



Submission to the Yoorrook Commission

Caring for Country

Overcoming the twin legacies of terra nullius and aqua nullius

13 November 2023

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Murray Lower Darling Rivers Indigenous Nations (MLDRIN)

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Acknowledgement

We acknowledge the unceded sovereignty of First Nations and Traditional Owners in so-called Victoria, and we pay our respects to Elders past and present. Since time immemorial, First Peoples have upheld their laws, practiced their customs and lore, and cared for Country. We acknowledge their enduring spiritual, cultural, familial, material and economic connections to land and waters.

In writing this submission, we are not attempting to speak for any First Peoples organizations or individuals (aside from those listed as authors). We acknowledge that Traditional Owners and First Nations hold the cultural authority, expertise, and obligation to speak for and care for Country. The dispossession of Country by the ongoing colonisation of Victoria has had devastating consequences for the health of First Peoples and the health of Country. The horrific violence of colonisation, and the systems it gave rise to, continues to harm First Peoples today.

Overview

This submission identifies the impact of the settler state legal system on Indigenous legal relations with water and land while also identifying opportunities to address these impacts.

*'Cultural flows is water and land'*¹

This submission argues that current governance regimes water in the State known as Victoria work to affirm the twin legacies of terra nullius and aqua nullius which are based on water theft, degradation, and dispossession.

This submission covers an immensely complex area of land and water laws. The bitter history of colonial dispossession continues to reverberate today, with ongoing contemporary impacts to Indigenous land and water rights and well-being.

Of necessity, we have kept this submission a high-level overview of the current legislative and policy context and how it relates to Indigenous water rights. Each of the contributing authors is available to provide further detail to the Yoorrook Justice Commission as needed.

Most importantly, in writing this submission, we are not attempting to speak for any First Peoples organizations or individuals (aside from those listed as authors).

Terminology

Throughout this document, we use the following terms:

- Traditional Owners and First Nations – political collectives and entities with connection to Country, including but not limited to those groups that have been recognised by the settler state
- First Peoples and Indigenous Peoples – all Aboriginal and Torres Strait Islander People residing in Victoria.

International context

The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) (2007) has been endorsed by Australia, although it has yet to be reflected in the laws of the settler state. First Peoples in Australia are using the provisions of international legal instruments such as UNDRIP to support their claims for greater recognition and protection of their water rights.

National context

Commonwealth law continues to affirm the twin legacies of terra nullius and aqua nullius which are based on water theft, degradation, and dispossession. Lessons can be learnt from key moments over the last thirty years to ensure that First Peoples are leaders in future reforms.

¹ Traditional Owner, cited in Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021)
<https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 28.

Victoria

The settler state fragments Country. It separates land and water under distinct legislation and policies. Water is further fragmented with marine waters, surface water and groundwater each governed separately. In examining the impact of settler state law, we identify major impacts, gaps, and potential pathways for reform.

Key opportunities

There are several key policies and processes underway in Victoria currently that may provide important opportunities to address land and water injustice. These need to be prioritized and resourced by the Victorian Government to deliver outcomes.

Recommendations

This submission does not seek to make formal recommendations to Yoorrook, but rather we seek to amplify and promote the voices of First Peoples. We therefore offer only these recommendations for Yoorrook's consideration:

1. In 2022, 27 Traditional Owner groups prepared Nation Statements that expressed their expectations and demands in relation to water and Country. These Nation Statements have been published in *Water is Life*, but remain the property of each contributing Nation or Traditional Owner group. A review of these statements is an excellent foundation for Yoorrook's assessment of water injustice in Victoria and we strongly encourage the Commissioners to read each statement in full.²
2. Land and water justice will mean different things for each mob. We strongly encourage Yoorrook to hear directly from as many Indigenous People as possible across Victoria, so that the Commission's findings reflect the diversity, strength and leadership of Indigenous People.
3. Traditional Owners, First Nations, and Indigenous People (and their peak bodies and representative organisations) will likely require additional financial support to make representations and provide evidence to Yoorrook. Providing this support is a matter of urgency to ensure that all voices are heard.

² We also acknowledge that some statements may no longer represent the position of the Traditional Owner group who prepared them in 2022. For instance, Djaara have recently released their Gatjin Strategy, a water strategy that goes beyond the material presented in their Nation Statement.

International context

International law plays an important role in understanding and upholding First Peoples' rights to water.

United Nations Declaration on the Rights of Indigenous People (UNDRIP)³

The United Nations Declaration on the Rights of Indigenous People (UNDRIP),⁴ endorsed by Australia in 2009, is the leading international instrument articulating extensive First Nation rights.⁵

The right to self-determination as it applies to Indigenous peoples is explained in Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').⁶ The UNDRIP also informs understanding of how other existing rights specifically apply to Aboriginal and Torres Strait Islander peoples. In 2009, its core tenets were acknowledged on behalf of the Federal government by the then Minister for Families, Housing, Community Services and Indigenous Affairs in her speech marking Australia's formal endorsement of the Declaration.⁷

This is an important consideration given that recognition of the rights agenda for Indigenous peoples in Australia is more reliant on international human rights standards. This is because there are no internal human rights standards, like a bill of rights, enshrined in the Australian Constitution, and only partial adoption of such standards at the state and territory level (in Victoria and the Australian Capital Territory). The UNDRIP should be endorsed in its entirety as it reinforces best practises and that supports specific parts of the UNDRIP but endorsing it in its entirety alleviates pressure from govts and strengthens the overall commitment to Aboriginal Victorians aspirations of treaty/truth telling/sovereignty and reconciliation.

The UNDRIP has two articles specifically referencing water. Article 25 articulates the right of Indigenous peoples to 'maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used ... waters' for future generations. Article 32 clause 2 directs the State to 'consult and cooperate in good faith' with Indigenous peoples to obtain free, informed and prior consent 'particularly in connection with the development, utilization or exploitation of mineral, water or other resources.'

While there are only two direct references to water(s) in this declaration, there are numerous references to resources.⁸ Water is included in this understanding of 'resources', as is evident from article 32 clause 2.

Articles relating to self-determination are also highly relevant to water and how it should be governed if Indigenous rights are to be advanced. Article 18 for example, addresses both aspects of Indigenous Peoples' political self-determination by recognizing their 'right to participate in

³ This section draws on material from Katie O'Bryan and Kate Harriden, 'Hear Their Voices: Australia's First Nations Women and the Legal Recognition of Their Rights to Water' [2023] *Australian Feminist Law Journal*.

⁴ *Declaration on the Rights of Indigenous People* GA Res 61/295 UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

⁵ See UNDRIP, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/Res/61/295 (adopted 13 September 2007) Art 3.

⁷ Jenny Macklin, 'Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples' (2009) 7(11) *Indigenous Law Bulletin* 6.

⁸ See UNDRIP, preamble, arts 8, 25, 26, 27, 28, 29, 32.

decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.’ Article 26 further emphasizes Indigenous Peoples’ self-governance by acknowledging their rights to ‘control’ lands, territories, and resources they possess, including water.

Many First Nations groups in Australia have utilised the provisions of the UNDRIP to support their claims for greater recognition and protection of their water rights.⁹ Accordingly, and given Australia’s endorsement of the UNDRIP, any progress on First Nations water rights should be benchmarked against the UNDRIP. This was the view of the National Cultural Flows Research Project, discussed below.¹⁰

⁹ See e.g., Northern Australia Indigenous Land and Sea Management Alliance, ‘A Policy Statement on North Australian Indigenous Water Rights’ (November 2009); Federation of Victorian Traditional Owner Corporations, ‘Victorian Traditional Owner Water Policy Statement 2014’ (November 2014); North Australian Indigenous Experts Water Futures Forum, ‘Mary River Statement’ (6 August 2009); First Peoples’ Water Engagement Council, ‘Policy Framework’ (March 2012); see also MLDRIN Submission to *Restoring our Rivers Bill* (2023), Submission 54 (see Appendix).

¹⁰ Rebecca Nelson, Lee Godden and Bruce Lindsay, *Cultural Flows – A Multi-Layer Plan for Cultural Flows in Australia: Legal and Policy Design* (University of Melbourne, 2018) 74.

National context

Commonwealth law continues to affirm the twin legacies of terra nullius and aqua nullius which are based on water theft and dispossession. Lessons can be learnt from key moments over the last thirty years to ensure that First Peoples are leaders in future reforms.

*'We were never compensated for the loss of that water.'*¹¹

When the British invaded Australia, the 'fiction of first discovery' that dispossessed Indigenous Peoples of their lands also took their waters.¹² Fletcher describes this as 'one of the grandest acts of larceny ever committed: the theft of an entire continent'.¹³ The legitimacy of the Australian legal system (and the Australian state) thus rested on the doctrine of *terra nullius*, the erroneous assumption that the land belonged to no one. Embedded within terra nullius was an equally dangerous and incorrect assumption: that the waters also belonged to no one, or *aqua nullius*.¹⁴

This theft of water has historical and contemporary impacts. The settler state has attempted to erase Indigenous ways of knowing and caring for Country and their laws at the same time as it degraded the physical environment upon which these institutions and indeed all human welfare for thousands of years relied. The settler state usurped the authority of Indigenous people, and proceeded to impose a system of regulating land and water that has resulted in massive wealth generation for the state and private settler interests and equally massive loss of biodiversity and unsustainable land and water management. First Peoples have borne the compounding impacts of contemporary and inherited losses.

Occupation for more than 40,000 years depended on knowledge of water distribution and use of technology to harvest water and aquatic resources. Historically Traditional Owner interventions improved rates of harvest of certain species, for example, river flows were manipulated with the construction of fish traps, weirs and small dams. Water bodies and wetlands provided seasonal or occasional abundance which allowed large groups of people to gather for ceremonial, social and economic purposes. In the more southerly districts of Victoria, coastal wetlands were relatively rich in food resources, as were the swamps found in the volcanic western district of Gunditjmarra country, for example.¹⁵

Archaeological sites associated with Aboriginal occupation are often found near inland water and wetland habitats which can be rich in relics and artefacts, middens, ochre grounds, camping sites, ovens, scar trees. Indeed, proximity to water has been identified as one of the key determinants of archaeological potential. The clear majority (95%) of the 30,000 significant Aboriginal places and

¹¹ Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021) <https://law.unimelb.edu.au/data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf> 11.

¹² Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010).

¹³ Zena Cumpston, Michael-Shawn Fletcher and Lesley Head, *Plants: Past, Present and Future* (Thames & Hudson Australia, Edited by Margo Neale, 2022), 62.

¹⁴ Virginia Marshall, *Overturning Aqua Nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017); Katie O'Bryan, 'More Aqua Nullius? The Traditional Owner Settlement Act 2010 (Vic) and the Neglect of Indigenous Rights to Manage Land and Water Resources' (2016) 40 *Melbourne University Law Review* 547.

¹⁵ Gunditjmarra People and G Wettenhall, *The People of Budj Bim: Engineers of Aquaculture, Builders of Stone House Settlements and Warriors Defending Country* (em PRESS Publishing, 2010).

heritage sites that are recorded are located on or near Victorian waterways. There are numerous archaeological sites around all the lakes in the western district for example, and waterbodies that have been subject to artificial drainage by non-Indigenous people, such as Lake Colac and Lake Corangamite, are consistent with this pattern.

Agricultural development brought widespread changes to the hydrologic regimes of Victoria's catchments at the expense of First Peoples. Activities associated with agricultural development (land clearing, river regulation, over-use of water resources, draining wetlands, other flood mitigation works) altered seasonal flows, exacerbated salinization, movement of pest species, siltation and the degradation of the habitat of fish and wildlife. In combination, these processes and their environmental effects eroded the capacity of country, including rivers, wetlands and floodplains, to sustain Indigenous economies, with devastating social consequences. Many Traditional Owners will testify to the loss of control and autonomy, the inability to access and holistically manage customary estates, to exercise custodial authority and to prevent further ecological degradation and economic impoverishment.¹⁶

Settler state water management has changed the way water moves through Country, and limits the ability of Traditional Owners to get water onto Country at the right time and in the right way, with devastating outcomes for the health of Country. Changes in water movement and the construction of settler state infrastructure have also resulted in the erosion of land previously covering ancestral remains.¹⁷

The separation of land and water titles in the 2000s intensified these impacts, by further undermining holistic Indigenous laws and also limiting the power of land rights recognition to include rights to water.¹⁸ This separation has also led to an enormous concentration of wealth in non-Indigenous hands. In 2023, the value of water entitlements on issue in the southern Murray-Darling Basin was \$32.3 billion,¹⁹ but Indigenous organisations hold less than 0.2% of these entitlements.²⁰ Worse, this has gone backwards in NSW by almost 20% over the decade from 2009 to 2019.²¹ In Victoria, the trend is not well understood, but the total volume of water entitlements held by Indigenous organisations is less than 0.2%.²² More needs to be done by Victoria to understand and respond to this trend.

¹⁶ See, for example, Section B of Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>.

¹⁷ See Wamba Wemba Nation Statement, in Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>.

¹⁸ Lana D Hartwig, Sue Jackson and Natalie Osborne, 'Recognition of Barkandji Water Rights in Australian Settler-Colonial Water Regimes' (2018) 7(16) *Resources* doi:10.3390/resources7010016; Lana D Hartwig et al, 'Water Colonialism and Indigenous Water Justice in South-Eastern Australia' (2021) 38(1) *International Journal of Water Resources Development* 30.

¹⁹ Aither, *Water Markets Report: 2022-23 Review and 2023-24 Outlook*. (Aither, Pty Ltd, 2023).

²⁰ Lana D Hartwig and Sue Jackson, *The Status of Aboriginal Water Holdings in the Murray-Darling Basin: ARI Report No. 2020/004* (Australian Rivers Institute, Griffith University, 2020) <<http://hdl.handle.net/10072/400302>>.

²¹ Lana D Hartwig, Sue Jackson and Natalie Osborne, 'Trends in Aboriginal Water Ownership in New South Wales, Australia: The Continuities between Colonial and Neoliberal Forms of Dispossession' (2020) 99 *Land Use Policy* 104869.

²² Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>.

Native title rights to water²³

In 1992, with the ruling of the High Court in *Mabo*, the fiction of terra nullius was formally overturned (or at least modified) by the recognition of enduring native title rights under the common law of Australia.²⁴ The Commonwealth government then passed the *Native Title Act 1993*, codifying native title rights and the processes for establishing them.

While there are extensive and well-documented problems with Australia's native title regime,²⁵ it has assisted some First Nations groups to become native title holders, leading to more control over what happens on their Country. This control, however, has not extended to water, with *aqua nullius* remaining an influential institutional understanding of water rights and an unofficial policy tool.²⁶ The management of water is the subject of specific treatment in the *Native Title Act (NTA)* that reduces the input of Indigenous Australians to merely an opportunity to comment on proposed activities that may affect their native title.²⁷ Although there potentially may be scope for input into water management in areas where native title holders have been recognised as having exclusive possession,²⁸ no exclusive possession has been recognised in Victoria, or is likely to be recognised. In terms of native title rights to take and use water, in determinations to date in Victoria this has been limited to the right to take and use for personal, domestic and non-commercial communal needs.²⁹

Native title rights do include rights to water, but case law and statute have significantly diminished the content and power of native title to recognise Indigenous water rights.³⁰ One of the challenges for native title rights to water is the state legislation that vests the right to control the use and flow of water in the Crown in each state and territory. In 2002, the Australian High Court found that vesting of water in the Crown was 'inconsistent' with any native title rights to exclusive possession of inland waters.³¹ However, in the context of settler colonial Australia, and in the

²³ This section is in part drawn from Katie O'Bryan, *Indigenous Rights and Water Resource Management: Not Just Another Stakeholder*, (Routledge, 2019) 67-89.

²⁴ *Mabo and others v. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992).

²⁵ See e.g., Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523; Lisa Strelein, *Compromised Jurisprudence. Native Title Cases Since Mabo* (Aboriginal Studies Press 2006); Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications 2012); Sean Brennan and others (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press 2015); Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, April 2015).

²⁶ Virginia Marshall (n10).

²⁷ *Native Title Act 1993 (Cth)* s 24HA.

²⁸ See *Gumana v Northern Territory [No 2]* [2005] FCA 1425 (11 October 2005) [43].

²⁹ Following the decision in *Akiba v Commonwealth* (2013) 250 CLR 209 (Akiba), there is the potential for native title rights to take and use water to be expanded. The High Court in Akiba held that there was a right to take resources for any purpose, which could include for commercial purposes. At the time of writing there has been no judicial determination on this point in relation to water (as a resource). In light of Akiba, some exclusive possession consent determinations no longer contain the qualification that water access and use be for cultural, spiritual and non-commercial communal needs. See, eg, *Minning v Western Australia* [2020] FCA 1051 order 7(b).

³⁰ Jason Behrendt and Peter Thompson, 'The Recognition and Protection of Aboriginal Interests in NSW Rivers' [2004] (3) *Journal of Indigenous Policy* 37; Sue Jackson and Jon Altman, 'Indigenous Rights and Water Policy: Perspectives from Tropical Northern Australia' (2009) 13(1) *Australian Indigenous Law Review* 27; Poh-Ling Tan and Sue Jackson, 'Impossible Dreaming — Does Australia's Water Law and Policy Fulfil Indigenous Aspirations?' (2013) 30 *Environmental and Planning Law Journal* 132; Lee Godden, Sue Jackson and Katie O'Bryan, 'Indigenous Water Rights and Water Law Reforms in Australia' (2020) 37 *Environmental and Planning Law Journal* 655.

³¹ *Western Australia v Ward* (2002) 213 CLR 1, 152.

absence of any treaty with Indigenous Peoples, the legitimacy of the Crown's ability to assume the right to control water remains contested.³²

Water quality

*'We've had fish kills, and that's affecting spiritual health.'*³³

Australia's water laws at the national level focus largely on the management of water quantity, in response to the over-allocation of water to human consumption. However, water quality, although often overlooked, has also been terribly affected by the settler state water management regime. Rural communities in the Murray-Darling Basin experience severe decline in drinking water standards during extreme drought. In 2018, catastrophic declines in dissolved oxygen levels caused massive fish deaths, a situation caused by over-extraction of water and climate-change induced drought, during which the Baaka/Darling River nearly ran dry.³⁴ In 2023, after unprecedented floods across south-eastern Australia, fish again died in their millions at Menindee Lakes when dissolved oxygen levels plummeted.³⁵ The Baaka/Darling River is in crisis, whether in flood or drought. However, Indigenous voices remain sidelined in the inquiries into water quality. In 2019, two separate inquiries into the fish deaths were held, and neither included an Indigenous author.³⁶

Key moments

In 2004, Australian governments agreed to the National Water Initiative (NWI), which for the first time, committed to 'recognise [I]ndigenous needs in relation to water access and management' as part of the water planning and entitlement framework.³⁷ However, this fell short of putting in place effective mechanisms to recognise Indigenous *rights* to water or advance Indigenous ways of knowing and caring for water³⁸ from within state systems of resource regulation and environmental management. In addition, the NWI formalised the separation of water from land, a move that both entrenched and accelerated water dispossession from First Nations.³⁹

³² Erin O'Donnell, 'Water Sovereignty for Indigenous Peoples: Pathways to Pluralist, Legitimate and Sustainable Water Laws in Settler Colonial States' (2023) in press *PLOS Water*.

³³ Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021) <https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf> 14.

³⁴ AAS, *Investigation of the Causes of Mass Fish Kills in the Menindee Region, NSW, over the Summer of 2018-2019* (Australian Academy of Science, 2019) <<https://www.science.org.au/supporting-science/science-policy-and-sector-analysis/reports-and-publications/fish-kills-report>>.

³⁵ NSW Office of the Chief Scientist and Engineer, *Independent Review into the 2023 Fish Deaths in the Darling-Baaka River at Menindee* (NSW State Government, 2023) <https://www.chiefscientist.nsw.gov.au/_data/assets/pdf_file/0006/584142/Menindee_Full_Report_FINAL.pdf>.

³⁶ Bradley Moggridge and Ross Thompson, 'Aboriginal Voices Are Missing from the Murray-Darling Basin Crisis', *The Conversation* (online, 2019) <<https://theconversation.com/aboriginal-voices-are-missing-from-the-murray-darling-basin-crisis-110769>>.

³⁷ COAG, *Intergovernmental Agreement on a National Water Initiative* (Council of Australian Governments, 2004), 25(xi).

³⁸ Sue Jackson and Joe Morrison, 'Indigenous perspectives on water management, reforms and implementation', in K Hussey & S. Dovers (eds) *Managing Water for Australia: The Social and Institutional Challenges* (CSIRO, 2007), 23-41.

³⁹ Lana D Hartwig et al, 'Water Colonialism and Indigenous Water Justice in South-Eastern Australia' (2021) 38(1) *International Journal of Water Resources Development* 30; LD Hartwig, S Jackson and N Osborne, 'Trends in Aboriginal Water Ownership in New South Wales, Australia: The Continuities between Colonial and Neoliberal Forms of Dispossession' (2020) 99 *Land Use Policy* 104869.

In 2007, the Murray Lower Darling Rivers Indigenous Nations confederation (MLDRIN) released the Echuca Declaration, which claimed cultural flows as an ‘inherent right’.⁴⁰ In 2010, the Echuca Declaration was endorsed by the Northern Basins Aboriginal Nations (NBAN).

Also in 2007, the Commonwealth passed the *Water Act 2007*, which set out the requirements for the Murray-Darling Basin Plan and the imposition of a sustainable diversion limit on water extraction in the Murray-Darling Basin. Although the *Water Act 2007* and the Murray-Darling Basin Plan included some weak procedural protections and (limited) acknowledgements of Indigenous water values, there was no commitment to recover water rights for Indigenous Peoples.

The Murray-Darling Basin Authority (MDBA),⁴¹ the entity which prepares, implements and monitors the Basin Plan, mandates the inclusion of an Indigenous position on the Board.⁴² To be eligible for appointment to the MDBA Board in that role, the Indigenous person must have a high level of expertise in ‘Indigenous matters relevant to Basin water resources.’⁴³ It is important to note that this is not self-determination as (1) the Indigenous person does not need to be from the M-D Basin and (2) they are not elected or otherwise selected by the Basin Nations.

The remaining positions on the MDBA require a ‘high level of expertise in one or more fields relevant to the Authority’s functions’,⁴⁴ which do not include Indigenous matters. This arbitrary standard of ‘high level of expertise’ has the potential to over-value institutional qualifications or expertise or rely on narratives of low capacity to ensure that dedicated Indigenous positions, in any organisation, are the *only* positions filled by Indigenous people.⁴⁵

The Act also provides for two Indigenous representatives on the Basin Community Committee (BCC).⁴⁶ This is an increase from the previous sole Indigenous BCC representative; however it is in a basin with more than 40 Indigenous nations.⁴⁷

As an alternative process for appointing Indigenous representatives, the process followed in the appointment of Elders from Wurundjeri Woi-Wurrung and Bunurong to the Birrarung Council represents a clearer expression of self-determination. In this case, the relevant Traditional Owner organisation recommends the specific Elders to be appointed by the Minister. The fact that this process is not followed for appointments to the MDBA Board, the BCC, or the national Committee on Aboriginal Water Interests is problematic.

In practice, the *Water Act 2007* has not improved water allocation decisions of Basin States and the ACT from an Indigenous water rights perspective. A review of 10 surface and groundwater plans from NSW⁴⁸ submitted for accreditation under the Basin Plan showed that not only the limited

⁴⁰ MLDRIN, *Echuca Declaration* (Murray Lower Darling Rivers Indigenous Nations, 2007) <<https://www.mldrin.org.au/wp-content/uploads/2018/07/Echuca-Declaration-Final-PDF.pdf>>.

⁴¹ See *Water Act 2007* (Cth), s 177(b). The first person to hold this position is Rene Woods, appointed in December 2020. Murray-Darling Basin Authority, ‘MDBA Welcomes Rene Woods as New Indigenous Board Member’ (Media Release, 18 December 2020) <<https://www.mdba.gov.au/news-and-events/newsroom/mdba-welcomes-rene-woods-new-indigenous-board-member>>.

⁴² A legislative instrument made pursuant to the *Water Act 2007*. This includes ensuring the volume of water extracted from the Murray-Darling Basin does not impinge on environmental requirements, see s 20 of the *Water Act*.

⁴³ *Water Act* s 178(2A).

⁴⁴ *Water Act* s 178(2)(a).

⁴⁵ Katie O’Bryan and Kate Harriden, ‘Hear Their Voices: Australia’s First Nations Women and The Legal Recognition of Their Rights to Water’ (2023) *Australian Feminist Law Journal*, 17. DOI: [10.1080/13200968.2023.2253015](https://doi.org/10.1080/13200968.2023.2253015)

⁴⁶ *Water Act* s 202(5)(c).

⁴⁷ See Murray Lower Darling Rivers Indigenous Nations <<https://mldrin.org>>; Northern Basin Aboriginal Nations <www.facebook.com/northernbasinaboriginalnations/>.

⁴⁸ NSW was selected because it has the largest Indigenous population of Basin jurisdictions. Indigenous peoples in this part of the Basin comprise almost 10% of the population yet currently own a mere 0.2% of available surface water.

nature of the provisions in the *Water Act 2007*, but the poor performance of NSW in satisfying even these weak obligations.⁴⁹ They argued that opportunities to redress the dispossession of Aboriginal water rights in NSW are being forgone through the implementation of this major reform and that Basin governments have a moral obligation to exceed the minimalist requirements of the current water allocation framework. MLDRIN has more recently lodged a case against the Federal Water Minister for failing to have due regard to First Nations positions on a water allocation plan.⁵⁰

On the 6th September this year, the Federal Water Minister tabled the *Restoring Our Rivers Bill* amend the *Water Act (2007)*. Despite claims in the speech introducing the Bill to the Senate that it was ‘a reasonable agreement, a balanced agreement’⁵¹ that had taken a year of dedicated consultation with states and territories, farmers and irrigators, scientists and experts, environmentalists and First Nations groups, the amending Bill was entirely silent on First Nations rights and interests.⁵² The Bill, was subsequently the subject of a Senate Inquiry, in which multiple First Nations individuals and organisations provided both written submissions and later verbal testimony on the 31st October – 1st November, citing the need for the Bill to recognize First Nations in the objects and purposes of the Act, as well as providing for both substantive and procedural rights. The decision about the Bill and the future of First Nations water justice in the Murray Darling Basin is now in the hands of the senate.⁵³

Over \$13 billion was invested in water recovery for the environment through a combination of water purchases and investments in water efficiency savings in partnership with the states. One example of this was the Connections project in northern Victoria, where the Commonwealth Government invested \$1 billion to improve water delivery efficiency in the Goulburn Murray Irrigation District (GMID), in return for 50% of the savings being given to the Commonwealth Environmental Water Holder. The remaining 50% were gifted to GMID irrigators.

In 2018, in response to a lack of progress by Australian governments in progressing cultural flows, the National Cultural Flows Research Project launched multiple reports detailing how cultural flows can be identified and managed,⁵⁴ as well as the law and policy pathways to return water rights and power in water decision-making to First Nations and Traditional Owners.⁵⁵ In particular, the National Cultural Flows Research Project identified three pathways to increasing Indigenous access to water and power in water management (Figure 1):

1. Increasing the volume of settler state *water rights* held by Indigenous People and organisations;

⁴⁹ Sue Jackson, Emma Carmody and Lana D Hartwig, ‘Treading Water on Indigenous Water Rights: The Serious Deficiencies of Water Allocation Planning and Management in NSW under the Murray Darling Basin Plan’ 27 *Pandora’s Box* 72.

⁵⁰ See <https://www.edo.org.au/2023/10/26/first-nations-launch-legal-challenge-against-commonwealth-over-consultation-failures-in-murray-darling-water-resource-plan/>

⁵¹ <https://minister.dcceew.gov.au/plibersek/speeches/speech-introducing-restoring-our-rivers-bill>

⁵² Grant Rigney et al, ‘Labor’s New Murray-Darling Basin Plan Deal Entrenches Water Injustice for First Nations’, *The Conversation* (online, online, 2023) <<https://theconversation.com/labors-new-murray-darling-basin-plan-deal-entrenches-water-injustice-for-first-nations-212261>>

⁵³ See Appendix for a copy of MLDRIN’s submission on the *Restoring Our Rivers Bill* (Submission 54).

⁵⁴ MLDRIN, NBAN and NAILSMA, *Cultural Flows: A Guide for Water Managers* (National Cultural Flows Research Project, 2017) <<https://www.culturalflows.com.au/~culturalflowscom/images/documents/Water%20Managers%20Guide.pdf>>.

⁵⁵ Rebecca Nelson, Lee Godden and Bruce Lindsay, *Cultural Flows – A Multi-Layer Plan for Cultural Flows in Australia: Legal and Policy Design* (University of Melbourne, 2018); MLDRIN, NBAN and NAILSMA, *A Pathway to Cultural Flows in Australia* (National Cultural Flows Research Project, 2018) <<http://culturalflows.com.au/images/documents/Law%20and%20Policy%20Summary.pdf>>.

2. Increasing the *power and influence* of Indigenous People in the care and management of waterscapes; and
3. *Transforming the foundation* of the relationship between the settler state and Indigenous Peoples through Treaty and agreement making.

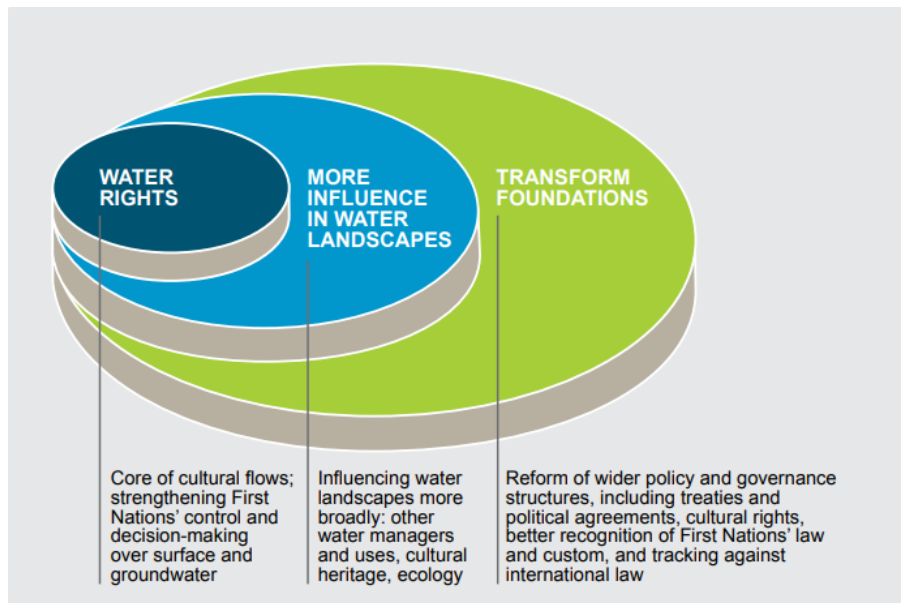


Figure 1: Pathways to water justice (source: MLDRIN, NAILSMA & NBAN (2018))

The third approach, transform foundations, is the most ambitious and has the greatest capacity to promote self-determination.⁵⁶ This approach involves the effective inclusion of First Nations in water governance, using both legal and non-legal means. It aims to transform the governance framework by putting First Nations at the centre of water management. In that respect, it was noted in the review that the UNDRIP can provide the inspiration for establishing new approaches to water governance by way of, for example, treaty or other forms of political agreement.⁵⁷

⁵⁶ Lee Godden, Sue Jackson and Katie O'Bryan, 'Indigenous Water Rights and Water Law Reforms in Australia' (2020) 37 *Environmental and Planning Law Journal* 658.

⁵⁷ Rebecca Nelson, Lee Godden and Bruce Lindsay, *A Pathway to Cultural Flows in Australia* (2018) 13.

Victoria

The settler state fragments Country. It separates land and water under distinct legislation and policies. Water is further fragmented with marine waters, surface water and groundwater each governed separately.

Settler state land and sea laws

Caring for Country needs to recognise interrelated systems. The problem is that the settler legal system separates these systems into different regimes.

Background to the Victorian *Traditional Owner Settlement Act 2010 (Vic)*⁵⁸

In 2005, in response to the devastating High Court decision in *Yorta Yorta v Victoria*,⁵⁹ a group of Traditional Owners formed the Victorian Traditional Owner Land Justice Group and called for a comprehensive land justice settlement to 'finally address the fundamental need for land justice in Victoria'.⁶⁰ In March 2008, a Steering Committee was set up to investigate and develop options for policy reform in relation to land justice in Victoria, including in relation to native title.⁶¹ In December 2008, it produced its final report ('*Steering Committee Report*')⁶² which was subsequently endorsed by the State government in June 2009.⁶³ As part of its response to the recommendations contained in the *Steering Committee Report*, the Victorian government enacted the *Traditional Owner Settlement Act 2010 (Vic)* ('TOSA').

The *Traditional Owner Settlement Act 2010 (Vic)* as it relates to Indigenous water rights

Section 9 of the TOSA provides for recognition of Traditional Owner rights and interests. Water rights, however, are not mentioned, but are instead a subset of natural resource rights in s 9. To have Traditional Owner rights and interests recognised, the Traditional Owner group must enter into a recognition and settlement agreement ('RSA') with the State.⁶⁴ The exercise of natural resource rights is then dealt with in pt 6, which requires a natural resource agreement ('NRA').

Water resource rights in NRAs are limited to taking and using water 'for traditional purposes'.⁶⁵ Traditional purposes are defined as the purposes of providing for any personal, domestic or non-commercial communal needs of the members of the traditional owner group,⁶⁶ terminology which is consistent with s 211(2)(a) of the *NTA*.⁶⁷ Water rights under the TOSA do not include any

⁵⁸ This section draws on material Katie O'Bryan, *Indigenous Rights and Water Resource Management: Not Just Another Stakeholder*, (Routledge, 2019) 105-121.

⁵⁹ (2002) 214 CLR 422.

⁶⁰ VTOLJG, *Statement* (The Victorian Traditional Owners Land Justice Group, 17 February 2005), cl 1.1 <<http://www.landjustice.com.au/document/Communique-Statewide-Meeting-17-18Feb05.pdf>>.

⁶¹ The Steering Committee was chaired by Professor Mick Dodson and comprised of members of the VTOLJG, Native Titles Services Victoria (NTSV), and senior departmental representatives of the State Government. The author was an employee of NTSV during this time and participated in one of the working groups which were set up to advise the Steering Committee on various topics contained in the terms of reference and to assist in negotiations.

⁶² Steering Committee for the Development of a Native Title Settlement Framework, *Report of the Steering Committee for the Development of a Native Title Settlement Framework* (December 2008).

⁶³ Rob Hulls, 'Keynote Address' (Speech delivered at the AIATSIS Native Title Conference, Melbourne, 4 June 2009).

⁶⁴ TOSA s 9.

⁶⁵ TOSA s 84(a). Note that certain other resources can be used for commercial purposes, see s 84(b).

⁶⁶ TOSA s 79.

⁶⁷ It is also consistent with determinations of native title made in Victoria. Note however that in relation to s 211 of the *NTA*, s 211(3) includes cultural and spiritual activities as a class of activities to which the section applies.

management rights. Further, water is treated as a resource, a very western conception of water and one which allows water to be separated from land.

In summary the TOSA is inadequate to address First Nations water aspirations.

The Victorian Traditional Owner *Cultural Landscapes Strategy*, developed by Traditional Owners with the support of the Department of Environment, Land, Water, and Planning,⁶⁸ and Parks Victoria, provides a much more holistic approach to managing Country than the fragmented approach inherent in the settler-state legal system. The Strategy 'sets out a framework to systematically enable and empower Victorian Traditional Owners to lead planning and activate cultural knowledge and practices to manage Country.'⁶⁹ It is a form of transformational change envisaged in the third approach of the National Cultural Flows Research Project, discussed earlier.

Sea Country

Sea Country recognises that marine waters are connected to, and cannot be separated from, Country. Commonwealth and Victorian state laws do not adequately recognise Indigenous rights to Sea Country.

Large-scale planned offshore oil and gas extraction will see Sea Country become an increasingly important issue for First Peoples in Victoria.⁷⁰ In the absence of Treaty, and without adequate recognition of Traditional Owner rights to Sea Country within current Commonwealth and Victorian legislation, there is significant risk of further dispossession becoming entrenched.⁷¹ Traditional Owners and First Nations will be required to negotiate not only with the state government, the federal government (when at least 3 nautical miles from the shore) and private companies (such as wind farm developers).

While the *Native Title Act 1993* allows for the possibility for native title to be recognised at sea, subsequent case law has been resistant to recognise exclusive native title rights to sea country.⁷² The recent Federal Court of *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 has further opened the door to wider legal recognition of Indigenous rights to sea country. However, it is important to note that the case frames First Peoples connection to sea country as 'immediate and direct interests' rather than rights.⁷³

In 2022, two Sea Country Indigenous Protected Areas (Sea Country IPA) projects were announced. The Gunditjmarra Sea Country IPA incorporates Deen Maar Island and supports the further protection of the Budj Bim Cultural Landscape.⁷⁴ The GunaiKurnai Land and Waters Aboriginal Corporation commenced the process of establishing a Sea Country Indigenous Protected Area

⁶⁸ Now the Department of Energy, Environment and Climate Action (DEECA).

⁶⁹ FVTOC, Victorian Traditional Owner Cultural Landscapes Strategy (The Federation of Victorian Traditional Owner Corporations) <<https://fvtoc.com.au/sections/landscapes/>>.

⁷⁰ See David Prestipino, 'Southern Blast: Locals step up to fight against seismic blasting', *National Indigenous Times* (online, 14 October 2023) <<https://nit.com.au/14-10-2023/8133/southern-blast-locals-step-up-fight-against-seismic-blasting>>.

⁷¹ See Environmental Defenders Office, 'Woodside's seismic blasting approval thrown out after legal challenge by Traditional Custodian' (online, 28 September 2023) <<https://www.edo.org.au/2023/09/28/woodsides-seismic-blasting-approval-thrown-out-after-legal-challenge-by-traditional-custodian/>>.

⁷² *Commonwealth v Yarmirr* [2001] HCA 56; 208 CLR 1.

⁷³ *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, 65.

⁷⁴ Department of Climate Change, Energy, the Environment and Water, 'Indigenous Protected Areas' (Commonwealth Government) <<https://www.dceew.gov.au/environment/land/indigenous-protected-areas/sea-country-grant-opportunity>>.

(IPA) located between Nanjet, east of Wilsons Promontory, and Mallacoota, on the Victoria and NSW border.⁷⁵

At the policy level, the Victorian Traditional Owner Cultural Landscapes Strategy refers to Sea Country Plans. Sea Country plans may be prepared by Victorian Traditional Owner groups detailing their goals related to managing Sea Country. Sea Country plans have preceded the establishment of the Cultural Landscapes Strategy.²⁷

Settler state water laws

Shaky foundations

*'Who allowed that?'*⁷⁶

The foundation of Victoria's *Water Act 1989* is section 7(1), which states:

'The Crown has the right to the use, flow and control of all water in a waterway and all groundwater.'

Consistent with water laws in other states and territories, Victoria's *Water Act 1989* assumes that the Crown has the legitimate ability to claim the right to control water, and the functionality of Victoria's statutory water framework is contingent upon the Crown holding this right. Section 7(1) underpins the ability of the Minister for water to issue water licences, create water entitlements, and make water allocations. In doing so, this legislation reproduces and re-entrenches the erroneous assumption of aqua nullius- and denies Indigenous people jurisdiction over water (or other features of Country).⁷⁷

In 2022, the Victorian Government formally acknowledged that:

'The assumption of terra nullius also informed the development of settler state water law – namely, Victoria's current water management system is designed around the premise that the Crown has the right to the use, flow and control of all water in a waterway and all groundwater. The phrase **aqua nullius** has been used by Dr Virginia Marshall, a Wiradjuri Nyemba woman, principal lawyer in her legal firm Triple BL Legal and a pre-eminent academic scholar in Aboriginal water rights and interests, when discussing 'the omission of Indigenous peoples' water rights and interests', and the Western view that water belongs to no one'.⁷⁸

This is an important step, but without more, this acknowledgement does not address the contemporary expression of aqua nullius in the *Water Act 1989*, nor does it tackle the impacts of water dispossession. To do so will require transforming the foundations of settler water law in Victoria, which will depend on the Treaty process.

However, establishing the detail of the wealth transfer to the settler state and private interests as a result should be a matter of priority. This could include a review of water authorities in Victoria

⁷⁵ See, for example, <https://gunaikurnai.org/wp-content/uploads/2022/11/Offshore-Renewable-Energy-Infrastructure-Area-Submission-GLaWAC-221007.pdf>

⁷⁶ Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021) <https://law.unimelb.edu.au/data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 8.

⁷⁷ Erin O'Donnell, 'Water Sovereignty for Indigenous Peoples: Pathways to Pluralist, Legitimate and Sustainable Water Laws in Settler Colonial States' (2023) in press *PLOS Water*.

⁷⁸ Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>, 15 (emphasis in original).

(including their income generation) and a review of the value of private rights to water, including water trading.⁷⁹ This is an indication of the economic development from which First Peoples have been excluded.

Caring for Country: water as a relative, not a resource

*'Stolen lands, stolen waters, and stolen authority too.'*⁸⁰

Traditional Owners across Victoria have been almost entirely excluded from caring for water. Aside from Traditional Owner Settlement Agreements, they have no formal powers in water management, although the 2019 amendments to the *Water Act 1989* required water decision-makers to consider Aboriginal cultural values and uses of waterways (alongside other uses, such as social and recreational uses). Traditional Owners remain reliant on agreements reached through the goodwill of government agencies to exert influence in the way that waterways are managed and cared for across Victoria. Many Traditional Owners are demanding that the settler state recognise (and fund) their authority to care for and manage waterscapes:

'Eastern Maar assert the right to have mandated delegations of empowered decision making that will work alongside existing Crown governance processes for the management all parreeyt [water] within our Ancestral Territory until a new model is codeveloped.'⁸¹

'We require dedicated and long-term funding to be re-established as the water authority for our Country.'⁸²

'A Djaara water authority is required to manage our water and water interests... The Djaara Gatjin Authority will authorise water decisions on Djandak and manage Djaara water rights and entitlements.'⁸³

Traditional Owners around Victoria also recognise particular waterways as living entities and ancestral beings, with whom people are in a relationship defined by mutual obligation, interdependence, and reciprocity.⁸⁴ The *Water Act 1989* treats water as a resource to be commodified and managed efficiently. This separates water from land (an explicit policy goal of Australian governments since the National Water Initiative in 2004), and embeds a scarcity framing, in which water uses can be traded off against each other.⁸⁵ This is incompatible with Traditional Owner laws and concepts of water and waterways:

⁷⁹ Some information may be found in the work of organisations such as Aither, e.g. Aither, *Water Markets Report: 2022-23 Review and 2023-24 Outlook* (Aither, Pty Ltd, 2023).

⁸⁰ Aunty Evon Barker, cited in the Gunditjmarra Nation Statement, in Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>, 185.

⁸¹ Eastern Maar Nation Statement in Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>, 150.

⁸² Tati Tati Nation Statement in Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>, 231.

⁸³ DJAARA, *Dhelkunyangu Gatjin: Working Together to Heal Water (Djaara Gatjin Strategy)* (Dja Dja Wurrung Clans Aboriginal Corporation, 2023) <<https://djadawurrung.com.au/wp-content/uploads/2023/06/Dhelkunyangu-Gatjin-Working-together-to-heal-water-Gatjin-Strategy-2023.pdf>>, 18.

⁸⁴ Katie O'Bryan, 'The Changing Face of River Management in Victoria: The Yarra River Protection (Wilip-Gin Birrarung Murrong) Act 2017 (Vic)' (2019) 44(6–7) *Water International* 769; see, for example, Gunditjmarra Nation Statement in Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>.

⁸⁵ Erin O'Donnell, 'Repairing Our Relationship with Rivers: Water Law and Legal Personhood' in Rhett Larson and Vanessa Casado Pérez (eds), *Research Agenda for Water Law* (Edward Elgar, 2023) 113.

'Water has been given to us and our Country forever. Water as a commodity is not our cultural way. Ancestors have provided water for us forever. Only through the frontier wars has that water become a commodity.'⁸⁶

Settler state water rights

*'All water is Aboriginal water.'*⁸⁷

Traditional Owners in Victoria have never ceded their rights to water and continue to reject the idea that water can be owned and managed separately to the land. The Echuca Declaration claimed cultural flows as an 'inherent right' to water of sufficient quantity and quality to provide for social, cultural, economic, well-being and environmental needs of First Nations people and Country.⁸⁸ Cultural flows and the cultural water paradigm reflect a holistic understanding of water, in which caring for water unites sovereignty and self-determination, healthy Country, healthy people, and cultural economies.⁸⁹

In claiming the right to control the use of water, the settler state has assumed the authority to grant water use rights to settler water users. In September 2022, the Victorian Government reported that Traditional Owners held less than 0.18% of all settler water rights issued in Victoria.⁹⁰

For many Traditional Owners, the concept of receiving rights to use water from the settler state of Victoria is incompatible with their unceded rights to all water:

'How do we distinguish ourselves to not be the colonisers too? ...If you're not in it, the farmers will get everything, the environment and our cultural flows will get nothing. How do we participate but not become them? If we become black colonisers, it moves too far from where we are as cultural people.'⁹¹

'A 'water return' would and should only be an accepted outcome if it is one component of a greater redress action'.⁹²

For others, water rights issued by the settler state are a necessary first step towards broader water justice:

⁸⁶ Aunty Denise Lovett, cited in the Gunditjmara Nation Statement, Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>, 183.

⁸⁷ Traditional Owner, cited in Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021) <https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>.

⁸⁸ MLDRIN, *Echuca Declaration* (Murray Lower Darling Rivers Indigenous Nations, 2007) <<https://www.mldr.in.org.au/wp-content/uploads/2018/07/Echuca-Declaration-Final-PDF.pdf>>.

⁸⁹ Erin O'Donnell et al, 'Cultural Water and Indigenous Water Science' (2023) 381(6658) *Science* 619; Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021) <https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>.

⁹⁰ Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>.

⁹¹ Aunty Denise Lovett, cited in the Gunditjmara Nation Statement, in Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>, 185.

⁹² Eastern Maar Nation Statement in Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>, 147.

'If you control water you control a lot. There's power, an attitude, around that.'⁹³

'[W]e're all here to get water for our people. There's an opportunity today to get water for our Country and our people. Opportunity to progress our people's campaign for water rights and water for our people.'⁹⁴

'Give us our water and we'll show you what we can do with it.'⁹⁵

However, even then, Traditional Owners are clear that this is not their preferred outcome: '[s]o we have to play the whitefella game, as much as we don't want to.'⁴⁸ Advocacy for water rights is always connected to a transfer of power, so that holding settler water rights is a pathway to increasing power in the way that water is managed: '[w]e want to own the water, we want to have a say, we want to have control over it.'⁹⁶

Due to the inadequacies of native title (and Traditional Owner Settlement Agreements) as a pathway to cultural flows, Traditional Owners have also focused on increasing access to water rights issued by the settler state as a pathway to water-based economic development: '[w]e need cultural water for our cultural economies.'⁹⁷ In 2021, the *Cultural Water for Cultural Economies* report identified multiple pathways to increasing Traditional Owner access to settler state water rights.⁹⁸

1. Legal reform of section 8A rights

All Traditional Owners with an agreement under the *Traditional Owner Settlement Act 2010* have access to water under section 8A of the *Water Act 1989*. However, there are no explicit definitions of how much water this entitles Traditional Owners to use; the use of the water is limited to non-commercial communal water rights related to the maintenance of traditional values and uses of water; and it is not an exclusive right to water, meaning that Traditional Owners cannot prevent other users from taking water in a way that compromises their rights and interests under section 8A. None of the eligible Traditional Owners are using water available under this right, indicating that it is not fit for purpose.

The section 8A rights are a crucial pathway, as they remain connected to land and are a partial expression of Traditional Owners' inherent rights to water. Legal reform of this right to water is necessary so that it is genuinely accessible for use, including clarity on the volume and expanding the uses to which it can be put to include cultural economies. The Victorian Government

⁹³ Traditional Owner, cited in Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021)

<https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 22.

⁹⁴ Traditional Owner, cited in Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021)

<https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 40.

⁹⁵ Traditional Owner, cited in Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021)

<https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 46.

⁹⁶ Traditional Owner, cited in Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021)

<https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 10.

⁹⁷ Traditional Owner, cited in Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021)

<https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 18.

⁹⁸ Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021) <https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>.

committed to a First Principles Review of the *Traditional Owner Settlement Act 2010* which was completed in 2021 with recommendations submitted to government. It is not clear what has happened since, or the extent to which the recommendations and government response will consider questions about access to water.⁹⁹

2. Unallocated water

Secondly, although many parts of Victoria have fully or over-allocated the available water, there are some regions with 'unallocated' water. In these areas, water is available for use, but has not yet been allocated to any individual water user. These areas typically occur in southern Victoria, although there are also some groundwater aquifers in northern Victoria with unallocated water available. Access to this water should be a relatively straightforward path to increasing water held by Indigenous people in Victoria. However, there have been four water licences issued to Traditional Owners through this pathway, and each case took approximately a year of negotiation between the Victorian government, the relevant water authority (Southern Rural Water) and the Traditional Owners:

- In March 2021, Gunaikurnai Land and Waters Aboriginal Corporation received a 2 GL water licence in the Mitchell River. This process formally began at a workshop held as part of the *Cultural Water for Cultural Economies* project in February 2020.¹⁰⁰
- In September 2022, Gunditj Mirring Traditional Owner Aboriginal Corporation received a 2.5 GL water licence in the Fitzroy River catchment in south-western Victoria.¹⁰¹ This process was also initiated at a separate workshop as part of the *Cultural Water for Cultural Economies* project in February 2020.
- In October 2023, Gunaikurnai Land and Waters Aboriginal Corporation received two further licences (500 ML surface water licence in the Tambo River, and 200 ML groundwater licence in the Buchan Munji aquifer system). Negotiations for these licences commenced shortly after *Water is Life* was launched in September 2022.¹⁰²

Given that none of these licences involve the extraction of water (Traditional Owners have chosen to leave the water in-stream to care for Country), thereby making the application and assessment process significantly easier than a standard licence application where water is pumped from the river onto crops, it is hard to understand why the allocation of water that is available for use takes such a long time. Each water return has involved persistent, high-level advocacy by Traditional Owners over a long period, a process which is exhausting and time-consuming.

⁹⁹ Federation of Victorian Traditional Owner Corporations, 'First Principles Review' <https://fvtoc.com.au/sections/first-principles-review/>.

¹⁰⁰ Troy McDonald and Erin O'Donnell, 'Victoria Just Gave 2 Billion Litres of Water Back to Indigenous People. Here's What That Means for the Rest of Australia', *The Conversation* (<https://theconversation.com/victoria-just-gave-2-billion-litres-of-water-back-to-indigenous-people-heres-what-that-means-for-the-rest-of-australia-150674>, online, 30 November 2020) <<https://theconversation.com/victoria-just-gave-2-billion-litres-of-water-back-to-indigenous-people-heres-what-that-means-for-the-rest-of-australia-150674>>.

¹⁰¹ Kyra Gillespie, 'Gunditjmara Traditional Owners Handed Unallocated Water from Fitzroy River System', *ABC News Online* (online, 2022) <<https://www.abc.net.au/news/2022-10-09/gunditjmara-given-unallocated-water-from-fitzroy-river-system/101506836>>.

¹⁰² William Howard, 'Water Rights Returned to Gippsland Traditional Owners in Landmark Victorian Government Deal', *ABC News Online* (online, 2023) <<https://www.abc.net.au/news/2023-10-12/traditional-owners-given-more-water-in-landmark-announcement/102963860>>.

3. Groundwater

Groundwater licences offer a significant opportunity for Traditional Owners to manage and control water that is typically more reliable than surface water during drought. This could support cultural economies, or could be held in situ to protect sources that supply springs that may carry cultural importance, or supply river waterholes during drought. It is likely that many Traditional Owners and First Nations will strongly prefer to leave this water in situ.

There is relatively little experience of holdings of groundwater for environmental purposes (broadly understood) around the world.¹⁰³ This could include holding groundwater in situ, or withdrawing groundwater to support Country during times of high stress (e.g. during severe droughts, to maintain critically important places). Further developing groundwater holdings presents an opportunity for Victorian Traditional Owners to be leaders internationally in this area.

The International Association of Hydrogeologists Australia's Indigenous Groundwater Declaration supports the now well-established importance of groundwater for First Peoples.¹⁰⁴ The Declaration recognises First Peoples' 'sovereignty over their lands and waters'¹⁰⁵ and promotes actions that affirm the incorporation of 'Indigenous knowledges in groundwater activities, deliberations, decisions, and policies.'¹⁰⁶

A key consideration in relation to holding groundwater for extraction is the additional cost of accessing it due to the cost of drilling bores and pumping. In settler nations that have recognised First Nations' rights to groundwater, settlement agreements sometimes include, and should include, funding for this reason.¹⁰⁷ Without such funding, these rights to water remain 'paper rights' only.

Conversely, groundwater pumping by others can be a key risk to Country that settler water laws often do not fully recognise or assess. In Victoria, the grant of a licence to pump groundwater is guided by a formal policy that focuses narrowly on only 'high value groundwater-dependent ecosystems'.¹⁰⁸ This focuses on Ramsar wetlands, heritage river areas, listed threatened species, and priorities of waterway managers. This is unlikely to comprehensively include the ways that groundwater supports Country in ways that are important to Traditional Owners.

Another key risk associated with groundwater is the potential for water agencies to under-emphasise consultation with Traditional Owners in relation to water management plans for groundwater, compared to surface water. Such consultation is especially important given the gaps in settler water law discussed above.¹⁰⁹

¹⁰³ Rebecca Nelson, 'Water Rights for Groundwater Environments as an Enabling Condition for Adaptive Water Governance' (2022) 27(2) *Ecology and Society* 28 (22pp), DOI:10.5751/ES-13123-270228.

¹⁰⁴ IAHA, *Indigenous Groundwater Declaration* (International Association of Hydrogeologists Australia) <<http://declaration.iah.org.au/>>.

¹⁰⁵ IAHA preamble.

¹⁰⁶ IAHA.

¹⁰⁷ Philip Womble, Debra Perrone, Scott Jasechko, Rebecca L Nelson, Leon F Szeptycki, Robert T Anderson and Steven M Gorelick, 'Indigenous Communities, Groundwater Opportunities' (August 2018) *Science* 453-455.

¹⁰⁸ Victoria Water Register, *Guidelines for Groundwater Licensing and the Protection of High Value Groundwater Dependent Ecosystems* (State of Victoria, 2015)

<<https://www.waterregister.vic.gov.au/images/documents/Guidelines%20for%20Groundwater%20Licensing%20and%20the%20Protection%20of%20High%20Value%20Groundwater%20Dependent%20Ecosystems.pdf>>.

¹⁰⁹ See, for example, the recent legal action undertaken by MLDRIN, <https://www.edo.org.au/2023/10/26/first-nations-launch-legal-challenge-against-commonwealth-over-consultation-failures-in-murray-darling-water-resource-plan/>.

4. *Treated, fit-for-purpose recycled water*

In Victoria, there is increasing emphasis on the provision of recycled water as a climate-resilient source of water for irrigation and industry, as well as for some household uses.¹¹⁰ This opens up two possible pathways for Traditional Owner access to water. Firstly, Traditional Owners could receive the rights to use this recycled water themselves. This could be used for economic development directly, or it could also be on-sold by Traditional Owners to other users (industrial or agricultural). Traditional Owners have indicated that they ‘could make [a] treated water project happen quite easily’ with assistance from water corporations and relevant expertise.¹¹¹ However, other Nations have consistently rejected this pathway as a form of rubbish water that no one else wants: ‘our ancestors didn’t swim or fish or get food from wastewater.’¹¹²

Less controversially, there is a second pathway for the use of recycled water, in which recycled water can be used to reduce existing levels of water extraction from rivers and aquifers. This is by far the preferred pathway for Traditional Owners. The Victorian Government has committed to accelerate its production of ‘manufactured’ water (recycled water and desalination) in order to return more water to the environment and to Traditional Owners.¹¹³ However, there are no specific commitments that describe what this ‘accelerated’ investment will look like, or when it will commence.

5. *Water reallocation via purchase or other agreement*

In northern Victoria (and many parts of southern Victoria), water systems are considered to be ‘fully allocated’ in settler law, and returning water to Traditional Owners would require a redistribution of those water rights. This can be achieved through agreement making. For example, DEECA currently holds 1.4 GL of water as a s51 licence on the Birrarung (Yarra River), which it committed to return to Wurundjeri Woi-wurrung in 2020. This still has not occurred.

A redistribution of settler water rights can also occur when water delivery is made more efficient. Water that was previously lost to evaporation or seepage can be redistributed and put to other uses. An example of this is the Connections Project in northern Victoria, which has delivered 425 GL of water (which include the Melbourne water retailers, the Victorian Environmental Water Holder, the Commonwealth Environmental Water Holder, and irrigators in the Goulburn-Murray Irrigation District). The Connections Project has also delivered 4 GL of water as additional water savings. In May 2021, 2 GL was announced as extra savings by the Victorian Government, and returned entirely to irrigators,¹¹⁴ despite Victorian Government commitments to increasing access

¹¹⁰ Department of Environment, Land, Water and Planning, *Central and Gippsland Region Sustainable Water Strategy* (State of Victoria, 2022) <https://www.water.vic.gov.au/data/assets/pdf_file/0030/668163/central-and-gippsland-region-sustainable-water-strategy.pdf>.

¹¹¹ Erin O’Donnell, Katie O’Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021) <https://law.unimelb.edu.au/data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 33.

¹¹² Erin O’Donnell, Katie O’Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021) <https://law.unimelb.edu.au/data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 25.

¹¹³ Department of Environment, Land, Water and Planning, *Central and Gippsland Region Sustainable Water Strategy* (State of Victoria, 2022) <https://www.water.vic.gov.au/data/assets/pdf_file/0030/668163/central-and-gippsland-region-sustainable-water-strategy.pdf>, 90-91.

¹¹⁴ Clint Jasper, ‘Traditional Owners Say Missing out on Rare Opportunity to Access Water Rights Is a Step Backwards’, *ABC News Online* (online, 2021) <<https://www.abc.net.au/news/2021-05-25/traditional-owners-miss-out-on-victorian-water-rights/100159640>>.

to water for Traditional Owners throughout Victoria.¹¹⁵ In February 2022, a further 2 GL of water savings was announced, of which one-third was returned to irrigators and two-thirds (1.36 GL) were set aside for Traditional Owners in northern Victoria.¹¹⁶ This water has not yet been returned to Traditional Owners for use and it is not clear when or how this will happen.

Finally, a redistribution of water rights can occur via the water market. This is the mechanism by which the majority of water for the environment has been recovered in the Murray-Darling Basin Plan, and is frequently the financially cheapest and most straightforward way to re-allocate water from existing users.¹¹⁷ Although *Water is Life* commits to developing a framework for government to fund Traditional Owners to acquire water on the market (Target 7), there is no evidence of this framework as yet, and consequently no funding for Traditional Owners to acquire water. In fully allocated water systems, acquiring water on the market is the only pathway for substantial surface water returns to Traditional Owners in northern Victoria.

Every delay in purchasing water on the market means that more funding is required. In 2018, the Australian Government committed \$40 million to purchase water rights on the market for Traditional Owners. Water prices for permanent water access entitlements have increased significantly since then, so \$40 million only buys 2/3 of the water it would have purchased in 2018.¹¹⁸

¹¹⁵ Department of Environment Land Water and Planning (Vic), *Water For Victoria: Water Plan* (State Government Victoria, 2016).

¹¹⁶ Premier of Victoria, *Successful Connections Project Delivers Extra Water (Press Release)* (State Government of Victoria, 2022) <<https://www.premier.vic.gov.au/successful-connections-project-delivers-extra-water>>.

¹¹⁷ R Quentin Grafton and Sarah Wheeler, 'Economics of Water Recovery in the Murray-Darling Basin, Australia' (2018) 10 *Annual Review of Resource Economics* 487.

¹¹⁸ Grant Rigney et al, 'Labor's New Murray-Darling Basin Plan Deal Entrenches Water Injustice for First Nations', *The Conversation* (online, online, 2023) <<https://theconversation.com/labors-new-murray-darling-basin-plan-deal-entrenches-water-injustice-for-first-nations-212261>>.

Key opportunities for reform to hold government to account

There are several key policies and processes underway in Victoria currently that may provide important opportunities to address land and water injustice.

Land and water returns

*'we've gotta have land and water, gotta come together.'*¹¹⁹

Genuine progress in addressing land and water injustice in Victoria must include the return of both land and water to Traditional Owners. There are multiple models for this to proceed (see Box 1 and Box 2),¹²⁰ depending on the rights and interests of each Traditional Owner group, and their willingness to act in partnership with settler state governments.

Box 1: Land and water returned to Nari Nari Tribal Council

Nari Nari Tribal Council land and water management Gayini Nimmie-Caira is an 88,000-ha property on the Lowbidgee floodplain that is rich in cultural heritage, with 50,000 years of Indigenous occupation. Located on Nari Nari Country in the southern Murray-Darling Basin, the property is owned by the Nari Nari Tribal Council (NNTC), who manage the wetland with an integrated economic, social, cultural, and ecological vision for Country. The NNTC, the Nature Conservancy, the University of New South Wales, and the Murray Darling Wetlands Working Group brought together cultural objectives, Indigenous science, Western environmental science, community partnerships, conservation skills, and sustainable agriculture to deliver a new, holistic 'Healthy Country Planning' approach to land and water management. By recreating floodplain functions, the NNTC aims to increase cultural-environmental health outcomes that reverse the harm done by colonial land management, as well as create economic value. A partnership between the NNTC and the Commonwealth Environmental Water Holder provided environmental watering to Gayini Nimmie-Caira, which achieved multiple ecological and cultural benefits.

¹¹⁹ Traditional Owner, cited in Erin O'Donnell, Katie O'Bryan and Lee Godden, *Cultural Water for Cultural Economies* (Murray Lower Darling Rivers Indigenous Nations and University of Melbourne, 2021) <https://law.unimelb.edu.au/data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>, 46.

¹²⁰ Box 1 from Erin O'Donnell et al, 'Cultural Water and Indigenous Water Science' (2023) 381(6658) *Science* 619; see also R Woods, I Woods and JA Fitzsimons, 'Water and Land Justice for Indigenous Communities in the Lowbidgee Floodplain of the Murray-Darling Basin, Australia' (2022) 38(1) *International Journal of Water Resources Development* 64. Box 2 from Guditjmarra Nation Statement in Department of Environment, Land, Water and Planning, *Water Is Life: Traditional Owner Access to Water Roadmap* (State Government of Victoria, 2022) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>, 177-197; see also S Brown et al, *Budj Bim Cultural Landscape World Heritage Nomination* (Department of the Environment and Energy, 2017).

Box 2: Gunditjmara caring for Country at Budj Bim

Budj Bim was recognised as a World Heritage site in 2019 for outstanding universal value, and in particular, the Indigenous heritage values of the aquaculture that has been practiced at the site by Gunditjmara people for over 6,000 years. The Budj Bim area includes Indigenous freehold land, several Indigenous Protected Areas, and national parks which are co-managed. Gunditj Mirring Traditional Owner Aboriginal Corporation is restoring eel aquaculture as part of reinvigorating their cultural economies. Much of the focus has been restoring land and water connectivity around Lake Condah, and in 2022, Gunditj Mirring Traditional Owner Aboriginal Corporation received a settler state water licence for 2.5GL on the Palawarra (Fitzroy River). This water is being used to care for Country by providing instream flows.

Implementation of Cultural Landscapes Strategy

‘Cultural landscapes are reflections of how Aboriginal people engage with the world.’¹²¹

The implementation of the Victorian Traditional Owner *Cultural Landscapes Strategy* will deliver a more holistic approach to managing Country as an alternative to the fragmented approach inherent in the settler-state legal system. The Strategy ‘sets out a framework to systematically enable and empower Victorian Traditional Owners to lead planning and activate cultural knowledge and practices to manage Country.’¹²² The Cultural Landscapes Strategy should inform the review of Victoria’s public lands legislation that is currently underway. Development of legislation that enables Traditional Owners to be appointed as managers of public lands is an urgent priority.

Implementation of *Water is Life*

The Victorian Government has identified 12 Targeted Outcomes in *Water is Life*, including new legislation to recognise all waterway as living entities. Although implementation of all outcomes will not deliver water justice, it would be an important step forward. Implementation of *Water is Life* has lagged since its launch in September 2022, and should be accelerated.

Treaty negotiations

The Victorian Treaty process provides a crucial opportunity to address land and water injustice, by acknowledging and addressing the false assumption of aqua nullius. This kind of foundational reform can only be achieved through a transformative process such as Treaty.

¹²¹ FVTOC, Victorian Traditional Owner Cultural Landscapes Strategy (The Federation of Victorian Traditional Owner Corporations) 5 <<https://fvtoc.com.au/sections/landscapes/>>.

¹²² FVTOC Cultural Landscapes Strategy.

Contributors

Eddie Cubillo

Dr Eddie Cubillo is an Aboriginal man with strong family links in both the urban and rural areas throughout the Northern Territory. He is a descendant of the Larrakia, Wadjigan and Central Arrente peoples. Eddie is a lawyer, admitted to the Supreme Court of the Northern Territory and is recognised nationally and internationally for his experience and expertise in Indigenous governance and justice service delivery to First Nations Peoples. Eddie is currently the Director of the Indigenous Law and Justice Hub, at Melbourne Law School.

In 2022 he completed his PhD thesis titled 'What Does 'Self-determination' mean in the context of legal service provision for Aboriginal and Torres Strait Islander Legal Services, which involved interviews with key stakeholders in the ATSILS movement and won the UTS Chancellors award for outstanding thesis on the grounds of the significance of the work and the quality of the thesis.

Dr Cubillo has been a former Chair of the North Australian Aboriginal Justice Agency (NAAJA) and the Northern Territory Aboriginal Justice Advisory Committee. In 2002 he was elected to the ATSIC Yilli Rreung Regional Council, and subsequently became the Chair. In 2010 Dr Cubillo was appointed the Anti - Discrimination Commissioner of the Northern Territory. Mr Cubillo then took on the role of Executive Officer with National Aboriginal & Torres Strait Islander Legal Service (NATSILS). As the Executive Officer he championed the rights of Indigenous Australians in a legal context. In 2015 he was named the National Indigenous Legal Professional of the year and in 2016 attended Geneva on a UN Indigenous fellowship. In 2017 he then took up an opportunity to work on the Royal Commission into the Protection and Detention of Children in the Northern Territory as the Director of Community Engagement.

Eddie currently sits as an Independent Representative on the Justice Policy Partnership under the Closing the Gap Agreement, Co-Chairs the Indigenous Governance Awards for Reconciliation Australia and is a member of the panel appointing members to the Victorian Treaty Authority.

Sue Jackson

Sue Jackson is a professor of geography at Griffith University. She researches the interaction between Indigenous customary and state environmental governance and planning systems. For the past 15 years she has focused on the meaning of water, its symbolic significance, material value and the ways in which it is governed throughout Australia. Sue has conducted collaborative research with Indigenous organisations in many regions of the country, including northern Australia, the Pilbara, and throughout the Murray Darling Basin. She is a member of the Murray-Darling Basin Authority's Advisory Committee on Social, Economic and Environmental Sciences and its Social Economic Advisory Group. Sue is a former holder of an ARC Future Fellowship relating to Indigenous water rights. She has advised numerous Traditional Owner groups and their representative organisations on water governance matters.

Kate Jama

Kate Jama is a Research Fellow at the Melbourne Centre for Law and the Environment and a PhD Candidate at the University of Melbourne Law School. Kate's research examines how Australian settler law and technology work together to enable extractive practices in the Southern and Indian oceans. Kate previously worked in environmental and social policy with the Victorian Department

of Energy, Environment and Climate Action (DEECA) and the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP).

Murray Lower Darling Rivers Indigenous Nations (MLDRIN)

The Murray Lower Darling Rivers Indigenous Nations (MLDRIN) is a confederation of Indigenous Nations or Traditional Owners in the southern part of the Murray Darling Basin. MLDRIN was formed in 1998 during the Yorta Yorta Native Title Case. During this time the Yorta Yorta called for a gathering of all the Indigenous Nations along the Murray River to come together in solidarity for their cause. That first gathering of the Nations along the Murray resulted in the establishment of the Confederation, which further garnered strength and importance after the Native Title determination. However, it should be remembered that MLDRIN is an expression of the way the Indigenous Nations have always done business – by caring for Country and talking to traditional neighbours from upstream and downstream on the Murray and its sister Rivers, Creeks, Lakes, Billabongs and Waterways.

Katie O’Bryan

Dr Katie O’Bryan is a Senior Lecturer at Monash University. Katie joined the Law Faculty in 2015, having taught at Monash since 2012. Prior to entering academia, she practised as a solicitor in native title, acting for native title claim groups in both Western Australia and Victoria. She holds a Master of Laws in Environmental Law from Macquarie University and a PhD from Monash focussing on the legal recognition of Indigenous water rights. Katie's research and teaching interests include Indigenous Legal Rights, Native Title, Water Law, Rights of Nature laws, Human Rights, Constitutional Law, Administrative Law and Public Law and Statutory Interpretation.

Erin O’Donnell

Dr Erin O’Donnell is a Senior Lecturer and ARC Research Fellow at the University of Melbourne Law School. She is a water law and policy expert, recognized internationally for her research into the legal rights for rivers and Indigenous rights to water. Since 2018, Erin has been a member of the Birrarung Council, the voice of the Yarra River in Melbourne. From 2018-2021, Erin partnered with MLDRIN on the *Cultural Water for Cultural Economies* project, which involved working directly with 20 Traditional Owner groups across Victoria. From 2021-22, Erin was seconded to the Victorian Government as a co-author of *Water is Life: Traditional Owner Access to Water Roadmap*, as part of a majority Traditional Owner writing team. In 2023, Erin commenced an ARC-funded research fellowship to explore the opportunity of treaty to address *aqua nullius*, increase Traditional Owner power and resources in water, and create more sustainable and legitimate settler state water laws.

Rebecca Nelson

Rebecca Nelson is an Associate Professor of Melbourne Law School. Her research focuses on environmental and natural resources law and policy, with an emphasis on groundwater and empirical research. Rebecca was the lead author of the National Cultural Flows Research Project’s legal component. She is a member of the Murray-Darling Basin Authority’s Advisory Committee on Social, Economic and Environmental Sciences and its Social Economic Advisory Group. Rebecca is a former holder of an ARC Discovery Early Career Researcher Award (2018-2020), and from 2010-2014, she led the Comparative Groundwater Law and Policy Program, a collaborative initiative between Water in the West at Stanford University and the United States Studies Centre at the

University of Sydney. In 2014 she was named the Law Council of Australia's Young Environmental Lawyer of the Year for her contribution to water law and environmental law. Dr Nelson holds a Doctor of the Science of Law from Stanford University, a Masters in law (Stanford) and Bachelor of Engineering (Environmental) and Bachelor of Laws (University of Melbourne).

Appendix: MLDRIN Submission



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Murray Lower Darling Rivers Indigenous Nations (MLDRIN)

Submission to the Water Amendment (Restoring Our Rivers) Bill 2023
Senate Standing Committees on Environment and Communications

About MLDRIN

MLDRIN is a representative confederation comprising delegates from more than 20 First Nations in the southern part of the Murray Darling Basin. Since 1998 MLDRIN has worked to provide a united voice to advance First Nations water justice in the Basin. MLDRIN has played a central role in advocating for measures to address the dispossession of First Nations' water rights. In 2007, MLDRIN produced the formative *Echuca Declaration*, which spells out the principles and processes for establishing First Nations water entitlements, or cultural flows¹, under the settler-colonial water management framework. MLDRIN has worked to advance our members rights and interests through implementation of the Basin Plan, including through the preparation and assessment of Water Resource Plans, involvement in the Basin Environmental watering plan and development of Cultural Flows Management Plans.

This submission makes the following key points:

- Basin First Nations have enduring rights to manage, own and access water on their Country.
- Australian law and policy has systematically failed to recognise and address these rights, leading to the marginalisation of First Nations in water decision making and dispossession from water access, management and ownership.
- The Albanese government has made explicit election commitments to “Increasing First Nations ownership of water entitlements and participation in decision making.”
- The Water Amendment (Restoring Our Rivers) Bill 2023 (‘the Bill’) includes no substantive measures to improve outcomes for First Nations and fails to deliver on a key part of the government's *Five Point Plan for the Murray Darling Basin*.
- The Bill must be amended to include specific measures that address Basin First Nations water rights and interests through the delivery of the Water for the Environment Special Account (WESA).

¹ As per Article 1 of the *Echuca Declaration*, 2007: “Water entitlements that are legally and beneficially owned by the Indigenous nations and are of sufficient and adequate quantity to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous nations. This is our inherent right.”

- The Bill must be amended to introduce important improvements to the Water Act 2007 to recognise First Nations rights and interests, including procedural justice and water ownership.
- The Government must make additional policy, program and resourcing commitments to deliver on water justice for First Nations.

First Nations' water rights in the Murray Darling Basin

Nations of the Murray Darling Basin have distinct rights and cultural obligations relating to water, waterways and river Country. These rights have been recognised and affirmed in international agreements to which Australia is a signatory, including the United Nations Declaration on the Rights of Indigenous People (UNDRIP) and the Convention on Biological Diversity (COB)².

Australian domestic law and policy (including the Water Act 2007) provides only cursory and inadequate consideration of First Nations water rights. The Water Act 2007 (Cth) 2007, the Basin Plan and subordinate instruments include limited, weak legal requirements that have largely failed to give effect to First Nations water rights or provide meaningful access to water for First Nations.³ Commissioner Bret Walker SC, in delivering the report of the Murray Darling Royal Commission highlighted that:

“The absence in the Water Act and Basin Plan of any clear or express reference to the relevance of international obligations in the Biodiversity Convention to the role of Aboriginal people in the Basin’s biodiversity is striking...A stronger legal platform for the role of Aboriginal people in managing Basin water resources is required.”⁴

First Nations have been marginalised from water management and decision making, and dispossessed from water access and ownership. First Nations own just 0.2% of available surface water in the Basin⁵ and in some regions water ownership has *decreased* since the Basin Plan was legislated.⁶ Funding of \$40 million for acquisition of water entitlements for Basin Nations (the Aboriginal Water Entitlements Program or AWEP) has still not been delivered more than 5 years since it was committed by the Turnbull government. Analysis conducted by water market research firm Aither, for MLDRIN, has confirmed a

² Notably The Convention on Biological Diversity Article 8(j) - Traditional Knowledge, Innovations and Practices. <https://www.cbd.int/traditional/>

³ As outlined in MLDRIN’s Submission to the Murray Darling Basin Royal Commission (2018). See also Melissa Kennedy, Brendan Kennedy & Sangeetha Chandrashekeran, ‘*Terra nullius has been overturned. Now we must reverse aqua nullius and return water rights to Traditional Owners,*’ *The Conversation*, March 30, 2022. <https://theconversation.com/terra-nullius-has-been-overturned-now-we-must-reverse-aqua-nullius-and-return-water-rights-to-first-nations-people-180037>

⁴ South Australia, Murray-Darling Basin Royal Commission, Report (2019).

⁵ MLDRIN and NBAN (2021). *Research into how much water is held by First Nations and Traditional Owner Organisations in the Murray-Darling Basin in 2020: A First Nations Summary*. https://www.mldrin.org.au/wp-content/uploads/2021/07/1342_MILDRIN-16pp-Report-Lana_v3-min-1.pdf

⁶ See: <https://www.theguardian.com/australia-news/2020/jul/24/australias-water-market-is-excluding-indigenous-people-study-finds#:~:text=%E2%80%9CA%alarminglly%2C%20we%20also%20found%20that,worth%20more%20than%20%2416bn.>

significant decrease in the value of the AWEF funding. At today's prices, funding committed for Nations in the southern basin can only buy two-thirds of the water that could have been acquired in 2018. In 2023, buying the same volume of water that could have been purchased in 2018 will cost almost \$11 million more.⁷ These failings highlight the inequity experienced by Basin Nations under the Murray Darling Basin water allocation and management framework.

Government commitments

Water Minister Tanya Plibersek has stressed that the Restoring our Rivers Bill aims to deliver on the Government's election commitments on the Murray Darling Basin. The Albanese Government's *five-point plan for the Murray Darling Basin* included a commitment to "Increasing First Nations ownership of water entitlements and participation in decision making."⁸ Minister Plibersek has also said an agreement between Basin States to amend the Basin Plan (directly relevant to this Bill) will "ensure there is secure and reliable water for...First Nations."⁹

We note that other key policy commitments of the Australian government¹⁰ anticipate strengthened recognition of First Nations water rights and stronger, more appropriate avenues for First Nations people to contribute to water management decision making¹¹.

However, the Bill does not include any provisions directed to advance outcomes for First Nations people and fails to deliver on a key part of the government's *five-point plan for the Murray Darling Basin*. Delaying the scheduled statutory review of the Water Act until 2027 means substantive reform could be deferred beyond this term of government, increasing uncertainty and putting the progress of First Nations water justice at risk.

The Restoring our Rivers Bill 2023 is a long-overdue opportunity to update legislation, policy and resourcing arrangements to ensure they address the enduring rights of First Nations and the ongoing legacy of dispossession. This could also ensure legislation and policy aligns with the Australian Government's commitments, growing public understanding of First Nations water rights¹² and the expectations of Basin Nations.

⁷ See Aither Water Portfolio Investigation, prepared for MLDRIN: https://mldrin.org/wp-content/uploads/2023/08/WEB_20230829-MLDRIN-Slide-Deck-FINAL-STC.pdf

⁸ See: <https://anthonyalbanese.com.au/media-centre/labors-plan-to-future-proof-australias-water-resources-butler>

⁹ See: <https://minister.dcceew.gov.au/plibersek/media-releases/historic-deal-struck-guarantee-future-murray-darling-basin>

¹⁰ Relevant policy commitments include the Closing the Gap inland waters target, development of national First Nations water holding arrangements and the proposed 'refresh' of the National Water Initiative

¹¹ Andrew McConville (MDBA CEO), 'Address to the National and Rural Press Club on the 10th anniversary of the Basin Plan' (Speech, 22 November 2022) <https://www.mdba.gov.au/news-and-events/newsroom/address-national-and-rural-press-club>

¹² For example, a 2019 survey found that About 70% of 2,695 respondents from Murray-Darling jurisdictions support reallocating water from irrigators to Aboriginal communities. Jackson, S., Hatton MacDonald, D., & Bark, R.

This submission proposes that the Committee make the following recommendations to begin addressing the continued water injustices faced by Basin First Nations:

- (a) Improve the provisions outlined in the Bill to ensure tangible benefits for Basin First Nations through delivery of the Water for the Environment Special Account (WESA) and other measures
- (b) Ensure the Bill incorporates further amendments to the Water Act 2007 to recognise Basin First Nations' procedural and substantive rights relating to Basin water resources
- (c) Commit to additional policy, program and resourcing commitments including
 - (i) Adequate resourcing for Basin First Nations water acquisition and the AWEP
 - (ii) Adequate resourcing for Basin First Nations water assessment, planning and implementation of cultural flows.

Provisions of the Bill

The Water Amendment (Restoring Our Rivers) Bill 2023 does not provide for any specific measures or legislative amendments that address ongoing water injustice faced by Basin First Nations.

Water for the Environment Special Account (WESA)

Critically, proposed amendments to increase flexibility for the delivery of the WESA represent a significant missed opportunity to support water access and management for Basin First Nations. From briefings provided by DCCEEW officials, MLDRIN understands that it is *intended* that expanding the type of projects that can deliver the 450 GL target could involve benefits for Basin First Nations through land and water purchase packages¹³. However, the Bill makes no explicit provision for Basin First Nations outcomes through land and water purchases, nor has the government outlined any policy, program or implementation approach to realise such benefits. MLDRIN is concerned that implementation will depend entirely on policy design and will be subject to political expediency. With the Bill in its current form, there is no guarantee or assurance that any Basin First Nations will be able to benefit. Tangible measures to address Basin First Nations water injustice should be enshrined in legislation to counteract the impacts of the ever-changing political cycle¹⁴

If the government is committed to generating Basin First Nations outcomes from proposed changes to the WESA, then the Bill should specify that any combined land and water purchase facilitated through WESA must be held and managed by Basin Nations. There is a moral and policy imperative to do this.

H. (2019). Public attitudes to inequality in water distribution: Insights from preferences for water reallocation from irrigators to Aboriginal Australians. *Water Resources Research*, 55, 6033–6048.

<https://doi.org/10.1029/2019WR025011>

¹³ Briefing provided by DCCEEW officials to MLDRIN staff, 22nd September, 2023.

¹⁴ Katherine Selena Taylor, Bradley J. Moggridge & Anne Poelina (2016) Australian Indigenous Water Policy and the impacts of the ever-changing political cycle, *Australasian Journal of Water Resources*, 20:2, 132-147, DOI:

[10.1080/13241583.2017.1348887](https://doi.org/10.1080/13241583.2017.1348887)

<https://www.tandfonline.com/action/showCitFormats?doi=10.1080%2F13241583.2017.1348887>

We recognise that water recovered through WESA will have to deliver environmental outcomes. Member Nations of MLDRIN want to be able to hold and deliver water to sustain and enhance their Country, informed by Nation-led planning and cultural science. The flexible delivery of WESA should advance this goal. Any proposal to return water to Basin First Nations with prescribed use limitations (such as environmental outcomes) *must* be accompanied by other legal, policy or program commitments to secure additional water holdings *without* use restrictions. Examples are presented later in this submission.

In addition to addressing outcomes from WESA, the Bill must also ensure equitable support for Basin First Nations in adjusting to the impacts of water management decisions. MLDRIN contends that Basin First Nations have borne the greatest impacts from unsustainable management of the Basin's rivers and have benefited least from the exploitation of water resources. If the Australian government is to "invest in Basin communities impacted by further water recovery"¹⁵ consideration must be given to investing in Basin First Nations who have been impacted by dispossession, poor water management and exploitation of water resources. The recent disastrous fish kills in the Barka/Darling River are a stark example of these kinds of impacts¹⁶.

Other provisions of the Bill

- MLDRIN supports the proposal to rescind the 1500 GL cap on Commonwealth water purchases. MLDRIN strongly opposed this restriction on effective water recovery when it was instituted in 2015¹⁷. Removing the cap is an important step towards realising improved outcomes for Country.
- MLDRIN recognises the importance of timely action on constraints relaxation and supports the concept of a constraints relaxation roadmap. MLDRIN is aware that some First Nations are involved in discussions with state governments on this issue and urges that all parties should consider how implementation of constraints management can support improved watering of Country and improved land and water access for First Nations.
- MLDRIN is concerned that the proposal to allow additional supply measures to be notified has been developed without any consultation with Basin First Nations who contend with the direct impacts of floodplain infrastructure projects. Many First Nations people and organisations have expressed concerns and raised opposition to supply measures that entail significant alterations to the cultural character of floodplain areas and risk directly damaging cultural heritage features¹⁸. Basin states and the Basin Officials Committee must not notify new supply measures unless these have received the free, prior and informed consent of affected Basin First Nations.

¹⁵ Explanatory Memorandum for the Water Amendment (Restoring Our Rivers) Bill 2023

¹⁶ Office of the Chief Scientist and Engineer, Independent review into the 2023 fish deaths in the Darling-Baaka River at Menindee, Final Report.

https://www.chiefscientist.nsw.gov.au/data/assets/pdf_file/0006/584142/Menindee_Full_Report_FINAL.pdf

¹⁷ MLDRIN, 2015 Submission to Inquiry into the Water Amendment Bill 2015

¹⁸ See *First Nations statement on Victorian Sustainable Diversion Limit Adjustment Mechanism Supply Measure projects*: <https://engage.vic.gov.au/download/document/30478>

- MLDRIN is extremely concerned that the proposal to delay the statutory review of the Water Act to 2027 means that election commitments addressing First Nations outcomes may not be adequately addressed by this government and could be deferred indefinitely (see 'Improving the Water Act below').

Recommendations

The Bill must be amended to ensure that WESA can provide for improved Basin First Nations water access, ownership, and management.

1. Include First Nations outcomes in the Objects of Water Act section 86AA to facilitate First Nations water access through WESA.
2. Include specific reference to activities or measures that will support First Nations objectives and outcomes in the Act at section 86AA(2) or in the Purposes of the WESA (section 86AD).
3. WESA funding and any 'surplus amount' referred to in proposed new s86AH should be applied for the benefit of Basin First Nations, within the purposes of the Water Act.
4. Establish a commitment and program to ensure Basin First Nations' outcomes from WESA, including through land and water package purchases, and a defined percentage or allocation of funding from the special account to resource these activities.
5. Amend section 86AE to specify that a minimum volume of water, to be secured through the WESA, will be transferred to Basin First Nations ownership, in a way determined by Basin First Nations.
6. Stipulate that any combined land and water package purchase facilitated through WESA must be held, owned and managed by Basin First Nations and/or their nominated representative organisations.
7. Amend section 86AD(2)(c)(ii) to ensure a dedicated component of the WESA funds is committed to provide for payments that address the detrimental impacts of poor water management, ecological degradation and stalled Basin Plan implementation on Basin First Nations.

Improving the Water Act 2007

First Nations are playing an increasingly active and important role in the management of Basin water resources and the restoration of Country. The *Restoring our Rivers Bill* represents a critical opportunity to update the Water Act to better reflect and support First Nations active involvement in Basin water management.

First Nations have been left out of the substantive provisions of the Water Act and it is now starkly apparent that this omission is not only unjust, but also impractical. Basin First Nations can no longer be regarded as ancillary to Basin Plan implementation or the administration of the Act. It is patently not appropriate for First Nations to be grouped as part of a general 'public interest' consideration for

development of the Basin Plan¹⁹. First Nations must be expressly recognised as *rights*-holders (not ‘stakeholders’), and substantive provisions to recognise their rights and interests must be included in the Act. This recognition should align with and give effect to the Australian Government’s endorsement of the United Nations Declaration on the Rights of Indigenous People (UNDRIP). The recently released South Australian Government response to the Murray Darling Basin Royal Commission reiterates the need for ‘statutory amendments’ to address First Nations water rights and interests.²⁰

First Nations organisations had anticipated the 2024 statutory review of the Water Act as an opportunity to update the legislation to reflect the active involvement of Nations in Basin water management. For Basin First Nations, the review is not a ‘distraction’²¹, it is a critical priority for necessary water reform. To delay the review for an additional three years further disenfranchises Basin First Nations. The Restoring our Rivers Bill can institute changes to the Act that deliver on the Albanese Government’s election commitments and create a pathway for enhanced water justice through review and implementation of the Basin Plan and related instruments.

The Water Act must be amended to give effect to three key principles:

- 1) recognition of First Nations water rights and interests
- 2) First Nations procedural justice and decision making rights; and
- 3) substantive rights for water access and ownership.

There are a range of options for practical drafting changes that could give effect to these principles. Our recommendations highlight the policy outcomes required of key changes and highlight some specific drafting options for amendments.

Recommendations

Principle 1: Recognition

8. Revise the Bill to include amendments to the Water Act 2007 that recognise and advance First Nations water rights and interests, as guided by long standing advocacy from MLDRIN and other First Nations organisations.
9. Amend the Objects (section 3) of the Water Act to recognise the rights and interests of Basin First Nations in the Basin water resources, as articulated through relevant principles and articles of the UNDRIP, including Articles 26 and 32.
10. Include the UNDRIP in the definition of “relevant international agreements” in the Act and amend section 3 and sections 20 and 21 of the Act to reflect this inclusion.

¹⁹ See Water Act 2007 section 21(4)(c)(v): the Authority and the Minister must have regard to social, cultural, Indigenous and other public benefit issues.

²⁰ Government of South Australia (2023) Response to the Murray Darling Basin Royal Commission. p. 43.
<https://cdn.environment.sa.gov.au/environment/docs/Murray-Darling-Basin-Royal-Commission-response-report-for-online-viewing.pdf>

²¹ Water Amendment (Restoring Our Rivers) Bill 2023, *Explanatory Memorandum*. p 5

11. Include substantive provisions in the Act to establish a clear and positive duty on decision makers (Commonwealth, MDBA and Basin States) to give effect to, or act in accordance with UNDRIP and the Convention on Biological Diversity Article 8(j) in the preparation of the Basin Plan, Water Resource Plans, and other subsidiary instruments.
12. Change references to “Indigenous people” or “indigenous organisations” in the Water Act and Basin Plan to be “Basin First Nations people” or “Basin First Nations Organisations” and change the corresponding definitions.

Principle 2: Procedural justice

13. Amend Water Act sections 20, 21 and 22 to include substantive requirements to give effect to First Nations procedural rights as defined in Article 19 of the UNDRIP, including:
 - a. Amend section 20 to add a new subsection that states ‘by providing for Basin First Nations people’s rights and interests’, and that section 20(a) be amended to refer specifically to UNDRIP.
 - b. Amend Water Act section 21 to ensure proper consideration of Basin First Nations rights, interests and objectives and proper implementation of relevant international agreements.
 - c. Amend s 21(4)(b) to specify that the Authority and Minister must act in accordance/take into account First Nations water knowledge and cultural science (and amend the definition of ‘best available scientific knowledge’ accordingly).
 - d. Insert a new section 21(4)(d) to establish a requirement for the Authority and the Minister to act consistently with the rights and interests of Basin First Nations/Traditional Owners, in exercising their powers and performing their functions.
 - e. Amend section 22 to specify that the content of the Basin Plan must substantively address Basin First Nations rights and interests, including in the management objectives and outcomes and in water resource plans.
 - f. Amend section 22, Item 11 and section 22(3)(ca) to specify that a requirement for the preparation of water resource plans is to secure the free, prior and informed consent of relevant Basin First Nations.
14. Amend section 50 of the Act to add a subsection that specifically relates to First Nations rights and interests including consideration of current First Nations water ownership across the Basin, achievement of cultural flows and related targets.
15. Include an Object in section 3 of the Act to facilitate partnerships with Traditional Owners in the management of water resources, water dependent assets and Ramsar wetlands.

Principle 3: Water access and ownership

16. Amend section 23(1) of the Act to require that the Long-term average sustainable diversion limit must also be capable of meeting Basin First Nations cultural objectives and watering requirements, or establish an allowance for cultural water requirements (as determined through an appropriately resourced program of assessment undertaken by Basin First Nations or their nominated representative body).

17. Amend section 22(1) of the Act to include a requirement that water resource plans must include a program, to be implemented over the life of the WRP, that designs and delivers cultural flows (as defined in the Echuca Declaration), being controls over water resources sufficient to improve the spiritual, cultural, environmental social and economic conditions of Basin First Nations within the WRP area. Foundationally, this must include resourcing Basin First Nations, or their nominated representative body to undertake this work.

Policy, program and resourcing commitments

Statutory amendments are essential to secure recognition of First Nations rights and interests. Additional policy, program and resourcing commitments are also necessary to realise outcomes for First Nations and to deliver on the Government's election commitments. The Committee must consider and make recommendations for measures to support First Nations outcomes that align with and strengthen proposed legislative amendments.

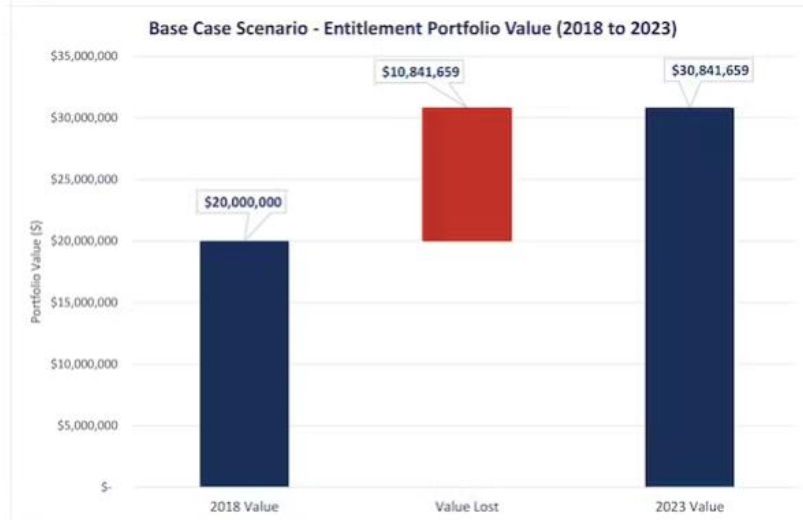
Water Access

The Murray Darling Basin is a fully allocated system and Australia's most mature water market, worth billions of dollars annually. First Nations own just 0.2% of available surface water in the Basin. The Government has committed to increasing Basin First Nations ownership of water entitlements in the Murray Darling Basin. To deliver on this commitment and progress the Closing the Gap inland water target, urgent resourcing commitments must be made to address barriers to entry to the water market for Basin First Nations.

To date, the only funding available to support acquisition of water entitlements by Basin First Nations is the \$40 million AWEP. Despite consistent advice from peak First Nations organisations since 2018²², successive governments have failed to deliver the \$40 million. As a result, Basin First Nations have witnessed a significant reduction in the value of the only funding source available for water acquisition. Analysis undertaken by water research firm Aither for MLDRIN highlights that, based on 2023 water prices, funding committed for First Nations in the southern Basin can only buy two-thirds of the water that could have been acquired in 2018. In 2023, buying the same volume of water that could have been purchased in 2018 will cost almost \$11 million more.²³ This lost value is a stark illustration of the continuing injustice faced by Basin First Nations. Please see Appendix A to review Aither's detailed analysis of the foregone value of the \$40 million AWEP.

²² The *What we heard: consultation draft* prepared by DCCEEW for the AWEP states that "Through the consultation process trust models have emerged as the preferred arrangement."
<https://www.dcceew.gov.au/sites/default/files/documents/what-we-heard-consultation-draft-awep.pdf>

²³ See Aither Water Portfolio Investigation, prepared for MLDRIN: https://mldr.in.org/wp-content/uploads/2023/08/WEB_20230829-MLDRIN-Slide-Deck-FINAL-STC.pdf



Source: Aither Trade Database (SA, VIC and NSW water register data)

Figure 1: Extra funding (almost \$11 million) would be required to buy the same volume of water in the southern basin in 2023 as would have been available in 2018. Aither

In 2019, the Australian Labor Party committed to deliver an additional \$50 million for cultural water, on top of the \$40 million already committed to AWEP if it won government in that year’s election²⁴. That commitment was not honoured in the ALP’s platform in the lead up to the 2022 Federal election. If significant additional funding for Basin First Nations water acquisition was deemed a necessity by the ALP in 2019, there is no reason why that commitment should be any less critical in 2023. The commitment must be honoured by the current Labor Government.

Recommendations

18. Properly resource the Aboriginal Water Entitlements Program (AWEP) to provide a meaningful pathway towards water justice by (at a minimum):
 - a. supplementing the program to make up for the lost purchasing power of the \$40 million caused by unnecessary delays, significantly increased water entitlement prices and foregone trade revenue; and
 - b. honouring the commitment made by the Australian Labor Party in the lead up to the 2019 election to contribute an additional \$50 million to the AWEP.
 - c. Investing in Basin Nations’ preferred representative bodies to determine appropriate water holding arrangements for entitlements acquired through AWEP.

²⁴ Tony Burke MP, Media Release: *Labor Will get the Basin Plan Back on Track*. <https://www.tonyburke.com.au/media-releases/2019/5/6/media-release-labor-will-get-the-basin-plan-back-on-track>

Genuine Investment in Cultural Flows is Needed Now

As noted earlier in this submission Cultural Flows were first defined in Article 1 of the Echuca Declaration (2007). The methodology for determining Cultural Flows was subsequently operationalized by the multi-year National Cultural Flows Research Project (NCFRP)²⁵ (2011 -2019) in which MLDRIN, along with NBAN and NAILSMA, took leading roles. The NCFRP was supported by several agencies, including 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.

In 2018, the Littleproud-Bourke 'Deal-Sheet' (Appendix B, 3 a) included seed funding of \$1.5 million to MLDRIN and NBAN respectively. The funds were to enable each organisation to (1) employ one full-time staff member for three years and (2) undertake Cultural Flows implementation projects within each organisation's respective geographic footprint.

In 2023, MLDRIN is the only representative Basin Nation organisation currently developing Cultural Flows implementation projects with Nations²⁶. As such, MLDRIN is uniquely positioned to provide authoritative and trusted advice on the status of Cultural Flows and the necessary conditions for current and future success.

- The importance of this work cannot be understated. A program (or programs) of work, that continues to deliver Cultural Flows projects Basin-wide is foundational to achieving the necessary legal and policy reform forecast in this submission. Cultural Flows projects, when developed appropriately, empower Basin Nations to contribute to 'the best available science'.
- There are no shortcuts to securing Basin Nations inputs into *genuine* Cultural Flows projects. Given the magnitude and complexity of the task, the work (which is without question achievable) requires: (1) sufficient and highly skilled staff, (2) sufficient time and (3) sufficient investment in Basin Nations. Currently all three conditions for the success of Basin Nations and/or their representative bodies are not being met.
- There are over 40 Basin Nations. The Basin covers more than 1 million square kilometres, including 75% of NSW, more than 50% of Victoria, 15% of Queensland, 8% of South Australia and all of the Australian Capital Territory²⁷. It was patently an impossible task for two staff to deliver this work in 3 years (per 2018 Littleproud-Bourke Deal-Sheet).
- Both the process and outcomes of Cultural Flows must empower Nations.

²⁵ <http://culturalflows.com.au/>

²⁶ MLDRIN's ongoing capacity to continue this work will be curtailed within the next 6 months due to the absence of any available ongoing funding (advice provided to MLDRIN during meetings with the funding body, 12th September and 4th October, 2023).

²⁷ <https://www.mdba.gov.au/basin/basin-location>

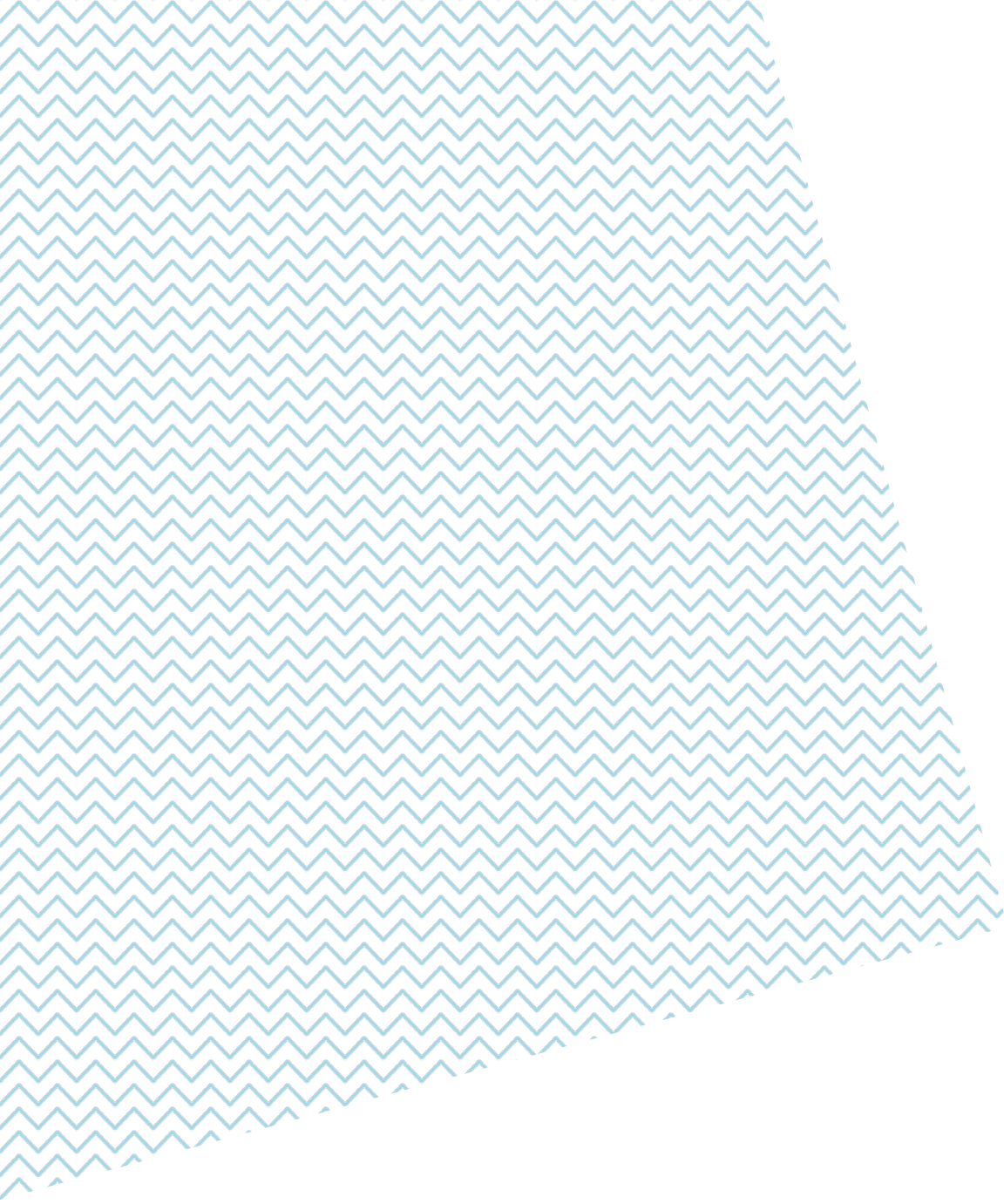
It is MLDRIN's opinion, informed by praxis, that Cultural Flows are best undertaken as a collaboration between Basin Nations and their preferred representative body. This work requires specialized skill sets and long-term investment to deliver empowering Cultural Flows processes and outcomes²⁸.

The level of resourcing required to deliver Cultural Flows for 40 Nations is 10-fold the 2018 investment and will minimally require 5 years of funding should this work be delivered by MLDRIN or another Basin Nation representative body. Working with an established body would effectively minimise transactional costs.

Recommendation

19. Genuinely resource a comprehensive Basin-wide program of Cultural Flows without delay.

²⁸ This cannot be achieved by fly-in-fly-out consultants. Nor is it appropriate for government agencies to initiate and/or implement programs named in such a way as to invoke the impression, both amongst Nations and stakeholders, that such programs can and will deliver Cultural Flows (they won't and they can't).



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