



Australian Government
Productivity Commission

Securing Aboriginal
and Torres Strait Islander
people's interests in water

Supporting Paper D

National Water Reform 2020
Draft Report

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GUIDE TO THE SUPPORTING PAPERS (AND DESCRIPTOR)

SP A Water entitlements and planning (*Entitlements and planning*)

SP B Water trading and markets (*Trading*)

SP C Environmental management (*Environment*)

SP D Securing Aboriginal and Torres Strait Islander people's interests in water (*Cultural access*)

SP E Ensuring the integrity of water resource management (*Integrity*)

SP F Urban water services (*Urban*)

SP G Urban water services: regional and remote communities (*Regional*)

SP H Water reform in rural Australia (*Rural*)

SP I Government investment in major water infrastructure (*Infrastructure*)

SP J Community engagement (*Engagement*)

SP K Knowledge, capacity and capability building (*Knowledge*)

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Contents

Key points	4
1 The NWI does not reflect Traditional Owners' aspirations	6
1.1 Written in 2004, the NWI is a product of its time	6
1.2 Traditional Owners have further articulated aspirations to include economic use	7
1.3 Despite limited NWI objectives, progress was slow	11
1.4 Support for a renewed NWI to help realise Traditional Owner aspirations is widespread	11
2 A renewed NWI	12
2.1 Existing frameworks can be used to deliver outcomes whilst the NWI is being renewed	13
3 Achieving cultural outcomes through enhancing the influence of Traditional Owners in water planning and management	14
3.1 Water planning is a key vehicle for achieving cultural outcomes	14
3.2 Cultural outcomes can also be pursued through environmental water management	15
3.3 Traditional Owners need to be involved in broader natural resource management programs	17
3.4 High-quality engagement with Traditional Owners should be one focus in a renewed agreement	19
4 Enabling access to water for economic use	19
4.1 There are many barriers to accessing water for economic use	20
4.2 Current access is limited	21
4.3 There has been some progress in increasing access	22
4.4 A way forward to improve access	23
5 NWI renewal advice	27
References	29

Key points

- The National Water Initiative (NWI) is a product of its time, with a focus on achieving cultural outcomes through engagement with Aboriginal and Torres Strait Islander people. Since 2004, Aboriginal and Torres Strait Islander people have articulated their aspirations for access to water for unconstrained use (that is, for both cultural and economic purposes).
- In 2020, all Australian governments signed the National Agreement on Closing the Gap. One desired outcome is that Aboriginal and Torres Strait Islander people maintain their distinctive relationship with water. A target for inland waters is also to be developed.
- Consistent with the co-design approach committed to in the National Agreement on Closing the Gap, a Committee on Aboriginal Water Interests with Aboriginal and Torres Strait Islander membership has been established to develop a new NWI element covering Aboriginal and Torres Strait Islander people's interests in water. This approach could be strengthened.
 - Given the importance of its work, the committee should report directly to water ministers.
 - There should be coordination between the committee and Coalition of Peaks members involved in implementing the National Agreement on Closing the Gap to ensure the water outcome and inland waters target from the National Agreement on Closing the Gap is reflected in a renewed NWI.
- The delivery of cultural outcomes could be improved through existing frameworks while the new NWI element is being developed, as well as being incorporated into the renewed NWI.
 - Clear, measurable and well-informed cultural outcomes should be agreed in water plans. Monitoring and reporting arrangements that promote accountability and foster learning about what works should also be in place.
 - Cultural outcomes should be pursued through environmental watering where they are consistent with achieving agreed ecological obligations.
 - Local catchment or land management authorities should establish long-term relationships with Traditional Owners and engage with them on the management of cultural assets.
- Where governments determine that access to water is the best way to support economic development, that access should be facilitated within existing entitlement frameworks.
 - Where the consumptive pool is fully allocated, water should be bought from the market.
 - Where the consumptive pool has not been fully allocated, reserves can be created in systems, as has happened recently in the Northern Territory and Queensland.
 - Where governments invest in new water infrastructure, consideration should be given to reserving a share of any new water rights for Traditional Owners where this would be consistent with, and support, targets under the National Agreement on Closing the Gap.

Water is an essential part of connection to Country for Aboriginal and Torres Strait Islander people. Many water sources are featured in the Dreaming (oral histories of creation) and have significant spiritual value. They also support economic activity, including food production, and provide potable water — with cultural significance accompanying each water use. Special places near water have been sites for large gatherings for ceremonial, social or economic purposes. Rivers, creeks and lakes often mark boundaries between groups and nations. And waterways have been transportation routes, with travel and trading partnerships defined by cultural relationships (National Cultural Flows Research Project 2014, p. v). In other words, the water needs of Traditional Owners span a wide range of cultural and economic purposes.

A number of inquiry participants highlighted the importance of water to Traditional Owners.

Maintaining spiritual and cultural relationships with land, water and Country are crucial for Aboriginal people. The right to economically develop natural resources, consistent with cultural obligations, is also of significant importance. (NSW ALC, sub. 96, p. 2)

Land, water and people are inextricably connected, which means unity of land, water and Indigenous people. (Indigenous Reference Group (IRG) to the Ministerial Forum on Northern Development, sub. 103, p. 7)

... our involvement in the management of water is essential for our physical, spiritual, cultural, environmental, social and economic health ... (NBAN, sub. 17, p. 2)

Reflecting Traditional Owners' connection with water and Country, governments committed through the National Water Initiative (NWI) to recognise Aboriginal and Torres Strait Islander people's needs in relation to water access and management,¹ and agreed to a number of actions to support achievement of this outcome.² These were:

- the provision of access to water resources, in accordance with relevant legislation, through planning processes that ensure:
 - inclusion of Indigenous representation in water planning, wherever possible
 - incorporation of Indigenous social, spiritual and customary objectives — and strategies for achieving them — in water plans, wherever they can be developed
- that water planning processes take account of the possible existence of native title rights to water in a catchment or aquifer area
- that water allocated to native title holders for traditional cultural purposes be accounted for.

While the NWI is the primary national articulation of policy concerning the water interests of Traditional Owners, a number of other national Acts and agreements are also relevant, including the:

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act)

¹ NWI paragraph 25(ix).

² NWI paragraphs 52–54.

-
- *Native Title Act 1993* (Cth) and associated agreements
 - *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act)
 - National Agreement on Closing the Gap.

Many State and Territory policies and legislation also influence Traditional Owners' access to water resources.

This supporting paper focuses on access to water for cultural and economic purposes. The provision of safe water for remote communities and broader public health implications is examined in *SP G Regional*.

This paper includes:

- background on the NWI and progress to date against agreed outcomes (section 1)
- advice to governments on:
 - a co-design process to develop a new NWI element addressing Aboriginal and Torres Strait Islander people's interests in water (section 2)
 - approaches to delivering cultural outcomes through water management frameworks (section 3)
 - a contemporary focus for access to water for economic use (section 4).

1 The NWI does not reflect Traditional Owners' aspirations

1.1 Written in 2004, the NWI is a product of its time

The 1990s was a significant era for the recognition of Aboriginal and Torres Strait Islander people's right to access their traditional lands, with the landmark decision in *Mabo v Queensland [No 2] 1992*³ and the associated Native Title Act which recognised limited rights to use water on native title land (Australian Government 1993).

By the end of the 1990s, Australian governments had developed a greater understanding of Aboriginal and Torres Strait Islander people's connection to Country and that water was also a central part of that connection. The NWI placed Aboriginal and Torres Strait Islander people's access to water on the national water policy agenda, and was the first step towards improving access. However, this was mainly through seeking to improve consultation with Traditional Owners during water planning processes and ensuring that water plans considered cultural values.

³ HCA 23.

1.2 Traditional Owners have further articulated aspirations to include economic use

While the NWI includes provisions that recognise and provide for cultural values in water plans, at the time, these were considered to include social, spiritual and customary uses of water — that is, values that are frequently aligned to or dependent on the condition of environmental assets.

However, in the years since the NWI was agreed, Aboriginal and Torres Strait Islander people have further defined and articulated their thinking on water. In 2007, 31 First Nations in the Murray–Darling Basin (MDB) endorsed a statement on their rights and aspirations relating to water management — the Echuca Declaration. The declaration defined cultural flows as:

... water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right. (MLDRIN 2007, p. 2)

It also: described a range of environmental, social and economic conditions that would be improved for First Nations if cultural flows outcomes were achieved; set out mechanisms for delivering cultural flow outcomes; and commented on the quantity of cultural flows needed.

The key difference between the NWI and the Echuca Declaration was that the latter explicitly broadened cultural outcomes (which were to be achieved by the provision of cultural flows) to include economic development.

The subsequent National Cultural Flows Research Project (2011–2018), funded by several Commonwealth agencies⁴, articulated how cultural flows might be implemented (National Cultural Flows Research Project 2018). The project, a collaboration between peak Aboriginal organisations, Australian Government agencies and private organisations, developed a framework to conceptualise how the aspirations of Aboriginal and Torres Strait Islander people could be met through legal and policy reforms (figure 1).

The framework identifies mechanisms for:

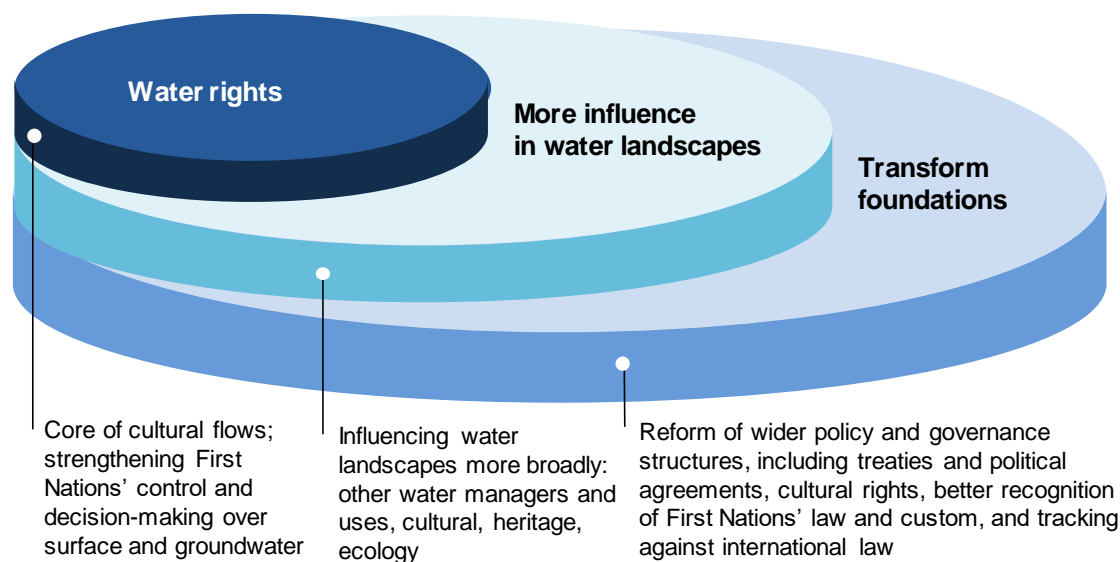
1. improving water rights (such as through the creation of Aboriginal Strategic Reserves in undeveloped regions and the purchase of entitlements in fully developed regions)
2. increasing influence in water landscapes (such as through strengthened recognition of First Nations' objectives in water management plans)
3. transforming the broad foundational context in which water management is undertaken.

The National Cultural Flows Research Project was developed for the benefit of First Nations across Australia, with a focus on the MDB. Throughout Australia, Aboriginal and Torres

⁴ The Murray–Darling Basin Authority, the Commonwealth Environmental Water Office, the National Water Commission, and the Department of Families, Housing, Community Services and Indigenous Affairs.

Strait Islander people have been working towards increasing their influence in water management using ‘governance models that fit the context and direction of Traditional Owners’ (Martuwarra Fitzroy River Council and Water Justice Hub, sub. 80, p. 1).

Figure 1 **The National Cultural Flows Research Project framework introduced three legal and policy approaches to cultural flows**



Source: *National Cultural Flows Research Project (2018)*.

The Martuwarra Fitzroy River Council (sub. 80) has developed a complementary proposal to the National Cultural Flows framework: a Conservation and Management Plan for the heritage listed Fitzroy River Catchment. Traditional Owners have proposed the plan to the Western Australian Government to jointly manage the Fitzroy River. The proposed plan places the Martuwarra, the River of Life (the Fitzroy River), at the centre of decision making, incorporates first law (the system of Aboriginal governance), and is built on the traditional knowledge of six independent Nations.

Two other key developments of relevance to the issue of access to water for Aboriginal and Torres Strait Islander people have occurred since the NWI was agreed.

As noted by a number of inquiry participants⁵, in 2009, Australia adopted the United Nations Declaration on the Rights of Indigenous People (UNDRIP). Articles 25 and 26 of the

⁵ IRG, sub. 103, p. 17, Martuwarra Fitzroy River Council and Water Justice Hub, sub. 80, p. 1, NSW ALC, sub. 96, p. 1.

declaration are particularly relevant to water access (box 1). The IRG, for example, recommended that:

Governments adopt the United Nations Declaration on the Rights of Indigenous People as a guide to engaging with Indigenous people in the design and implementation of a new National Water Initiative. (sub. 103, p. 17)

Box 1 UNDRIP provides an underpinning for Traditional Owner involvement in water management

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to their lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Source: *UN (2007)*.

And in 2020, a new National Agreement on Closing the Gap was signed by all governments. The agreement establishes four priority reforms to transform the way governments work with Aboriginal and Torres Strait Islander people, and establishes targets for improvements in socioeconomic conditions (box 2).

The National Agreement on Closing the Gap has implications for a new NWI in two key ways. First, the four priority reform areas transform the wider policy and governance context in which any new policy affecting Aboriginal and Torres Strait Islander people would be negotiated. These broad reform areas effectively reflect progress in the third component of the National Cultural Flows Research Project framework (transform foundations) and set the context within which a new NWI would be developed. Second, it includes several water-related commitments. One outcome sought is that ‘Aboriginal and Torres Strait Islander people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters’ (Australian Governments and the Coalition of Peaks 2020, p. 34). And a new target is to be designed to:

... measure progress towards securing Aboriginal and Torres Strait Islander interests in water bodies inland from the coastal zone under state and territory water rights regimes. This will include data development to identify a nationally consistent measure for inland

waters encompassing, for example, water licences, water rights and water allocation plans. (p. 36)

Box 2 The National Agreement on Closing the Gap seeks to improve outcomes for Aboriginal and Torres Strait Islander people

In 2008, the Council of Australian Governments established a Closing the Gap strategy with the aim of improving outcomes of Aboriginal and Torres Strait Islander people in the areas of health, education and employment. The strategy had mixed results, with improved outcomes in some areas and unchanged or worse outcomes in others (SCRGSP 2016).

In July 2020, all governments signed a new National Agreement on Closing the Gap. The agreement takes a new approach — shared decision making and co-design of policies between government and Aboriginal and Torres Strait Islander organisations. This represents a shift towards a genuine partnership with Aboriginal and Torres Strait Islander people, based on ‘the belief that when Aboriginal and Torres Strait Islander people have a genuine say in the design and delivery of services that affect them, better life outcomes are achieved’ (Australian Governments and the Coalition of Peaks 2020, p. 2). Four priority reforms aim to transform the way governments work with Aboriginal and Torres Strait Islander people. These are:

- strengthening and establishing formal partnerships and shared decision making
- building the Aboriginal and Torres Strait Islander community-controlled sector
- transforming government organisations so they work better for Aboriginal and Torres Strait Islander people
- improving and sharing access to data and information to enable Aboriginal and Torres Strait Islander communities to make informed decisions.

In addition to the reforms, the new agreement includes 16 socioeconomic targets across a range of areas, and an additional four targets to be developed. Two of these targets to be developed are relevant to the refreshed National Water Initiative.

- The community infrastructure target ‘will measure progress towards parity in infrastructure, essential services, and environmental health and conditions. This will include data development to measure essential service provision to Aboriginal and Torres Strait Islander communities, including water and sewerage, waste management, road reserves and electricity supply, as well composite measures to capture all aspects of the target’ (Australian Governments and the Coalition of Peaks 2020, p. 36). This is discussed further in *SP G Regional*.
- The inland waters target ‘will measure progress towards securing Aboriginal and Torres Strait Islander interests in water bodies inland from the coastal zone under state and territory water rights regimes. This will include data development to identify a nationally consistent measure for inland waters encompassing, for example, water licenses, water rights and water allocation plans’ (Australian Governments and the Coalition of Peaks 2020, p. 36).

A target will also be developed for service provision for communities (*Report*: chapter 12). A renewed NWI will have to meet these government commitments — both in the way it is developed and its policy content.

1.3 Despite limited NWI objectives, progress was slow

Progress on addressing Aboriginal and Torres Strait Islander people’s interests in water was slow in the years after the NWI took effect. In 2011, the National Water Commission commented that ‘most jurisdictions ... improved consultations with Indigenous communities in water planning and management, but [had] generally failed to incorporate effective strategies for achieving Indigenous social, spiritual and customary objectives in water plans, as envisaged under the NWI’ (NWC 2011, p. 46). Similarly, in 2017, the Productivity Commission concluded that most jurisdictions had ‘routinely failed to identify and provide for Indigenous cultural values and objectives in water plans’ (PC 2017, p. 99).

1.4 Support for a renewed NWI to help realise Traditional Owner aspirations is widespread

Many inquiry participants expressed support for a renewed NWI to better reflect the aspirations of Aboriginal and Torres Strait Islander people. Forty submissions from Traditional Owners, non-Indigenous organisations and individuals covered this topic, and inquiry participants argued that more needs to be done to achieve Traditional Owners’ aspirations to access water. The introduction to this supporting paper highlights the importance to Aboriginal and Torres Strait Islander participants, and box 3 demonstrates the wider support in the community.

The Commission’s advice on a renewed NWI reflects the three components of the National Cultural Flows Research Project’s framework: transforming the foundations of national water reform through partnership (section 2); strengthening Aboriginal and Torres Strait Islander people’s influence in water management systems to achieve cultural outcomes (section 3); and addressing water rights to reflect commitments under the National Agreement on Closing the Gap (section 4).

DRAFT FINDING 9.1

Much more needs to be done to include Traditional Owners’ interests in water in jurisdictional planning and the management of water. Slow progress against commitments made in the 2004 National Water Initiative, coupled with the contemporary context including the National Agreement on Closing the Gap and wide support for action, warrants inclusion of both a dedicated objective and new element in a renewed National Water Initiative.

Box 3 Inquiry participants expressed support for First Nations aspirations in water

Inquiry participants in the broader community raised the importance of water access for First Nations.

The needs of Indigenous communities to access and manage water have been a marginal consideration for policy makers, relative to the attention and effort given to (a) environmental restoration in regions such as the [Murray–Darling Basin], (b) structural adjustments and the vitality of irrigation communities, and (c) developing northern Australian water resources ... there is a risk that inaction will undermine the achievements of the land rights era of reforms ... In drafting the NWI, COAG did not properly consider the implications for Indigenous peoples of separating land and water titles and these urgently need serious and close attention to avoid or ameliorate adverse impacts. (Jackson, sub. 61, p. 1)

In recognition of the role water plays for the economic and overall well being of [Indigenous populations, WaterRA is a strong supporter of research and collaboration with [Indigenous groups with the aim to resolve water access or technological (e.g., water treatment) issues. We encourage the NWI to embrace the positive challenge to co-create a suitable framework with the [Indigenous leadership. (Water Research Australia, sub. 98, p. 4)

Implementation of the NWI has failed to adequately recognise, support and improve the water requirements of Indigenous Australians across the various jurisdictions. Further, the NWI itself is not 'fit-for-purpose' in meeting the future water requirements of Indigenous Australians and their communities. (ANU's Institute for Water Futures, sub. 30, p. 7)

It is well-established that the identity, culture and wellbeing of First Nations are intrinsically linked to land and water, yet there are limited opportunities for First Nations to participate in water planning and management, or access water for their cultural and economic needs. This is in part due to an ongoing lack of understanding of and support for cultural water. The NWI objectives should be strengthened to reflect the need to increase First Nations' access to water to complement direct involvement in planning and management of water resources. (MDBA, sub. 23, p. 6)

2 A renewed NWI

Reflecting widespread support for greater access to water for Aboriginal and Torres Strait Islander people, a new objective and element dedicated to Aboriginal and Torres Strait Islander people's interests in water should be included in the renewed NWI.

The National Agreement on Closing the Gap provides the broader context for how this new policy should be developed and some of the targets it needs to address. Given the commitment to partnership, the new element should be developed through a co-design process with Aboriginal and Torres Strait Islander people.

This would be consistent with aspects of the third component of the National Cultural Flows framework. While the full description of the component is potentially far-reaching and includes references to treaty-making, key aspects are focused on partnership and co-governance to provide First Nations with a voice in the management of water resources and landscapes. Elements of the component also note the need to better recognise and implement existing agreements such as UNDRIP (and the National Agreement on Closing the Gap could have been referenced in this component had it been in place at the time the framework was developed).

Consistent with the idea of co-design and increasing the voice of First Nations people, the National Water Reform Committee has recently established the Committee on Aboriginal Water Interests (the committee). The committee, with Aboriginal membership, is tasked with developing a new element for the NWI addressing Aboriginal and Torres Strait Islander people's interests in water. The Commission supports this approach, but notes that to give issues associated with Aboriginal and Torres Strait Islander people's interests in water the status that they warrant in policy making, the committee should report directly to water ministers overseeing the development of the renewed NWI (*Report*: chapter 4).

A diverse group is essential to ensure that the content of a renewed NWI reflects the diversity of Aboriginal and Torres Strait Islander knowledges and perspectives on water. The committee has Aboriginal members who bring a deep understanding of water resource management, and a variety of perspectives. It also includes representatives from multiple States and Territories to cover variation in governance models due to differences in geography and culture, and has a gender balance to cover both Men's and Women's Business.

Content of the new element will need to align with governments' commitments under the National Agreement on Closing the Gap — actions consistent with the water outcome and targets could be included. There would therefore be significant benefits from coordination between the committee and the Coalition of Peaks members involved in developing the implementation arrangements for the National Agreement on Closing the Gap, particularly development of the inland waters target. The Commission also recognises the committee's experience and knowledge in water resource management. To ensure this knowledge is available to the Coalition of Peaks if required, the committee's terms of reference should allow for it to advise on, and contribute to, development of the inland waters target if requested.

2.1 Existing frameworks can be used to deliver outcomes whilst the NWI is being renewed

Whilst this policy work is being undertaken by the Committee on Aboriginal Water Interests, the Commission considers that existing frameworks can still be used to deliver improved water outcomes for Aboriginal and Torres Strait Islander people. However, in working within the existing water management frameworks, it is necessary to differentiate between aspirations of Aboriginal and Torres Strait Islander communities for water for economic development and the more traditional cultural outcomes envisaged under the original NWI. The former requires the provision of consumptive water entitlements, able to be used for a range of purposes, while the latter can be achieved through enhancing the influence of Traditional Owners in relevant water planning and management purposes.

These two approaches align with the first and second components of the Cultural Flows framework (figure 1), and are discussed in the sections below. The advice provided by the Commission in both these sections is to governments and for consideration by the Committee on Aboriginal Water Interests as they develop the new Indigenous element of the NWI.

3 Achieving cultural outcomes through enhancing the influence of Traditional Owners in water planning and management

Cultural values relating to water are complex and diverse, and may vary significantly between Aboriginal and Torres Strait Islander peoples. Recent work provides one insight into their breadth (box 4). The key is that cultural values are inextricably linked to the environmental condition of Country. Given this, the most effective way of achieving cultural outcomes is through enhancing the influence of Traditional Owners in the water management processes that most affect their Country. These include water planning where the trade-offs between social, economic, environmental and cultural outcomes are agreed and environmental water management and natural resource management in which on-ground action is taken to achieve agreed environmental outcomes.

The following discussion reflects recommendations made by the Commission in 2017 (PC 2017). Since then, there has been little progress in some areas (*Assessment*) and the 2017 recommendations remain relevant. In other areas, progress has been better, meriting advice to support governments in going further.

Box 4 Aboriginal and Torres Strait Islander people's water values are wide ranging

For Aboriginal and Torres Strait Islander people, rivers, wetlands, aquifers and other water bodies have interdependent cultural, social, spiritual, customary and economic significance.

The Aboriginal Water Initiative collated a list of water dependent cultural values in New South Wales through direct engagement with local Traditional Owners. These cultural values include (but are not limited to):

- creation sites along a Songline or Dreaming track
- teaching sites where knowledge and language are passed on to the younger generation
- gender specific sites for Men's and Women's Business
- ceremonial sites or meeting sites
- resource sites for cultural practices
- burial places or sites
- massacre sites
- sites that contain evidence of occupation
- culturally specific environmental conditions to sustain totemic species or cultural keystone species.

Source: *Moggridge, Betterridge and Thompson (2019, p. 276)*.

3.1 Water planning is a key vehicle for achieving cultural outcomes

While States and Territories have engagement mechanisms in place, progress on embedding cultural values in water plans and achieving cultural outcomes remains insufficient.

In 2017, the Commission found that most jurisdictions had taken steps towards engaging Traditional Owners in water planning, and as a result have started to recognise cultural water needs in these processes. But more could be done. The Commission recommended that cultural objectives and outcomes should be explicitly agreed, specified and provided for in water plans and that progress in achieving those objectives should be regularly monitored and reported publicly (PC 2017, p. 109).

Since 2017, many States and Territories have made some progress (box 5).

However, there is should be further development. Reiterating the Commission’s conclusion from its 2017 assessment, States and Territories should ensure both the specification of clear, measurable and well-informed cultural outcomes in water plans, and monitoring and reporting arrangements that promote accountability and foster learning about what works (PC 2017, p. 18).

Renewal of the NWI should embed principles consistent with these outcomes (*Report*: chapter 9), and ensure performance against these commitments is tracked.

3.2 Cultural outcomes can also be pursued through environmental water management

Because cultural outcomes are frequently dependent on or aligned with environmental values and condition, environmental water management can often achieve both environmental and cultural outcomes. This is particularly the case in the MDB and southern Victoria where there is held environmental water and environmental water managers make active decisions on the key locations and timing for its use. For example, environmental flows could be planned to support bird breeding, fish movement or recruitment, or vegetation regeneration, which may be aligned with cultural objectives.

However, it is important that water managers do not assume that environmental and cultural outcomes always align. For example, the NWC noted that:

Species of importance scientifically or to peak groups such as recreational fishers or tourism, may not align with those required by traditional owners for food or ceremonial purposes. (2014, p. 422)

Box 5 **Attainment of cultural outcomes is a work in progress**

Action to embed, achieve and report on cultural outcomes in water plans has varied around the country.

As the Murray Lower Darling Rivers Indigenous Nations (sub. 105, p. 8) noted:

Some plans also include principles, objectives and strategies to recognise and protect First Nations water-dependent values and outcomes ... For example, amended [Water Sharing Plans]⁶ in NSW include Objectives, Strategies and Performance Indicators relating to First Nations water interests. [But t]he practical value of these provisions is unclear. [Water Allocation Plans] in [South Australia] also include extensive description and recognition of First Nations water interests.

Similarly, all new water plans from 2018 in Queensland explicitly recognise the importance of water resources to Aboriginal and Torres Strait Islander peoples. Water plans must include strategies for the achievement, monitoring and reporting of cultural outcomes (Business Queensland 2020).

Victoria's annual report on Traditional Owner outcomes have been incorporated into water resource plans, as per Basin Plan requirements (DELWP (Vic) 2019).

Other States and Territories are working to better incorporate cultural outcomes into water planning.

- In the Australian Capital Territory, development of its water resource plans was a strong catalyst to implement a framework to provide for cultural water for the Ngunnawal community. The water resource plans state the ACT Government will work with the Ngunnawal people to identify cultural water flow opportunities and support the community in obtaining water access entitlements (EPSDD (ACT), pers. comm., 21 September 2020).
- In the Northern Territory recent water allocation plans have highlighted the need for ongoing work to identify Aboriginal cultural values and their water requirements (Northern Territory Government, pers. comm., 4 September 2020).
- The Western Australian Government has started to incorporate cultural outcomes in water plans through work in the north of the state (DWER (WA), pers. comm., 21 September 2020).
- The Tasmanian Government has been focusing on better engaging the Tasmanian Aboriginal community in water planning in recent years, however, it is yet to result in specific cultural outcomes in water plans (pers. comm., 9 September 2020).

In 2017, the Commission recommended that environmental water planning processes should provide explicitly for other public benefit outcomes (including cultural) where these are compatible with environmental outcomes (PC 2017, p. 156). (These benefits are discussed in *SP C Environment*.) It also found that there should be 'public reporting of how Indigenous cultural objectives have been considered in the management of environmental water — both held and planned' (PC 2017, p. 109). Since then, engagement of Aboriginal and Torres Strait Islander people in environmental watering activities, and reporting on activities, has broadly improved (box 6).

⁶ The submission refers to Sustainable Water Strategies (SWSs), which was an error (MLDRIN, pers. comm., 25 November 2020).

A renewed NWI should build on progress and current practice by requiring environmental water holders to engage and promote cultural outcomes through environmental watering provided they are consistent with agreed ecological obligations. Environmental water managers will need to ensure that Traditional Owners are engaged in long-term and meaningful ways to identify cultural values and outcomes specific to Country. These processes will need to be supported by sufficient time and resources for environmental water managers and Traditional Owners to ensure Traditional Owners' full participation. Further discussion is presented in *SP C Environment*.

Box 6 First Nations' participation in environmental water management has improved

Within the Murray–Darling Basin:

... basin water holders, and state governments, are now required to self report on how they have engaged with and supported First Nations outcomes through environmental watering, under the 2018 Water (Indigenous Values and Uses) Direction. The first 'First Nations People participation in environmental watering' report was released in 2019. (MLDRIN, sub. 105, p. 2)

The 2020-21 environmental watering priorities are the first to have included the perspectives of First Nations people. We worked with the Murray Lower Darling Rivers Indigenous Nations (MLDRIN), the MDBA and the Commonwealth Environmental Water Office in a project called 'the First Nations Environmental Water Guidance Project' to articulate guidance for the environmental watering priorities. (NBAN, sub. 17, p. 2)

In 2018-19, the Victorian Environmental Water Holder documented cultural values and objectives, and identified priority cultural sites for rehabilitation through Aboriginal Waterways Assessments and partnered with Traditional Owners through:

- working with Aboriginal Water Officers from the local Catchment Management Authority
- planning environmental flows with Traditional Owners to deliver cultural outcomes
- monitoring plants and animals in collaboration with Traditional Owners
- the appointment of an Aboriginal Commissioner in 2019 (VEWH 2019).

3.3 Traditional Owners need to be involved in broader natural resource management programs

As described in *SP C Environment*, the provision of water for the environment is a critical element in achieving agreed environmental (and aligned cultural) outcomes, but it is not sufficient. The management of environmental water needs to take place within a broader natural resource management (NRM) program (*SP C Environment*: section 2.1). NRM programs aim to manage land and water in an integrated way to reduce environmental degradation and to achieve agreed community objectives.

Engaging Traditional Owners in NRM is the key avenue to recognise and maintain and strengthen their connection to Country. Involvement in NRM also provides an opportunity

for Traditional Owners and catchment or land management authorities to partner in the management of cultural assets.

Over the years, there have been many initiatives to more actively involve Aboriginal and Torres Strait Islander people in the management of natural resources (box 7).

Box 7 Many natural resource management initiatives have featured partnerships with Traditional Owners

Since 1997, the Australian Government's Indigenous Protected Areas program has been assisting Aboriginal and Torres Strait Islander communities to conserve their land or sea Country while allowing for sustainable development.

The Australian Government National Landcare Program and its previous incarnations (Caring for Country, National Heritage Trust) have been operating since 1996. More recent programs have provided opportunities for stronger participation of Aboriginal and Torres Strait Islander people in the planning and delivery of National Landcare Program investment and outcomes.

In 2013, the New South Wales and Australian Governments purchased 86 000 hectares of the Murrumbidgee floodplain in southern New South Wales for the Nimmie Caira Project. In 2017, a consortium led by the Nature Conservancy and including the Nari Nari Tribal Council was successful in tendering to manage of the site.

Under the Water for Victoria program, the Victorian water sector is diversifying its workforce. In 2018, Victorian water corporations and catchment Mmanagement authorities were developing traineeship and employment programs for Traditional Owners and Aboriginal people in Victoria.

Since 2017, under the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic), 15 Victorian state and local agencies and the Wurundjeri Woi Wurrung Cultural Heritage Aboriginal Corporation have collaborated to develop a draft Yarra Strategic Plan for the integrated management of the river and its parklands.

In 2020, the Australian Government announced the Murray–Darling Communities Investment Package, which includes a commitment to investing in four new Indigenous Ranger programs to care for Country across the Basin.

Sources: DAWE 2020; DOI (NSW) 2018; National Landcare Program 2020; NIAA 2020; Pitt 2020; Victorian Government 2020.

While there has been progress in including Traditional Owners in NRM, a coordinated approach is merited given the numerous initiatives across different legislation and policies. Natural resource management programs should ensure stronger engagement with Traditional Owners. As NRM typically occurs at the local level, engaging directly with local Traditional Owners regarding Country is more appropriate than engaging with peak bodies in this circumstance.

A renewed NWI should require natural resource managers to develop long-term relationships with Traditional Owners around the management of Country. This would allow natural resource managers to engage Traditional Owners to incorporate cultural outcomes into wetland and river plans. It would also facilitate natural resource managers working

collaboratively with Traditional Owners in on-ground management programs to promote cultural outcomes. These processes will also need to be supported by sufficient to ensure Traditional Owners' full participation.

Long-term relationships with Traditional Owners could also assist in improving the quality of engagement on a range of issues related to the management of Country (such as water planning and environmental water management), and increase Traditional Owners' influence on landscapes.

3.4 High-quality engagement with Traditional Owners should be one focus in a renewed agreement

Achievement of cultural objectives and outcomes through water planning, management of environmental water and NRM will rest on deep engagement with Traditional Owners, fostered through the development of long-term relationships around the management of Country.

While all jurisdictions have mechanisms to engage Traditional Owners, inquiry participants have pointed to shortcomings in the quality of that engagement (*Assessment*). For example, the IRG said that:

Indigenous involvement in existing water planning can encompass a spectrum of involvement that encompasses limited engagement, active participation, through to formal and extended collaboration. There are currently significant variations across time and jurisdictions in the structure, process and consistency of implementation of existing regimes. (sub 103, p. 15)

The renewed NWI should embed the principles for engagement, formal partnership and shared decision making that governments have committed to in the National Agreement on Closing the Gap. This is particularly as they relate to water planning, environmental water management and broader natural resource management to ensure that cultural objectives are agreed and can be achieved through these mechanisms.

4 Enabling access to water for economic use

Aboriginal and Torres Strait Islander people consider that, in addition to the protection of cultural values, there is a need for water entitlements for community and economic development. This aligns with increasing water rights, the first component of the National Cultural Flows framework (figure 1).

Whilst the NWI clearly referred to cultural values, there has been some debate on whether the issue of water for economic use could be considered under the wording of the NWI .

On one hand, the Indigenous Access section of the NWI which covers actions does not include access to water for economic use.⁷ As the IRG observed:

The NWI provided constrained recognition of Indigenous interests in water ... recognition was limited to social, spiritual and customary interests, not, as many [I]ndigenous leaders have argued economic interests. (sub. 103, p. 7)

On the other hand, some participants have noted that paragraph 25 (ix) of the NWI⁸, which focused on desired outcomes, could be interpreted to include provisions for water for economic use (IRG, sub. 103, p. 7; Jackson, sub. 61, p. 3).

Additionally, in later work in 2010, governments acknowledged in the *NWI Policy Guidelines for Water Planning and Management*, that Indigenous values could include economic use.

Although the range of Indigenous values in water may be difficult to quantify, they are likely to cover both cultural and economic uses of water, and these uses may overlap. (COAG 2010, p. 32)

Regardless of the debate, the NWI did not adequately provide guidance on Aboriginal and Torres Strait Islander people's access to water for economic use and this needs to be addressed in the renewed NWI.

4.1 There are many barriers to accessing water for economic use

As the Commission observed in 2017, the boundaries between water for economic use, and for cultural uses can sometimes be blurred (PC 2017, p. 106). For example, they overlap in activities such as native food businesses, where cultural practices are also used to generate income.

But it is nonetheless important to consider water for economic purposes as a distinct issue because of the way the water entitlements framework and markets operate in enabling access to water. Practically, under existing state and national policy and legislation, any person wanting to extract water from a river, wetland or groundwater for a consumptive purpose requires an entitlement. This includes Aboriginal and Torres Strait Islander communities desiring to use water for community economic development. In highly developed water systems where markets are operating, entitlements need to be acquired through the market.

These statutory arrangements can create barriers for Aboriginal and Torres Strait Islander people. Participation in water markets and managing water entitlements have a number of requirements including purchasing water entitlements, paying water fees and charges by a prescribed date, decisions on use or trade of seasonal allocations and adapting to changes in water market operations. Without adequate supporting arrangements, gaining access to water

⁷ NWI paragraphs 52–54.

⁸ 25. The Parties agree that, once initiated, their water access entitlements and planning frameworks will: (ix) recognise indigenous needs in relation to water access and management.

through markets and maximising the value of the resource can be difficult for Aboriginal and Torres Strait Islander people (PC 2017, p. 106).

Inquiry participants and others have raised these and a number of other issues relating to access to water for economic use including native title and water legislation, water entitlement processes and competition from other water users (NBAN, sub. 17, p. 2; Jackson, sub. 61, pp. 3–4; IRG, sub. 103, pp. 12, 16; MLDRIN, sub. 105, p. 8).

Regarding native title legislation, the courts have only recognised native title rights to water for domestic purposes (Macpherson 2017). This means, for example, that when Traditional Owners engage in customary fishing, they may be unable to barter or exchange fish with the community without a native title determination, as this would be classified as a commercial activity (PC 2016, p. 155). Similarly, harvesting reeds for weaving or trading is prohibited under some legislation as it is defined as aquaculture, which is commercial in nature.⁹

4.2 Current access is limited

Recent research by Hartwig, Jackson and Osborne (2020) showed that Aboriginal water holdings represent a very small proportion of total water holdings in the New South Wales portion of the MDB (box 8).

Box 8 **Aboriginal water in the New South Wales portion of the Murray–Darling Basin hold very few entitlements**

Hartwig, Jackson and Osborne (2020) found that water holdings by Aboriginal organisations and entities in the New South Wales portion of the Murray–Darling Basin represent 0.2 per cent of all available surface water (as of October 2018), based on water register searches and datasets. Data on water holdings of individuals identifying as Aboriginal was not available. Aboriginal water holdings originated from Aboriginal land handovers under the *Aboriginal Land Rights Act 1983* (NSW) and through Aboriginal land acquisition schemes by the NSW and Australian Governments.

They also found that water rights held by Aboriginal organisations declined by at least 17 per cent between 2008 and 2018. This was a result of permanent water (and land) sales after the liquidation of Aboriginal enterprises.

Section 44 of the *Aboriginal Land Rights Act 1983* (NSW) prohibits the sale of land belonging to Aboriginal Land Councils or the winding up of these organisations in event of overdue or unpaid rates, which provides some protection against losses of land. However, no such provisions are in place with respect to water entitlements.

Source: Hartwig, Jackson and Osborne (2020).

⁹ *Fisheries Act 2000* (ACT).

Similarly, the ACCC found that:

First Nation and Traditional Owner groups own a very small proportion (less than 0.1 per cent) of permanent water rights across the Southern Basin ... provisional analysis of allocation trade data in the Southern Connected Basin over 2012-13 and 2018-19 period indicate that Traditional Owner groups very rarely purchase allocations, but do consistently make a very small number of allocation sales each year ... (2020, pp. 131, 170)

And the New South Wales Aboriginal Land Council noted that:

Land and water rights remain central to Aboriginal peoples. Reacquiring our lands and waters is at the heart of our future. Through the NSW *Aboriginal Land Rights Act (ALRA) 1983*, Aboriginal people have successfully seen thousands of hectares of land returned across NSW with much land still under claim. However, our ownership of water is miniscule by comparison. (sub. 96, p. 1)

This situation has emerged despite many advocacy statements to improve access for economic use (table 1).

Table 1 A timeline of advocacy statements to improve Aboriginal and Torres Strait Islander people's access to water for economic use

<i>Authors</i>	<i>Policy</i>	<i>Year</i>
ATSIC and Lingiari Foundation	Onshore water rights discussion booklet Offshore water rights discussion booklet	2002
ATSIC	Indigenous Fishing Strategy	2004
MLDRIN	Echuca Declaration	2008
NAILSMA	Mary River Statement	2009
NAILSMA	North Australian Indigenous Water Statement	2009
MLDRIN, NBAN and relevant government departments	National Cultural Flows Research Project	2011 to 2018

Sources: *Jackson, sub. 61, p. 4; IRG, sub. 103, p. 2.*

4.3 There has been some progress in increasing access

Meeting aspirations for access to water for economic use have clearly been difficult to achieve in practice. But action to address this issue is starting to be taken by a number of jurisdictions and the Australian Government. Amongst these are a \$40 million program in the MDB, programs in Victoria and the provision of water reserves in the Northern Territory and northern Queensland (discussed further in the next section).

In addition, the Australian, Queensland, Western Australian and Northern Territory Governments have recognised the connection between economic development and

Aboriginal and Torres Strait Islander community wellbeing in the Northern Australia Indigenous Development Accord.

Economic development is a productive path to long-term community wellbeing, and contributes to nation building. Parties support the [Indigenous Reference Group's] aspiration for Indigenous self-determination and economic independence through engagement in markets and the use of private capital. (COAG 2019, p. 3)

Once developed, the inland waters target under the National Agreement on Closing the Gap (box 2) will likely also contribute to furthering access to water for economic use, through actions in the jurisdictional implementation plans under the agreement.

4.4 A way forward to improve access

Where access to water is regarded as the best way to support Aboriginal and Torres Strait Islander communities' economic development objectives, governments should facilitate access to that water as efficiently and transparently as possible within existing entitlement frameworks.

There will be costs if governments provide access outside existing frameworks. In undeveloped systems, a lack of transparency may conceal the highest value alternative use of that water (that is, the opportunity cost of the water provided to Aboriginal and Torres Strait Islander users). In fully developed systems, there would also be indirect — but material — costs to other entitlement holders if governments intervened to change existing arrangements in water entitlement and planning frameworks to favour any particular group. This could then cause a loss of confidence in those arrangements among investors and access seekers more generally.

In undeveloped regions, reserves can be a way forward

In water systems where the consumptive pool is not fully allocated, governments may choose to allocate or reserve a volume of unallocated water for exclusive use by Aboriginal and Torres Strait Islander people, but should do so transparently.

The *NWI Policy Guidelines for Water Planning and Management* note a typical rationale for water reserve policies is that Aboriginal and Torres Strait Islander people may be working towards acquiring the infrastructure and water literacy to use water for economic purposes, but by the time they do, it will be more expensive for them (or governments) to acquire water entitlements (DAWR 2017, p. 24).

A number of States and Territories have established, or are considering, specific provisions to access water for economic use in undeveloped regions.

The Northern Territory Government's Strategic Aboriginal Water Reserves Policy sets aside a percentage of water from the consumptive pool of a water allocation plan (Northern

Territory Government 2017). Aboriginal land rights holders can use this reserve for economic development. The percentage of the water reserved is based on the percentage of Aboriginal land containing water resources in the water allocation plan area. For land to be eligible for a Strategic Aboriginal Water Reserve, it needs to be classified as one of the following:

- Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
- Aboriginal land under Northern Territory Enhanced Freehold
- land within an Exclusive Possession Native Title Determination Area.

Since 2019, the Queensland Government's Cape York Water Plan has provided over 485 gigalitres of water per year for local management by Traditional Owners (DNRME (Qld) 2019, p. 3). The access to water resources, granted to native title holders and Aboriginal and Torres Strait Islander corporations, aims to help these groups achieve their economic, social and cultural needs and aspirations (Queensland Parliament 2019, pp. 2, 8).

The Western Australian Government is considering multiple Strategic Aboriginal Water Reserves. It negotiated to include a Strategic Aboriginal Water Reserve in the Indigenous land use agreement with the Yamatji Nation during a native title settlement agreement in February 2020. This reserve provides access to up to 25 gigalitres per year of groundwater for licensed use by the Yamatji Nation. The Western Australian Government has also provided \$20 million for groundwater investigations to support future licence applications by the Yamatji Nation (DWER (WA), pers. comm., 21 September 2020). Consultation is currently being undertaken for the draft Derby Groundwater Allocation Plan, which incorporates a Strategic Aboriginal Water Reserve.

Transparency through any process to create allocations will be important to sustaining confidence in water rights and the development of efficient water markets.

In fully developed regions, governments can purchase entitlements on the market

In regions where water rights are fully allocated, jurisdictions can provide water entitlements to Aboriginal and Torres Strait Islander communities by purchasing entitlements on the market. There have been some steps in this direction (box 9).

When governments are considering community development opportunities for Aboriginal and Torres Strait Islander people, and have found water to be the most effective way of delivering these, they should consider buying water from entitlement holders on the water market to ensure that the integrity of the entitlement system is maintained.

Box 9**Governments have purchased entitlements on the market for Traditional Owners**

Government have established a number of initiatives to provide access to water for economic use in developed catchments.

- The Australian Government has provided \$40 million for a water entitlement scheme in the Murray–Darling Basin, which will assist Aboriginal communities to invest in water for cultural and economic activities. \$20 million is available each for the Northern and Southern Basin Aboriginal Communities (DAWE 2019).
- The Victorian Government has invested \$5 million to fund projects for access to water for economic development in partnership with Aboriginal people. The Aboriginal Water Program, which commenced in 2016, supports local Traditional Owners by researching economic development opportunities for the use and ownership of water (DELWP (Vic) 2020).
- The New South Wales Government established Aboriginal Community Development Licences to be used for economic purposes such as irrigated cropping, aquaculture or manufacturing (PC 2017, p. 106). These were part of the Aboriginal Water Initiative which has now been defunded.

Construction of new infrastructure in undeveloped areas presents an opportunity

The Australian Government has allocated significant funding to constructing water infrastructure. As part of the 2020-21 Federal Budget, an additional \$2 billion in capital funding was announced, which brought the Australian Government’s total funding commitment under the National Water Infrastructure Development fund to \$3.5 billion (NWGA 2020b). \$388 million of this has been specifically allocated for constructing four water infrastructure projects across Northern Australia (NWGA 2020a, p. 11).

In assessing water infrastructure proposals, governments should ensure that Traditional Owners are fully consulted on the proposal and that any negative implications of development on environmental, social, cultural heritage and other values are clearly identified and fully considered, in accordance with requirements under the ATSIHP Act and the EPBC Act.

The NWI calls for demonstration of environmental sustainability and economic viability of a major development before it is approved. Consideration could be given to extending the NWI criteria for major water infrastructure investments to ensure they are culturally responsive. That is, the aspirations and concerns of Traditional Owners should be understood, discussed and considered in developing plans for major infrastructure, and project proponents should specifically identify and account for impacts on Aboriginal and Torres Strait Islander heritage and other cultural values associated with water (*SP I Infrastructure*).

In undeveloped areas in particular, there is an opportunity to consider the provision of Indigenous access entitlements. These may be in lieu of identified impacts or to contribute to the future development of that community and to assist in meeting commitments under the National Agreement on Closing the Gap.

Engagement is a crucial element of developing new infrastructure. Infrastructure Australia has developed principles in this regard.

Governments and proponents should undertake meaningful stakeholder engagement at each stage, from problem identification and option development to project delivery. (2018, p. 3)

The Commission considers this a key area of concern, as Traditional Owner engagement on infrastructure has been poor in the past. Some Traditional Owners have raised concerns about consultation processes for new developments. For example:

In NSW a series of new dam projects have highlighted deficiencies in First Nations consultation. Despite an announcement that pre-construction works on the Wyangala Dam wall-raising project will commence in October 2020, the NSW Government has not undertaken any meaningful consultation with Wiradjuri and other First Nations. Traditional Owners have also highlighted concerns regarding poor consultation for the ‘Macquarie River Re-regulating storage’¹⁰. In fact, a Facebook event for consultation on the Macquarie River Re-regulating storage failed to identify First Nations in a list of organisations with a ‘primary connection to the Macquarie River’. (MLDRIN, sub. 105, p. 12)

Aboriginal people’s rights and interests must be recognised more comprehensively in water planning. This should extend to major infrastructure such as dams and weirs. Engagement with Aboriginal people upstream and downstream of these proposals is needed, consistent with Akwé: Kon guidelines. (NSW ALC, sub. 96, pp. 2–3)

In summary, where governments have decided to invest in new water infrastructure, the Commission considers that jurisdictions should ensure developments are culturally responsive and formed with high-quality engagement with Aboriginal and Torres Strait Islander people, and that they consider the provision of Indigenous access entitlements.

Whatever the approach, supporting arrangements should be in place

In 2017, as noted above, the Commission observed that Aboriginal and Torres Strait Islander communities may face barriers to sourcing water through standard access pathways (due to the costs of purchasing and maintaining entitlements, and the complexity of water market operations) and need assistance to both gain access and exploit potential opportunities (PC 2017, p. 106).

Access to water is not the only barrier that Aboriginal and Torres Strait Islander people potentially face in taking advantage of economic development opportunities. Other factors, such as access to specialist skills and knowledge, experience with water-related businesses, and the infrastructure and financial capital needed to make best use of water are just as important. Water access arrangements for Aboriginal and Torres Strait Islander people are likely to produce the greatest value for their communities when they are part of a broader strategy for community development, which may include investment in education, training and business development.

¹⁰ The Macquarie River Re-regulating storage project constructed a new re-regulating gated weir and fishway structure on the Macquarie River.

The chances of success will be maximised if programs providing water for economic purposes are co-designed with Traditional Owners using good policy design principles, namely: engaging effectively with Traditional Owners in program design to set a clear and measurable policy objective; identifying the range of ways the objective could be met (including via the provision of resources other than water); transparently weighing up — quantitatively or qualitatively — the benefits and costs of each option; and reviewing and evaluating the policy. Program design and implementation should also carefully specify and implement governance arrangements, accountabilities and conditions for use.

Under the National Agreement on Closing the Gap, the Australian, State and Territory Governments have committed to developing a national target for inland waters, including data development work to identify a nationally consistent measure encompassing for example, water licences, water rights and water allocation plans (Australian Governments and the Coalition of Peaks 2020, p. 36). Data to inform the reporting on progress against the Closing the Gap targets will be publicly available via the Productivity Commission’s Closing the Gap Information Repository and the Productivity Commission will conduct three-yearly reviews of progress under the National Agreement on Closing the Gap (Australian Governments and the Coalition of Peaks 2020, p. 41).

5 NWI renewal advice

The renewed NWI should have a new element for Aboriginal and Torres Strait Islander people’s access to water, developed by the Committee on Aboriginal Water Interests.

DRAFT NWI RENEWAL ADVICE 9.1: A NEW CO-DESIGNED ELEMENT

The renewed National Water Initiative (NWI) should include both an objective and new element dedicated to Aboriginal and Torres Strait Islander people’s access to water and the involvement and participation of Aboriginal and Torres Strait Islander people in water management. The Commission supports the establishment of the Committee on Aboriginal Water Interests to develop the new NWI element.

In developing the new element, the committee should:

- ensure alignment between commitments under the National Agreement on Closing the Gap and new NWI content
- have a terms of reference that allows for an advisory role to the Coalition of Peaks
- report directly to water ministers.

The new element of the NWI should consider processes which ensure high-quality engagement, and the delivery of cultural outcomes through water planning, environmental water management and natural resource management to increase First Nations influence in water management more broadly.

In addition to cultural outcomes, the renewed NWI should consider provisions to enable access to water for economic use and regularly monitor and publicly report on progress.

DRAFT NWI RENEWAL ADVICE 9.2: IMPROVING CULTURAL OUTCOMES USING EXISTING FRAMEWORKS

In developing a new National Water Initiative element, the Committee on Aboriginal Water Interests should consider content that ensures that:

- cultural objectives are explicitly identified and provided for in water plans and progress in achieving those objectives is regularly monitored and reported publicly
- environmental water holders seek to deliver cultural outcomes whenever consistent with their ecological obligations
- natural resource managers incorporate cultural objectives into river and wetland plans and work with Traditional Owners in on ground management programs to achieve them
- Traditional Owner engagement in water planning, environmental water management and natural resource management is of high quality and fostered through the development of long term relationships (Draft NWI renewal advice 6.2, 8.3 and 8.9).

DRAFT NWI RENEWAL ADVICE 9.3: IMPROVING ACCESS FOR ECONOMIC DEVELOPMENT

In developing a new National Water Initiative element, the Committee on Aboriginal Water Interests could consider content that ensures that, where State and Territory Governments have decided that providing access to water is an effective way to support the economic development of Aboriginal and Torres Strait Islander communities, access is provided by:

- sourcing water within existing water entitlement frameworks, such as by purchasing water on the market or as part of transparent processes for assigning unallocated water
- ensuring adequate supporting arrangements (such as training and business development) are in place to enable Aboriginal and Torres Strait Islander communities to maximise the value of the resource for their needs and uses
- actively involving Aboriginal and Torres Strait Islander communities in program design.

This would be supported by:

- specifying and implementing governance arrangements for such water
- regularly monitoring and publicly reporting on the inland waters target under the National Agreement on Closing the Gap.

Where governments invest in new water infrastructure, particularly in undeveloped areas, governments should consider whether reserving a share of any new water rights for Traditional Owners would be consistent with plans for future community development and assist in meeting targets set under the National Agreement on Closing the Gap.

References

- ACCC (Australian Competition and Consumer Commission) 2020, Murray-Darling Basin Water Markets Inquiry, Interim report, Canberra.
- Australian Government 1993, Native Title Act, www.legislation.gov.au/Details/C2017C00178 (accessed 6 October 2020).
- Australian Governments and the Coalition of Peaks 2020, National Agreement on Closing the Gap.
- Business Queensland 2020, Developing water plans, www.business.qld.gov.au/industries/mining-energy-water/water/catchments-planning/planning/developing (accessed 9 December 2020).
- COAG (Council of Australian Governments) 2010, NWI Policy Guidelines for Water Planning and Management, Canberra.
- 2019, Northern Australia Indigenous Development Accord, Canberra.
- DAWE (Department of Agriculture, Water and the Environment) 2019, Improving water access for Indigenous people living in the Murray-Darling Basin, www.agriculture.gov.au/water/mdb/basin-plan/commitments/indigenous-water-access (accessed 2 October 2020).
- 2020, Projects funded from Phase 1 the Natural Heritage Trust, www.environment.gov.au/biodiversity/invasive-species/funded-projects/nht (accessed 17 November 2020).
- DAWR (Department of Agriculture and Water Resources) 2017, NWI module: Engaging Indigenous peoples in water planning and management.
- DELWP (Vic) (Department of Environment, Land, Water and Planning (Vic)) 2019, Traditional Owner objectives and outcomes: Compilation of contributions to Victoria's water resource plans.
- 2020, Water Community and Country: Victoria's Aboriginal Water Program.
- DNRME (Qld) (Department of Natural Resources, Mines and Energy (Qld)) 2019, Cape York Water Management Protocol, Brisbane.
- DOI (NSW) (Department of Industry (NSW)) 2018, The Nimmie-Caira Project - Water in New South Wales, www.industry.nsw.gov.au/water/plans-programs/state-significant-projects/nimmie-caira (accessed 6 August 2018).
- Hartwig, L.D., Jackson, S. and Osborne, N. 2020, 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession', *Land Use Policy*, vol. 99, pp. 1–13.
- IA (Infrastructure Australia) 2018, Infrastructure Decision-making Principles, Sydney.
- Macpherson, E. 2017, 'Beyond recognition: Lessons from Chile for allocating Indigenous water rights in Australia', *UNSW Law Journal*, vol. 40, no. 3, pp. 1130–1169.

-
- MLDRIN (Murray and Lower Darling Rivers Indigenous Nations) 2007, Echuca Declaration, Melbourne.
- Moggridge, B.J., Betteridge, L. and Thompson, R.M. 2019, 'Integrating Aboriginal cultural values into water planning: a case study from New South Wales, Australia', *Australasian Journal of Environmental Management*, vol. 26, no. 3, pp. 273–286.
- National Cultural Flows Research Project 2014, *Cultural Flows Literature Review*.
- 2018, *A pathway to cultural flows in Australia: Law and Policy Summary*.
- National Landcare Program 2020, *Previous programmes*, www.nrm.gov.au/news-and-resources/resources/previous-programmes (accessed 27 January 2021).
- NIAA (National Indigenous Australians Agency) 2020, *Indigenous Protected Areas (IPAs)*, www.niaa.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas (accessed 1 October 2020).
- Northern Territory Government 2017, *Strategic Aboriginal Water Reserve: Policy Framework*, version 13/10/17.
- NWC (National Water Commission) 2011, *The National Water Initiative — Securing Australia's Water Future: 2011 Assessment*, Canberra.
- 2014, *Australia's Water Blueprint: National Reform Assessment 2014*, Canberra.
- NWGA (National Water Grid Authority) 2020a, *The National Water Grid: Investing in Australia's water future*, Canberra.
- 2020b, *Working in partnership*, www.nationalwatergrid.gov.au/program (accessed 23 November 2020).
- PC (Productivity Commission) 2016, *Marine Fisheries and Aquaculture*, Report no. 81, Canberra.
- 2017, *National Water Reform*, Report no. 87, Canberra.
- Pitt, K. and Wyatt, K. 2020, *Joint media release: Investing in our First Nations communities*, Media Release, 8 September.
- Queensland Parliament 2019, *Explanatory note, Water Plan (Cape York) 2019 (Qld)*.
- SCRGSP (Steering Committee for the Review of Government Service Provision) 2016, *Overcoming Indigenous Disadvantage Key Indicators 2016*.
- UN (United Nations) 2007, *United Nations Declaration on the Rights of Indigenous Peoples*, Geneva, Switzerland.
- VEWH (Victorian Environmental Water Holder) 2019, *Reflections: Water for the Environment in Victoria 2018-19*, Melbourne.
- Victorian Government 2020, *Draft Yarra Strategic Plan: An Overview*, Melbourne.