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Productivity Commission

*Online submission*

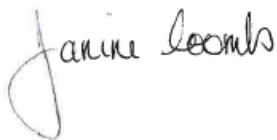
### **SUBMISSION ON NATIONAL WATER REFORM**

The Federation of Victorian Traditional Owner Corporations represents the interests of Victorian Traditional Owner Corporations, which have or are in the process of gaining recognition under the Native Title Act 1993 (Cth) or the Victorian Traditional Owner Settlement Act 2010 (Vic). The Federation and its members, along with other Traditional Owner organisations across the country, have a growing base of assets, resources and business interests, and maintain their connection to Country, including with respect to water.

Water is a strategic and significant resource in Australia and its use, management and control has a potent and real effect on the lives and outcomes for Indigenous Australians. It is therefore of utmost importance for Australia's future growth and wellbeing that the unique Australian context and Indigenous interests are considered within national water reforms.

Our submission, including a range of recommendations, is attached for your consideration.

Yours sincerely,



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# Submission to the Productivity Commission

## National Water Reform

### Summary

The National Water Initiative (NWI) has provided a platform for a coordinated approach to water. However, a key concern is that the NWI and the regulatory regime (across jurisdictions) have provided only weak and discretionary reference for the inclusion of Indigenous interests, and there has been little change over the last decade in the way in which Indigenous interests are incorporated into the overall system.

In Victoria a number of initiatives have been set in train under the latest State Water Plan to increase the level of representation in planning processes. However, Victorian Traditional Owners continue to seek a stronger and more integrated approach to the Indigenous interest in water management.

The debate on national water reform must include Traditional Owners' roles and functions of speaking for and caring for Country as a legitimate and necessary component of the unique Australian context. The Indigenous interest is holistic with social, cultural, environmental and economic dimensions.

This submission seeks to enable the Indigenous interest to be fully incorporated into the reform agenda and to enable the market and regulatory institutions and processes to provide efficiency and clarity particularly focusing on the issues raised in property rights, planning and environmental management.

Across a number of aspects of the Productivity Commission's framework, it provides discussion and recommendations for:

- Refreshing and updating the NWI to more strongly recognise the Indigenous interest in all its dimensions
- Incorporating into the regulatory framework stronger recognition of the objectives arising from the Indigenous interest
- Developing a stronger regulatory approach to recognise the underlying Indigenous interest in water, particularly in relation to new water sources
- Enhancing the planning processes and institutional structures to increase efficiencies and clarity in the market
- Considering environmental management requirements to enhance the range of shared benefits
- Strengthening the measurement of water use to better capture the impacts on Indigenous interests.

## Introduction

Moving water to its highest value is an on-going motivation of the 2007 reforms to unbundle water interests from land and to establish a trading market. However, the reforms also allowed for a range of ways in which the State and Commonwealth could intervene to ensure the transition to a market system and management through rules and institutions to recognise a range of externalities and requirements for a productive water resource in the Australian context.

Over time these mechanisms continue to be refined, for example to manage allocations to the environment and ensure fairness and security across urban and rural requirements. There has been some recognition of Indigenous interests, including guidance within the National Water Initiative. However, there is a need for a coordinated, comprehensive framework that balances the recognition of Indigenous interests in the use, development and control of the water resource.<sup>1</sup> The Water Act 2007 and Victorian laws do not provide mandatory statutory requirements in relation to Traditional Owner interests and values through allocative or governance mechanisms in managing water.

In 2007 the report *Indigenous Interests and the National Water Initiative* stated<sup>2</sup>:

Governments have previously allocated water entitlements in many systems with little regard or knowledge of Indigenous interests in the Water and there is now opportunity to redress that neglect.

A decade later, the statement remains largely valid. There have been some attempts within State policies to enhance representation in decision-making and to provide (limited) funding to purchase allocations. Indigenous parties have sought to offer a framework to enhance the opportunities for the access, management and governance, use and control of water, as expressed for example through the:

- Echuca Declaration (2007)
- Federation of Victorian Traditional Owner Corporations Water Policy Framework (2014).

The National Cultural Flows program and Murray Lower Darling Rivers Indigenous Nations too are working to identify ways in which the water networks and systems can be understood through an Indigenous lens.

Key messages underpinning this work are that the Traditional Owners' roles and functions of speaking for and caring for Country are legitimate and necessary within the unique Australian context and that this requires an holistic approach that is multi-dimensional, with economic,

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<sup>1</sup> Both international and national laws provide a basis for these interests, including under the United National Declaration on the Rights of Indigenous Peoples, Native Title Act 1993 (Cth) and Traditional Owner Settlement Act 2010 (Vic), Environment Protection and Biodiversity Conservation Act 1999(Cth), Aboriginal Heritage Act 2006 (Cth)

<sup>2</sup> *Indigenous Interests and the National Water Initiative (NWI): Water Management, Reform and Implementation* Sue Jackson, CSIRO Sustainable Ecosystems October 2007 for North Australian Indigenous Land and Sea Management Alliance

environmental, cultural and social objectives seen holistically, and integrated within the broader systems of natural resource management.

Traditional Owners have a range of interests that stem from the relationship to the landscapes and their responsibilities and obligations, rights and interests to speak for Country and to care for Country. Intrinsically the Indigenous interest is more than a community or a sector interest; it is a fundamental of culture and connection to Country.

In Victoria the historical dispossession of Traditional Owners from the land and the 1886 Irrigation Act which tied water and land has meant dispossession from water. By virtue of splitting water from land this century (with a significant push due to the scarcity of water during the millennium drought) Traditional Owners were not entitled to water allocations.

With the advent of water as a 'new' form of property right there is a need to fundamentally address the way this will be dealt with. Further additions of new water sources need to be carefully considered in this context.

While the National Water Initiative identified the consideration of Indigenous interests as an area for further consideration, there is a need to find a robust approach to provide certainty and ensure 'best value' is able to include Indigenous interests, within the property rights, allocation institutions and rules, and the mechanisms for management and monitoring. This best value must be able to give focus to the economic significance of water, as well as the social, cultural and environmental aspects of the Indigenous interest.

A national approach to reform is an opportunity to reconsider some ways to meet the Indigenous interest. Importantly, however, the approach taken cannot be 'frozen in time'. The ability to engage in the water system and adapt to the aspirations and opportunities for Indigenous interests is a key consideration for understanding the reform priorities.

## **How are interests currently addressed**

The Victorian government has recently set out its water plan through 'Water for Victoria'. This has articulated the way in which Aboriginal interests will be addressed.<sup>3</sup>

### *Governance*

In 2007 the report on *Indigenous Interests and the National Water Initiative* stated:

It is clear that foremost attention has been given to resource governance as Indigenous groups seek to assert their rights and create inclusive processes and collaborative relationships based on recognition of cultural difference, including Indigenous law and custom, equity and trust.<sup>4</sup>

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<sup>3</sup> See Chapter 6 *Water for Victoria Water Plan* Victorian Government 2016

<sup>4</sup> *Indigenous Interests and the National Water Initiative (NWI): Water Management, Reform and Implementation* Sue Jackson, CSIRO Sustainable Ecosystems October 2007 for North Australian Indigenous Land and Sea Management Alliance (p71)

In Victoria there has been an attempt to increase the number of Aboriginal people involved in the current infrastructure through membership of boards that help to promote planning and governance of water resources as part of a focus on diversity on boards.<sup>5</sup> There is also a move to ensure that water authorities strengthen the community and Aboriginal consultation processes and a position of an Aboriginal Water Commissioner has been established for the Victorian Environmental Water Holder.

However, a gap remains in developing the capital and rules in terms of the ability to share the resource. This is in direct comparison to the ability to direct water savings to environmental purposes.

#### *Physical access*

Under native title, and the Traditional Owner Settlement Act 2010 (Vic), there are limited ways to access water, more or less reflecting the rights that other people have to access water, largely limited to domestic or cultural use or access such as through Crown land water frontages. Other access is subject to permission of landowners.<sup>6</sup>

#### *Ownership*

Neither native title nor settlements under Victoria's Traditional Owner Settlement legislation provide directly for ownership interests in water. There is no 'freestanding right' to water as the Traditional Owners.

While the government has been able to establish levies that can be used to fund environmental water purchasing and management, there is no institutional or regulatory mechanism to support the parallel approach to ensure that the Indigenous interest in water (or even a cultural use of water) is also recognised, or indeed to recognise the loss of such use through the systemic land ownership structures and since 2007 the systemic water ownership structures.

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<sup>5</sup> <http://www.premier.vic.gov.au/applications-open-for-more-diverse-water-boards/> (accessed 30/3/17)

<sup>6</sup> For further information on native title and Traditional Owner Settlements in Victoria in relation to water, see *Submission to the Murray Darling Basin Authority on the Draft Basin Plan*, Native Title Services Victoria, 2013

## Feedback on the Preliminary Framework – national water reform priorities

The Federation of Victorian Traditional Owner Corporations has established a Water Policy Framework. It is in many respects similar to the to the Productivity Commission’s Preliminary Framework. Under the following rubric there is a match for the scope of the Commission’s inquiries in the Issues Paper:

Federation of Victorian Traditional Owner Corporations framework <sup>7</sup>	Fundamentals	Productivity Commission framework
Allocation	Caring for Country	Property rights
Governance	Speaking for Country	Planning processes for allocation
Access	Connecting to Country	Trading, environmental management, and institutional arrangements
Capacity	Ability to engage in the system	Processes (planning and allocation) and institutional arrangements
Research	Integrating appropriate information	Trading to highest value

The Productivity Commission’s paper explores a number of elements that inherently recognise the Indigenous interest. By providing for an ‘Indigenous interest’ in the preliminary framework, the ability to capture the integrated analysis will set a platform for further consideration.

### Recommendation

We recommend that the Indigenous interest is incorporated within the key aspects of the framework to ensure that the potential issues are able to be incorporated into further discussion and addressed in policy and legislative reform and consequent measurement and management mechanisms.

### Discussion

#### *Property rights*

The Productivity Commission’s Preliminary Framework should explicitly consider the interests that Traditional Owners have in the Country, and that this has a social, cultural, environmental and economic perspective. This is of particular importance in underpinning development of new water entitlements.

The Indigenous interest is fundamental to the question of determining available water sources. Any new property rights that are created (and then allocated) without consideration of the underlying Traditional Owner interests could be regarded as an imposition on, or reduction of, the Indigenous interest.

<sup>7</sup> Federation of Victorian Traditional Owner Corporations, *Victorian Traditional Owner Water Policy Framework* 2014 (see <http://fvtoc.com.au/wp-content/uploads/2013/10/Water-Policy-Framework.pdf>)

Property rights in water created in 2007 provided a windfall gain for the land owners, as they gained a more fungible set of interests. In some cases this is thought to be significant, for example, anecdotally some 'farms' have traded water as the major income source with little or no agricultural output.

This windfall gain, it is argued, is at the expense of the Traditional Owner interests, since there has been a loss of land and there has been a 'further loss' through the subsequent development of water interests.

Any framework to understand national water reform priorities therefore should provide explicit connection to the trading, governance and planning and property rights that Traditional Owners have an interest in. In particular, the creation of new property rights needs to consider such arrangements, rules and institutions that balance consumptive use, environment, 'public' interests and Indigenous interests.

#### *Governance (allocative planning and water services contexts)*

A market-based approach is a desirable and effective way of enabling decisions that allow for trade-offs (which by definition give the highest value use).

However, a market does not always perfectly manage interests, particularly where there are (unpaid for) impacts on others – including future generations – or where the market is constrained by the operating environment itself. The water market is therefore bounded by multiple rules of physical, economic and environmental constraints: where water can flow, the infrastructure with public and club benefits, the impacts on a wide range industries or the environment (including flora, fauna and landscape features).

Furthermore, the old adage that 'values define value' is constructed into the current water systems that focus on balancing (by market and non-market means) the trade-offs of irrigation, environmental and urban values, but has lacked the framework by which to incorporate the full range of Indigenous values.

Where Indigenous values are incorporated, it is generally through the 'heritage values', which are one aspect of the broader means of caring, connecting and speaking for Country. The native title rights (and in Victoria the explicit reference to the [Traditional Owner Settlements Act 2010](#)) in essence provides limited access for non-commercial or domestic water use similar to others in the community.

Good governance that enables allocative planning needs good process, institutional structures and appropriate informational input to decision-making. Importantly the overarching purposes or principles need to be appropriate to guide the decision-making and guide the boundaries for the market operations. A strong planning framework, and one that sets the rules of allocative mechanisms and long term considerations will provide certainty for all parties.

The Productivity Commission's preliminary framework therefore could be enhanced through the explicit reference to the need to balance the governance outcomes, to ensure appropriate principles, values and rules can be given effect to within the general market approach.

The States and MDBA have often sought to garner an Indigenous view from 'peak bodies'. While this approach is effective in developing system wide information and policies, there remains a need to work more closely with the Traditional Owners and rights holders' organisations directly in relation to the governance of water within their specific regions.

In order for the management of the water resource to give effect to the Indigenous interest, the Indigenous interest must be incorporated into the governance processes. This may be best managed through a mix of 'seats on boards' and through a greater level of planning interaction.

#### *Trade activity*

Activity in the market varies across markets, but nationally 90% of trading activity is in the Southern MDB. The State registries, complex allocation rules and weaknesses in accessibility, quality and short history of water market information for interpreting the market, provide some difficulty in achieving the smooth market operations.

A third of irrigators are neutral/disagree that it's easy to trade allocation water and 41% do not think the water trade market is fair for all users.<sup>8</sup>

The market needs to be transparent and to allow users to plan the best use of their water resources and capital. While climate change, weather events, product market changes will continue to bring uncertainty, the rules and principles provide the regulatory means to supplement and guide the price signals in the imperfect market, with many values, players, and externalities.

In this context the articulation of the Indigenous interest is important to best enable Indigenous and other interests to plan and direct capital and water resource in a way that best supports the desired outcomes. The long term, collective perspective with values that strive to balance the social, cultural, environmental and economic needs will focus on sound long term investment.

Whether it has a private or public good element, water can be directed through a market mechanism. However, the regulatory objectives and management processes have been used to supplement and guide the price signals.

Arguably a legislative framework that can balance environmental water (and recognise the many complexities for both the short term and long term) while enabling a market approach, has the foundations to recognise the Indigenous interest.

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<sup>8</sup> University of Canberra 2014, *Regional Wellbeing Survey* (as reported by the Department of Agriculture and Water Resources)



However, in order to ensure that the management mechanisms, information collection and operational arrangements need to recognise the long term, intergenerational and collective nature of the 'ownership' and management of the interests in water. This may mean having appropriate mechanisms that actively protect Indigenous interests.

The way in which the water use is monitored and measured may need to reflect a stronger recognition of the Indigenous interest.

The focus on trade to encompass all water systems where this offers net benefits is a key question, which must have regard for the way in which to value and measure those benefits.

It is always problematic to measure benefits where the trade-off becomes a complex analysis of values or has long term effects. A mechanism that does not include the cost or risk factors will not provide a true picture of the price or market effectiveness.

The institutional arrangements, whether they are at the level of principles, values and objectives or at the level of rules and trading limitations and the registry functions are key to the system of markets. The Indigenous interest therefore naturally requires inclusion in further work.

The framework therefore needs to incorporate the Indigenous interest more fully and explicitly, particularly in the areas of property rights, planning processes and environmental management.

## Property rights

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- What further actions are needed to achieve clear and secure property rights
  - What steps are required to
    - Unbundle entitlements in unregulated surface and groundwater systems
    - Incorporate all water uses within one planning framework
  - What new water sources should be brought into a water entitlement process and why
  - Are current approaches to water rights compliance and enforcement fit-for-purpose
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### Introduction

In measuring progress of the NWI and consideration of any regulatory reform proposals, it is important to recognise that the Indigenous interest broadly pertains to extractive and non-extractive uses and managing the flows to the areas that are best value. To achieve certainty for all parties and clear and secure property rights across the system, Traditional Owners seek to meet their obligations and aspirations with sufficient certainty over:

- control over sufficient quantity of water resources
- recognition and measurement of the public and private benefits
- governance roles within the whole system
- non-extractive access.

Incorporating further sources of water into the system, including through unbundling unregulated water and use of ground water, requires a stronger focus on Indigenous ownership interests to mitigate further dispossession in property and alienation from the connection to Country.

In any changes it would be inappropriate for allocation to directly or indirectly favour current holders of land or water, simply on the basis of their current holdings. That could be seen as providing another windfall to those asset holders at the expense of Traditional Owners. Traditional Owners on the other hand with the inherent connection to the land provide a favourable focus for allocation mechanisms.

### Recommendations

1. Update the NWI and water regulatory system to explicitly incorporate the full suite of Indigenous interests, including economic interests
2. Provide recognition for Indigenous interests in the allocation of entitlements through a regulatory mechanism that recognises underlying Indigenous interests, the loss of interests through dispossession and the capital requirements
3. Provide for the regulatory and management mechanisms that set a minimum level of water allocated to and controlled and managed by Indigenous interests to ensure an appropriate system in the Australian context
4. Integrate into the process for and the objectives of including any new water sources in the system to be subject to an underlying Indigenous interest that will help actively protect those interests

## Discussion

### *Ownership*

Traditional Owners have not been recognised within the ‘ownership’ system. At the point of separation of land from water, the land ownership of Traditional Owners, including their corporations, was between nil and negligible, and as such water assets were not established.<sup>9</sup>

Ownership of water in Victoria remains largely connected to the historical land ownership (where the separation has taken place within the MDB). While the water has been separated as a property right, a relatively small amount of water has been traded away from the land permanently - approximately 7% of all entitlements are not tied to land.<sup>10</sup>

The largest proportion of waters separated from land has been to environmental water holders. For example, 21% of the Murray and 14% of the Murrumbidgee General Security entitlements have been purchased by governments. This has reduced the consumptive pool.

The Victorian Traditional Owner Water Policy Framework calls for a framework that will recognise water interests which are:

- additional to and separate from environmental water
- sufficient to meet the range of needs of the community
- highly secure and tradeable.

The NWI provides some indication of the need for recognising the Indigenous interest in relation to planning processes, with particular emphasis on the native title rights and social, spiritual and customary objectives. It is therefore unclear whether these include a property interest that is economic.

While customary use is not exclusive of economic interest, there remains no regulatory guidance or mechanisms by which to balance these interests through the allocative processes – except in so far as there is an ability to purchase water entitlements.

Recent native title cases have turned attention to the ‘economic’ use of resources. There is greater clarity that ‘customary’ or ‘traditional’ does not preclude ‘economic’ uses and benefits.<sup>11</sup> The NWI could be refreshed and updated to better recognise these factors, alongside the need to strengthen the NWI provisions for more certainty.

A focus on uniform entitlements, which can be transferred between locations, purposes and owners, provides a strong basis for a market approach. However, there are numerous constraints on this, including for example potable and non-potable water or environmental

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<sup>9</sup> This does not include Aboriginal private land holders who may have received allocations. The quantity of land owned in Victoria owned by collective Aboriginal interests is thought to be about 17,000 ha (or ~0.0007% of Victoria). These holdings are largely in the southern parts of the State.

<sup>10</sup> P89 *Social and Economic Impacts of the Basin Plan in Victoria* Tim Cummins and Associates with Frontier Economics 2017

<sup>11</sup> *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33 (7 August 2013)

water mechanisms including sustainable limits and the management of flood and drought events. Further management of water through dams (including the recent proposal for new Snowy river hydro-electricity generation) also require a stronger focus on the management/governance of the system.

### *Environmental objectives*

The key way in which the environmental objectives are being met within the market are through the buybacks by the Commonwealth, with subsequent delivery through the Victorian Environmental Water Holder.

Several projects have been initiated including with Aboriginal stakeholders. These are seen as having a positive effect on the ecological outcomes for waterway health. However, this has not impacted the ability for Traditional Owners to access water or to strengthen participation in the market.

In fact it is arguable that the water buy-back regime has had the impact of as having reduced the ability of Traditional Owners to access 'surplus' water through either the market, or through the development of mechanisms to create surplus water, which could be made available.

### *Process to achieve secure property rights, including new water sources (including surface and ground water)*

Any further unbundling of water systems or additional sources of water into the market, must firstly be considered in light of the Indigenous interests. These interests must be incorporated into the highest level of legislative authority, providing for the values, principles and aspirations of Traditional Owners. These interests cover Country and are not limited to the land with formal title ownership.

Before any new systems are brought into a market regime, it will be important that there is a strong process of consultation and engagement to ensure that the views of Traditional Owners are incorporated into policy.

A single planning framework will be required, to ensure that the integrated systems and catchments (to include for example the interconnectedness of surface and ground water). This needs to provide the framework for the management and monitoring of the system, including a basis for the allocative mechanisms.

Further, any allocation system will need to address the need for understanding the status of potential recipients. It may be appropriate to provide active protection of the Indigenous interests through a mix of tradeable and non-tradeable entitlements. Potential mechanisms could be a mix of:

- A 'senior status' for water rights for Traditional Owners (cf Native American approaches)
- A proportional recognition, based on the potential land ownership and land interests (cf NZ's Maori fisheries and aquaculture regulatory frameworks, which provided for transferring

a proportion of the interests in fishing quota, and enabling a proportion of marine aquaculture space to be available)

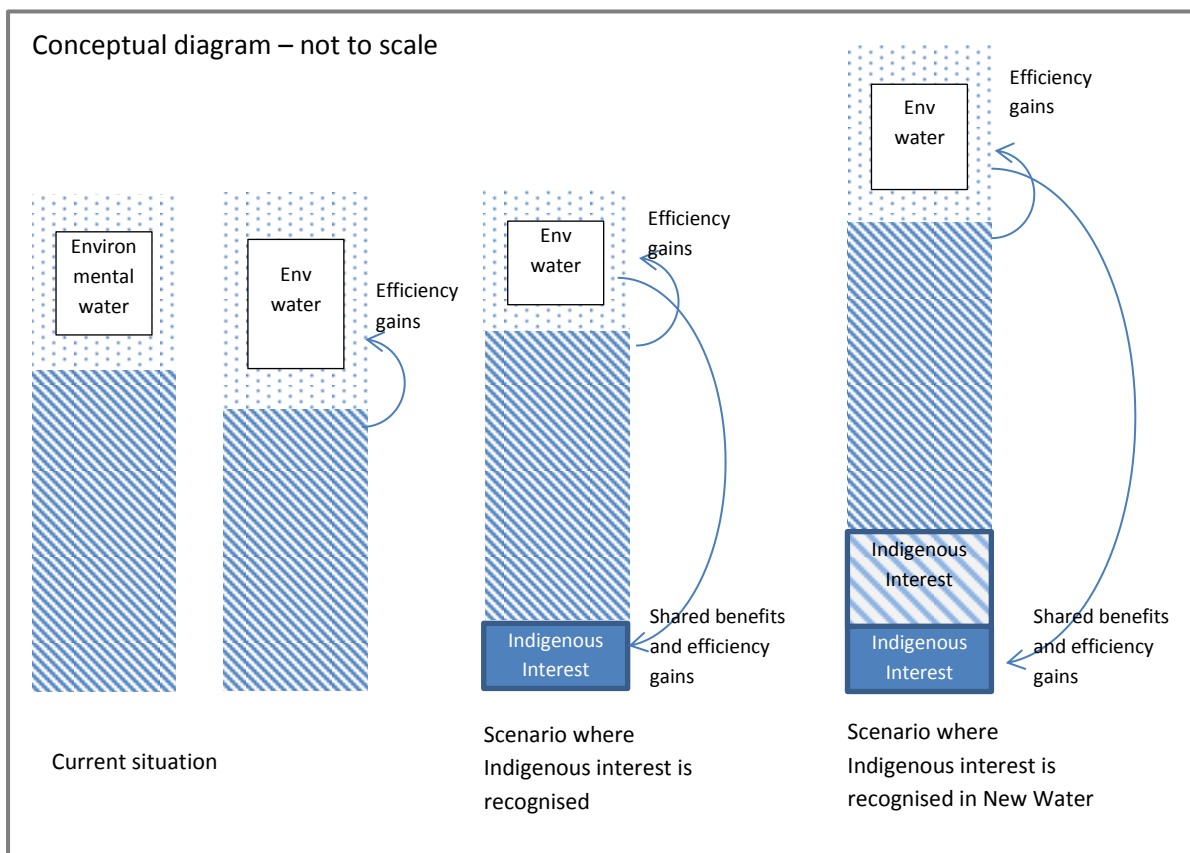
- A use, development and control mechanism, including access to a purchase fund
- A re-direction of water saved from the system to Traditional Owners
- The ownership of new water to vest in Traditional Owners from which others derive an allocation (and pay a rent).

There is a good deal of concern about new sources of water drawing on ground water. A strong foundation of research and consultation will be required on the effects in terms of management and water quality.

Further, the link to land ownership and ground water will need to be given significant consideration. The evidence of interconnectedness, and the ability to control the water flows will be of particular interest to Traditional Owners.

If there is to be a process to consider adding this water to the market, and in particular to open up the quantity of water that can be traded off the associated land, then the impacts in terms of quantity and quality will need to be fully considered.

A diagrammatic representation of an approach that sets a minimum, which is attracted from the water savings, and an underlying interest to build the amount of water from new sources and savings that could be the total new water, but could be accessed by rights of use.



### *Impacts on current entitlement holders*

The property rights afforded to landholders in 2007 have been of economic value. The protection of those property rights is important in order to maintain trust in the system. However, there is some concern that there could be impact on these entitlements by recognising the Indigenous interest.<sup>12</sup> Systems that allow for (surplus) water to be redirected to the environment appear to be acceptable, but not for other purposes. Equally it is important to actively protect the Indigenous interest.

Determining the addition of new water sources into the market without setting a regulatory approach to actively protect Indigenous interests (and to give recognition to other interests – environmental and public interests) is likely to lead to further windfall gains.

There is a significant risk that the further removal and requisition of Indigenous interests could be removing property interests, particularly if they are then being transferred to private interests (rather than being maintained in public ownership). The recent Timber Creek<sup>13</sup> case highlights the potential risks if these issues are not dealt with appropriately from the start. It is therefore important that the clarity of principles and values continue to be strengthened through governance and regulatory mechanisms.

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<sup>12</sup> National Irrigators Council *Cultural Flows Position Statement* March 2015

<sup>13</sup> *Griffith v Northern Territory of Australia (No 3)* [2016] FCA 900

## Planning

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- What are key areas of water planning where further progress is required to achieve the objectives and outcomes of the NWI
  - Is there scope to streamline water planning processes to reduce unnecessary costs on planners and participants
  - Are processes for reviewing water plans sufficiently robust, transparent, open and timely
  - Is there scope to improve how water plans deal with long-term shifts in climate affecting resource availability – are there recently examples of leading practice
  - Are current water entitlement and planning frameworks conducive to investor confidence, facilitating investment in major new infrastructure while managing risks to supply security of existing water users
  - How can interest and needs of Indigenous people be better accommodated and represented in water planning processes
  - What steps have been or should be taken to integrate water quality objectives into water planning arrangements
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### Introduction

The planning processes have a significant impact on the Indigenous interests, in part due to the balancing of many different objectives across the system, and in part because the objectives and the values are not articulated, or only partially identified. While some effort has been afforded to understanding of ‘cultural flows’ and Indigenous issues this has not been well connected to planning processes.

The NWI provides some guidance on Indigenous interests, providing discretionary consideration mainly of native title and customary objectives. The Victorian Water Plan also identifies the need for planning processes, and sees ‘shared benefits’ arising where for example “water corporations might be able to time water releases from storages for customary or spiritual purposes”.<sup>14</sup>

The focus on native title in the NWI is not satisfactory as a framework for understanding the Indigenous interest. Traditional Owner nations can be recognised through other statutory and on-statutory mechanisms.

### Recommendations

1. Establish a stronger focus on long term planning that incorporates Indigenous interests by establishing the objectives and values within the overarching framework as a mandatory component
2. Ensure that the allocation and planning process provides for a long term plan, and that this is then given effect to through short term planning, which is more streamlined
3. Incorporate Indigenous participation in planning, governance and representation through different mechanisms, in order to streamline and reduce the planning burden

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<sup>14</sup> *Water for Victoria Water Plan*, Victorian Government 2016 (p104)

## Discussion

### *Planning mechanisms*

Streamlining and reducing the costs (and risks) of planning to ensure the robust and integrated plans is essential, particularly for Traditional Owner groups with limited capacity to participate in multiple processes.

Currently planning under the NWI has no mandatory requirements in relation to Indigenous interests. The guidance is narrow, with a focus on native title and cultural heritage. The MDBA must have regard for social, cultural and spiritual values. This is not only a relatively weak level of commitment, but essentially removes the many ways in which the economic and other values actually align or dovetail into the whole plan.

It would reduce the costs and risks to planning processes if there is a clearer pathway to the input to planning, where the overarching objectives are well understood and are always within the framework of decision-making.

### Clarity on Representation

There is a lack of clarity between the governance and representative nature of the Indigenous inclusion. Clarity on what is meant by 'representation' is required. For example, it may not be always clear whether this means representing an interest (which could be local or broad on behalf of others, who have endorsed or given mandate to that person to speak on their behalf and represent their interests), or whether this is in some way 'representing' a more diverse board.<sup>15</sup> If the body is a governance body, a question of representation can be fraught, particularly where the 'representative' is not selected to, or is not in a position to, represent the interests of others. Recognising the regions and roles of Traditional Owners is critical to ensure that the appropriate interests are incorporated into planning and decision-making.

Some catchment management authorities and water corporations in Victoria have individual Aboriginal board members and some have employed Aboriginal liaison officers to assist in consultation. However, planning processes, largely do not include Traditional Owners within representative positions.

Having input from the appropriate people is critical in order to ensure that the planning processes incorporate appropriate Indigenous interests. Traditional Owners may be dealing with several water authorities (and similarly, water authorities may be dealing with more than one Traditional Owner group). This means that the planning processes need to recognise the integrated nature of planning across systems and across planning horizons.

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<sup>15</sup> Traditional Owner representative organisations have a number of roles and functions. For example, the corporations may act akin to local government, in planning and authorising activities, or as a business investor, as a consulting firm, or as a trustee managing interests for their communities. The particular roles of individuals within these structures may be equally as diverse.



It is imperative that there is a mandatory approach to including the Indigenous interest in planning. There are a number of ways this could be achieved:

- A minimum number of Board positions on water authorities (eg MDBA, water corporations, catchment management authorities)
- Standing committees of relevant Traditional Owner groups
- Specific referral of draft plans to relevant groups comment and approval
- Incorporation of Traditional Owner groups' own plans into the planning processes, including the research and development of knowledge about water
- Strengthening the level of consultation within various policy and planning phases or levels (eg flood planning and management)
- Consultation being taken at appropriate levels, across broad parts of the water system, for example through MLDRIN or in specific regions, where a particular group has specific interests and knowledge

### Strengthening focus on Objectives

Decision-making and planning processes require clear and mandatory inclusion of objectives and guidance to recognise the Indigenous interest. Efficient and streamlined planning and decision-making processes require clear objectives where the strategic outcomes are already known and formulated.

Taking the time to set and incorporate the Indigenous interest in the long term strategies and objectives will make for more efficient planning processes. Less time will be required for shorter term planning and decision-making with a greater level of certainty in the market.

The NWI and the water systems at State level have not addressed the objectives of the Indigenous interest with sufficient clarity or through mandatory requirements. This has led to a lack of a strong focus on the Traditional Owner interests in core water planning, as water planning tends to be seen in terms of the allocations.

Indigenous interests are not embedded at the centre of planning. This is reflected in the 'add on' approach in State and MDBA planning processes. For example, the recent Victorian government report on the social and economic impacts of the Basin Plan notes in the introduction that the Water for Victoria plan "supports engagement with indigenous communities in water resource planning and consideration of indigenous values and uses". There is no other reference to impacts on indigenous communities.<sup>16</sup>

Given the lack of clarity in how to best incorporate the Indigenous interest in planning, this has led to some instances water authorities incorporating non-water operations into planning as a way to engage with Indigenous communities (eg opportunities for Indigenous people to undertake the mowing of water frontages).

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<sup>16</sup> P15 *Social and Economic Impacts of the Basin Plan in Victoria* Tim Cummins and Associates with Frontier Economics 2017. It is interesting as context that the following sentence references the commitment of the Victorian government to work in partnership with water authorities and catchment management authorities to achieve balanced outcomes from the MDBA.

MDBA prioritises the protection of historical entitlements over the distribution of resources in a way that meets the long term needs and is able to incorporate a stronger focus on the ecological or Indigenous interests.

Moreover, with a clear articulation of the objectives, the ability to measure performance and to therefore manage and direct the management resources will be simpler.

A greater focus on the definitive requirements for long term planning within the NWI, providing the direction to States, the MDBA, and the many water authorities, that will provide a strong set of objectives that establish the long term goals and policies across water systems.

At the very least, this will provide a rational and transparent means to articulate the way in which plans will balance and promote trade-offs necessary within a market framework and a basis for regulatory boundaries and rules.

Objectives could include aspects such as:

- Research and information, including through incorporation of Traditional knowledge
- Monitoring
- Allocation of water towards Indigenous interests and benefits
- Objectives for use of 'surplus' water (not just as environmental water)
- Objectives for flood plains waters, and other waters
- Long term investment towards water being used to replenish and manage many landscapes for a range of activities and objectives (eg food collection and hunting)
- Partnership arrangements and processes for managing operational decisions (eg during flood events)
- How to maintain a strategic assets focus in Australia
- Allocation of water specifically to Indigenous groups to meet multiple/mixed objectives

### *Investment*

The Commonwealth buy-backs of water have had a significant effect on the price of water. Irrigators who had high debt sold off water entitlements, and in the dry years have relied on the markets to buy water. The Commonwealth buy-backs were concentrated on the high reliability water. This implies greater competition for annual allocations, increasing pricing and variability across industries. However, due to the high rainfall in the 2010-12 years these impacts have been less noticeable.

During the period up to 2014 there were restrictions in place to limit the amount of trading across different parts of the system, to reduce the risk of changes in water availability within subsystems (and the consequent economic impacts due to transitional lack of information and market certainty). However, the level of 'speculators' in the water market has been low.<sup>17</sup>

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<sup>17</sup> P99 *Social and Economic Impacts of the Basin Plan in Victoria* Tim Cummins and Associates with Frontier economics 2017

The infrastructure investments across Victoria over the last 10-15 years have been very significant, to enable the irrigation and urban water supplies to be more secure, and to increasingly reduce the losses from evaporation.

While the cost benefit analyses and socio-economic research, largely focuses on employment and downstream effects of loss of water for irrigation, and enables the water for waterway health (eg salinity, fish breeding) there has to date been no significant work relating to the loss of heritage sites, or of the ability of Indigenous people to exercise their cultural activities.

Analyses and decisions taken in terms of investment and in the management of water (including for example, from floods or drought) are often not based on an examination of the full impacts.

Consequently the costs are borne elsewhere, either from the loss of cultural assets or from the departmental budgets for repairs and maintenance. Within the movement of water from one water body to another may be undertaken without understanding its 'spiritual' context, amounting to both tangible intangible losses and costs.

Regulatory mechanisms may be used address externalities, whether these are rules or boundaries for trade, or to provide alternative or substitute resources to replace/rectify the impacts and externalities. In developing the water trading system there is a need to give further consideration to balancing the costs benefits across the system and outside of the system.

In this context, it is recognised that the ability to quantify and determine future needs of the Indigenous interest, and balance these with other needs and uses is potentially limited through lack of data, including pricing data. This tends to imply strengthened regulatory mechanisms and objectives alongside a greater ability to operate within the market.

## Environmental management

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- What are the guiding principles for 'best practice' management of environmental water? Are the institutional and governance arrangements for held environmental water working well
  - What is the role of governments in promoting trade in environmental water and acquiring environmental water at least cost to the community
  - How can institutional arrangements be used to ensure agencies with natural resource management responsibilities (including environmental water managers) pursue least cost approaches to achieving environmental and other public benefit objectives
  - Are the policies that affect the health of water systems sufficiently integrated
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### Introduction

Environmental management within the water system has three main limbs:

- water purchasing – with public investment money
- regulatory mechanisms to assign, divert or control water resources within the system
- private use or purchasing of water.

However, this is not to say that benefits for the environment are not achieved through other water that is unallocated, or is used for irrigation.

Greater focus on measurement and monitoring would provide a stronger reference point for the multiple ways in which water is used for environmental watering, and in deed for the many shared benefits that can arise from that. In particular stronger linkages to the holistic outcomes that Indigenous interests seek could assist in developing the greater value and least cost from water objectives.

### Recommendations

1. Consideration of a legal personality for particular environmental assets as a long term way to develop the objectives and best practice approach to environmental management
2. Increasing focus on the measurement and monitoring of environmental benefits, including where these cross over with Indigenous interests
3. Enhancement of opportunities for Indigenous interests to participate through governance of relevant institutions as well as through the allocation of water that can provide the holistic range of benefits

## Discussion

Internationally there is an emerging legal framework of the environment (eg a water body) being a legal person in its own right, rather than a mechanism to achieve or address public interests.<sup>18</sup>

In developing any new approaches, this could be given consideration and as part of the development of best practice. The principles then would be developed based less on balancing different 'human' consumption trade-offs but more specifically on the health and wellbeing of the waterways, but not necessarily at the expense of the 'use' of that water for other purposes.

The current institutional arrangements provide a strong platform for managing public interests in the environment. It may be possible to achieve greater value for money where there are shared benefits with and across environmental outcomes. For example, Traditional Owners are often seeking water (at particular times and in particular places) for enhancing wildlife for hunting purposes. The strict 'environmental' objectives have limited ability to achieve such outcomes. While there are clearly environmental outcomes wrapped up in this, the objective is focused on hunting.

While caution will be required in terms of addressing what shared benefits means (and whether this can be achieved outside of the Indigenous interest) it could be a starting point for a stronger focus on measuring (and then monitoring) holistic outcomes and the subsequent understanding of the potential benefits for the environment and the Traditional Owners.

The establishment of an Aboriginal Water Commission position in Victoria could assist to enhance the environmental outcomes in association with other outcomes through stronger linkages. However, this may require consideration of the way in which objectives are developed to ensure clear ways for measuring shared benefits.

The ability for the environmental water holders to trade water is crucial to the ability to achieve environmental objectives, while enhancing the ability to access that water for other uses. It allows the timing and location of water delivery, and by incorporating the environmental values into decision-making allows irrigators and environmental interests to value water, enabling the market to allocate water efficiently.

The ability of Indigenous interests to participate in, and contribute to, the environmental management outcomes are limited in terms of the capacity to hold water. The planning and use of water through governance is increasingly seen as a positive way to achieve environmental outcomes.

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<sup>18</sup> See for example the New Zealand Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

## Achieving Reform

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- Should further water reform be pursued through an improved NWI
  - How can policy impetus be best generated
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The National Water Initiative provides strong guidance across jurisdictions. While State-based requirements, in part reflecting the total water resources, and the historic way in which those resources have been used, will continue to be required, the NWI could provide a stronger level of agreements.

In this context reform of the NWI is a very important way to strengthen the shared vision and objectives for the Australian context. Within this context, there is a leadership role to play in actively protecting the Indigenous interest, and developing ways to balance and enhance the ability of Australia to benefit from that resource.

The NWI has been used as the baseline, and it may also encourage future development and strengthened capacity within the water institutional arrangements.

Developing policy impetus will need an on-going platform for a national discussion. The issues raised by the National Water Authority, particularly in relation to Indigenous interests, have progressed little. It is therefore imperative that further work is undertaken to develop a range of opportunities for short term and long term systemic change, from within the regulatory and government sectors, but also from academic quarters.

The productivity commission's focus on national economic outcomes is a key component of this, and can greatly enhance the discussion including through linking measurement of Indigenous interests in water and the National Indigenous Reform Agenda (Closing the Gaps) Reporting.

### **Recommendations**

1. Refresh the NWI and strengthen its weight for national agreement including with respect to reforms on issues pertaining to Indigenous interest, with increased focus on the allocative mechanisms and incorporation of objectives and values within planning processes in the water system.
2. Give greater focus to the measurement of progress of Indigenous water interests, including through the linkages with other measures of Indigenous wellbeing and participation in the social, economic, cultural and environmental wellbeing of Australia.