply similar mechanisms to cultural values.

Element 4: Water Law Rules About Planning and Managing Water Resources

Water law rules about planning and managing water resources (state, inter-state, and federal) provide opportunities for First Nations to influence water resources across a region or in specific areas without holding specific water rights. However, it should be noted that this would not result in the same degree of direct control over an entitlement as would be the case under Approach 1. The following types of water law planning and management rules provide scope for protecting 'in situ' water for cultural purposes:

- extraction caps:
  - over large areas, which are either permanent (for example, sustainable diversion limits) or temporary (for example, seasonal allocations);
  - over small areas, for example, buffer zones/site-based cease to pump rules that prohibit extraction in certain places/at certain times to protect culturally significant flows;
- **water trading rules and storage management rules** that influence how water moves from one place to another;
- **rules about building water-related infrastructure**, for example, ways to direct water 'savings' from projects to increase water use efficiency on farms to cultural objectives, and ways to ensure that infrastructure is not built in culturally inappropriate places or otherwise harms cultural flows; and
- **rules about licensing/authorising individual activities**, for example, individual extractions or the construction of individual works such as bores.

Water planning rules may include the rules above, as well as overarching objectives and other matters. In addition to providing for these kinds of substantive protections for culturally significant water places and flows, water planning rules should incorporate First Nations' objectives and associated strategies. In other cases, the relevant rules will be set out in legislation or regulations.

Model Provision: Cultural Significance as a Consideration Relevant to Water Planning and Entitlement Decisions

Requiring consideration of cultural significance in water planning and licensing is one way to protect 'in situ' water that is culturally significant. It also presents as a way to ensure that stand-alone water entitlements for cultural flows (see) can be defended against potential third party impacts.

General provision applicable to all functions

It is the duty of all persons exercising functions under this Act, including in relation to water plans and entitlements, to take all reasonable steps to do so in accordance with, and so as to promote, the following principles:

(a) geographical and other features of Aboriginal significance should be protected; and

(b) flows of water that sustain geographical and other features of Aboriginal significance should be protected.

In exercising a function relating to water resources plans or entitlements to take water, the person exercising that function must record the way in which that person has taken into account principles (a) and (b).

Provision specific to licensing/trading

In considering an application [for a new entitlement/licence or to trade an existing entitlement/licence], the Minister must have regard to the following matters:

(c) …

(d) any adverse effect that the allocation or use of water under the entitlement is likely to have on—

(i) existing authorised uses of water; or

(ii) the needs of traditional owner(s) of lands that may be affected by the use; and

(e) whether the proposed source of water is within [buffer distance] of an area of cultural heritage sensitivity under the [cultural heritage legislation]…

Note that the Basin Plan for the Murray-Darling Basin (Chapter 10 Part 14) contains extensive provisions requiring a water resource plan to identify 'objectives' and 'outcomes' of 'Indigenous people in relation to managing the water resources of the water resource plan area'. It also requires that '[a] water resource plan must be prepared having regard to the views of Indigenous people with respect to cultural flows' (cl 10.54). Detailed resources dealing with these provisions are available in the Murray-Darling Basin Authority's Part 14 Guidelines: https://www.mdba.gov.au/sites/default/files/pubs/D17-6996-WRP-requirements-Part-14-Aboriginal.docx.

NB: The initial model provisions given above are based on elements of ss 5 and 9 of the *Water Management Act 2000* (NSW) (in relation to the principle of protecting features of Aboriginal significance), s 71C of the *Water Act 2000* (NT) (in relation to making public the reasons for a decision related to extraction); and s 40(1) of the *Water Act 1989* (Vic).

Model Provision: Culturally Significant Water-Dependent Sites as an Element of a Cap on Extraction (In the Form of a Buffer Zone Around a Site or Maximum Water Level Lowering)

Rules for water supply works located near groundwater dependent culturally significant sites

(1) A water supply work approval must not be granted or amended to authorise the construction of a water supply work which, in the Minister's opinion, is located within:

(a) 100 metres of a groundwater dependent culturally significant site in the case of a water supply work solely for basic landholder rights; or

(b) 200 metres of a groundwater dependent culturally significant site in the case of a water supply work not solely for basic landholder rights.

(2) The distance restrictions specified in subclause (1) do not apply to the granting or amendment of a water supply work approval if the Minister, in consultation with the relevant traditional owner(s), is satisfied that the location of the water supply work at a lesser distance would result in no more than a minimal impact on these water sources and their groundwater dependent culturally significant sites.

NB: This model provision is based on rule 42 of the Water Sharing Plan for the Greater Metropolitan Region Groundwater Sources 2011 (NSW).

Rules for extraction licences in relation to water table levels required to support culturally significant sites:

(1) A water licence is not to be granted unless the Minister is satisfied that adequate arrangements are in force to ensure that no more than minimal harm will be done to any water source as a consequence of water being taken from the water source under the licence.

(2) For the purposes of sub-section (1), the Minister must consider the following thresholds when determining whether the predicted impacts of granting a licence will cause no more than minimal harm:

(a) Less than or equal to a 10% cumulative variation in the water table, 40m from any;

(i) high priority groundwater dependent ecosystem; or

(ii) high priority culturally significant site;

listed in the schedule of the relevant water sharing plan, is acceptable.

(b) If a greater impact than the threshold identified in paragraph (a) is predicted, then appropriate studies will need to demonstrate to the Minister's satisfaction that the variation will not prevent the long-term viability of the dependent ecosystem or significant site.

(3) For the purposes of sub-section (2), 'appropriate studies' on the potential impacts of water table changes greater than 10% are to include an identification of the extent and location of the asset, the predicted range of water table changes at the asset due to the activity, the groundwater interaction processes that affect the asset, the reliance of the asset on groundwater, the condition and resilience of the asset in relation to water table changes and the long-term state of the asset due to these changes.

NB: This model provision is based on s 63 of the *Water Management Act 2000* (NSW) (in relation to the prohibition on more than minimal harm) and the NSW Aquifer Interference Policy 2012 – Minimal Impact Considerations for Aquifer Interference Activities (highly productive alluvial groundwater sources).

Element 5: Common Law or Statutory Agreements Between First Nations and Other Parties

Common law or statutory agreements between First Nations and other parties that are involved in water management (public agencies, international or local NGOs, public land managers, or other private landholders) may be used to deliver First Nations' objectives in relation to water (see Part 4, WP1 'Private Agreements'). A contract is a common law agreement (and a memorandum of understanding is its non-legally binding form); whereas statutory agreements are specifically set out in legislation (for example, types of cultural heritage and environmental planning agreements). Such agreements could approximate the effect of law/policy reform that seeks to achieve these outcomes in a more formal and lasting way. It is likely easier to terminate a contract than it is to change a law.

Model Provision: Statutory Conservation Agreements Dealing with Watering of Private Land or Use of Private Land that Affects Water

Statutory land use agreements for conservation and restoration purposes could be used by First Nations people, including in partnership with other landowners, to:

- undertake water management on land that creates both cultural and environmental benefits and creates income for First Nations. This could relate to regimes such as that for creating biodiversity credits under biodiversity stewardship agreements or obtaining funding under conservation agreements under the new Biodiversity Conservation Act 2016 (NSW), supported by funding from the $240 million Biodiversity Conservation Trust; or
- restricting activities on land that would impair water quality or change the timing or quantity of water flows (ie to protect in situ cultural flows).

Where First Nations peoples hold the relevant land to be watered, they could enter into an agreement with the relevant Minister. Where First Nations people seek to undertake watering on land owned by others, this may be supported by the relevant legislation (see below). However, this should also be accompanied by a common law agreement between the Nation group and the land holder to ensure pass-through of a clear proportion of the funding that the government gives to the owner of the land to the First Nations partner group undertaking management.

Provisions for conservation agreement and stewardship payments

(1) A conservation agreement may contain any of the following terms, binding on the owner from time to time of the land to which it applies:

(a) restricting development on the land,

(b) requiring the owner to refrain from or not to permit specified activities on the land,

(c) requiring the owner to carry out specified activities or do specified things,

(d) requiring the owner to permit access to the land by specified persons, including traditional owners,

(e) requiring the owner to contribute towards costs incurred which relate to the land or

the agreement,

(f) specifying the manner in which any money provided to the owner under the agreement is to be applied by the owner,

(g) requiring the owner to repay money paid to the owner under the agreement if a specified breach of the agreement occurs,

(h) providing for any other matter relating to the conservation or enhancement of the land.

(2) A conservation agreement may contain terms, binding on the Biodiversity Conservation Trust:

(a) requiring the Trust to provide financial assistance, technical advice or other assistance, or

(b) requiring the Trust to carry out specified activities or do specified things, or

(c) providing for any other matter relating to the conservation or enhancement of the land.

(3) For the purposes of this section, 'activities' relating to land includes activities that take water from the land or activities on land that affect the quality or quantity of water resources.

Provisions for covenant that restricts activities on land that could affect water

(1) The owner of any land which the Trust considers to be:

(a) ecologically significant,

(b) of natural interest or beauty,

(c) of historic interest,

(d) of cultural significance, or

(e) of importance in relation to the conservation of wildlife or native plants, or aquatic systems related to the land,

may, subject to obtaining the Minister's approval thereof, enter into a covenant with the Trust which binds him as to the development or use of the land or any part thereof or the conservation or care of any bushland trees rock formations buildings or other objects on the land, or water resources that may be affected by activities on the land.

[Note: in relation to water resources, relevant use of the land includes irrigation of the land or refraining from irrigation of the land in certain ways.]

(2) A covenant under this section may include provision for the Trust, its officers, agents or nominees or members of the public generally (including traditional owners) to enter the land and to remain thereon for certain purposes.

NB: These model provisions are based on s 5.22 of the *Biodiversity Conservation Act 2016* (NSW) and s 3A of the *Victorian Conservation Trust Act 1972* (Vic).

Model Provision: Statutory Conservation Agreements Dealing with Watering of Public Land or Use of Public Land that Affects Water

(1) A public land manager may enter into an Aboriginal cultural heritage land management agreement with a registered Aboriginal party for the purposes of managing or protecting Aboriginal cultural heritage in a specified area in the conduct of land management activities or activities relating to the management of water on land.

(2) Within 12 months of the commencement of this section, a public land manager must consult with any registered Aboriginal party in relation to the public land manager's land to determine whether such registered Aboriginal party would consider entering a cultural heritage land management agreement.

(3) For the purposes of this section, 'public land manager' means any of the following—

- (a) a committee of management;
- (b) the Secretary to the Department of Environment, Land, Water and Planning;
- (c) a municipal council;
- (d) Parks Victoria;
- (e) VicRoads;
- (f) VicTrack;
- (g) a water authority.

NB: This model provision is based on s 74A and the definition of 'public land manager' in the *Aboriginal Heritage Act 2006* (Vic).

Common Law Agreements with Private Land Owners

Common law partnership agreements with private entities (such as conservation NGOs) could also be used by First Nations people to undertake water management that creates both cultural and environmental benefits. These agreements could apply where:

- First Nations hold land in some form, and a conservation partner can provide support in the form of assistance with healthy Country planning/healthy waters planning, specialised technical expertise, access to water testing equipment, or funding for water management activities; or
- A conservation partner holds land and may provide resources and funding for water management activities, and a Nation group can provide traditional knowledge about land and water management practices and on Country implementation of management.

Agreements of this sort could include provisions for the following elements:

- joint development of a management and monitoring and evaluation plans e.g. through community workshops;
- involvement of other partners, e.g. state and local government land management agencies that can provide funding, data and training; Land Councils that can provide ranger program support; and philanthropic organisations that can provide funding;
- site surveys of culturally significant water-related sites with a view to applying for cultural heritage protections (see above) and forming the evidence base for further funding

applications;

- management activities to be undertaken in relation to culturally significant water sources, e.g. fencing to exclude feral animals;
- associated activities to be undertaken, e.g. youth engagement, community education, traditional knowledge communication and economic opportunities;
- governance arrangements; and
- funding arrangements.

NB: This model provision is based on the *Mimal Healthy Country Plan 2017-2027* (Mimal Land Management Aboriginal Corporation), developed in partnership with Bush Heritage Australia, a national conservation NGO.

Element 6: First Nations' Ecological Knowledge Protections

There are various options for protecting First Nations' ecological and other knowledge related to water. This section will canvass agreements in relation to intangible Aboriginal heritage under cultural heritage legislation. To be effective, this option would require First Nations to register the knowledge to be protected under the legislation. Doing so would make effective a prohibition on making commercial or other use of that knowledge without consent, and associated agreement-making processes. Other options to protect traditional knowledge are dealt with in Approach 3 (Element 5) in relation to models of co-governance.

Model Provision: Protecting Traditional Knowledge Using Cultural Heritage Arrangements

(1) An Aboriginal intangible heritage agreement is an agreement relating to registered Aboriginal intangible heritage made between any person or body and—a registered Aboriginal party; or

  (a) a registered native title holder; or

  (b) a traditional owner group entity.

(2) An Aboriginal intangible heritage agreement may deal with any of the following—

  (a) the management, protection or conservation of Aboriginal intangible heritage;

  (b) the research or publication of Aboriginal intangible heritage;

  (c) the development or commercial use of Aboriginal intangible heritage;

  (d) the rights of traditional owners to use and commercially exploit Aboriginal intangible heritage, including anything produced from the research and development of Aboriginal intangible heritage;

  (e) the compensation to be paid to traditional owners for the research, development and commercial use of Aboriginal intangible heritage.

These provisions would also be accompanied by complementary provisions to:

- prescribe a format for the agreement;
- provide for the registration of agreements;

- make it an offence to use any registered Aboriginal intangible heritage for commercial purposes without the consent of the relevant Aboriginal party to the agreement (NB: it may be appropriate to consider non-commercial types of use that should also be prohibited in the same way, e.g. use of the knowledge by a government agency for water management purposes without consent); and
- make it an offence for a party to a registered Aboriginal intangible heritage agreement to fail to comply with the conditions of the agreement.

NB: This model provision is based on a s 79D(1) and (2) of the *Aboriginal Heritage Act 2006* (Vic).

Organisational Form and Context

Environmental protection and water laws often provide little guidance to government or project proponents on identifying an appropriate First Nations person to speak for/as Country, and potentially allowing for an inappropriate person to be so identified. Similarly, private contracts can be concluded by any person, regardless of any formal status as a First Nations representative. By contrast, cultural heritage laws tend to provide specific organisational entry-points for Nation groups (for example, 'registered Aboriginal parties') that may restrict those who can be formally 'heard'.

In lobbying for change, First Nations should consider the degree to which it is appropriate to guide governments as to the appropriate entities or groups that may represent them. This may arise, for example, in introducing provisions for First Nations:

- nominees to water planning committees or advisory committees under environmental laws;
- applicants nominating culturally significant species for listing under environmental laws or culturally significant places under town planning or heritage laws other than those specifically directed to Aboriginal cultural heritage; and
- responses to calls for public comment in relation to proposals to approve project under environmental laws or draft water plans, etc.

Pathways to Broader Adoption

Modular and Incremental Approach vs Lobbying for a 'Package' of Reforms

The opportunities comprising this approach are modular. Although each of them could be pursued in isolation, this will not maximise the benefits of this approach. Pursuing multiple opportunities together, as a 'package', would result in greater First Nations' influence and a more coherent reform strategy. The present attention to First Nations' water issues (reflected, for example, in the funding for the Cultural Flows Research Project as a whole, and in the Productivity Commission's 2017 draft report assessing progress against the NWI) could represent an opportune time to pursue an integrated package of reforms. Alternatively, this approach could be pursued incrementally, seeking small changes when appropriate opportunities for law and policy reform arise. However, an incremental approach risks incoherent reforms over time and should be avoided if possible.

A Clear Message About the Key Rationale for Changing Different Laws and the Conceptual Links Between Laws

Increasing influence in the water landscape touches on many laws. This creates potential for the message about reform to seem fragmented. A reform 'package' may be presented coherently using clear messages about what needs to change about each area of law, and emphasising the logical links between laws. This may help reduce the risk that important areas of reform are overlooked or perceived as dispensable.

How to Consider Opportunities Presented by this Approach in a Particular Jurisdiction

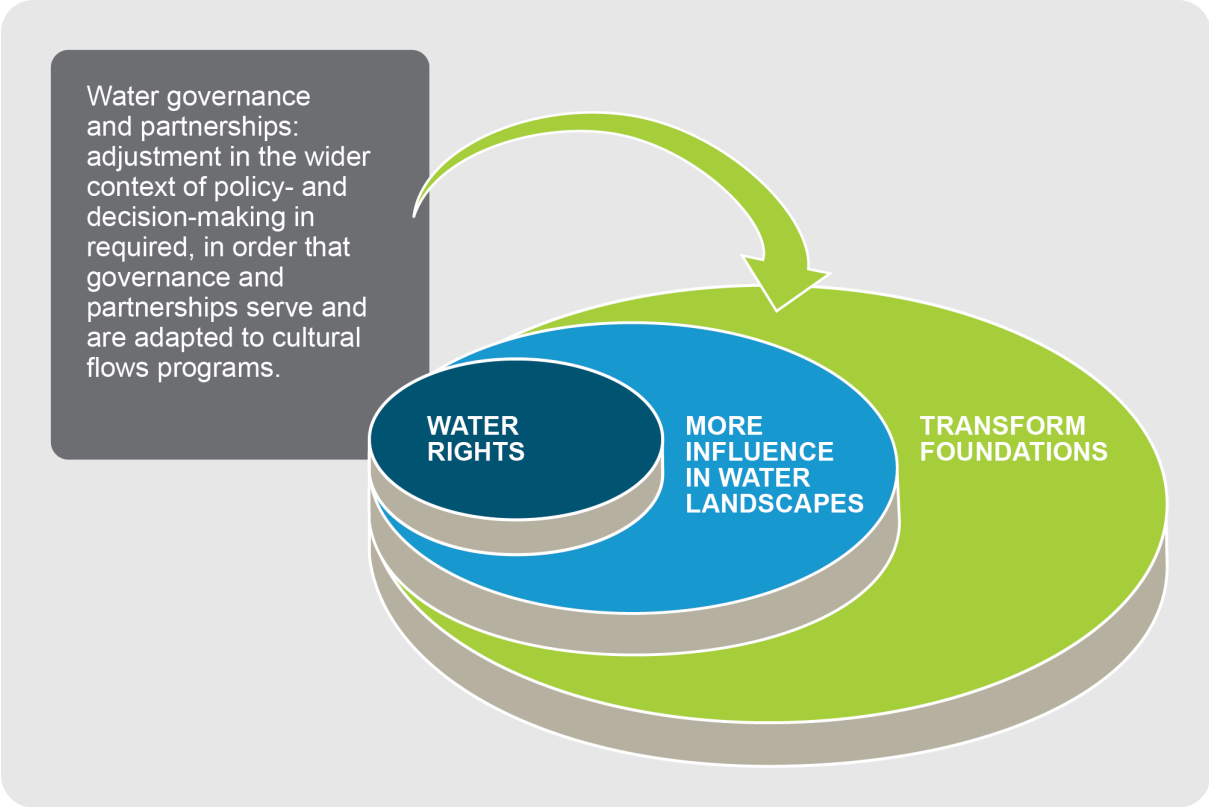
A Nation group could evaluate the implications of this approach in their jurisdiction by using the tables set out in WP2 to:

- consider each 'leading edge' mechanism and the extent to which that mechanism is present in their jurisdiction (either with legal advice or in conference with state agencies);
- consider the degree to which the existing statutory language in the Commonwealth, state or territory laws could be interpreted to cover water resources or cultural significance, for example. If this is possible, but is not being done at present (where, for example, the historical use of a mechanism has been restricted to land), it may be that only a change in agency policy could result in greater influence for First Nations. Alternatively, if existing statutory language could not be interpreted to cover the broader contexts discussed here, it may be that legislative change is required.

APPROACH 3

Transform Foundations

Figure 6: Transform foundational governance frameworks for cultural flows



This diagram indicates how water governance and the building and delivering of partnerships are a key supporting basis for cultural flows. There are established governance arrangements for water, but reform is needed in order to better fit cultural flows water rights models and complementary landscape legal and policy frameworks.

Water governance concerns setting the wider rules, parameters and conditions to achieve the best out of cultural flows programs.

Ongoing building and refinement of partnerships will be crucial, including at various levels ranging from the operational through to political agreements and treaty-making.

Governance and partnerships feed back into what water rights systems, the broader set of influential laws and policy, and institutional behaviours can and will deliver. Hence, governance and partnerships are about changing relationships, underpinning concepts and practices so that cultural flows are an established part of water management.

Summary of the Approach

Cultural flows cannot function without appropriate and facilitative governance frameworks, in relation to which rights are exercised, duties performed, preferences and policies articulated, actions undertaken, conduct occurs, and organisations operate. To put this another way, there are governance arrangements that do currently exist – including government, water authorities, First Nations' organisations, water markets and water planning, environmental imperatives, and so on – that are integral to how water management works. This includes water management based on the 'core' concerns of water rights and interests, as well as matters concerned with the broader management of water landscapes, as we show in Approaches 1 and 2 above. Cultural flows cannot and do not exist or operate in a vacuum, but rather in an inherited governance framework. The current Australian framework is not, however, well-adapted to First Nations' rights, interests or perspectives in water, as these have been all but ignored in the history of settler water law in Australia. Relevant inroads have been made into First Nations' role in governance of water landscapes and systems, through native title, land rights, and certain water law reforms, but this has not been expressly based on models or concepts of cultural flows.

Summary: Transform Foundations

- ✔ Focus on governance
- ✔ Recognition of First Nations as customary political entities
- ✔ Governance tools and possibilities include treaty-making, human rights models, constitutional recognition, cultural assessment tools, and hybrid legal personhood
- ✔ Establish a rights-based 'floor' for cultural flows
- ✔ Recognise and protect customary knowledge as a foundation of governance
- ✔ Cultural flows programs part of tracking progress against international instruments
- ✔ Available foundations (for example, agreement-making, cultural rights)
- ✔ Potentially far-reaching
- ✔ Requires normative shift and political imagination
- ✔ Consider unevenness of 'national-building' and capacities among First Peoples
- ✔ Facilitate resource base

Cultural flows require reform of governance to enable First Nations' 'voice' in the management of water resources and water landscapes, to give that 'voice' substance and effect, and to connect governance systems to recognition, rights and duties, policy and outcomes.

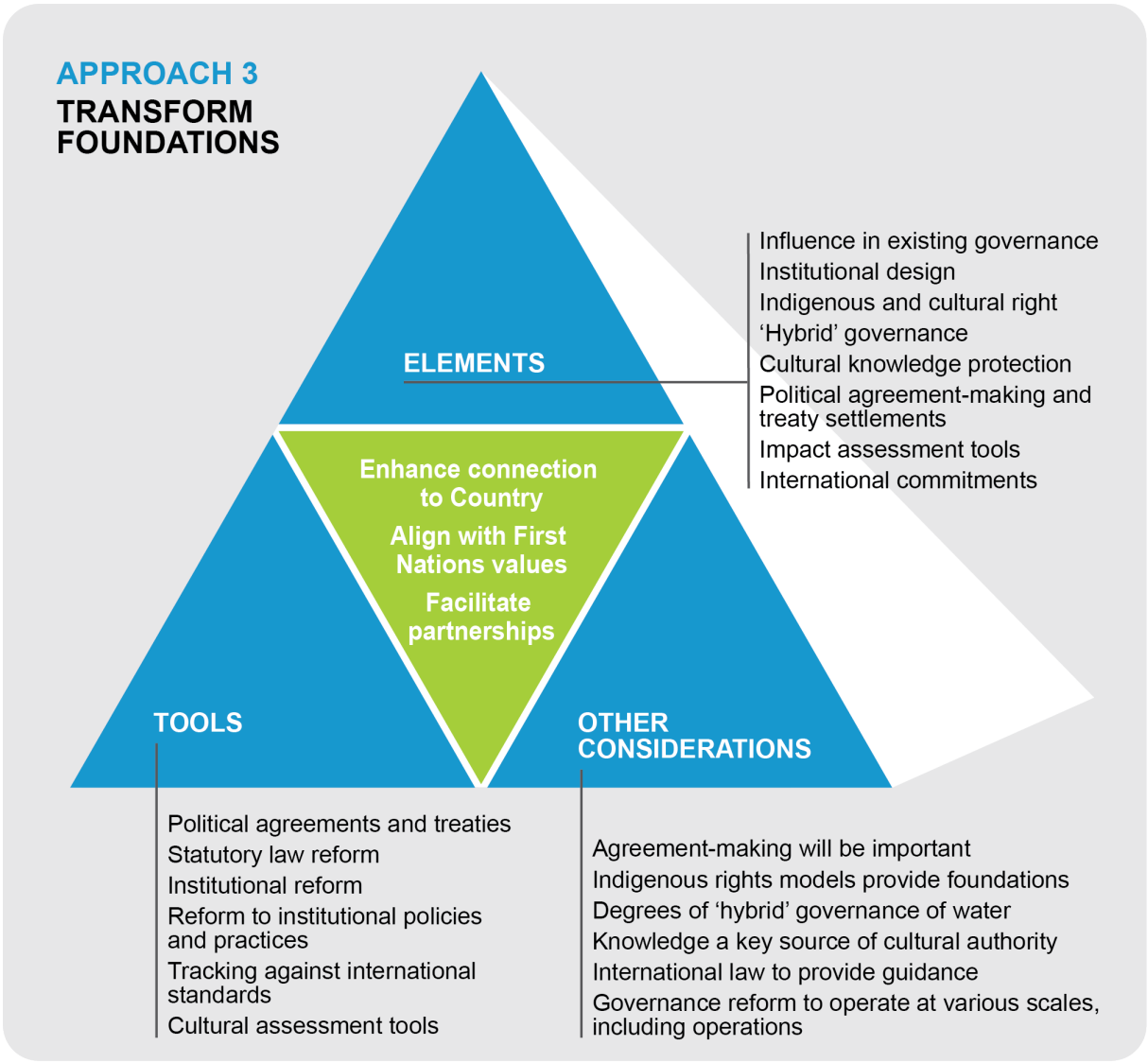
In this section, we look to certain overarching, strategic issues in governance reform that may be part of the cultural flows 'tool box'. Proceeding from the work in WP1 and WP2, these issues look to a project of *transformation* of governance, a project that is ultimately necessary because of the almost complete absence of First Nations from water law and policy arrangements, and we consider below the role and nature of the following key elements (Figure 7):

1. Representation and influence in existing governance arrangements;
2. Institutional design;
3. Underpinning norms: Indigenous and cultural rights;
4. New norms: personification and 'hybrid' governance;
5. 'Cultural knowledge' protections: protecting and rebuilding a foundation of cultural governance;

6. Political agreement-making and treaty settlements;
7. Assessment tools; and
8. International treaty implementation.

Certain governance mechanisms have already been considered in the preceding sections of this report. They include measures such as reform of water planning, proposals for cultural water holders, the use of agreements in advancing collaboration and water access, or a statutory water fund. The matters laid out in this part of the report are not exclusive of governance reform proposals expressed above. Indeed, governance measures above should be considered as part of the overall 'transformational' toolbox. They are situated elsewhere in this report because of their relationship to the subject matter of earlier parts of this report.

Figure 7: Key aspects: Transform Foundations



Key Elements and Model Provisions

Element 1: Representation and Influence in Technical and Administrative Governance Arrangements

General models of statutory representation on water governance bodies, and, in particular, representation of First Nations, are noted above. Anticipated reforms to water legislation will continue pathways of First Nations' statutory representation on water bodies, such as a dedicated Aboriginal commissioner on the Victorian Environmental Water-Holder. The new Birrarung Council advising on governance of the Yarra River in Victoria will include dedicated positions for First Nations representatives. Representation of First Nations on existing water authorities and other relevant governance bodies (for example, statutory NRM bodies, or MDBA) may be appropriate and desired reforms to establish a First Nations' voice within water governance. As noted above (Approach 2), this may occur by way of statutory mandate.

These arrangements are important in establishing what might be understood as a 'baseline' First Nations' representative presence at the policy and general governance level of established water institutions. This is distinct, therefore, from establishment of new or additional First Nations' institutions involved in water management.

Additionally, there may be considerable value in establishing representative and participatory arrangements for First Nations at the level of technical, administrative or operational levels of existing water management. Influence and recognition of First Nations' values and preferences in relation to water could also be useful if they are integrated into the operational or technical measures for water governance. For example, in Victoria, water management is extensively guided in practice by terms and conditions contained in Instruments of Appointment of Storage Managers, made under s 122ZK of the *Water Act 1989* (Vic). The Storage Manager may also make Storage Management Rules.[28] These instruments and rules could, for instance, include requirements for consideration or accommodation or First Nations' water values, include First Nations' representatives into operational governance, and/or establish relevant programs in capacity building.

Model Provisions: First Nations Participation in Operational, Technical or Administrative Governance of Water

Example 1: Storage operator appointment under *Water Act 1989* (Vic)

Appointment of X Water Corporation as Storage Manager for the Y System Headworks

…

Storage Management Objectives

4. The Storage Manager must achieve the following Storage Management Objectives when carrying out its Storage Management Functions:

   …

   k. to facilitate the protection of Aboriginal cultural heritage, in accordance with relevant cultural heritage management plans and by other means.

   l. To identify and maximise opportunities for Aboriginal uses and values to be met…

Aboriginal Obligation

9.1 That within 12 months of the date of an amending Order the Storage Manager must provide to the Minister a program to identify and subsequently implement measures reasonably capable of meeting Aboriginal outcomes and objectives for the River system.

9.2 That program should include but not be limited to:

9.2.1 management of flows in a manner consistent with a plan to recognise and enable the protection and flourishing of Aboriginal connection to values and uses of water in the system;

9.2.2 development of capacity, education and training of the Aboriginal community, especially for young people, in water resources management to facilitate the program; and

9.2.3 appropriate coordination with other programs, plans and resourcing required to be implemented by the Storage Manager or other relevant natural resources agency.

9.3 The program must be prepared and implemented in partnership with [First Nations' Land or Water council] and the Aboriginal community.

…

Governance arrangements

(1) Implementation of Storage Manager functions shall occur under the supervision of formal governance arrangements, which includes representatives from all entitlement holders and key stakeholders, including…

(a) [First Nations' Land or Water council]

Element 2: Institutional Design

Design of governing institutions will be crucial to the adaptation or evolution of water governance to cultural flows. Institutions, in the broadest sense, include organisations, fundamental rules and practices, or established principles or objects. Reform and adaptation of existing institutions will likely be important to cultural flows models and tools. For example, intervention into or adaptation of water markets can be one source of cultural flows (see Approaches 1 and 2) and thereby provides a governance framework and tools for achieving First Nations' objectives. Engagement, including formal negotiation and agreement-making, with existing organisations, such as Environmental Water Holders or water corporations, represent important institutional dimensions of governance affecting or facilitating cultural flows. Amending the mandates of those organisations may be a useful or necessary reform to further these governance options.

New institutional models may be preferable to reforming existing institutions, or alongside that reform. The example of a cultural water holder is identified above (Approach 1). We express no views on the choice of the design or indeed preference for a discrete cultural water holder model. We would note, however, that a relatively wide spectrum of possibilities is available, ranging from a separate statutory entity to expansion of the functions of existing models of indigenous corporation to 'water trusts' established under general law.

An additional consideration is the emerging model of institutional design focused on corporate forms of co-management at the landscape scale. Accompanying, in particular, those legal and policy

innovations emphasising 'personification' of water systems, the corporate or organisational elements of these reforms tend to include joint management arrangements.[29] They are distinguishable from 'water holder' or 'water trust' models of governance (see Approach 1) insofar as the legal and policy focus encompasses functional areas of water landscape management, such as land-use planning or integrated catchment management, alongside (or even outside of) water resources regulation (see Approach 2).

The functional (fragmented legal/regulatory) as well as geographic (landscape, 'Country') focus of institutional design will be an important question for cultural flows governance.

Institutional design should have regard to a series of governance tasks, functions and principles in contributing to cultural flow outcomes:

- A corporate entity engaged in water transactions and managing water-holdings (see Approach 1). If so, what should that entity should look like?
- A corporate entity engaged in negotiation over operational processes (such as delivery) of water management, including water authorities. If so, what should that entity look like?
- A corporate, nongovernmental or statutory entity involved in monitoring, assessment, disputes handling, advice and/or capacity building. Broadly, this set of tasks might be said to comprise 'integrity' functions reposed in an institution(s).
- A corporate, nongovernmental or statutory entity involved in advocacy and/or enforcement of the interests of First Nation(s) in relation to water.
- A corporate, nongovernmental or statutory entity capable of assuming an integrated resource management approach, or a 'basin' management approach, to water systems.
- A corporate, nongovernmental or statutory entity with responsibility for coordinating and achieving integration of the various, often disparate, elements and/or components relevant to cultural flows management.

While certain features may be found in a single institution or body, there are other features that may best sit with different bodies or across more than one institution. For example, an entity focusing on water transactions and managing water holdings may be distinct from a body involved in advocacy, 'integrity' or coordinating tasks. In other circumstances, joint or partnership approaches may best achieve a certain task or function, for instance integrated resource management may be best approached through partnerships with catchment managers, where meaningful influence and First Nations' authority is recognised.

Element 3: Underpinning Norms: Indigenous and Cultural Rights

Governance needs to be based on foundational principles and purposes. For cultural flows, an important source of underpinning norms can be found in the principles and models of Indigenous rights, which are increasingly well established in international law, and are finding footholds in domestic Australian law and policy. Cultural flows models can find an important reference point in Indigenous rights concepts.

International instruments, such the UN Declaration on the Rights of Indigenous Peoples, reflect the importance of cultural and existential connections between Indigenous Peoples and their ancestral lands, waters, territories, and resources. This nexus between legally recognised rights and obligations, the integrity of Indigenous communities, and connections to land and places, are also evolving in international forums, including courts and tribunals.

The use of Indigenous rights models need not be exclusive of other ways of representing fundamental connections of First Nations, law, and traditional lands and waters. For example, language of sovereignty is employed in the Canadian context alongside reference to and consideration of Aboriginal rights. However, in connecting water governance frameworks to First Nations' interests and perspectives, reference to Indigenous rights is useful. Indigenous rights models have some traction already in Australian human rights law. For example, the Victorian Charter of Human Rights and Responsibilities includes protections for Aboriginal peoples' cultural rights, including 'their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs'.[30]

Application of Indigenous rights provisions to protection and/or enhancement of First Nations' connection to water may lead to refinement and adaptation of rights-based tools. Additionally, consideration needs to be given to the status and operation of Indigenous rights models and tools. For example, is broader adoption of Indigenous rights provisions in human rights law preferable, from which application can be made to water resources management? Or is a preferable approach to adapt and incorporate Indigenous rights tools into water law? How can or should Indigenous rights provisions be used to inform stand-alone 'river' or 'basin' laws? How can or should they be used to inform constitutional law reform?

Model Provision: Cultural Rights Protections in State Constitutions

1A Recognition of Aboriginal people

(1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria

(2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—

  (a) have a unique status as the descendants of Australia's first people; and

  (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and

  (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

(3) The Parliament does not intend by this section—

  (a) to create in any person any legal right or give rise to any civil cause of action; or

  (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria – other than provided for under section 1AA.

1AA Cultural rights of Aboriginal people

(1) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

  (a) to enjoy their identity and culture; and

  (b) to maintain and use their language; and

  (c) to maintain their kinship ties; and

  (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

(2) For the purposes of subsection (1)(d), 'traditional laws and customs';

(a) acknowledges that traditional laws and customs may adapt, evolve or otherwise develop;

(b) need not to have been observed or continued substantially uninterrupted since sovereignty; and

(c) need not to have been observed and acknowledged by each generation since sovereignty.

(3) A public authority must act consistently with subsection (1) in its administration, in the carrying out of its functions, and in the exercise of its powers, duties, rights and privileges.

(4) Notwithstanding anything in section 1A, subsections (1) and (2) of this section are enforceable against a public authority in a court or tribunal of competent jurisdiction.

NB: From *Constitution Act 1975 (Vic)*, s 1A and text from *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 19 and Australian Law Reform Commission, *Connection to Country Report*.[31]

Element 4: New Norms: Personification and 'Hybrid' Governance

A significant, recent innovation in water governance is the emergence of policy and regulatory frameworks attempting to synthesise First Nations' and settler models of law, obligations, custodianship and rule-making for water and water landscapes. As noted in WP1 and WP2, examples include the Whanganui River Settlement in New Zealand, the Atrato River judgement in Columbia and the Yarra River legislation in Victoria. 'Personhood' in the legal sense includes vesting the status of legal personality in a place (for example, a river), which concurrently operates as a device of recognition of First Nations' epistemic, normative and customary relation to that place. First Nations' ancestral connections to water may be represented in forms of personhood, kinship or analogous models, including obligations. Legal devices may, as in the Yarra River example, include legislative recognition of First Nations' relationships to lands, waters and place but absent the form of legal personality as part of the 'hybrid' model and representation.

The use of tools of legal personality to recognise First Nations' connections to lands, waters and places, and to establish a form of hybrid or joint status attaching to those places, is a tool of governance that may be particularly appropriate and valuable to co-management or, at the political or policy level, co-governance of water systems in which cultural flows tools are also deployed or exercised. To date, legal reform that has used the 'personification' strategy has not tended to disrupt the ordinary water rights system and there will be the unfolding need to *coordinate* governance architectures based on legal personality vested in rivers or other waters with management of water rights (including, where appropriate and feasible, cultural flows based on legal water rights, controls or conditions). The 'device' of personification operates primarily at the level of governance and other cultural flows tools (such as water rights or legal obligations benefiting cultural outcomes) would need to be integrated with it.

As the distinction between the Whanganui River and Yarra River examples shows, the model of 'hybrid' personification in law of river systems (or other waters or places) may be flexible. It may not be necessary or desired to establish additional institutional forms of legal personhood but rather legal spaces for recognition—and as appropriate, re-building—of First Nations' institutions, practices, norms and law vested in waters.

Model Provision: Legal Personhood

Example 1: extract from *Whanganui River (Settlement of Claims) Act 2017* (NZ)

12. Te Awa Tupua recognition

Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.

13. Tupua te Kawa

Tupua te Kawa comprises the intrinsic values that represent the essence of Te Awa Tupua, namely—

Ko Te Kawa Tuatahi

(a) Ko te Awa te mātāpuna o te ora: The River is the source of spiritual and physical sustenance:
Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.

Ko Te Kawa Tuarua

(b) E rere kau mai i te Awa nui mai i te Kahui Maunga ki Tangaroa: the great River flows from the mountains to the sea:
Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.

Ko Te Kawa Tuatoru

(c) Ko au te Awa, ko te Awa ko au: I am the River and the River is me:
The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being.

Ko Te Kawa Tuawhā

(d) Ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua: the small and large streams that flow into one another form one River:
Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua.

Example 2: derived from *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic)

1. Purposes

The main purposes of this Act are—

(a) to provide for the declaration of the River and certain public land in its vicinity for the purpose of protecting it as one living and integrated natural entity.

(b) to recognise and as far as practicable accommodate the customary, traditional and ancestral connections of the First Nation to the River and to establish conditions under which those connections can be flourish and, as necessary, be re-established.

12. Cultural principles

(1) Aboriginal cultural values, heritage and knowledge of the River should be acknowledged, reflected, protected and promoted.

(2) The role of the traditional owners as custodians of the River should be acknowledged through partnership, representation and involvement in policy planning and decision-making.

Element 5: Cultural Knowledge Protections

Traditional, spiritual, customary or cultural knowledge related to water is a resource of cultural, social and strategic importance. In the absence of legal interests and rights in water, or relevant occupation or rights over land, cultural knowledge is a key force connecting First Nations to water systems. Where rights and interests in land and water are recognised in law, cultural knowledge is a critical source of First Nations' law, custom, practice and connection.

Increasingly, this role of cultural knowledge is recognised in water law and practice. Hence, projects aimed at identification and reproduction of 'Indigenous values', 'uses', 'objectives' and so forth are prominent within water management, including at the statutory level.[32] UNDRIP and the CBD contain provisions for protection of cultural knowledge, in recognition of it as a central matter of water governance. Statutory protections for First Nations' knowledge in water can be found in some heritage schemes (for example as intangible heritage) (see Approach 2).

First Nations' traditional ecological knowledge and knowledge governance systems (including rules, protocols, norms, and practices) are instrumental to the distinctive and special connection of First Nations to water and Country generally. Knowledge systems and governance are indivisible from water as a resource and, where appropriately recognised in water governance, represent a key basis of autonomy and source of First Nations' *authority*. First Nations' deep role in cultural governance of water landscapes through knowledge can be said to be significant epistemological—and indeed ideological and normative—force in governance of water systems. In effect, knowledge is a cultural force, representative of First Nations' jurisdiction over lands and water, and that may have legal and policy support.[33]

Governance of First Nations' cultural knowledge in water is connected intrinsically to the governance of water resources generally. Knowledge governance is intrinsic to the existence and operation of cultural flows, including the recognition and protection of cultural knowledge as a strategic feature of water management. Whether viewed as integrated through 'Indigenous ecological knowledge' or as a discrete knowledge base (not necessarily tied to ecological knowledge), governance arrangements need to include cultural knowledge protections. Legal and policy protection for cultural knowledge is necessary to the protection of integrity and strategic value of the epistemic values represented by First Nations' knowledge. Governance strategies in relation to cultural flows and water system management should therefore also contend expressly with knowledge governance through legal, policy, procedural and educational (inter-generational and cross-cultural transmission) mechanisms.

Existing legal tools, such as protection for intellectual property, moral rights or for confidential information, may have a role to play in protecting cultural knowledge. Yet these legal protections are not necessarily always best adapted or suited to cultural knowledge in the natural resources context. Unique cultural knowledge protections have been drafted into the Ngarrindjeri Agreement and this text is a useful starting point for legal definition and protection of cultural knowledge. The legal status accorded to cultural knowledge may depend on the circumstances in which it relates to cultural flows arrangements, for example through statutory protection in water planning contexts, or contract

provisions under agreements concerning water entitlements, or stand-alone statutory protections in water legislation.

Model Provision – Cultural Knowledge

This is adapted from Steve Hemming, Daryle Rigney and Shaun Berg 'Researching on Ngarrindjeri 'Ruwe/Ruwar': Methodologies for Positive Transformation' (2010) 2 *Australian Aboriginal Studies* 92).

Cultural Knowledge means all and any cultural knowledge, whether such knowledge has been disclosed or remains undisclosed of the Indigenous group, including but not limited to:

(a) traditions, beliefs, observances, customs; or

(b) songs, music, dances, stories, ceremonies, symbols, narratives and designs;

(c) languages;

(d) spiritual knowledge;

(e) traditional economies and resources management;

(f) scientific, spatial, agricultural, technical, biological and ecological knowledge; and includes documentation or other forms of media arising there from including but not limited to archives, films, photographs, videotape or audiotape.

…

Notwithstanding any other clause in the Agreement, it is acknowledged that:

(a) [The Indigenous Group] owns all and any Cultural Knowledge; and

(b) [The Other Party] undertakes not to collect, use, disclose or handle Cultural Knowledge without the prior written consent of [the Indigenous Group]; and

(c) any report or publication resulting from the Project shall be designated as either a 'Category A Report' or a 'Category B Report' and the following shall apply:

  (i) the publication of a Category A Report shall be unrestricted and the ownership of such publication shall vest in [all Parties] as tenants in common in equal shares (except such parts of the report which constitute Cultural Knowledge included with the consent of [the Indigenous Group]; and

  (ii) the publication of a Category B Report shall be restricted to [the Other Party] and the ownership of such publication shall vest in [the Indigenous Group]; and

(d) [The Other Party] (and each of their Personnel and Students) who records Cultural Knowledge in material form does so as a mere amanuensis.

…

If the dispute relates to whether particular knowledge is Cultural Knowledge, [the Indigenous Group] has the sole and absolute discretion, to the exclusion of all other Parties to this Agreement, to determine whether such particular knowledge is Cultural Knowledge, and such determination shall be binding on each of the Parties.

Element 6: Political Agreement-Making and Treaty Settlements

Governance arrangements relating to cultural flows will likely emerge out of negotiation and agreement-making, whether at a political level or at an administrative or practical level (for example, in negotiation with specific institutions or authorities). These arrangements, or opportunities for them,

may emerge at different levels, ranging from sector-specific to regional to state-wide or national approaches. Indeed, such arrangements already occur, such as through agreements with environmental water holders or specific water authorities. Private agreement-making with water entitlement holders may also be relevant here.

Aside from localised agreement-making, cultural flows and First Nations' role in water management generally may be framed by political agreement-making between First Nations and governments. This has already occurred, in effect, in certain cases, at the regional level, such as the Noongar or Ngarrindjeri agreements. As distinct from agreements framed solely by statutory schemes, such as native title legislation, these agreements were negotiated through relatively unique processes and include broad subject-matter (including in relation to water) and were not limited to questions of land.

Political agreement-making – which may also be framed in concepts of 'treaty' or in like terms – is essentially about consensus and agreement between *polities*, or entities exercising recognised jurisdictional authority of some description.[34] This has been a matter of law since the demise of the doctrine of *terra nullius* in the *Mabo* case.[35] That authority may relate to land and natural resources, to 'intangible' resources (such as knowledge), and/or to custom, practice and relationships inhering in communities' ancestral connections to Country. Such agreement-making is now a widespread and diverse device of 'engagement, recognition and co-existence'.[36]

These processes are, as Brennan et al note, about 'political agreements that have legal consequences'.[37] To date, settlement processes established under statute, such as under the 'future act' provisions of native title legislation or under Victoria's traditional owner settlement legislation, do not equate with wide-ranging 'treaty-like' processes. These mechanisms can set up *legal* settlement which, although undoubtedly important, orientate negotiations and agreement-making toward 'finality and certainty'[38] around the subject matter prescribed by Parliament in the forms of agreement that can be made. As native title law has increasingly showed, this legalistic focus can constrain agreement-making as much as facilitate it. Political agreement-making, such as foreshadowed in the 'treaty' or 'Makarrata' concepts, is distinguishable from strictly legal settlement processes. It is necessary to recognise, as Brennan et al express it,

> ***'that the "political settlement" captured in the law is always a work in progress. Our legal and constitutional system never stands still. It is an unfolding story in which even fundamental assumptions are sometime revisited in order to move forward'.[39]***

Political agreement-making is never ultimately closed; what the law provides, rather, is to stabilise, recognise and regulate point in time relationships between parties and the dealings and expectations between them.

The issue of political agreement, or treaty, is a matter First Nations in Australia have placed in the public domain for several decades. It is notorious that Australia alone among Anglophone, common law countries established no treaty system with Aboriginal peoples through the process of colonisation and since. The concept of a treaty (or treaties) between First Nations and the Crown in Australia has ebbed and flowed. It has been revisited via the *Makarrata* model advanced under the Uluru Statement from the Heart.

In one of the few official attempts to consider the form and shape of political agreement-making between Aboriginal and non-Aboriginal peoples, the Senate Standing Committee on Legal and Constitutional Affairs in 1983 looked into legislative, constitutional, international-law and common law approaches that might underpin political settlement and agreement-making between First Nations and state interests.[40] The 1983 Senate Committee Report proposed a form of compact between the Commonwealth and Aboriginal representatives, with constitutional backing. The Committee

recommended reform of the Commonwealth Constitution to enable the making of an agreement analogous to agreements made under section 105A of the Constitution (which concern financial agreements with the States over debts) with non-exclusive, broad-ranging content.[41]

We express no view on the particular form or dynamic political agreement-making relating to water should take, other than to say that it is reasonable to anticipate that there will be (further) agreement-making in this field. Political agreement-making processes between First Nations, governments, and/or other actors will likely provide a key vehicle for development and innovation in water governance generally, including determination, among other matters, of appropriate governance tools advancing cultural flows and scales at which these may operate. The links between political negotiation and settlement and governance innovations have been evident in other jurisdictions, such as the use of 'personhood' and co-management in resolution of disputes and claims in New Zealand.

Further, it is reasonable to anticipate that resource management issues, including issues relating to land and water, will be the subject-matter of political dealings and settlement. The issue of cultural flows and First Nations' effective and substantive role in water management should be a 'pillar' of any such arrangements.

Political agreement may be part of 'comprehensive' treaty negotiations,[42] as for instance is unfolding currently in Victoria and South Australia. Alternatively, regional or sector-specific agreements may be sought as an effective response. In any case, where political agreements or treaties establish framework mechanisms for responding to matters between First Nations and the Crown, the issue of waters should be included as subject-matter in negotiation and agreement-making.

Model Provision: Regional Treaty in Respect of Rivers and Waterways – Terms of Negotiation

This has been adapted from 'Whanganui River Claims – Terms of Negotiation', https://www.govt.nz/dmsdocument/3703.pdf.

Purposes

(1) This document records the intentions of the Crown and First Nation in negotiation of a settlement in relation to claims, redress, protection and restoration of connections of the First Nation to the Rivers and Waterways designated.

(2) This document includes the following provisions, which are all integral to the Terms of Negotiation:

- (a) A Statement of Intent;
- (b) Recitals and agreed facts;
- (c) The parties;
- (d) Delivery of benefits from a negotiated settlement;
- (e) Extent and scope of formal negotiations;
- (f) Matters excluded from formal negotiations;
- (g) Conditions;
- (h) Governance entity and arrangements upon settlement;
- (i) Waiver of other avenues of redress;
- (j) Claims to be settled;
- (k) Procedures for negotiation; and

(l) Formal agreement on terms of negotiation.

Element 7: Tools for Assessments Relating to Cultural Flows

Assessment tools and procedures will be important to various tasks associated with decision-making, planning and policy-making for cultural flow programs. Assessment processes seek to collate, organise, analyse and elaborate on knowledge informing water management (and other relevant governance arrangements, such as environmental management or land use planning).

Assessment devices and methods may generally be divided into two forms. These may be quite inter-related in practice. First, there are processes for assessment of impacts of activities, uses or development on First Nations' interests and values, which comprise a form of 'cultural' impact assessment at the individual project level. Similarly, as part of this approach, strategic assessment procedures can be devised and implemented that account for and inform the impact of policies, programs or plans on First Nations' interests or values. Each case assessment typically intends to identify and quantify the extent and nature of impacts, ameliorate or mitigate them, and compensate for residual impacts considered unavoidable or inevitable.

Procedures for assessment of impacts on First Nations' interests should include comprehensive impact assessment techniques, with scope to account, in an integrated and proportionate manner, for cultural, social and environmental impacts on First Nations' lands or waters, on sacred places, and on distinctive relationships with those places. The *Akwe:Kon Guidelines*,[43] established under the Convention on Biological Diversity, are an appropriate model and starting point for development of this type of impact assessment tool within governance arrangements for cultural flows.

An assessment model borrowing from the Akwe:Kon approach would establish a prominent role for First Nations in water governance, including in processes of monitoring, information, analysis, project or program design, and ongoing supervision. First Nations' have ongoing attachments to and engagement with water systems, enhanced through cultural flows projects and planning, and providing a stable and institutional base for assessment and monitoring.

While *Akwe:Kon* is an example of assessment technique relevant to First Nations, revision of existing strategic assessment tools, having regard to the *Akwe:Kon Guidelines*, could be a focus of proactive and systematic First Nations engagement in governance. This might include, for example, amendment of integrated water assessment and planning regimes[44] operating under water legislation to expand this into cultural assessment.

Secondly, assessment procedures may identify and establish benefits and outcomes arising from First Nations' involvement and exercise of knowledge and authority in management. In this sense, assessment tools focus on positive actions and contribution, as distinct from justifiable constraints and mitigation of loss or harm. This might be expressed, alternatively, as a model of comprehensive assessment, in which rules of limitation (for example, adverse impacts to be avoided) are used alongside, and integrated with, rules of capacity and authority (for example, bi-cultural knowledge and practices identified and incorporated into management). The question of assessment, therefore, can be seen to interact with issues of cultural knowledge, as well as restoration and reparation of culture, community, Country and water systems.

A comprehensive assessment procedure may proceed from and go beyond the *Akwe:Kon* model, with a view to identifying and acting on opportunities for improved governance and innovation

generally, co-extensive with customary law and practice, as well as constraints consistent with co-existence and cultural and ecological restoration.

Current Aboriginal Waterway Assessment models represent one model of practice aiming to take a more comprehensive approach to water assessment, in which social, cultural and economic effects of assessment processes and outcomes are integral to the procedure. Although still nascent in their use and development in Australia, these models derive from assessment models based on cultural health indices, developed in New Zealand. As Tipa and Tierney have noted, cultural health assessment devices should not only add to the stock of values and indicators in good water management but also be properly integrated into water management practices and inform legal and regulatory systems.[45]

In this regard, effectively designed assessment tools, as part of cultural flows governance, provide wider governance benefits, such as integrity and performance monitoring. How First Nations' roles in impact assessment can be integrated into good governance should be considered and identified in water management regimes. General obligations to adopt and integrate such assessment methods into water management could be given legislative form and prescriptive arrangements, adapted for the needs of particular water systems, and could be formulated at the regulatory or technical level.

Comprehensive assessment tools also need to function within a framework of recognition and a cognisant principle of enabling First Nations to exercise rights to protect and manage natural resources of significance to them.[46]

Element 8: Tracking Cultural Flows Programs Against International Standards

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is the leading international instrument elaborating state obligations relating to Indigenous Peoples. As a 'soft law' instrument in the international law system, UNDRIP does not have the status of an instrument embodying binding obligations on signatory states. Its value and effect are interpretive and norm-setting. Nevertheless, UNDRIP has currency, weight and influence.[47] It was prepared and negotiated within First Nations peoples and it is part of the growing machinery of rights-setting and governance relating to First Nations in the international sphere. Alongside UNDRIP, the UN has established the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples, and the Special Rapporteur on the Rights on Indigenous Peoples. Earlier treaty mechanisms, such as International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries ('ILO Convention 169') are important foundations to the international indigenous rights framework.

Australia has endorsed UNDRIP, although has not ratified ILO Convention 169. Each contains important standards, principles and ideas governing the interactions of First Nations (indigenous peoples) and states. These instruments are reflective of the relevance and significance of international law to practices and outcomes for First Nations within states.[48] One of the main issues now outstanding in delivering on the authority and influence of instruments such as UNDRIP is implementation.[49] As Professor Megan Davis has remarked: 'what really matters in terms of impact at the end of the day is state practice: when and where states are implementing the UNDRIP and the UN mechanisms monitoring that implementation'.[50]

UNDRIP provisions and content are relevant to the development of cultural flow programs, not least because of the standard-setting qualities of that instrument and its direct import to First Nations rights and benefits associated with water, as well as land and other resources. As noted above, UNDRIP provisions can inform domestic rights-based approaches to law and governance reform. Further to incorporation of international norms into Australian laws, UNDRIP can be integral to achievement of cultural flow outcomes and programs insofar as those latter programs are a focus of UNDRIP

implementation. To that end, policy development around cultural flows ought to include monitoring and tracking against UNDRIP standards, accounting also for developments and evolution of standards elsewhere in the international domain such as in international courts and tribunals, expert bodies, or authoritative reports. The success or otherwise of cultural flows programs can also, then, be used to gauge progress by Australia in relation to various key UNDRIP provisions, such as those relating to indigenous rights to participate in decisions that affect them, rights to have a say in resource management, and rights to maintain and enjoy culture.

Pathways to Broader Adoption

Pathways to governance reform suggested by the discussion above commence from the starting point that governance operates at multiple levels (for example from the operational to general international legal principles), proceeds from existing governance arrangements, and it is 'sub-optimal' in terms of partnerships with First Nations. Overall water governance is also likely sub-optimal, such as in terms of fragmentation, coherence and integrity, and well-designed cultural flows programs may contribute to improved system functioning overall and water reform.

Parallel pathways for governance reform are likely warranted, including:

- ✓ Larger-scale reforms, such as including water management within treaty negotiations, enhanced constitutional recognition, and indigenous rights reforms;
- ✓ Reform and agreement-making at the local level, including regionally and at operational levels;
- ✓ Expansion and continued development of:
    - assessment tools,
    - cultural protections,
    - resourcing, design and capacity building of cultural flows programs;
- ✓ Development of First Nations' institutional and organisational arrangements and capacity in water management, whether in the form of 'water trust', 'water holders', or other relevant policy or operational vehicles;
- ✓ Innovations in 'co-governance' or 'hybrid' governance, such as models of recognition of bi-cultural obligations and character or 'biocultural' rights vested in Country.

Principles of Implementation of Cultural Flows Programs

The value and measure of any of the reform measures referred to above lie in their application to the given circumstances and 'operationalising' change, including at the levels of policy, land and water management practices, and indeed everyday life of lived relationships with water.

The circumstances in which any cultural flows program operates will vary according to a range of factors. Among those factors are:

- the strengths, capacities and preferences of First Nations' communities;
- the degree of regulation and modification of water systems;
- the politics of local water interests;
- the engagement and preferences of governments;
- law, policy and practice in specific jurisdictions; and
- resourcing requirements and alliance- or partnership- building.

There are, no doubt, other factors relevant to outcomes as well.

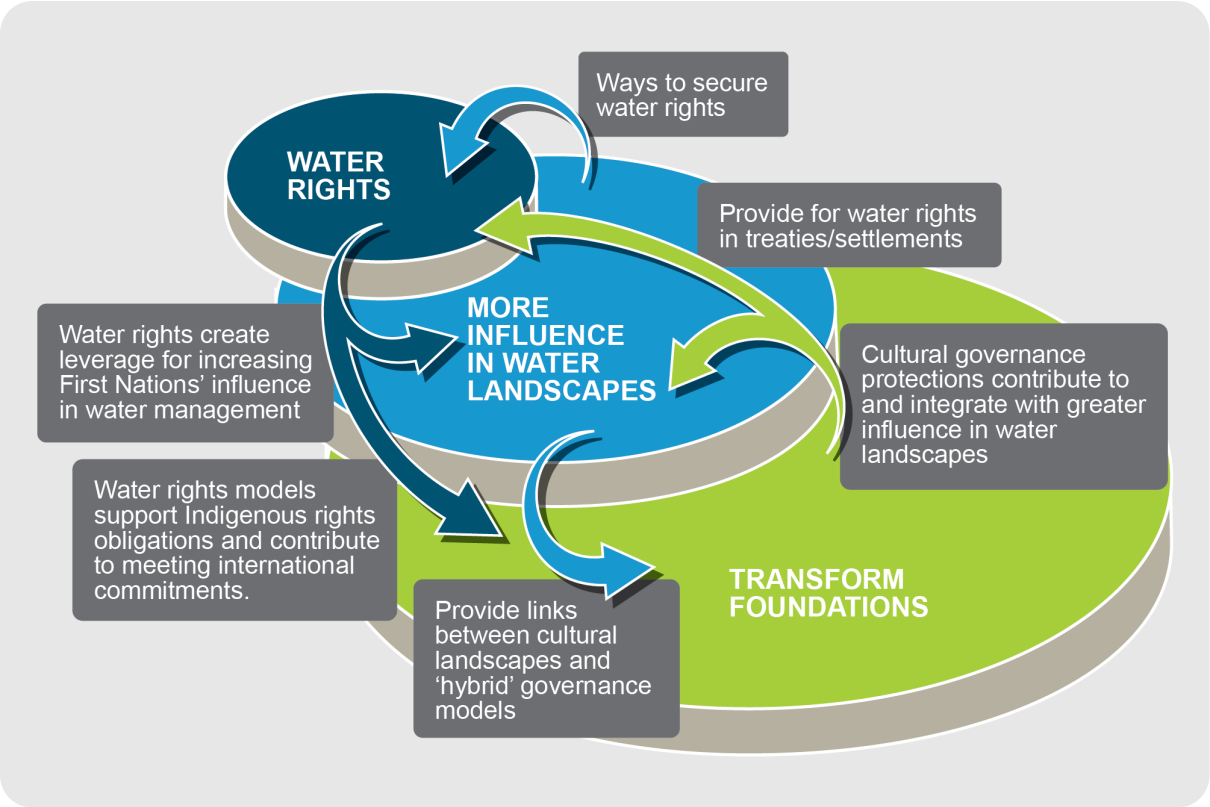
At a higher level, at least 10 characteristics or principles of implementation are necessary for a viable or successful adoption of cultural flows programs based on the model and measures outlined in the above sections.

A non-exhaustive list of implementation principles is considered below.

1. All 'Approaches' are Necessary Constituent Features of Any Cultural Flows Program

The 'approaches' outlined above – water rights, matters relevant to water landscapes, and governance – cannot be treated as alternative or isolated features of an implementation program for cultural flows. Each approach is essential ultimately to the development and successful formulation of a cultural flows program, as distinct from ad hoc or partial attempts to achieve equitable and sustainable outcomes for First Nations. Delivery of reform at all 'approach' levels, according to a coherent program, will be an indicator of successful implementation. Although each approach is presented separately in this Report, for reasons of clarity, each approach is closely tied to each other approach (see Figure 8 below). Recognising these connections still allows for an implementation plan to take a staged approach to the cultural flows program.

Figure 8: Relationships between the three-layered Approaches to cultural flows



2. Partnerships and Agreements are a Central Strategy to Implementing Cultural Flows

Partnerships, agreements and/or 'treaties' are likely to be key instruments in charting pathways forward in implementation of cultural flows programs. Manifestly, agreements – whether statutory, binding or non-binding in status – are already used in relation to First Nations' engagement in water management. A mix of political, statutory, legal and non-binding agreements may well be appropriate in any given set of circumstances. Cultural flows in many ways are premised upon genuine partnership between First Nations and 'settler' institutions. At a political level, this requires substantive shifts in the approaches and perspectives of non-Indigenous institutions. Agreement-making can provide flexibility and dexterity in managing relationships and outcomes, but underpinning realities and differentials of bargaining power need to be recognised and accounted for in these processes, as part of the context of partnership and agreement-making.

Key partnerships and agreements must have legal and/or political force. Agreement-making, as well as substantive obligations, must include clear evidence of 'free, prior and informed consent'. To this end, partnerships and agreements must seek to achieve or contain ambition for parity of bargaining power, proceeding to tangible outcomes. Measurable criteria of equity and sustainability must underpin partnerships and agreements. In addition, they must be constructed in the language of good faith and directed to recognition of the special responsibilities and obligations of First Nations to Country, including water.

3. Water Governance Recognises and Protects Cultural Knowledge About Water

The significance and role of cultural knowledge as a factor in water governance is noted in Approach 3 above. Cultural knowledge represents First Nations' world views in respect of water and Country, as well as being a cultural force in and basis for the management of water resources. The transmission, custodianship and exercise of cultural knowledge are inherent to the integrity of First Nations' communities, including their internal social organisation and existence as political or jurisdictional entities. The incorporation of cultural knowledge into water management and planning, including as part of cultural flows programs, cannot respectfully and appropriately occur without wider governance reform, in which exercise of customary authority of First Nations accompanies the exercise and use of cultural knowledge. Cultural knowledge is not merely a source of data or information for water planning or decision-making purposes. The unique cultural status of traditional ecological knowledge is best reflected in sui generis legal protections, recognising this unique character of cultural knowledge and protecting it through special statutory means (or other legal protections as appropriate).

4. Governments Clearly and Demonstrably Consider and Account for First Nations' Diverse Values, Objectives and Capacities Relating to Water

First Nations' historic exclusion from formal water management and state control of water resources has been, until very recently, virtually absolute. Moreover, First Nations' relationships to water were violently ruptured through clearances and dispossession from the time of frontier conflict onwards. Cultural flows models and programs aim, as a strategy, to address the frequent absence of First Nations in water management. At the level of principle, this is consistent with the starting point that, in policy-making and decision-making, Governments clearly and demonstrably consider and account for First Nations' diverse values, objectives and capacities relating to water. Much of what is proposed here as features of cultural flows programs goes beyond this minimum condition and aims to build on this condition.

5. Sustainable, Ongoing Resourcing is Critical to a Long-Term Strategic Program of Implementation of Cultural Flows Measures

Cultural flows programs need to include reform of resourcing. Short-term, disrupted, ad hoc funding cycles are a relevant problem to financing and resourcing in water management as they are in other First Nations' funding programs. Relevant resources include not only financial resources but also, for instance, development and retention of human resources, skill and capacity in water management, and technical and physical resourcing. Strategically recognising the connections between water management and other sectors (for example, health, education, economic development, employment and business) will help to further support a cultural flows implementation program.

In seeking to achieve culturally appropriate First Nations' objectives and outcomes for water, resourcing reform needs to be structural, commencing with principles of equity and sustainability over the long-term. Implementation of cultural flows programs should be accompanied, for example, by fiscal and financing reform capable of achieving a sustainable financing base, alongside a resourcing horizon comparable to stable water planning (such as a requirement for 10-year resourcing horizons for cultural flows programs).

6. Shifted Perspectives of Water Management Support First Nations and Benefit Non-Indigenous Society

Water reform that includes genuine cultural flows programs will not merely integrate First Nations' views into established water management, or bring First Nations representatives into that exercise. More fundamentally, cultural flows embrace and provide the opportunity for degrees of 'hybrid' understandings and models of water management. This requires progressive shifts in perspective on water, which might be termed 'bi-cultural', combining traditional and contemporary ideas, approaches and insights. In this sense, water reform opportunities provided by cultural flow models are inherently opportunities for both First Nations and non-Indigenous society. This will mean integrating and reconciling fundamental concepts and practices that may be in tension, such as water as an abstract 'resource' and water as inherent to place and culture.

7. All Elements of Reform Should Enhance Independence of First Nations in Water Decision-Making

Cultural flows programs should build the authority, profile and capacity of First Nations in water management, or, where appropriate, consolidate authority and independence in water management. Included in this premise may be what has been referred to as 'nation-building' as a method of self-determination and improved water and river management.[51] Other terms and approaches may be used, but, in any case, implementation should be directed to and account for independence of First Nations voices and institutions in management and decision-making.

8. First Nations Have an Active and Informed Involvement in All Aspects of Water Management and Operations, Including Monitoring, Reviewing and Auditing.

Active roles of First Nations in managing water 'on Country' are crucial to effective implementation, not least as First Nations have ongoing obligations and engagement with Country. First Nations can and do provide key operational services to water management, including monitoring, reviewing, and auditing. These roles and tasks can encompass processes of re-building and re-establishing connections to Country. In other settings, such as land management, these supporting services are critical to re-establishing effective natural resources management programs (such as through ranger programs, traditional burning, caring for Country, and so on). As examples in Components 2-4 of the NCFRP demonstrate, implementation of cultural flows provides multiple benefits. Additionally, active First Nations services and programs in monitoring and review can have benefits in information provision, planning, compliance and adaptive management. Like any other water entitlements, cultural water rights can be harmed by other water users' non-compliance with water laws. Monitoring, reviewing and auditing attain particular significance in this context.

9. Government has Clear Lines of Responsibility for Implementing and Achieving Cultural Outcomes in an Efficient and Timely manner, Including Via a Statutory Review Mechanism

Implementation of programs in any context can fail for lack of clear responsibility for outcomes and clear lines of authority and decision-making. Whatever precise configuration of cultural flows program is devised, identifying relevant authorities and duties will be an important feature. This will likely include authorities and responsibility within state institutions, as well as First Nations organisations

and other sectors where relevant. Mechanisms of independent program review enshrined in law, over an appropriate time frame (such as 10 years), and are valuable for ensuring oversight, integrity and processes of learning from the cultural flows program.

10. Implementation is Scoped Broadly but Applied with Regard to Context, First Nations' Priorities, and Existing First Nations' Organisations

As the breadth of legal and policy considerations above attests, implementation of cultural flows programs may account for and include a diversity of 'tools' and measures. The application and 'configuration' and the mechanisms used will likely be context-specific. It will be adapted and appropriate to local circumstances, the contingencies of dealings between First Nations, government and other water interests, and connections and relationships between First Nation groups in a given water system. As a matter of principle, then, the scoping of opportunities (including opportunities for innovation) should be broadly conceived with a view to elaborating and meeting or progressing First Nations' priorities. It is also important to recognise that many First Nations groups use existing organisational structures for a variety of purposes. First Nations' organisations and representatives should be a starting point for implementation of cultural flows programs.

Notes for Approaches 1-3.

[1] See, eg, Monica Morgan, Lisa Strelein and Jessica Weir, 'Indigenous rights within the Murray Darling Basin' (2004) 5(29) *Indigenous Law Bulletin* 17, http://classic.austlii.edu.au/au/journals/IndigLawB/2004/7.html.

[2] See National Cultural Flows Project Issues Paper, sections 3.4-3.6.

[3] See eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3 (d), (f), (g) and see discussion under Approach 2.

[4] Matters currently considered include: (b) the effect that the issue is likely to have on—(i) other water shares for which the water system is the associated water system; and (ii) any environmental entitlement to which the associated water system is subject; and (iii) the needs of other potential applicants.

[5] This option is canvassed in Allens, National Cultural Flows Project Issues Paper 2014 6.

[6] *Yanner v Eaton* (1999) 201 CLR 351.

[7] See *Karpany v Dietman* [2013] HCA 47.

[8] Lily O'Neill et al., 'Australia, Wet or Dry, North or South: Addressing environmental impacts and the exclusion of Aboriginal peoples in northern water development' (2016) 33 *EPLJ* 402-417.

[9] The term tenure is used here as commonly adopted in water and land management policy and law. Strictly, native title is not a tenure, i.e. it does not derive from the tenurial system received from England (*Mabo v Commonwealth (No 2)* (1992) 175 CLR 1).

[10] We note the *Aboriginal Land Act 1991* (Qld) pt 2A which allows conversion of native title to individual title.

[11] Nick Duff, 'Fluid Mechanics: The Practical Use of Native Title for Freshwater Outcomes' (AIATSIS Research Report, June 2017).

[12] Ibid.

[13] *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

[14] A comprehensive discussion of native title and indigenous interests in water by Richard Bartlett appears in Alex Gardner, Richard Bartlett, Janice Gray and Rebecca Nelson, *Water Resources Law* (LexisNexis, 2017), 259-278. For native title generally, see Richard Bartlett, *Native Title in Australia* 3rd ed (LexisNexis 2015). Given these references and other analyses, this report does not provide a detailed overview of native title.

[15] *Ward v Western Australia* (2002) 213 CLR 1.

[16] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 250 CLR 209.

[17] See generally *Northern Territory of Australia v Griffiths* [2017] FCAFC 106.

[18] See above *Akiba v The Commonwealth* (2013) 250 CLR 209; *Western Australia v BP (deceased)* (2014) 223 FCR 488; *Willis on behalf of the Pilki People v State of Western Australia [No 1]* [2014] FCA 714 (4 July 2014); *Rrumburriya Borroloola Claim Group v Northern Territory of Australia* [2016] FCA 776.

[19] Katie O'Bryan 'More Aqua Nullius? The Traditional Owner Settlement Act 2010 (Vic) and the Neglect of Indigenous Rights to Manage Inland Water Resources' (2017) 40 *Melbourne University Law Review* 547, 575-9.

[20] *Traditional Owner Settlement Act 2010* (Vic) s 80.

[21] Ibid s 8.

[22] Ibid subs 82(1)(c).

[23] Ibid s 79.

[24] For a comparative example on water rights settlements see the US$497.8 million and 697,000 acre-feet (860 Gigalitres) of water for the Crow Nation's 2.3 million acre reservation in Montana, USA. Settlement discussed in Brett Bovee, 'Establishing and Preserving Tribal Water Rights in a Water Stressed West' (2015) 17 *Water Resources Impact* 5, 5-6.

[25] Elizabeth Macpherson, 'Beyond Recognition: Lessons from Chile for Allocating Indigenous Water Rights in Australia' (2017) 40(3) *University of New South Wales Law Journal* 1130, 1155.

[26] 'Ley No 19.253 (Establece Normas Sobre Protección, Fomento Y Desarrollo de Los Indígenas, Y Crea La Corporación Nacional de Desarrollo Indígena) 1993 [Law No 19.253 (Establish Norms for the Protection, Creation and Development of the Indigenous, and to Create the National Corporation of Indigenous Development)] (Chile) ('Indigenous Law')' art 20(3).

[27] Victoria State Government, *Water for Victoria: Water Plan 2016*, 106.

[28] For example, Appointment of Grampians Wimmera Mallee Water Corporation as Storage Manager for the Wimmera-Mallee System Headworks; Storage Management Rules: Wimmera-Mallee System Headworks.

[29] See, eg, the joint management arrangements under *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) pt 2, subpt 3, which operate in wider governance arrangements established under pt 2 of that Act.

[30] *Charter of Human Rights and Responsibilities Act 2006* (Vic) subs 19(2)(d).

[31] See Australian Law Reform Commission, *Connection to country: Review of the Native Title Act 1993 (Cth)* (Report no 126, 2015), Recommendations 5-1, 5-2, 5-3.

[32] See, eg, *Basin Plan 2012* (Cth) s 10.52.

[33] See, eg, S Hemming and D Rigney, Restoring *Murray Futures: Incorporating indigenous knowledge, values and interests into environmental water planning into the Coorong and Lake Alexandrina and Albert Ramsar Wetland* (Goyder Institute for Water Technical Report Series 16/8, 2016), http://www.goyderinstitute.org/_r124/media/system/attrib/file/115/Goyder%20Report%20E.1.17%20Hemming%20and%20Rigney%202016%20final-amended.pdf.

[34] Marcia Langton and Lisa Palmer, 'Treaties, agreement-making and recognition of indigenous customary polities' in Marcia Langton, Maureen Tehan, Lisa Palmer, and Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements within Indigenous People* (Melbourne University Press, 2004).

[35] See Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams (eds), *Treaty* (Federation Press, 2005), 108-9.

[36] Maureen Tehan, 'Negotiating co-existence' in Marcia Langton, Maureen Tehan, Lisa Palmer, and Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements within Indigenous People* (Melbourne University Press, 2004), 174; see also Agreements, Treaties and Negotiated Settlements Database: www.atns.net.au; see also Marcia Langton, Odette Mazel, Lisa Palmer, Kathryn Shain and Maureen Tehan (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006).

[37] Sean Brennan et al, above n 8, 81.

[38] See remarks in Premier Brumby's Second Reading Speech introducing Traditional Owner Settlement Bill 2010 into the Victoria House of Assembly: Parliament Debates, Victorian Parliament, House of Assembly Wed 28 July 2010, p 2752.

[39] Brennan et al, above n 8, 50.

[40] Senate Standing Committee on Legal and Constitutional Affairs *Two Hundred Years' Later… Report by the Senate Standing Committee on Legal and Constitutional Affairs on the Feasibility of a Compact of 'Makarrata' Between the Commonwealth and Aboriginal People* (1983), http://aiatsis.gov.au/collections/collections-online/digitised-collections/treaty/senate-standing-committee-report.

[41] See also Geoffrey Lindell, 'The Constitutional Commission and Australia's first inhabitants: Its views on agreement-making and a new power to legislate revisited' (2011) 15(2) *Australian Indigenous Law Reporter* 26.

[42] On the concept of 'comprehensive' agreement- or treaty-making, see, eg, Sturt Bradfield, *Agreeing to terms: what is a comprehensive agreement?* (Issues Paper 26, Native Title Research Unit, AITSIS, 2004), http://aiatsis.gov.au/publications/products/agreeing-terms-what-comprehensive-agreement. Bradfield writes, at 13:

> I would propose, then, that the term 'comprehensive' be reserved for those agreements with the following (interrelated) elements:
>
> 1. Content – comprehensive agreements have a broad subject matter;
> 2. Process – comprehensive agreements have a distinct process of equitable and direct negotiation;
> 3. Recognition – comprehensive agreements recognise the Indigenous party as a political entity with inherent rights, as a people or as a nation;
> 4. Parties – comprehensive agreement must include (at least) an Indigenous people and a government, most appropriately the Commonwealth, as parties.

[43] CBD Secretariat, *Akwe:Kon: Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Assessments Regarding Development Proposed to Take Place on, or are likely to impact on, Sacred Sites and on Land and Waters Traditionally Occupied or Used by Indigenous or Local Communities* (2004), https://www.cbd.int/doc/publications/akwe-brochure-en.pdf.

[44] Eg *Water Act 1989* (Vic) pt 3.

[45] Gail Tipa and Laurel Teirney, *A Cultural Health Index for Streams and Waterways: A Tool for Nation-wide Use* (Report prepared for the Ministry of the Environment, 2006), https://mfe.govt.nz/sites/default/files/cultural-health-index-for-streams-and-waterways-tech-report-apr06.pdf; see also Garth Harmsworth and Shaun Awatere, 'Indigenous Maori knowledge and perspectives of ecosystems' in JR Dymond (ed), *Ecosystem Services in New Zealand: Conditions and Trends* (Manaaki Whenua Press, 2013).

[46] Ibid 23-24.

[47] See the debates over the legal status and effect of UNDRIP in Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 3 *Australian International Law Journal* 17.

[48] Ibid 48.

[49] Dana Rawls, *Tracking the UNDRIP: How the United Nations' Declaration on the Rights of Indigenous Peoples Is Being Implemented in Australia* (National Centre for Indigenous Studies, 2013).

[50] Davis, above n 20, 36.

[51] Steve Hemming, Daryle Rigney, Samantha Muller, Grant Rigney, and Isobelle Campbell, 'A new direction for water management? Indigenous nation-building as a strategy for river health' (2017) 22(2) *Ecology and Society* 13, https://dspace.flinders.edu.au/xmlui/bitstream/handle/2328/37372/Hemming_New_P2017.pdf?sequence=1&isAllowed=y.

APPENDIX 1: Reference Group and Research Committee Members

This Report and the earlier Component 5 working papers benefited greatly from feedback provided by the Project Reference Group and the Project Research Committee, the members of which are listed below. We also gratefully acknowledge the role of the National Native Title Council, particularly Alanna Maguire.

Project Research Committee and Reference Group

Note: Reference group members are listed in bold

Representative	Organisation	Location
Damein Bell	**Independent Chairperson**	**Heywood, VIC**
Paul Lane	**North Australian Indigenous Land and Sea Management Alliance**	**Broome, WA**
Grant Rigney	**Murray Lower Darling Rivers Indigenous Nations**	**Meningie, SA**
Rene Woods	**Murray Lower Darling Rivers Indigenous Nations**	**Wodonga, VIC**
Maureen McKellar	**Northern Basin Aboriginal Nations**	**Toowoomba, QLD**
Margaret Seckold	**Northern Basin Aboriginal Nations**	
Michael Anderson	**Northern Basin Aboriginal Nations**	**Goodooga, NSW**
Neil Ward	Murray-Darling Basin Authority	Canberra, ACT
Jacki Luethi	Murray-Darling Basin Authority	Canberra, ACT
Hilary Johnson	Commonwealth Environmental Water Office	Canberra, ACT
Annie Lane	ACT Environment and Planning Directorate	Canberra, ACT
Jeff Hillan	NSW Office of Environment and Heritage	Queanbeyan, NSW

Michael Moore	Queensland Department of Natural Resources and Mines	Brisbane, QLD
Lachlan Sutherland	SA Department of Environment, Water and Natural Resources	Adelaide, SA
Catheryn Lewis	Victorian Department of Environment, Land, Water and Planning	East Melbourne, VIC

APPENDIX 2:
Table of Relevant Legislation

These tables are included as an indication of the range of legislation that may be relevant to implementing a comprehensive approach to cultural flows in each state and territory; with reference to Commonwealth legislation where relevant. The lists for each Approach are not necessarily exhaustive. The tables focus on primary legislation (and, in the case of native title and land rights, key cases), rather than regulations that are made under that legislation. In some instances, the measures may be agreements where the authority for the measure is contained in statute. Detailed discussions with representatives from governments in all jurisdictions should be held to gain the best picture of the full suite of legislation that may be used to implement cultural flows in any particular region.

Approach 1: Water Rights	Water Legislation (rights and allocation focus)	Legislative measures for water entitlements	Native Title, state laws and seminal cases	Statutory Land rights and landholdings	Conservation reserves; joint management Agreements
Australian Capital Territory	*Water Resources Act 2007; Water Resources (Catchment Management Coordination Group) Amendment Act 2015*	Water access entitlement s 19 *Water Resources Act 2007* aligned to licence to take water from specified place ss 28, 30,32.	*Native Title Act 1994*	*Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)*	*Agreement between the Australian Capital Territory and ACT Native Title Claim Groups Agreement 1 January 2001 [Namadgi Special Aboriginal Lease over Namadgi National Park]*

Approach 1: Water Rights	Water Legislation (rights and allocation focus)	Legislative measures for water entitlements	Native Title, state laws and seminal cases	Statutory Land rights and landholdings	Conservation reserves; joint management Agreements
New South Wales	*Water Management Act 2000; Catchment Management Authorities Act 2003*; Water Sharing Management Plan for the Murrumbidgee Regulated River Water Source 2016	S 56 *Water Management Act 2000* Licensed environmental water s 8(1)(b) (see also ss 8B-D)	*Mary-Lou Buck on behalf of the Dunghutti People v State of New South Wales & Ors [1997] FCA 1624*	*Aboriginal Land Rights Act 1983*	See e.g. *Part 4 Div 1 National Parks and Wildlife Act* 1974
Northern Territory	*Water Act 1992; Lake Eyre Basin Intergovernmental Agreement Act 2009*	S 45 *Water Act* 1992	*Northern Territory of Australia v Arnhem Land Aboriginal Land Trust [2008] HCA 29*	See Commonwealth legislation	*Territory Parks and Wildlife Conservation Act 1976*
Queensland	*Water Act 2000; Cape York Peninsula Heritage Act 2007*	*ss 107-108, 114 Water Act* 2000 and water permit s 137 *Water Act 2000*	*Mabo v Queensland (No 2) (1992) 175 CLR 1* *Akiba v Queensland* (No 2) 204 FCR 1	*Aboriginal Land Act 1991; Torres Strait Islander Land Act 1991; Aboriginal and Torres Strait Islander Land Holding Act 2013*	*Nature Conservation Act 1992; Cape York Peninsula Heritage Act 2007*
South Australia	*Natural Resources Management Act 2004;* *Water Resources Act 1997; Groundwater (Border Agreement) Act 1985; Murray Darling Basin Act 2008*	S 124 *Natural Resources Management Act 2004* authorisation to take water	*Karpany v Dietman* [2013] HCA 47	*Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA)	*National Parks and Wildlife Act 1972*

Approach 1: Water Rights	Water Legislation (rights and allocation focus)	Legislative measures for water entitlements	Native Title, state laws and seminal cases	Statutory Land rights and landholdings	Conservation reserves; joint management Agreements
Tasmania	*Water Management Act 1999; Water and Sewerage Industry Act 2008; Water Management Amendment (Dam Works) Act 2015*	Water licences ss 54-56 *Water Management Act 1999*; (See Parts 7 and 8 re construction of dams and wells) s 54 re authority to take water	*Native Title (Tasmania) Act* 1994	*Aboriginal Lands Act 1985*	See e.g. S 73 *Nature Conservation Act* 2002
Victoria	*Catchment and Land Protection Act 1994; Water Act 1989; Water Industry Act 1994*; *Ashworth v Victoria* (2003) VSC 194.	Water Shares: Section 33F *Water Act 1989* 'Environmental entitlement' s 48B *Water Act 1989* (see also ss 48K-48O, 481, 64GB Water Act 1989)	*Traditional Owner Settlement Act* 2010; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422	*Aboriginal Lands Act 1970*	*Conservation, Forests and Lands Act 1987*; Land Use Activity Agreement between Dja Dja Wurrung Clans Aboriginal Corporation (Indigenous Corporation No 4421) and the State of Victoria, Being Part of the Recognition and Settlement Agreement under Section 4 of the *Traditional Owner Settlement Act 2010*
Western Australia	Rights in Water and Irrigation Act 1914	Water licence s 5C *Rights in Water and Irrigation Act* 1914 Note the licence still requires some form of access to land).	*Western Australia v Ward* (2002) 213 CLR 1	*Land Administration (South West Native Title Settlement) Act* 2016	*Conservation and Land Management Act 1984*

Approach 1: Water Rights	Water Legislation (rights and allocation focus)	Legislative measures for water entitlements	Native Title, state laws and seminal cases	Statutory Land rights and landholdings	Conservation reserves; joint management Agreements
Commonwealth	*Water Act 2007; Water Amendment (Review Implementation and Other Measures) Act 2016*; *Basin Plan 2012* (Federal register of Legislation, Legislative Instrument F2012L02240); *Water Market Rules 2009*; *Productivity Commission Act 1998*; *ICM Pty ltd v Commonwealth* (2009) 240 CLR 140	Note: The Commonwealth government does not allocate consumptive water entitlements. CEWH holds environmental water under a special account. See Part 6 Div 1 generally and esp. ss 104-111.	*Native Title Act 1993* (NTA) - Act has binding authority re state and territory govts.; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 *Akiba v Commonwealth* (2013) 250 CLR 209.	*Aboriginal Land Rights (Northern Territory) Act 1976*	Indigenous Land Use Agreements (see ss 24BA-24EC *NTA 1993* *See also Indigenous Protected areas EPBC Act 1999*

Approach 2: Increase Influence in Water Landscapes	Aboriginal cultural heritage laws	Land use laws (relevant to invasive species, water pollution and quantity as influenced by land use)	Environmental protection laws (relevant to water pollution, aquatic and riparian biodiversity, and management of public and private conservation lands)	Catchment management legislation (relevant to invasive species, water pollution and quantity as affected by land use)	Water laws (relevant to water pollution and quantity)
Australian Capital Territory	*Heritage Act 2004*	*Planning and Development Act 2007*	*Environment Protection Act 1997; Nature Conservation Act 2014*	ACT chiefly adopts a non-statutory approach	*Water Resources Act 2007; Lakes Act 1976*
New South Wales	*National Parks and Wildlife Act 1974*	*Environmental Planning and Assessment Act 1979*	*Protection of the Environment Administration Act 1991; Protection of the Environment Operations Act 1997; Biodiversity Conservation Act 2016*	*Local Land Services Act 2013; Natural Resources Commission Act 2003; Natural Resources Access Regulatory Act 2017*	*Water Management Act 2000; Water NSW Act 2014*
Northern Territory	*Heritage Act 2011; Northern Territory Aboriginal Sacred Sites Act 1989*	*Planning Act 1999*	*Environmental Assessment Act 1982; Waste Management and Pollution Control Act 1998*	NT adopts a non-statutory approach	*Water Act 1992*

Approach 2: Increase Influence in Water Landscapes	Aboriginal cultural heritage laws	Land use laws (relevant to invasive species, water pollution and quantity as influenced by land use)	Environmental protection laws (relevant to water pollution, aquatic and riparian biodiversity, and management of public and private conservation lands)	Catchment management legislation (relevant to invasive species, water pollution and quantity as affected by land use)	Water laws (relevant to water pollution and quantity)
Queensland	*Aboriginal Cultural Heritage Act 2003; Torres Strait Islander Cultural Heritage Act 2003; Cape York Peninsula Heritage Act 2007*	*Planning Act 2016*	*Environmental Protection Act 1994; Nature Conservation Act 1992; Environmental Offsets Act 2014; Vegetation Management Act 1999; Wet Tropics World Heritage Protection and Management Act 1993*	*Water Act 2000*	*Water Act 2000; Lake Eyre Basin Agreement Act 2001*
South Australia	*Aboriginal Heritage Act 1988*	*Development Act 1993*	*Environment Protection Act 1993; Native Vegetation Act 1991; Wilderness Protection Act 1992*	*Natural Resources Management Act 2004*	*Natural Resources Management Act 2004; River Murray Act 2003; Water Resources Act 1997 (SA); Groundwater (Border Agreement) Act 1985; Lake Eyre Basin (Intergovernmental Agreement) Act 2001*

Approach 2: Increase Influence in Water Landscapes	Aboriginal cultural heritage laws	Land use laws (relevant to invasive species, water pollution and quantity as influenced by land use)	Environmental protection laws (relevant to water pollution, aquatic and riparian biodiversity, and management of public and private conservation lands)	Catchment management legislation (relevant to invasive species, water pollution and quantity as affected by land use)	Water laws (relevant to water pollution and quantity)
Tasmania	*Aboriginal Heritage Act 1975*	*Land Use Planning and Approvals Act 1993*	*Environmental Management Pollution and Control Act 1994; State Policies and Projects Act 1993; National Parks and Reserves Management Act 2002; Nature Conservation Act 2002; Threatened Species Protection Act 1995*	*Natural Resource Management Act 2002*	*Water Management Act 1999*
Victoria	*Aboriginal Heritage Act 2006*; *Heritage Act 2017*	*Planning and Environment Act 1987*	*Conservation, Forests and Lands Act 1987*; *Environment Effects Act 1978; Environment Protection Act 1970; Flora and Fauna Guarantee Act 1988; National Parks Act 1975; Wildlife Act 1975*	*Catchment and Land Protection Act 1994; Heritage Rivers Act 1992*	*Water Act 1989*
Western Australia	*Aboriginal Heritage Act 1972*	*Planning and Development Act 2005*	*Conservation and Land Management Act 1984*; *Environmental Protection Act 1986*; *Wildlife Conservation Act 1950*	*Waterways Conservation Act 1976*; *Swan and Canning Rivers Management Act 2006*	*Rights in Water and Irrigation Act 1914*

Approach 2: Increase Influence in Water Landscapes	Aboriginal cultural heritage laws	Land use laws (relevant to invasive species, water pollution and quantity as influenced by land use)	Environmental protection laws (relevant to water pollution, aquatic and riparian biodiversity, and management of public and private conservation lands)	Catchment management legislation (relevant to invasive species, water pollution and quantity as affected by land use)	Water laws (relevant to water pollution and quantity)
Common-wealth	*Aboriginal and Torres Strait Islander Heritage Protection Act 1984*; *Environmental Protection and Biodiversity Conservation Act 1999*	N/A	*Environmental Protection and Biodiversity Conservation Act 1999*	*Natural Resources Management (Financial Assistance) Act 1992*	*Water Act 2007*

Approach 3: Transform Foundations	State Constitution	Human rights	Indigenous rights	'River' laws	Assessment
Australian Capital Territory	*Australian Capital Territory (Self-Government) Act 1988* (Cth)	*Human Rights Act 2004*	*Human Rights Act 2004*	No discrete river protection or conservation laws	No discrete cultural assessment laws
New South Wales	*Constitution Act 1902*	No legislated human rights code including cultural rights	*Constitution Act 1902*	No discrete river protection or conservation laws	No discrete cultural assessment laws
Northern Territory	*Northern Territory (Self-Government) Act 1978* (Cth)	No legislated human rights code including cultural rights	No discrete indigenous rights legislation	No discrete river protection or conservation laws	No discrete cultural assessment laws
Queensland	*Constitution Act 2001*	No legislated human rights code including cultural rights	No discrete indigenous rights legislation	No discrete river protection or conservation laws	No discrete cultural assessment laws
South Australia	*Constitution Act 1934*	No legislated human rights code including cultural rights	No discrete indigenous rights legislation	No discrete river protection or conservation laws	No discrete cultural assessment laws
Tasmania	*Constitution Act 1934*	No legislated human rights code including cultural rights	No discrete indigenous rights legislation	No discrete river protection or conservation laws	No discrete cultural assessment laws
Victoria	*Constitution Act 1975*	*Charter of Human Rights and Responsibilities Act 2006*	*Constitution Act 1975*	*Yarra River Protection (wilip-gin Birrarung murron) Act 2017*	Aboriginal Waterway Assessment tool used in water planning [non-legal device]

Approach 3: Transform Foundations	State Constitution	Human rights	Indigenous rights	'River' laws	Assessment
Western Australia	*Constitution Act 1889*	No legislated human rights code including cultural rights	No discrete indigenous rights legislation	No discrete river protection or conservation laws	No discrete cultural assessment laws
Commonwealth	*Commonwealth of Australian Constitution Act 1901*	No legislated human rights code including cultural rights	No discrete indigenous rights legislation	Basin Plan as legislative protection of discrete river basin, with indigenous consultation measures	Aboriginal Waterway Assessment tool used in water resource planning processes under Basin Plan, but no statutory basis [non-legal device]
Overseas jurisdictions	N/A	Various models of legal and constitutional protections of cultural rights, such as indigenous rights models in a number of South America states	*Treaty of Waitangi* (NZ)	*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ)	Cultural Health Index (NZ) used as a practical tool for river and stream assessments [non-legal device]

Approach 3: Transform Foundations	State Constitution	Human rights	Indigenous rights	'River' laws	Assessment
International instruments	N/A	*International Convention on Economic, Social and Cultural Rights*	*United Nations Declaration on the Rights of Indigenous Peoples* (2007) (UNDRIP); International Labor Organisation *Indigenous and Tribal Peoples Convention* (No. 169) (1989); *Convention on Biological Diversity* (1992)	N/A	*Akwe:Kon: Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Assessments Regarding Development Proposed to Take Place on, or are likely to impact on, Sacred Sites and on Land and Waters Traditionally Occupied or Used by Indigenous or Local Communities* (2004) [non-legal device]

APPENDIX 3: Assessment Criteria

Working Paper 2 evaluated each of the approaches presented in this Final Report against a set of formal assessment criteria, which were designed and intended to reflect First Nation peoples' values and aspirations for water (*The Echuca Declaration* 2007, as amended 2010). These criteria were developed as part of a broader Evaluation Framework in consultation with the Research Committee and other relevant stakeholders (including First Nations and representatives from state, territory and federal governments).

The list below briefly states the assessment criteria used. They are set out more fully in Working Paper 2 and in the Component 5 *Evaluation Framework: Draft Assessment Criteria* (June 2017) document, as refined in consultation with the Project Reference Group. Focus groups held with First Nations representatives determined that, of the thirteen criteria listed below, the top five criteria, in order of importance are set out in bold below. The number in parentheses that follows the criterion represents the relative importance of that criterion (1 being most important):

1) **Provide for increased control and decision-making power for First Nations in water management (1);**
2) **Enhance connection to Country (facilitating cultural rights and responsibilities);**
3) **Protect Traditional Knowledge (TK);**
4) **Likelihood of meeting identified First Nations outcomes** (for example, as set out in earlier components of the Project) – *note: assessment against this criterion is properly a matter for individual First Nations and will not be assessed in the abstract as part of this paper*;
5) **Facilitate partnerships and collaboration with science, conservation, cultural or research entities**

Other criteria (not in order of importance):

6) Build and/or consolidate culturally-appropriate economies and economic independence;
7) Minimise the need for human and financial resources and additional capacity building;
8) Minimise governance challenges (internal and external);
9) Minimise the degree of reform to law/policy required for adoption;
10) Maintain flexibility and adaptability to First Nation needs that vary in time and space;
11) Enhancing simplicity in implementation to avoid complex institutional and administrative arrangements;
12) Minimise legal and practical water management risks, for example, dealing with climate change, water quality, and liability; and
13) Provide ways to cooperate with others and resolve disputes about water management (includes enforceability).

All thirteen criteria received an individual response of 'strongly agree' or 'agree' from the majority of recipients. However, there was some disagreement from criteria that implied a need to minimise investment in some way (human and financial resources, governance, or degree of reform required). The reason given for disagreement with these criteria was that it may be necessary to invest substantially in order to achieve the desired outcome, and choosing a legal and policy model that merely minimised this investment may not deliver the optimal outcome for First Nations.

Summary Description of Most Important Criteria

1. Increased Control and Decision-Making Power for First Nations in Water Management

Successive reforms to Australian water law have yet to redress the historical exclusion of Aboriginal peoples from water law and policy frameworks, and have struggled to ensure healthy and sustainable land and water management. First Nations' views and decision-making have been largely absent from the water law reforms over recent decades, and, indeed, from water management in general. While stronger platforms have been developed more recently for the participation of First Nations in water management, significant gaps remain. Accordingly, this criterion seeks to examine the extent to which legal and policy options assist in strengthening decision-making power for First Nations in water management and in providing substantive decision-making with respect to cultural flows.

2. Enhancing Connection to Country

The Preamble to the *Echuca Declaration* 2007 (as amended 2010) states:

> ***RECOGNISING and REAFFIRMING that each of the Indigenous Nations represented within Murray and Lower Darling Rivers Indigenous Nations is and has been since time immemorial sovereign over its own lands and waters and that the people of each Indigenous Nation obtain and maintain their spiritual and cultural identity, life and livelihood from their lands and waters.***

This statement encapsulates the connection to Country and the pivotal importance of land and waters for First Nations. The Declaration further elaborates the spiritual association that First Nations peoples have with water – 'water has a right to be recognised as [an] ecological entity, a being and a spirit and must treated accordingly. For the Indigenous Nations water is essential to creation and many of Dreaming and other ancestral beings are created by and dwell within water.'

First Nations peoples across Australia have a connection to Country in which water is of special significance. Component 1 of the NCFRP described the Aboriginal cultural water values and needs across Australia (NNTC 2014). Component 2 of the NCFRP has identified the cultural flow objectives for two case studies in a manner that prioritises cultural management of water. For example, Murrawarri peoples have as their long-term objective to:

> ***re-establish cultural management of Country, including cultural practices and wellbeing associated with law, ceremony, trade, education and language.***

Similarly, the Victorian Traditional Owner Water Policy Framework 2014 states:

> ***Our vision is for an equitable and sustainable water management regime which recognises the rights of Victorian Traditional Owners to use, develop and control water resources on and under our Country.***

This assessment criterion focuses on the spiritual values and ecological being of water, as well as the enhancement of the cultural management of water and the ability to ensure that connection to Country is transferred between generations.

3. Protection of Traditional Knowledge

First Nations peoples have traditional knowledge of land and waters expressed through the practice of law and custom that grounds connection to Country. As the *Echuca Declaration* sets out, Aboriginal peoples aim to have:

> ***Use of the whole of the environment for educational purposes including the recording and transmission of Indigenous science and knowledge; to teach our people about our Country including collecting, protecting, respecting and passing on knowledge.***

This knowledge provides an invaluable resource for sustainable and ecologically sensitive water management. It is essential to develop and implement protocols such as free prior and informed consent and associated measures for traditional knowledge and heritage protections in land and water management.

4. Likelihood of Meeting First Nations' Outcomes

This criterion is designed to provide an individual Nation's perspective to the assessment criteria. It acknowledges that First Nations groups across the Country are diverse, their circumstances vary and that the outcomes that they seek to achieve will be specific to those communities. As the Victorian Traditional Owner Water Policy Framework 2014 states:

> ***We respect the legitimacy, primacy and decision-making authority of each Traditional Owner community and recognise that issues relating to water can be unique to their local context.***

Therefore, this criterion seeks to build in the significance of the outcomes that have been identified by First Nations into the matrix of factors to be considered when assessing legal and policy options for cultural flows (see Components 3 and 4). This criterion is of high importance, but will need to be assessed by the relevant First Nations on a case-by-case basis, in view of their own unique place-specific aspirations. The researchers will be expressly guided by relevant communities in applying this criterion.

5. Facilitate Partnerships and Collaboration with Government, Science and Private Entities

This criterion recognises the potential for productive partnerships where First Nations peoples (with due protections for traditional knowledge and practices) can work with a range of partners to achieve cultural flow outcomes. There is a spectrum of agreements and partnerships between First Nations and public and/or private organisations of varying scale and complexity. Agreements based on land rights or native title can recognise and secure cultural flows outcomes, and provide a platform for further negotiation and co-management. There are also specific co-management arrangements in Commonwealth, state and territory laws (for example, Indigenous Protected Areas) that support integrated land, water and natural resource management. Partnerships between First Nations and government agencies (such as trusts) provide the basis for governance of joint holdings of land and water. First Nations people may also enter private partnerships with non-government conservation organisations, outside of a statutory framework.

These agreements can be flexible and enforceable, and offer access to funding sources outside of the public sector. Experience shows that participating in these agreements can build First Nations peoples' capacity for managing cultural water outcomes. More broadly, these agreements can build momentum for cultural flows as part of broader socio-cultural objectives for First Nations peoples.