

# ADVICE TO THE NATIONAL WATER COMMISSION



**FPWEC**

First Peoples' Water Engagement Council

May 2012

# STATEMENT FROM THE CHAIRPERSON

*We wish to acknowledge the traditional Aboriginal people past and present as the original owners and managers of land and water in Australia. We also acknowledge and seek to build on the previous and ongoing work of Aboriginal groups to manage water in Australia.*

On 20 February 2009 delegates at the National Indigenous Freshwater Forum in Adelaide agreed that there should be a national reference group to speak on behalf of Australian Aboriginal peoples on inland water issues, including those issues specifically covered by the National Water Initiative. As a result of the Forum's decision, a six-member Interim Indigenous Water Reference Group was appointed. This group set the selection process for an ongoing body, drafted Terms of Reference for the body, and provided invaluable advice to the Commission. The First Peoples' Water Engagement Council (FPWEC) was formed in 2010 as an advisory group to the National Water Commission.

Council members were selected by an independent selection panel comprised of Aboriginal people, and were formally appointed by the National Water Commission Chair and CEO Ken Matthews. The inaugural meeting of the FPWEC was held in Canberra on 7 June 2010. The FPWEC also maintains a relationship with the Indigenous Advisory Committee (IAC),<sup>1</sup> and a member of the IAC regularly attends FPWEC meetings.

Since its formation the FPWEC has held approximately 3 to 4 meetings per year at different locations across Australia, including Darwin and the Fitzroy River region, Adelaide, Brisbane, Broken Hill, Newcastle and Canberra. In September 2011 the FPWEC hosted a partnerships building meeting that had the aim of strengthening relationships and communication amongst different Aboriginal organisations involved in fresh water management across Australia.

Since the formation of the FPWEC, Council members have also attended several conferences with the aim of raising the profile of both the work of the FPWEC and Aboriginal interests in water and water planning in Australia. Conferences attended included the National Native Title Conference (2011), the International River Symposium (2011), the Watermarks Water Heritage Conference (2011), Lake Eyre Basin Aboriginal Forum (2011) and the National Indigenous Land and Sea Management Conference (2010).

Other work of the FPWEC has included the creation of an "Introduction to Water Management in Australia" flyer for communities; a publication entitled "A review of Indigenous involvement in water planning in Australia"; and a submission on the National Water Commission's 2011 Biennial Assessment of progress in implementation of the National Water Initiative. The FPWEC has also developed a policy framework to assist the FPWEC in formulating and presenting its advice on national water policy matters. The policy framework also provides a model and a source of advice to support the independent policy needs of Aboriginal people in the areas of water planning, allocation and management.

In March 2012, the FPWEC convened the First Peoples' National Water Summit, bringing together approximately 70 Aboriginal delegates from across Australia. The Summit provided an opportunity for delegates to discuss at a national level Aboriginal interests in the management of water and to formulate recommendations to inform and amend government policy.

## **Advice for the National Water Commission**

The recommendations, principles and advice that follow are based on these two years of work and have been informed and strengthened by the discussions and feedback from delegates at the National Water Summit. The Council also acknowledges and seeks to build on the previous

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<sup>1</sup> The IAC is a body established to provide advice to Australian Governments on Aboriginal issues related to the *Environment Protection and Biodiversity Act 1999*.

work of Aboriginal groups including the *Indigenous Peoples' Kyoto Water Declaration* (2003),<sup>2</sup> the *Mary River Statement* (2009)<sup>3</sup>, the *North Australian Indigenous Water Policy Statement* (2009), the *Garma International Aboriginal Water Declaration* (2008),<sup>4</sup> and the *Murray and Lower Darling Rivers Indigenous Nations Echuca Declaration* (2008).

Water is fundamental to our development and reducing the unacceptable level of disadvantage that we experience in contemporary Australian society. The FPWEC believes that governments and their water agencies should collaborate in good faith with First Peoples, to develop water plans and management strategies that effectively implement the current reform agendas, including the National Water Initiative. The purpose of the following recommendations, principles and advice is to inform water reform and to provide guidance about how Aboriginal rights, needs, priorities and values can be promoted in water planning and management.

I would like to acknowledge the contribution of all the members of the FPWEC: Cheryl Buchanan, George Cooley, Bradley Moggridge, Brian Wyatt, Lillian Moseley and Robert Dalton. I would also like to acknowledge the National Water Commission and specifically the work of Murray Radcliffe; Craig McVeigh; Elaine Gardiner; Jason Field; our Inaugural Chair, Dr Anne Poelina; and our Secretariat, Melanie Durette, in supporting the FPWEC.

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**Phil Duncan**

Chairperson, First Peoples' Water Engagement Council

### ***The First Peoples' Water Engagement Council Logo***

The First Peoples' Water Engagement Council logo was created and donated in 2010 by Councillor Bradley Moggridge, a Kamilaroi man.

The logo represents a gathering of Australia's First Peoples' at the centre. They have travelled there following the many winding paths and in their travels and at their meeting place they are constantly surrounded by water, the essence of life.



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<sup>2</sup> Adopted at the Third World Water Forum, Kyoto Japan, 2003. At <http://www.waterculture.org/uploads/IPKyotoWaterDeclarationFINAL.pdf>. (Viewed 11 May 2012).

<sup>3</sup> At [http://www.nailsma.org.au/forum/northern\\_water\\_futures\\_forum.html](http://www.nailsma.org.au/forum/northern_water_futures_forum.html). (Viewed 11 May 2012).

<sup>4</sup> At <http://www.unutki.org/>. (Viewed 11 May 2012).

# PREAMBLE

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

Aboriginal peoples<sup>5</sup>, the First Peoples of Australia, are the traditional owners and managers of Australia's land and waters. We have maintained strong and vital relationships with our lands and waters since time immemorial. The land and the water – both above and below the ground – give us life: our livelihoods, our cultural identity and our spiritual well-being. We have responsibilities to our lands, territories and waters, and in turn they sustain us. As Aboriginal people, we do not divide water into separate environmental, economic, cultural, social, and spiritual components – we see the inherent relationships between these aspects and know that they form an inseparable whole. We also understand and respect the importance of the connections between surface water and ground water.

Our status as traditional owners affords a number of inherent rights including rights of self-determination. These rights are enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples*,<sup>6</sup> the *International Covenant on Civil and Political Rights*,<sup>7</sup> the *International Covenant on Economic, Social and Cultural Rights*<sup>8</sup> and other international human rights treaties. These rights, outlined below, must be respected and included as the minimum standard in any system governing the use or control of water:

## Decision-making:

- We have the right to participate in decision-making that affects our rights.<sup>9</sup>
- Governments must cooperate with Aboriginal peoples to obtain our free, prior and informed consent before taking legislative or administrative measures that may affect us, and before approving any project that affects our lands, territories, or natural resources including waters.<sup>10</sup>

## Lands and waters:

- We have rights to our traditional lands and waters – including both surface water and ground water – and the right to redress including compensation if our lands or waters are taken or harmed.<sup>11</sup>
- Governments must work with Aboriginal peoples to establish and implement a fair, independent, impartial, open and transparent process to recognise our rights to our lands, territories and resources, taking in account our laws, traditions, customs and land tenure systems.<sup>12</sup> The narrow legal construction of native title in Australia is not necessarily adequate to protect these rights, particularly in respect of water.

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<sup>5</sup> The FPWEC is a body that represents at a national level the views of Aboriginal Australians in respect of water issues. While the FPWEC has met with Torres Strait Islanders and discussed water issues with them, it does not present a Torres Strait Islander view. In describing Aboriginal peoples as the First Peoples of Australia and the traditional owners of Australia's land and waters, the FPWEC fully recognises the status of Torres Strait Islanders as the traditional owners and managers of the lands and waters of the Torres Strait Islands.

<sup>6</sup> GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007).

<sup>7</sup> GA Resolution 2200A (XXI), UN Doc A/6316 (1966).

<sup>8</sup> GA Resolution 2200A (XXI), UN Doc A/6316 (1966).

<sup>9</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), art 18.

<sup>10</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), arts 19 and 32.

<sup>11</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), arts 26 and 28.

<sup>12</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), art 27.

## Culture and environment:

We have a right to:

- practice our cultural traditions, to maintain our distinctive spiritual relationships with our lands, territories and waters, and to protect and enhance the fulfilment of our traditional cultural responsibilities.<sup>13</sup>
- conservation and protection of the environment and the productive capacity of our lands, territories and resources including water.<sup>14</sup>
- maintain, control, protect and develop our cultural heritage, traditional knowledge, traditional cultural expressions and our intellectual property.<sup>15</sup>

## Social and economic development:

We have the right to:

- the improvement of our economic and social conditions.<sup>16</sup>
- determine and develop our own priorities and strategies for exercising our right to economic and social development, in particular those related to the development or use of our lands, territories and other resources.<sup>17</sup>
- be secure in our own means of subsistence and development, and to engage freely in all traditional and other economic activities.<sup>18</sup>

They must be reflected both in the processes for making decision about water, and in the distribution of water entitlements.

The recommendations, principles and advice in this document provide a solid foundation and recommend a framework for ensuring that our inherent rights are respected and recognised in policy and legislation regarding water.

Water reform is necessary to ensure the recognition of the right of Aboriginal peoples to participate and have access to our waters as well as to share in the use of water resources with others - **that is, our fair share and our right to have a say.**

There is also an urgent need for Aboriginal peoples to improve our economic and social situation. This need is reflected in the *Closing the Gap* strategy, which recognises that finding solutions to long-standing problems requires government to focus on engagement and partnership with Aboriginal people and communities, building on their ideas, strengths and leadership. In relation to water, the *Closing the Gap* objectives cannot be achieved unless governments take steps to recognise the special relationships and responsibilities that link our people to land, territories and water, to respect our autonomy in decision-making, and to ensure our access to water for our cultural, social and economic development.

All State, Territory and Commonwealth governments have committed to implement the National Water Initiative (NWI). The NWI requires water planners to balance economic and social objectives, and provide enough water to sustain the environment. It also requires governments to provide for Aboriginal access to water, Aboriginal representation in water planning, and the incorporation of Aboriginal social, spiritual, customary objectives into water planning.

Water policy makers, planners and managers are increasingly recognising the need to address Aboriginal water issues. However, there is a need for a national Aboriginal water strategy to provide us with a solid basis for negotiating better outcomes. A national strategy will also ensure better coordination and consistency between decision-makers. There is also an

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<sup>13</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), arts 8, 11 and 25,

<sup>14</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), art 29.

<sup>15</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), art 31.

<sup>16</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), art 21.

<sup>17</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), arts 23 and 32.

<sup>18</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), art 20.

overwhelming need for more research identifying and quantifying the cultural, social, spiritual, and economic water needs of Australia's Aboriginal peoples.

The purpose of the following recommendations, principles and advice is to build on the NWI commitments and provide clear guidance about how Aboriginal rights, needs, priorities and values can be promoted in water planning and management. A national strategy for Aboriginal water issues is the most effective way of achieving these NWI objectives and commitments.

# RECOMMENDATIONS AND PRINCIPLES

## Recommendations

The First Peoples' Water Engagement Council recommends that:

1. There must be an Aboriginal water allocation in all water plans.
2. All Australian governments to review existing legislation related to the management of water resources and enshrine in future legislation the principles set out below, including mandatory:
  - Aboriginal engagement in decision-making, planning and management;
  - Aboriginal access to water for cultural and economic purposes; and
  - provision of necessary research, support and capacity building to participate fully and effectively in water planning and management.
3. The Council of Australian Governments establish and implement a National Aboriginal Water Strategy.
4. An Aboriginal Economic Water Fund, or funds be established to facilitate the National Aboriginal Water Strategy, and funding be provided to implement such a fund in cooperation with State or Territory jurisdictions.
5. The National Water Commission extend the term of the First Peoples' Water Engagement Council with resourcing and terms of reference necessary to:
  - continue its role of providing advice to the Commission;
  - drive the process of creating an Aboriginal Economic Water Fund;
  - serve as the reference group for the development and implementation of a National Aboriginal Water Strategy; and
  - coordinate advice to environmental water holders about cultural watering needs.
6. All Australian governments, together with their respective water-planning authorities, policy-makers, bureaucrats and technical specialists, implement the principles and advice set out below.

## Principles

### GOVERNANCE AND DECISION-MAKING

1. The structures for decision-making in water-planning and management must reflect Aboriginal peoples' status as traditional owners and self-determining peoples. The determination of appropriate forms of representation and participation must be determined by the Aboriginal people of each water-planning area.
2. Aboriginal people must be given the opportunity to participate fully in the development and management of water plans, and in monitoring, evaluation and reporting. In many cases Aboriginal people will require resourcing, support and capacity building to participate fully and effectively in these activities.
3. The principle of free, prior and informed consent requires planning processes to allow sufficient time for necessary information to be conveyed and understood by Aboriginal people, and for appropriate decision-making processes to take place, **before** any final decisions are made. This also requires meaningful and effective engagement at every stage of the planning process.

4. Water planning processes must be announced to Aboriginal people through appropriate channels within communities. Active steps must be taken to ensure that information is communicated effectively, taking into account the culture and language of the relevant Aboriginal people.

#### ABORIGINAL WATER

5. Aboriginal Water is water that meets the needs of Aboriginal country and culture.
6. Aboriginal water does not fit neatly into the different categories and frameworks of 'Western' water resource management. For this reason, the provision of Aboriginal Water will often require a combination of policy measures, using water from more than one 'pool'.
7. Aboriginal Water is a different concept from environmental water, and environmental water regimes may not always be adequate to meet the needs of Aboriginal country and culture. Nevertheless, if it is managed properly with adequate Aboriginal engagement, environmental water can theoretically go part of the way, or in some cases all of the way, towards meeting Aboriginal Water needs.
8. The determination and provision of Aboriginal Water must incorporate the following elements.
  - A) Partnerships between Aboriginal people and Environmental Water Managers to optimize both environmental and cultural outcomes;
  - B) Partnerships with local Aboriginal people, before finalising environmental water requirements, to identify cultural and spiritual values and priorities;
  - C) Research to identify the water needs to sustain those cultural values;
  - D) Full protection of Aboriginal cultural information and intellectual property;
  - E) Coordination of planning, management and delivery of environmental water, in collaboration with local Aboriginal people, to protect and promote identified cultural values to the greatest extent possible within available environmental water;
  - F) Provision of supplemental cultural flows where environmental water regimes are insufficient to meet all identified cultural values, with no financial cost to Aboriginal people for the allocation, storage, management or delivery of those flows.
  - G) Aboriginal ownership and autonomy over the management of supplemental cultural flows; and
  - H) Partnership with local Aboriginal people and communities in monitoring and evaluation of cultural and environmental outcomes.
9. The determination of Aboriginal Water requirements must be a distinct process, not merely an input into the determination of environmental water requirements.

#### ABORIGINAL ECONOMIC WATER

10. Achieving the aims of the *Closing the Gap* strategy will require Aboriginal people to have access to water for Aboriginal economic development.
11. The freedom for Aboriginal people to choose how to define and pursue economic well-being is fundamental and must be respected. Cultural economies based on traditional subsistence livelihoods have non-extractive water needs that must be protected through the principles above for Aboriginal Water.



12. Allocations of water from the consumptive pool must be made available to Aboriginal people who wish to engage in commercial enterprises.
  - A) In water systems that are not fully- or over-allocated, water for Aboriginal economic development is to be provided through Strategic Indigenous Reserves (SIRs). SIRs are proportions of the consumptive pool that are quarantined from the general water market, accessible only by Aboriginal peoples of the relevant plan area.
  - B) In fully- or over-allocated systems, water for Aboriginal economic development is to be provided through water entitlements acquired through purchases from the consumptive pool. Governments must provide funding and organisational assistance to enable this acquisition.
13. Ownership and management of Aboriginal economic water must lie with Aboriginal people.
14. Aboriginal economic water must be tradeable on temporary water markets, except where Aboriginal people choose to place limits on the tradability of their water entitlements.
15. Aboriginal people who wish to use water for economic development must be given necessary capacity-building, training and infrastructure support. In particular, assistance in establishing sound and appropriate governance mechanisms must be provided.

# ADVICE TO THE NATIONAL WATER COMMISSION

The following advice is intended to support and explain the principles and recommendations above. It gives some background to the terms and concepts used, and provides additional context and detail for the initiatives proposed. The advice covers three main areas, corresponding to the three headings in the principles document above:

- Governance and decision-making;
- Aboriginal Water;
- Aboriginal Economic Water.

Before going into these three specific areas, it is first necessary to explain how the advice as a whole links into the national governing framework for Aboriginal and Torres Strait Islander policy – *Closing the Gap*. Further elaboration on these links is also provided throughout the body of the advice.

## WATER REFORM: A STRATEGY FOR ‘CLOSING THE GAP’

Aboriginal people around Australia suffer disadvantage across economic, social and health indicators, including housing, education, employment, and business ownership. Addressing this disadvantage is the aim of the *Closing the Gap* strategy, a commitment of all Australian governments. Access to water from the consumptive pool can be an important component of the broader platform to help Aboriginal people to generate economic development and is therefore a sound strategy for ‘closing the gap’.

The Indigenous Economic Development Strategy 2011–2018 establishes the Australian Government policy framework that aims to support the increased personal and economic wellbeing of Aboriginal and Torres Strait Islander people through greater participation in the economy. It focuses on five priorities:

- strengthen foundations to create an environment that supports economic development;
- invest in education;
- encourage participation and improve access to skills development and jobs;
- support the growth of Aboriginal and Torres Strait Islander business and entrepreneurship; and
- assist individuals and communities to achieve financial security and independence by increasing their ability to identify, build and make the most of economic assets.

The objectives of the Indigenous Economic Development Strategy and of *Closing the Gap* more broadly cannot be fully achieved unless appropriate strategies are applied to water policy and sharing arrangements. This means:

- ensuring access to water for economic development;
- recognising the special relationships and responsibilities that link Aboriginal people to land and water;
- granting autonomy in decision-making; and
- building capacity for enterprise.

Moreover, governments must support Aboriginal people to build their understanding about the economic opportunities available through water markets and other water-related commercial enterprises.

## GOVERNANCE AND DECISION-MAKING

For many years, across a range of policy areas not limited to water management, Aboriginal people have been involved in 'consultation' processes that accompany important decisions that affect their lives. Too often, the voices of Aboriginal people have been lost in such consultations, or else their views and concerns are disregarded in the ultimate decisions. In relation to water management, Aboriginal people from around Australia are saying clearly that mere consultation is not enough. Too much is at stake, and so Aboriginal people are determined to become fully engaged in the decision-making processes that affect water planning and management on their country.

The recognition of Aboriginal peoples' status as traditional owners and self-determining peoples requires that the structures for decision making in water-planning and management incorporate Aboriginal voices, values, knowledge, priorities, and decision-making processes. The determination of appropriate forms of representation and participation must be determined by the Aboriginal people of each water-planning area.

In most jurisdictions, statutory and administrative structures will need to be altered or created to give Aboriginal people real representation in decision-making. State and Territory governments should enshrine in legislation the right of Aboriginal people to be included in decision-making, with flexibility around specific mechanisms to be created at local levels. The governing principle should be the need for Aboriginal peoples' free, prior and informed consent before decisions are made that will affect their interests and rights. The United Nations Permanent Forum on Indigenous Issues has issued clarifications on the interpretation of this principle, and the Aboriginal and Torres Strait Islander Social Justice Commissioner has provided guidance on how it should be implemented by Australian governments.<sup>19</sup> Aboriginal people must be given the opportunity to participate fully in the development and management of water plans, and in monitoring, evaluation and reporting.

One requirement of the principle of free, prior and informed consent is that planning processes must allow sufficient time for necessary information to be conveyed and understood by Aboriginal people, and for appropriate decision-making processes to take place, **before** any final decisions are made. Aboriginal people should not be simply asked to respond to a draft plan; instead they must be given the opportunity to be intrinsically involved in the preparation of draft plans. As a general rule, water-planners should come to Aboriginal people first, rather than wait for Aboriginal people to respond.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has developed a comprehensive set of principles that should govern proper consultation and engagement processes in this regard, drawing on conclusions of the United Nations Expert Mechanism on the Rights of Indigenous Peoples and the United Nations Permanent Forum on Indigenous Issues.<sup>20</sup> These principles make it clear that governments must engage in good faith, negotiating to arrive at decisions that enjoy a broad consensus. Relevantly:

*Governments need to do more than provide information about measures that they have developed on behalf of Aboriginal and Torres Strait Islander peoples and without their input. Further, consultations should not be limited to a discussion about the minor details of a policy when the broad policy direction has already been set.*

*Governments need to be prepared to change their plans, or even abandon them, particularly when consultations reveal that a measure would have a significant impact on*

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<sup>19</sup> Appendix 3, 'Elements of a common understanding of free, prior and informed consent', Aboriginal and Torres Strait Islander Social Justice Commissioner (2010) *Native Title Report*, Australian Human Rights Commission.

<sup>20</sup> Appendix 4, 'Features of a meaningful and effective consultation process', Aboriginal and Torres Strait Islander Social Justice Commissioner (2010) *Native Title Report*, Australian Human Rights Commission.

*the rights of Aboriginal and Torres Strait Islander peoples, and that the affected peoples do not agree to the measure.*<sup>21</sup>

Effective engagement of Aboriginal people will require changes to the way in which water-planners communicate: both in the way they convey information and in the way they receive and interpret it. Many Aboriginal people live in remote areas, and many speak languages other than English – these factors present clear barriers to communication. The announcement of water planning processes in newspapers or on television will be inadequate in many cases. Some Aboriginal people may not be comfortable with written communication, or may simply have different ways of communicating. The announcement of water planning processes needs to be done through appropriate channels within Aboriginal communities. Active steps need to be taken to ensure that all of the right people within communities are notified and engaged in water planning processes. Information must be communicated appropriately, taking into account relevant cultural protocols and possible language barriers, and should generally emphasise face-to-face meetings on country.

It is necessary to promote two-way understanding and to recognise and emphasise that the technical, bureaucratic and legal aspects of water resource management are unfamiliar, even alien, to many Aboriginal people. Modern water resource management involves the commoditisation of water, the separation of water from land, and the separation of water into ‘economic’ and ‘environmental’ categories. These things run counter to Aboriginal cultural values, and discussing water in these terms can be upsetting or hurtful. Nevertheless, Aboriginal people may find it unavoidable to speak the technical language of water resource management in order to make sure their rights are respected and their obligations to country can be fulfilled. Effective engagement with Aboriginal people will require policy-makers and technical experts to recognise and acknowledge the significance of this compromise, and to likewise step outside of their comfort zones and try to understand Aboriginal ways of thinking about water. As a minimum, water-planners should be required to undertake accredited Aboriginal cultural competence training programs.

In many cases, resourcing, support and capacity-building will be needed to enable Aboriginal people to understand the technical aspects of water management and to communicate their cultural priorities and water needs in a form that can be incorporated into water planning and management.<sup>22</sup> Constructive partnerships with Aboriginal people in monitoring, evaluation and reporting on water outcomes and broader environmental effects may also require training and resourcing. In some cases fee for service arrangements are appropriate.

#### RELATIONSHIP TO ‘CLOSING THE GAP’

Although many of the initiatives under the *Closing the Gap* strategy (discussed in more detail below at ‘Aboriginal Economic Water’) centre around the employment, education and physical health of Aboriginal and Torres Strait Islander people, objectives in these areas cannot be met without an integrated approach to addressing the marginalised position of Aboriginal and Torres Strait Islander peoples within Australian society. The Council of Australian Governments has explicitly named ‘Governance and Leadership’ as one of seven key ‘building blocks’ for the *Closing the Gap* strategy. Placing the power and responsibility of decision-making with Aboriginal people is essential for supporting sound governance and effective leadership. This includes decision-making around water issues. Accordingly, the advice given above should be considered to be a core aspect of fulfilling Australian governments’ commitment to improving the lives of Aboriginal people.

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<sup>21</sup> Principle 3, Appendix 4, ‘Features of a meaningful and effective consultation process’, Aboriginal and Torres Strait Islander Social Justice Commissioner (2010) *Native Title Report*, Australian Human Rights Commission.

<sup>22</sup> The FPWEC notes that Article 39 of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) states that ‘Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration’.

# ABORIGINAL WATER

## CONCEPTS AND DEFINITIONS

There is no clear consensus amongst the various Aboriginal peoples of Australia around the terminology to be used when describing their relationships to water and the ways in which their cultural values should be given effect in water planning and management.

It is appropriate that Aboriginal people define their needs and priorities within the unique settings of their country, cultures and landscapes, but this can present challenges for the FPWEC in setting definitions for key words and terms that can honour all perspectives.

The term 'cultural flows' has been developed by Aboriginal people over the last decade or so as one way of describing how Aboriginal cultural priorities can be realised in water planning and management.

- The Murray and Lower Darling Rivers Indigenous Nations (MLDRIN) defined cultural flows in their *Echuca Declaration (2008)* as 'water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right.'<sup>23</sup>
- The North Australian Indigenous Land and Sea Management Alliance (NAILSMA) has endorsed a similar definition: 'water entitlements that are legally and beneficially owned by Indigenous peoples and are of sufficient and adequate quantity and quality to maintain the spiritual, cultural, environmental, social and healthy livelihoods of Indigenous peoples of northern Australia'.<sup>24</sup>

The FPWEC respects the efforts of these and other organisations in developing and promoting these ideas.

In this document, the FPWEC has decided to use the term 'Aboriginal Water' rather than cultural flows, for a number of reasons:

- in order to avoid interfering or competing with the definitions of 'cultural flows' set out previously;
- in order to achieve a broader conceptual base that is equally applicable to a diverse range of situations in Australia, including arid environments where the idea of 'flows' is less relevant, and in the context of groundwater-dependent sites and values; and
- in order to reflect Aboriginal peoples' interconnected approach to water, emphasising the inherent linkages between cultural values, self-determination, traditional ownership, custodianship and stewardship, and the absolute importance of maintaining the health of country. There is a risk of policymakers and water managers misunderstanding the concept of 'culture' and giving it an overly narrow meaning, and so a broader term is preferred.

Aboriginal Water is an all-encompassing concept describing the water requirements for the enhancement and protection of Aboriginal peoples' physical, spiritual, cultural, and social well-being. This covers the amount, location, quality, flow rate, temperature, flow frequency and timing, and decision-making structures necessary to sustain country and culture, and in particular:

- cultural values and ethics;
- protection of significant sites;

<sup>23</sup> Art 1, Murray and Lower Darling Rivers Indigenous Nations' *Echuca Declaration (2008)*.

<sup>24</sup> North Australian Indigenous Land and Sea Management Alliance and Indigenous Water Policy Group, *A Policy Statement on North Australian Indigenous Water Rights*, November 2009, p3.

- protection of important species;
- care and respect for the landscape as a whole;
- cultural obligations including totemic relationships;
- gender specific sites, obligations and ceremonies (men's and women's business);
- burial sites and ongoing burial practices;
- cultural economies, including hunting, fishing, gathering, and medicines;
- preservation of sites containing physical evidence of occupation;
- spiritual connections;
- cultural identities and territories;
- songlines and dreaming;
- history, including missions, reserves and places where massacres occurred on the frontier; and
- autonomy and self-determination.

Aboriginal Water does not fit neatly into the conceptual frameworks of 'Western' water resource management. It has a unified and internally coherent rationale, grounded in Aboriginal knowledge of the hydrological, ecological and spiritual interconnections embedded in the landscape and how these are inextricably connected to peoples' material and spiritual wellbeing. People care for country and country sustains people.<sup>25</sup> Non-Aboriginal water resource management systems, by contrast, divide water into separate categories, under different rules and management regimes.<sup>26</sup> For this reason, the provision of Aboriginal Water will often require a combination of policy measures, using water from more than one 'pool'.

#### RELATIONSHIP TO ENVIRONMENTAL WATER

Aboriginal Water is conceptually different from environmental water. Environmental water regimes are grounded in different value systems and serve different objectives that do not always align with Aboriginal cultural values and objectives. In water planning there is often an implicit or explicit assumption that environmental water will serve as a surrogate mechanism to meet Aboriginal social, spiritual or cultural requirements.<sup>27</sup> However, environmental water regimes will not always be adequate to meet Aboriginal Water needs. For example:

- In many cases, environmental flows may be insufficient to return ecological and hydrological systems to their natural state. Environmental water managers in these situations must necessarily prioritise some environmental objectives over others, and will make those compromised choices based on Western scientific understandings of sustainability or 'environmental services'. These prioritisation decisions do not always align with Aboriginal peoples' cultural priorities, and are based on different assumptions, different goals, and different knowledge systems.
- The methodologies for determining environmental water needs do not take Aboriginal knowledge systems or ethical values into account; they do not prioritise the same sites and species, do not account for cultural livelihoods, do not

<sup>25</sup> 'Country' is a word that many Aboriginal people use to refer to their traditional land and waters, in an expansive sense that captures the relationships between people, ancestors, spirits, plants and non-human animals, songs, stories, knowledge, and territory. For a discussion of understandings of country and its relationship to ecology, see Weir, J (2012) 'Country, Native Title and Ecology', in Weir, J (ed) (2012) *Country, Native Title and Ecology*, ANU e-Press (co-published with Aboriginal History Inc), Canberra.

<sup>26</sup> See Weir, J (2010) "Cultural Flows in Murray River Country", *Australian Humanities Review* 48.

<sup>27</sup> See Finn M & Jackson S (2011). Protecting Indigenous Values in Water Management: A Challenge to Conventional Environmental Flow Assessments. *Ecosystems*, 14: 1232–124.

understand songlines and ancestral beings, and do not consider whose country benefits from flows and whose misses out.

- In systems where rivers are dammed or diverted, and particularly where natural systems rely on periodic over-bank flows, environmental water must be deliberately released and directed by water managers. If environmental flows are delivered without taking into account Aboriginal cultural values and priorities, they can fail to meet Aboriginal cultural needs and even do harm. The timing, temperature and volume can be wrong and may disrupt important cycles and systems, and even ceremonies. Constant flows can damage systems that rely on variable flows and periods of low or no flow. Further, the areas that receive sufficient water will often be too limited or seem arbitrarily chosen from the point of view of Aboriginal cultural understandings of country.

Nevertheless, if it is managed properly with adequate Aboriginal engagement, environmental water may go part of the way, or in some cases all of the way, towards meeting Aboriginal Water needs.

It must be understood that the determination of Aboriginal Water requirements is a distinct process, not merely an input into the determination of environmental water requirements. But from the point of water accounting, there may in particular cases be significant or even total overlap between Aboriginal Water and water earmarked as 'environmental water'. The extent to which Aboriginal Water needs can be satisfied using existing environmental water must be specifically assessed for each planning area, based on research conducted into the relevant hydrology, ecology and cultural values.

#### IMPORTANCE OF DECISION-MAKING STRUCTURES

A key part of understanding Aboriginal Water is to recognise that it is not simply about the physical delivery of water to specified locations. It is as much about the positioning of Aboriginal people in the process as it is about achieving particular physical outcomes. Aboriginal involvement in the decision-making process is a central and inherent objective, not simply an instrumental means for identifying what it is that water resource managers should do. Aboriginal Water is not capable of being 'delivered' as a passive product or service. It is about the empowerment of Aboriginal peoples to exercise true self-determination and custodianship over their country.<sup>28</sup>

The FPWEC considers that the provision of Aboriginal Water, and the involvement of Aboriginal peoples in planning and management, are necessary consequences of recognising Aboriginal peoples' status as traditional owners and self-determining peoples.

#### RELATIONSHIP TO 'CLOSING THE GAP'

As mentioned above, many of the initiatives under the *Closing the Gap* strategy (discussed in more detail below at 'Aboriginal Economic Water') centre around the employment, education and physical health of Aboriginal and Torres Strait Islander people. None of these aspects, however, can be considered in isolation from all of the others, and they cannot be effectively addressed separately from the full range of social, cultural, spiritual and ecological relationships in which Aboriginal peoples' lives are embedded. The *National Strategic Framework for Aboriginal and Torres Strait Islander Health 2003-2013* makes it clear that social and emotional well-being is a key determinant of Aboriginal and Torres Strait Islander health.<sup>29</sup> This view is reinforced by Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma, who has highlighted the links between perceptions of control and

<sup>28</sup> Behrendt and Thompson (2003) *The Recognition and Protection of Aboriginal Interests in NSW Rivers*, Report OCP 1008 for the Health Rivers Commission of New South Wales, at 13, 18.

<sup>29</sup> Department of Health and Aging (2007) *National Strategic Framework for Aboriginal and Torres Strait Islander Health (Australian Government Implementation Plan 2007-2013)*, pp23-26. At [http://www.health.gov.au/internet/main/publishing.nsf/Content/6CA5DC4BF04D8F6ACA25735300807403/\\$File/nfsatsihimp2.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/6CA5DC4BF04D8F6ACA25735300807403/$File/nfsatsihimp2.pdf).

chronic stress.<sup>30</sup> When Aboriginal people feel that they lack control over their physical environment, over the decisions that affect their lives, this can contribute to a burden of chronic stress that directly affects physical health as well as contributing to substance abuse (including alcohol and tobacco), mental health problems, and violence (including self-harm).<sup>31</sup> More broadly, Aboriginal people frequently emphasise the critical connection between 'healthy country' and healthy people, and there is a growing body of empirical literature providing hard evidence for this.<sup>32</sup> The direct physical and mental health benefits of caring for country, as well as associated improvements in social and other forms of wellbeing, are therefore well established.

Accordingly, the provision of Aboriginal Water should not be seen as something marginal to 'closing the gap', but rather a central and vital strategy for achieving the full range of *Closing the Gap* targets.

#### PROCESS FOR IDENTIFICATION AND DELIVERY

The FPWEC considers the following steps to be essential in the provision of Aboriginal Water.

- A) Early in the planning process, when the environmentally sustainable levels of extraction are being determined, it is imperative for water-planners to engage Aboriginal peoples and conduct or commission research to identify the water-dependent sites, species, systems, relationships, activities and other cultural values that the Aboriginal peoples of the planning area want to protect or prioritise. Cultural mapping exercises should be undertaken.
- B) Research must be conducted to identify the water needs (including volume, quality, temperature, flow rate, flow timing, flow path and location) to sustain those cultural values. This research should incorporate knowledge that is willingly provided by Aboriginal people (see next paragraph), such as seasonal knowledge; hydrological knowledge; knowledge of the links between different ecological systems, or between weather patterns, hydrology, and ecology; oral traditions, stories, and songs. Research in hydrology, ecology, and social science is developing and must continue to inform better understandings of the traditional management of Aboriginal Water and its implications for water planning and management.
- C) Cultural information and other Aboriginal intellectual property must be protected, including measures to ensure that:
  - copyright remains with the provider of the information;
  - the information is stored, accessed and used **only** in accordance with the wishes of the provider of the information; and
  - cultural protocols including gender restrictions are observed.

<sup>30</sup> Calma T (2007) 'Social determinants and the health of Indigenous peoples in Australia – a human rights based approach', *workshop paper presented by Mr Darren Dick on behalf of Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner*, International Symposium on the Social Determinants of Indigenous Health, Adelaide, 29-30 April 2007. At [http://www.hreoc.gov.au/about/media/speeches/social\\_justice/2007/social\\_determinants\\_n\\_the\\_health\\_of\\_indig\\_peoples.html](http://www.hreoc.gov.au/about/media/speeches/social_justice/2007/social_determinants_n_the_health_of_indig_peoples.html).

<sup>31</sup> *Ibid.*

<sup>32</sup> See Burgess CP et al (2009) 'Healthy country, healthy people: the relationship between Indigenous health status and "caring for country"', *Medical Journal of Australia* 190(10): 567-572; Garnett ST et al (2009) 'Healthy country, healthy people: policy implications of links between Indigenous human health and environmental condition in tropical Australia', *Australian Journal of Public Administration* 68(1):53-66; Ganesharajah C (2009) 'Indigenous Health and Wellbeing: The Importance of Country', Native Title Research Report No 1/2009, April 2009, AIATSIS, Canberra. See also Putnis A, Josif P & Woodward E (2007) *Healthy Country, Healthy People: Supporting Indigenous Engagement in the Sustainable Management of Northern Territory Land and Seas: A Strategic Framework*, CSIRO: Darwin.



These issues need to be discussed with the providers of information at the outset, in order to build a trusting relationship and ensure that everyone understands what is expected.

- D) The planning, management and delivery of environmental water must be coordinated to ensure that it protects and promotes Aboriginal cultural priorities to the greatest extent achievable within the available environmental water.

Each water plan must identify sites, systems, species and other cultural values to be protected, and contain rules to protect them. These rules must be given the same level of priority and reliability as rules to protect environmental assets.

The assumption that environmental water will automatically meet the needs for Aboriginal Water should be reversed. Water-planners must be able to demonstrate how environmental water regimes serve determined Aboriginal Water needs, and to identify the gaps where environmental water is unable to meet those needs.

- E) In cases where environmental water is insufficient to meet all identified cultural values and priorities, supplemental flows must be provided. Aboriginal people must have autonomy over the management of these supplemental flows, including timing, location and manner of delivery.
- F) Where supplemental flows are necessary to meet Aboriginal Water needs fully, Aboriginal people must not be liable for any cost related to the allocation, storage, management or delivery of those supplemental flows.
- G) Monitoring and evaluation of water outcomes must be undertaken in partnership with local Aboriginal people. In many cases this will mean engaging Aboriginal people on a fee for service basis to conduct measurements, monitoring, testing and related work.

## GOVERNANCE

The provision of Aboriginal Water will require three types of governance initiatives.

- The first is reform processes in the regional water planning and environmental water management regimes. These reforms must take place at the level of local and regional water planning and management bodies, State or Territory departments and legislatures, intergovernmental bodies such as the Murray-Darling Basin Authority, and the Commonwealth. The reforms should reflect the principles and advice in this document.
- The second is the establishment of mechanisms for Aboriginal people to hold and manage water entitlements as supplemental flows for Aboriginal Water. Determinations will need to be made around what entities will be best placed to serve as the holders of water entitlements. Entitlements could be held and managed, for example, by existing Aboriginal organisations; by new entities created for this purpose; or by new Aboriginal-controlled water-holders within existing water management bodies. Those determinations should be made at the local level rather than attempting to make general determinations at the national or State or Territory level. One size will not fit all, and the best arrangement in any given case will be informed by the capacities, aspirations, and cultural identities of the local Aboriginal people involved.
- Thirdly, an Aboriginal Economic Water Fund must be established to fund, coordinate and facilitate the acquisition and management of supplemental flows for Aboriginal Water. One option is for the Fund to acquire entitlements from the consumptive pool and transfer those entitlements to Aboriginal people, or else hold them on trust for local Aboriginal people to manage. The proposed Fund would provide necessary capacity building and information, and cover infrastructure costs, administrative costs and the cost of acquiring water entitlements. The design,

operation and governance of the Fund will require careful consideration in consultation with Aboriginal people and should be based on community controlled modelling (see below, 'Aboriginal Economic Water').

## **ABORIGINAL ECONOMIC WATER**

### ***ALLOCATION FROM THE CONSUMPTIVE POOL***

An allocation of water from the consumptive pool must be made available to Aboriginal people who wish to engage in commercial enterprises that require the consumption or diversion of water resources.

The aspect of choice should be emphasised. Some Aboriginal people are uncomfortable with the assumption that their economic wellbeing can only be sustained by exploiting their natural resources to satisfy market demand. Some may also be concerned about the commoditisation and extraction or diversion of water. Others still may choose to build sustainable enterprises that do not depend on the consumption or diversion of water, such as tourism. These diverse approaches to economic well-being must be respected, and must be protected through the mechanisms outlined above for Aboriginal Water.

Those Aboriginal people who do choose to enter into market-oriented activities that require water allocations must be given the opportunity to do so. In water systems that are not fully- or over-allocated, water for Aboriginal economic development is to be provided through Strategic Indigenous Reserves (SIRs). In fully- or over-allocated systems, water for Aboriginal economic development is to be provided through water entitlements acquired through purchases from the consumptive pool.

Of the three policy areas addressed in this advice, the provision of water for Aboriginal economic development is the most easily linked to the *Closing the Gap* targets. There is potential for real and sustainable improvements in Aboriginal economic livelihoods, arising from better access to the consumptive pool.

### **Strategic Indigenous Reserves**

An SIR is a water entitlement set aside from the consumptive pool for the sustainable economic development and wellbeing of Aboriginal people. At present, SIRs have been introduced into a small number of water planning areas in northern Queensland and the Northern Territory. Their rationale has been to ensure that Aboriginal people are not permanently 'locked out' of the water market simply because they have not yet built the capacity to engage as equal players. Based on the northern model, the FPWEC endorses the allocation of economic water to Aboriginal groups and representative bodies through SIRs in all water systems which are not fully allocated, or over-allocated.

In the north, the process of deciding on the governance arrangements for SIRs is still developing and ongoing. Questions around whether private individuals or traditional owner groups should be the holders of SIRs, or whether they should be held by existing entities or special-purpose entities, are yet to be finalised. However, the experience in these early pilot schemes has demonstrated that local people can and must come up with answers to the issues around SIRs. The FPWEC respects and recognises the right of Aboriginal groups and representative bodies to negotiate:

- the amount of water to be allocated;
- the responsibilities and obligations arising for Aboriginal people as a result of any such allocation; and
- the responsibilities and obligations arising for other stakeholders as a result of any such allocation.

SIRs should be given a legislative basis in each State and Territory, to ensure that water planners are required to engage with Aboriginal peoples about the provision of SIRs.

### **Purchases from the consumptive pool**

In fully- or over-allocated systems, water for Aboriginal economic development is to be provided through water entitlements acquired through purchases from the consumptive pool. Governments must provide funding and organisational assistance to enable this acquisition.

Australian governments must undertake feasibility studies on the establishment and support for an Aboriginal Economic Water Fund, funds that would purchase water entitlements and hold water in trust so it can be used for the economic benefit of Aboriginal people and communities. The FPWEC also calls on Australian governments to provide the resources to implement such a fund in their jurisdictions. The functions of this fund would include:

- 1) coordinating and facilitating the acquisition and management of special water allocations for Aboriginal Water and water for Aboriginal economic development; and
- 2) providing necessary capacities and opportunities for Aboriginal people to compete in the water market, including infrastructure costs, administrative costs and the purchase of water entitlements.

Funding provided through a national framework must ensure equality of access and fairness in the distribution of funding across all jurisdictions and regions, in so far as this is possible. Any fund or special purpose vehicle created to manage it would need to have the following characteristics:

- an independent body managed by Aboriginal people with appropriate review and accountability mechanisms built in;
- accessible at the local level with local voices, and not be overly burdensome in terms of administrative requirements to access; and
- accountable, transparent and providing a flow of services to people on the ground.

Moreover, the FPWEC calls on the Council of Australian Governments to commit to drive forward the Aboriginal Economic Water Fund.

### **What volume or proportion of water should be reserved or acquired?**

The appropriate criteria for determining the amount of water to be set aside as SIRs or acquired by an Aboriginal Economic Water Fund will differ between catchments.

For example, where Aboriginal people hold land under native title, statutory land rights, or some other tenure, the amount of water should be linked to the size of the land holdings, to ensure the full economic potential of the land can be realised. Legal doctrine in the United States has for more than a century recognised that Indigenous land rights must be accompanied by adequate water rights if they are to have any real beneficial value for their inhabitants.<sup>33</sup> Current Australian native title law is not well developed on the question of water entitlements, and it is preferable for governments to take a pro-active policy approach rather than leaving it to the Courts. In northern Australia, the amount of water to be set aside has been determined in some cases by reference to the proportion of the planning area that is Aboriginal-held land.

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<sup>33</sup> The “Winters doctrine”, or the reserved rights doctrine, set out in the 1908 case of *Winters v United States* 373 US 546 (1908), is a well-known legal precedent that relates to the early government policies of land settlement and the creation of self-sufficient reservations in the United States. According to this doctrine, when reservations were established in the early history of the United States, certain rights were reserved for Indigenous Americans with the purpose of allowing them to become self-sufficient communities.

Aboriginal people without substantial land holdings, however, should not be locked out of the water economy. Land should be seen as a sufficient but not a necessary criterion for water entitlements. Other criteria for determining the appropriate amount of water will include Aboriginal population in the plan area, level of social disadvantage and expressed aspirations.

### **Tradability**

There is a diverse range of opinion amongst Aboriginal people around the question of whether Aboriginal economic water entitlements should be capable of being traded on temporary or permanent water markets. Many are concerned about the risk that a community's access to economic water may be eroded over time if the entitlements are made permanently tradable. That is, they are worried that short-term economic pressures may lead a community's leaders to trade away the community's water, compromising their long-term interests. Others have expressed concerns about the cultural and ethical problems of participating in the commodification of water involved in the temporary water market.

The FPWEC approaches these issues from the perspective of choice and self-determination. It is vital for Aboriginal peoples to be able to decide for themselves the terms on which they engage in the water economy. For decades there have been strong and compelling criticisms of the non-alienability of land under native title and statutory Aboriginal land rights. Where Aboriginal people wish to use their existing resources to improve their economic situation, that choice should not be obstructed by laws and technical rules imposed by governments. In the FPWEC's view, the same arguments apply to water entitlements. That is not to say, of course, that the FPWEC endorses such a choice over the previously mentioned alternatives. The fundamental consideration is that the only restrictions on what Aboriginal people can do with their economic water entitlements should be restrictions imposed by those Aboriginal people themselves based on fully informed decision-making.

### **CAPACITY BUILDING**

Improving the living standards and opportunities of Aboriginal people will require a range of policy responses that support and enhance:

- Aboriginal cultural economies and traditional livelihoods through adequate environmental protection and the incorporation of cultural values into water management; and
- new Aboriginal enterprises through access to sufficient water allocations, capacity-building and support in the governance and management of those allocations.

Specifically, building the capacity of Aboriginal people to manage and access water for economic benefit will necessitate:

- feasibility assessments and economic modeling to advance the development of Aboriginal enterprises that, among other things, trade their water entitlements on the open market;
- assisting with identifying, building and maintaining the necessary infrastructure to use the water;
- fostering the development of Aboriginal management capacity to enable Aboriginal people to manage and benefit from an Aboriginal Economic Water Fund; and
- creating a timeline and process to hand over management of water allocation use and access to local people.