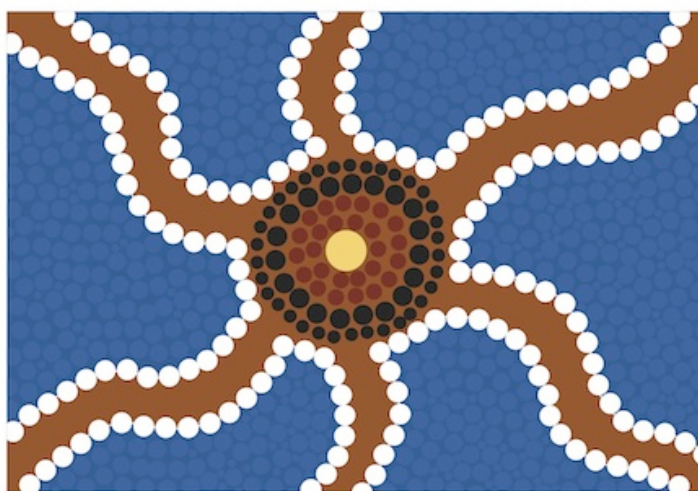


POLICY FRAMEWORK



FPWEC
First Peoples' Water Engagement Council

March 2012

This policy is a mechanism through which the FPWEC has developed and presented its advice on national water policy matters. In addition, it 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 May 2012, the ideas in this document were further refined into a set of recommendations and principles, and advice which was then presented to the National Water Commission.

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Policy Framework

STATEMENT FROM THE CHAIRPERSON

The First Peoples Water Engagement Council (FPWEC) has developed this policy framework on the basis of knowing that the First Peoples of Australia have maintained our relationships with our lands and waters from which we obtain and maintain our spiritual and cultural identity and sustainable livelihoods.

This knowledge and understanding is continually reaffirmed by Aboriginal people. For example, *The Garma International Aboriginal Water Declaration (2008)* acknowledges that water is essential for life and that access to clean water is a fundamental human right.¹ *The Mary River Statement (2009)* states that Aboriginal people of Australia are the traditional owners and custodians of the land and waters of their regions in which they are intrinsically entwined.² Further, the *Murray and Lower Darling Rivers Indigenous Nations Echuca Declaration* talks about water needing to be treated as a living being that is central to the creation and spiritual, social, cultural and economic survival of those nations.³

The work of FPWEC is also informed by various international rights frameworks, particularly the *United Nations Declaration on the Rights of Indigenous Peoples (2007)*. This Declaration explicitly recognises the unique relationships that Indigenous peoples have with our lands and waters and requires that States, among other things, respect and promote:

- Our right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with our own procedures.⁴
- Our right to maintain and strengthen their distinctive spiritual relationship with our traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold our responsibilities to future generations in this regard.⁵
- Their obligation consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.⁶

Water is fundamental to our development and to addressing 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 Aboriginal people, particularly traditional owners, to develop water plans and management strategies that effectively implement the current reform agendas, specifically the *National Water Initiative*.

It is our hope that this policy framework will help to build the capacity of Aboriginal people to bring about further changes in water policy and regulation through a long-term strategic approach that is responsive to ever changing environments and stakeholder demands.

¹ See Schedule 3.

² See Schedule 2.

³ See Schedule 1.

⁴ Article 18.

⁵ Article 25.

⁶ Article 32.

ACKNOWLEDGEMENTS

On behalf of the FPWEC members I would like to acknowledge that all Aboriginal people and communities are impacted by water planning in Australia, and that there are many people and communities working at the local level to advance similar objectives as outlined in this policy framework.

Furthermore, I would like to acknowledge the Indigenous Advisory Committee; the North Australian Indigenous Land and Sea Management Alliance, including the Indigenous Water Policy Group and the Indigenous Community Water Facilitators Network; and the Murray and Lower Darling Rivers Indigenous Nations; the NSW Aboriginal Land Council; and the Northern Murray-Darling Basin Aboriginal Nations.

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.

Phil Duncan

Chairperson

First Peoples' Water Engagement Council

About the First Peoples' Water Engagement Council (FPWEC)

The FPWEC was created following a series of meetings in February 2009 of Aboriginal people who are concerned with promoting a greater recognition of our rights to water. Council members representing large networks across Australia met to determine and confirm their agreed primary role in providing advice to the National Water Commission (NWC) about Aboriginal issues in relation to water planning and management. The first meeting of the FPWEC was held in Canberra on the 7th June 2010.

The FPWEC is seeking to advance Aboriginal people's engagement in water issues at the national level and to amplify the voice of regional groups that are participating in water planning. The FPWEC provides advice to governments and other stakeholders through the National Water Commission on matters such as:

- Consultation in water planning;
- Cultural water requirements;
- Commercial interests;
- Cultural heritage aspects of water; and
- The relationship between water and native title.

Most critically, the FPWEC is advocating for the implementation of water legislation and policies that allocate water to Aboriginal people to ensure equity, sustainable development and the recognition of cultural rights which includes cultural flows and access to the consumptive pool for commercial purposes.

ABOUT THIS POLICY FRAMEWORK

The approach taken by the FPWEC in developing and presenting our policies is to be as informative as possible by providing a context for each of the policy positions that we adopt. This approach establishes a foundation for the inclusion of evidence and advice to better align the adopted policy positions with Aboriginal people's stated rights, interests and aspirations with respect to water.

This policy framework is presented in two parts. The first part provides important background information and context. The second part provides the FPWEC's stated policies on key water related issues.

This is a "strategic" policy framework that seeks to inform and amend government policy. It does not include any operational component that requires the development of procedures or guidelines except those that relate to the changing of policies.

Primary Purposes of this Framework

This framework has two primary purposes:

- 1) Provide a mechanism that serves the FPWEC in presenting its advice on national water policy matters.
- 2) Provide 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.

The Design of this Framework

The policies contained in this framework are presented in three parts:

Policy Outcomes:	Outlines the intention of the policy, what it primarily aims to achieve and how these achievements might be measured.
Preamble:	Provides important background information associated with a particular policy area including definitions for key terms and references to: legislation, regulations and government policy; relevant international instruments and standards; and evidence that supports the stated policy position.
Council's Policy Position:	Provides the FPWEC's stated view on each of the listed policy areas.

PART ONE

FPWEC's Strategic Priorities

The work of the FPWEC is based around the following priorities set out in our strategic plan, which includes:

- 1) Articulating a policy for Aboriginal water and water allocations;
- 2) Achieving access for Aboriginal people to the consumptive pool for economic development;
- 3) Sharing information about Aboriginal interests in water with other Aboriginal and stakeholder groups across Australia along with promoting the successes;
- 4) Developing a position or policy on appropriate engagement of Aboriginal people in water planning processes in Australia, including the importance of and use of traditional knowledge.⁷

Articulating a policy for Aboriginal water and water allocations

There is no clear agreement amongst Aboriginal people as to the terminology chosen around cultural water and cultural flows. It is appropriate that Aboriginal people define their water resources 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.

“Cultural flows” for example is a concept developed by Aboriginal people in Australia over the last ten years. It is a way for Aboriginal people to engage on their own terms with the government systems of water planning. Some groups, such as MLDRIN and NBAN have defined cultural flows in Australia as

WATER ENTITLEMENTS THAT ARE LEGALLY AND BENEFICIALLY OWNED BY THE ABORIGINAL NATIONS AND ARE OF A SUFFICIENT AND ADEQUATE QUANTITY AND QUALITY TO IMPROVE THE SPIRITUAL, CULTURAL, ENVIRONMENTAL, SOCIAL AND ECONOMIC CONDITIONS OF THOSE ABORIGINAL NATIONS; THIS IS OUR INHERENT RIGHT.

NAILSMA uses a similar definition stating that water entitlements are intended to “maintain the spiritual, cultural, environmental, social and healthy livelihoods of Aboriginal peoples of northern Australia.”⁸

The FPWEC supports and honours these definitions, and recognises that specific terms and priorities may vary in different locations and for different groups.

Achieving access for Aboriginal people to the consumptive pool for economic development

In the past, water entitlements have been allocated with little regard or knowledge of Aboriginal interests. Many Aboriginal people believe that inequalities are still widening under contemporary water resource management regimes. Provision in planning documents for Aboriginal interests in water is commonly limited to

⁷ The FPWEC is a body that represents at a national level the views of Aboriginal Australians in relation to 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.

⁸ North Australian Indigenous Land and Sea Management Alliance. (2009) *Policy Statement on North Australian Indigenous Water Rights*, October 2009, available at <http://www.nailsma.org.au/nailsma/forum/downloads/Water-Policy-Statement-Plain-Text-Version.pdf>.

in-stream, or non-consumptive, values such as the preservation of water quality or the health of particular ecological systems or water-dependent sites. However, recently moves have been made in some jurisdictions towards specific allocations for Aboriginal commercial enterprises.

In many parts of regional and remote Australia, Aboriginal communities show higher levels of socio-economic disadvantage and unemployment than the surrounding average. The dire necessity of improving the economic situation for Aboriginal people is reflected in the Closing the Gap initiative that is committed to improving the lives of Indigenous Australians, particularly for Indigenous children.

It recognises that finding solutions to long-standing problems requires focusing on engagement and partnership with Aboriginal people and communities, building on their ideas, strengths and leadership. The objectives of Closing the Gap cannot be fully achieved unless these strategies are also applied to water policy. 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.

Development of economic and employment opportunities are therefore a high priority, and the consumptive use of water (in addition to non-consumptive benefits) may play a key role in such opportunities. The potential economic benefit to Aboriginal people is not yet fully known.

There are impediments to the acquisition by Aboriginal enterprises of water entitlements from the open market. The main impediment is the cost, but others include a lack of knowledge of water planning and markets; infrastructure and administrative capacity; over-allocation of particular basins; and, in the view of some Aboriginal people, environmental protection legislation in the areas where the enterprises would be run. A key problem is that where water resources are opened up to the market at a time when Aboriginal enterprises have not yet developed the capacity or resources to compete on an equal footing with established businesses, they may be locked out thereafter. Reserves or buy-backs are a way of combating this problem.

In addition, the establishment of an Aboriginal Water Trust or Fund may also provide a mechanism for Aboriginal economic interests to access consumptive water. In New South Wales, the Aboriginal Water Trust was formed in 2002, with \$5 million available in grants for Aboriginal community-owned commercially viable businesses where water is an essential component of the businesses' operations. Although this Trust never granted its funds to applicants, it did present a mechanism that was intended to support the growth of Aboriginal economic interests.

Aside from these impediments, there are other reasons for specific Aboriginal water allocations. The rights of traditional owners of land in other countries, including the United States, have been held to extend to commercial uses of water, and have not been limited to the continuation of pre-modern practices and techniques. The law of native title in Australia has not developed in this direction, but that does not detract from the argument that traditional owners *should* be able to benefit economically from their land holdings without being constrained by a historically static concept of "tradition"⁹. Further, in many cases the water entitlements of non-Aboriginal land owners have been transferred from older regimes where water rights were attached to property rights in the land. By contrast, specifically Aboriginal rights in land (whether statutory or native title) have not been held to grant substantial consumptive rights to water. So while land owners under non-Aboriginal law have "inherited" water entitlements from their property rights, traditional owners have not had the same benefit. This disparity provides an additional reason for specifically Aboriginal

⁹ In the Northern Territory the Tindall Aquifer Water Allocation Plan (Katherine) provides a reserve for "Aboriginal commercial development" which is proportional to the size of the expected landholding if the Katherine native title claim is successful.

allocations. Further, Aboriginal allocations provide scope for holistic management of economic uses and cultural flows – decision-making can serve both economic purposes and non-economic cultural purposes.

Sharing information and multiple stakeholder engagement

The FPWEC is uniquely placed to assist the sharing and comparing of information between Aboriginal people and organisations that have a role in water planning. There are regional networks in some parts of Australia building good connections, but there is scope for linking ideas, initiatives and experiences across different regions in the country.

The work of individual organisations and networks may also be more effective if efforts are coordinated. Ensuring that messages are consistent across different advocacy groups, particularly in the same state, will help their uptake. FPWEC members communicate through their networks and attend conferences and meetings throughout Australia to share information on Aboriginal issues relating to water and water planning, as well as the FPWEC's work. The FPWEC also engages and partners with key organisations, which included holding a partnerships building meeting in September 2011.

One of the key means through which the FPWEC will achieve this objective is by hosting a National First Peoples' Water Summit in 2012.

Developing a position or policy on appropriate engagement in water planning, including the importance of and use of traditional knowledge

Aboriginal people face significant impediments with accessing water for economic, environmental and cultural purposes to varying degrees across the jurisdictions and regions. Aboriginal people are also generally under-represented in decision-making processes related to water and catchment management even though there is growing recognition about Aboriginal peoples rights, interests and aspirations related to water.

Unless mechanisms are put in place to facilitate the effective engagement of Aboriginal people in water management, traditional knowledge associated with water will remain excluded from the decision-making process. While access to such knowledge can be invaluable to a range of stakeholders, its use has implications for its holders who must weigh up the potential benefits against the various risks associated with its potential misuse.

The primary focus of the NWI is to increase the efficiency and sustainability of Australia's water use by establishing a nationally consistent approach to water allocations and pricing, leading to greater certainty for investment and productivity, while optimising economic, social and environmental outcomes for rural and urban communities. This is premised on a market-based approach to water that decouples water from land.

The NWI framework recognises the importance of Aboriginal access to water. The parties to the NWI agree that, once initiated, their water access entitlements and planning frameworks will recognise Indigenous needs in relation to water access and management¹⁰. Specifically, parties to the NWI agreed to:

- incorporate Indigenous representation in water planning wherever possible (cl 52(i));
- ensure that water plans incorporate Indigenous social, spiritual and customary objectives and strategies for achieving these objectives (cl 52(ii));
- take account of the possible existence of native title rights to water (cl 53); and
- account for any water allocated to native title holders for "traditional cultural purposes" (cl 54).

¹⁰ NWI Agreement 25(ix).

Progress in meeting these commitments has been uneven and in many cases inadequate. The 2009 Biennial Assessment noted that:

IT IS RARE FOR INDIGENOUS WATER REQUIREMENTS TO BE EXPLICITLY INCLUDED IN WATER PLANS, AND MOST JURISDICTIONS ARE NOT YET ENGAGING INDIGENOUS PEOPLE EFFECTIVELY IN WATER PLANNING PROCESSES.¹¹

Two years later in the 2011 Biennial Assessment an improvement in consultation was recognised but it was found that most jurisdictions were still not meeting their commitments under the NWI:

MOST JURISDICTIONS HAVE IMPROVED CONSULTATIONS WITH INDIGENOUS COMMUNITIES IN WATER PLANNING AND MANAGEMENT, BUT HAVE GENERALLY FAILED TO INCORPORATE EFFECTIVE STRATEGIES FOR ACHIEVING INDIGENOUS SOCIAL, SPIRITUAL AND CUSTOMARY OBJECTIVES IN WATER PLANS, AS ENVISAGED UNDER THE NWI.¹²

Unless mechanisms are put in place to facilitate authentic engagement, and unless support and funding are provided to enable access by Aboriginal people to water, these commitments will not be met and the likelihood of achieving these national objectives may potentially worsen. Further, the variations between and within jurisdictions create difficulties and uncertainties for the NWI's objective of a nationally consistent approach to water planning.

Importantly, the FPWEC needs to inform current and future law, policy and decision making and make recommendations on how the values, rights and interests of Aboriginal people could better be considered in the implementation of the NWI.

International and domestic law and policy

Human rights instruments and international standards provide critically important guidance for Aboriginal peoples' rights, interests and aspirations with respect to water. The FPWEC's policies must also be mindful of domestic laws and policy that regulates the uses of water in Australia as well as the state of water sources and management practices.

Stakeholder interests in the water that is available in Australia

The State of the Environment Report 2011 provides an overall assessment of the future threats to inland water systems across Australia:

ALTHOUGH THE CAPACITY TO REVERSE MANY HISTORICAL IMPACTS IS LIMITED, THERE IS REASON TO BELIEVE THAT PROJECTED POPULATION AND ECONOMIC GROWTH CAN BE SIGNIFICANTLY DECOUPLED FROM FUTURE PRESSURES ON OUR INLAND WATER ECOSYSTEMS. MITIGATING THE RISKS TO INLAND WATER ECOSYSTEMS ARISING FROM A CHANGING CLIMATE WILL BE FAR MORE CHALLENGING AND MAY NOT BE ENTIRELY POSSIBLE. WITH SOME ADDITIONAL MANAGEMENT INTERVENTION AND INVESTMENT, THE INLAND WATER ENVIRONMENT IS LIKELY TO REMAIN IN GENERALLY GOOD CONDITION IN NORTHERN AUSTRALIA AND IN POOR, BUT POTENTIALLY IMPROVING, CONDITION ACROSS MUCH OF THE SOUTH, WITH ONLY LIMITED REGIONS SHOWING CONTINUING SERIOUS DETERIORATION. MUCH OF THE POTENTIAL FOR IMPROVEMENT RELIES ON ADJUSTING FUTURE LEVELS OF WATER

¹¹ Finding 1.6, p27.

¹² Finding 1.5, p.46.

ABSTRACTION TO MEET ENVIRONMENTAL FLOW REQUIREMENTS, IN A FUTURE THAT IS LIKELY TO BE DRIER IN THE SOUTH DUE TO CLIMATE CHANGE.¹³

While some parts of the continent are not expected to experience shortages of water to the extent that other parts will, all water sources and catchments have to be managed carefully. This analysis has to be considered within the context of the increasing human needs demands for water arising out of population growth and other factors.

Domestic laws and government policy

While all jurisdictions have their respective legal and policy approaches, the National Water Commission Act 2004 (Cth), The Water Act 2007 (Cth) and the National Water Initiative (NWI) together provide the overarching national framework for the sustainable use and management of water. This national framework has arisen out of the Council of Australian Governments (COAG) agreements and commitments.

In many cases the water entitlements of non-Aboriginal land owners have been transferred from older regimes where water rights were attached to property rights in the land. By contrast Aboriginal statutory property rights in land recognised have not been held to grant substantial consumptive rights to water.

Indigenous peoples rights and international standards related to water

Over recent years Aboriginal people in Australia have been coming together through our own regional, national and international fora to discuss our rights and responsibilities associated with water:

- *The Garma International Aboriginal Water Declaration (2008)* acknowledges that water is essential for life and that access to clean water is a fundamental human right.
- *The Mary River Statement (2009)* states that Aboriginal peoples of Australia are the traditional owners and custodians of the land and waters of their regions in which they are intrinsically entwined.
- Further, the *Murray and Lower Darling Rivers Indigenous Nations Echuca Declaration* talks about water needing to be treated as a living being that is central to the creation and spiritual, social, cultural and economic survival of those nations.

The work of FPWEC is also informed by various international rights frameworks. The most important of these instruments is the *United Nations Declaration on the Rights of Indigenous Peoples (2007)*.¹⁴ This Declaration explicitly recognises the unique relationships that Indigenous peoples have with our lands and waters and requires that States, among other things, respect and promote:

- Our right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with our own procedures.¹⁵
- Our right to maintain and strengthen our distinctive spiritual relationship with our traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold our responsibilities to future generations in this regard.¹⁶

¹³ State of the Environment 2011 Committee. Australia state of the environment 2011 – in brief, independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities. Canberra: DSEWPac, 2011, p. 23.

¹⁴ United Nations Declaration on the Rights of Indigenous Peoples, adopted at the 107th plenary meeting of the United Nations General Assembly on 13 September 2007.

¹⁵ Article 18.

¹⁶ Article 25.

- The obligation of States to consult and cooperate in good faith with the Indigenous peoples in order to obtain our free, prior and informed consent on any project affecting our lands, territories and other resources, particularly in connection to the development, utilization or exploitation of mineral, water or other resources.¹⁷

The Convention on Biological Diversity (1992), which is legally binding to signatories (including Australia), recognises the rights of “indigenous and local communities” related to the customary use of biological resources¹⁸ and the protection of traditional knowledge associated with genetic resources.¹⁹ Article 8(j) of the Convention on Biological Diversity also gives “indigenous and local communities” the right to exercise ‘prior informed consent’ over their traditional knowledge and to the fair and equitable benefit-sharing that may arise out of the utilisation of this knowledge. These rights are further elaborated in the recently adopted *Nagoya Protocol on access to genetic resources and the fair and equitable sharing of the benefits arising out of their utilization*.

While the standards arising out of many of these international instruments are not legally binding upon States, they still provide vital frameworks upon which the rights of Aboriginal people can be recognised and enforced domestically. In the meantime they provide a basis upon which Aboriginal people can negotiate better outcomes for Aboriginal water with governments and other decision-making bodies.

¹⁷ Article 32.

¹⁸ Convention on Biological Diversity, Article 10(c).

¹⁹ Article 8(j).

PART TWO – POLICIES

First Peoples Water Engagement Council – Policy on Cultural Flows

1.1 Preamble

Aboriginal people are entitled, as a matter of right, to the incorporation of cultural flows into water planning and management in Australia.

‘Cultural flows’, or Aboriginal cultural water, covers three main areas:

- 1) ***Allocations*** of water for Aboriginal cultural priorities, which overlap with environmental priorities but are not covered by them.
- 2) Aboriginal ***involvement in decision-making*** about water issues.
- 3) Measures to ensure that water is available for Aboriginal people to promote their own ***economic well-being***.

Different Aboriginal-based organisations and meetings have identified a range of reasons they consider Aboriginal water entitlements, under Aboriginal control, to be necessary and important:

- to improve and maintain the spiritual, cultural, environmental, social and economic conditions, and healthy livelihoods, of Indigenous peoples;²⁰
- to ensure the maintenance of Aboriginal cultural practices and connections with the rivers;²¹
- to sustain the cultural economy of each Aboriginal Nation;²²
- to ensure that cultural obligations relating to the health of the water body can be better met.²³

At the core of cultural flows is the belief that the environmental, economic, cultural, social and spiritual aspects of water form an inseparable whole.

Talking about cultural flows is made necessary by the way that water resource management is and has been done in Australia. Historically, governments failed to recognise the importance of environmental considerations for river health and continued flow, or the need to sustain Aboriginal cultural values. Land-use and water-use have not been adequately limited or regulated. Today, governments through water reforms recognise the need to balance different water uses and to provide an environmental minimum for sustainability. But these

²⁰ Jackson, Tan and Altman (2009) *Indigenous Fresh Water Planning Forum: Proceedings, Outcomes and Recommendations*, Canberra: National Water Commission; also Ross (2009) Submission to the Natural Resources Commission of NSW Riverina Bioregion Regional Forest Assessment River Red Gums and Woodland Forests, October 2009, available at <http://www.nrc.nsw.gov.au/content/documents/Forest%20assessment%20-%20Submission%20-%20Red%20gum%20PAR%20-%20MLDRIN.pdf>; North Australian Indigenous Land and Sea Management Alliance (2009) *Policy Statement on North Australian Indigenous Water Rights*, October 2009, available at <http://www.nailsma.org.au/nailsma/forum/downloads/Water-Policy-Statement-Plain-Text-Version.pdf>.

²¹ 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, p59.

²² Morgan, Strelein, and Weir (2004) *Indigenous Rights to Water in the Murray Darling Basin: In support of the Indigenous final report to the Living Murray Initiative*, Discussion paper No 14, Australian Institute of Aboriginal people Studies: Canberra, p40.

²³ Craig and Shearing (2004) *Best Practice Models and Approaches for Indigenous Engagement in the Murray Darling Basin*, Research Report Prepared for Murray Darling Basin Commission for the Development of the Indigenous Action Network, Macquarie Centre for Environmental Law: Sydney.

approaches still treat water as a resource for humans to use, and do not accord with Aboriginal cultural perspectives.

The FPWEC recognises that the concept of cultural flows may differ across the wide range of different cultures and water environments in Australia, and may not be easily expressed in a single legalistic definition. For this reason, and to recognise the work of other groups in defining cultural flows, the FPWEC is not defining cultural flows through this statement but rather putting forward its position on the need for and management of cultural flows in Australia.

1.2 Council's Policy Position

Key problems in current water planning and management include:

- Water systems are allowed to be degraded and over-allocated, damaging the health of the water systems, the ecosystems that depend on them, and the Aboriginal peoples' spiritual, cultural, social and economic lives that depend on the water and the ecosystems.
- Where environmental flows are of insufficient quantity or quality to return ecological or hydrological systems to their natural state, water managers must choose some environmental objectives over others, and these choices do not always align with Aboriginal cultural priorities.
- The way environmental flows are delivered does not take Aboriginal cultural priorities into account, such as whose traditional lands benefit from environmental flows and whose misses out; or whether the timing and pattern of flow variability is appropriate.
- Aboriginal people are not adequately involved in decision-making in water planning or management.
- Traditional Aboriginal knowledge is not adequately recognised, valued or utilised in water planning or management.
- Aboriginal people's water-dependent cultural values are not afforded the research and credible evidence assigned to environmental flows and ecological values.

Aboriginal people should be provided with special Aboriginal water allocations as a right, covering both surface and ground water, in order to reverse historical injustices and oversights. These allocations are justified by:

- a) Aboriginal peoples' historic and ongoing connections, rights and obligations to their traditional lands and waters; and
- b) contemporary social and economic disadvantage in Aboriginal communities.

The FPWEC believes that Aboriginal people have certain rights in relation to water:

- The right to access and use water.
- The right to manage and trade water.
- The right to deliver water to culturally significant sites and ecosystems.

These rights are supported by a range of international and human right instruments.²⁴

²⁴ *United Nations Declaration of the Rights of Indigenous Peoples*, endorsed by Australia on 3 April 2009, Arts 3, 18, 20, 23, 25, 32; United Nations Committee on Economic, Social and Cultural Rights, 29th Session, General Comment 15, 11-29 November 2002; United Nations General Assembly, 64th Session, Resolution 64/292 "The human right to water and sanitation", A/RES/64/292, 3 August 2010; United Nations Human Rights Council, Resolution A/HRC/15/L14, 30 September 2010.

1.3 Outcomes

The FPWEC's objectives for cultural flows are:

- The objectives, processes and outcomes of 'mainstream' water planning and management to include Aboriginal peoples' input and Aboriginal cultural priorities and knowledge.
- Environmental flows to be supplemented by additional allocations to meet Aboriginal cultural priorities.
- Environmental flows to be managed and delivered in a way that takes Aboriginal cultural values into account.
- Cultural flows to be owned, governed and managed by Aboriginal people at the local level.
- Water systems to be protected from harm.

1.3.1 WATER ALLOCATIONS

The FPWEC suggests that allocations for cultural flows outcomes could be made along one of two models:

- 1) Broadly defined cultural flows or Aboriginal water allocations (surface and ground water), from which Aboriginal people can satisfy their various economic, cultural and other needs, including the culturally-informed environmental priorities; or
- 2) A two-part scheme of allocation:
 - a) Special-purpose Aboriginal Economic Water Allocations to increase the capacity for Aboriginal people to develop water-dependent enterprises; and
 - b) Separate cultural flows allocations, to address the culturally-informed environmental priorities of Aboriginal peoples.

Because allocations for environmental flows in many water systems will not be sufficient in quantity to fully protect environmental and cultural values, the above allocations would be made from the consumptive pool.

1.3.2 GOVERNANCE ARRANGEMENTS

Whichever model for allocations is chosen, the FPWEC recommends the establishment of an Aboriginal Water Fund or Trust to fund, coordinate and facilitate the acquisition and management of special Aboriginal water allocations. The proposed Fund/Trust would provide necessary capacities and opportunities for Aboriginal people to compete in the water market, including infrastructure costs, administrative costs and the purchase of water entitlements. The design, operation and governance of the Fund/Trust will require careful consideration in consultation with Aboriginal people.

The water needs of land-holders under native title and other land rights legislation should be assessed through transparent, robust and equitable mechanisms, and water should be allocated accordingly. Allocations should not be assumed to be dependent on the existence of an already-recognised legal right. Aboriginal water allocations may be held and managed by existing Aboriginal organisations, by new entities created for this purpose, or by new Aboriginal-controlled water-holders within existing water management bodies.

In addition to providing new Aboriginal water allocations, a cultural flows policy will also affect 'mainstream' water planning and management. Planning processes should involve thorough consultation with Aboriginal people to identify and protect culturally significant sites, systems and species. Where environmental flows

regimes involve the release of water into a system from dams, these releases should be done in consultation with Aboriginal people to ensure that the timing and pattern of flows is appropriate.

First Peoples Water Engagement Council - Policy on Economic Water

2.1 Preamble

Economic water is water that is allocated from the consumptive pool that is intended to lead to one or more economic outcomes. Commercial water means the same as ‘economic water.’

In contrast to standard scientific and bureaucratic ways of dividing up the different ‘uses’ of water, Aboriginal perspectives do not necessarily draw hard lines around the environmental, spiritual, economic, cultural and social aspects of water. In this sense, it can be recognised that economic well-being *is a cultural value*.

Across Australia, Aboriginal people are on average less economically empowered than the wider population.

ALTHOUGH MANY INDIGENOUS AUSTRALIANS HAVE A GOOD STANDARD OF LIVING, TOO MANY EXPERIENCE UNACCEPTABLE LEVELS OF DISADVANTAGE IN LIVING STANDARDS, LIFE EXPECTANCY, EDUCATION, HEALTH AND EMPLOYMENT.²⁵

The causes for this disadvantage are complex, and include the ongoing effects of past injustices, dispossession and discriminatory government policies. The ‘Closing the Gap’ framework is the national overarching policy to relieving Indigenous disadvantage, but is limited in its capacity to support the delivery of economic development outcomes for Aboriginal people through existing water markets.

Improving the living standards and life opportunities of Aboriginal people will require a range of policy responses. Among these are measures to support:

- a) Aboriginal cultural economies and traditional livelihoods, which requires adequate environmental protection and the incorporation of cultural values into water management; and
- b) new Aboriginal enterprises, which will often require access to sufficient water allocations, and capacity-building and support in the governance and management of those allocations.

The rights of traditional owners of land in other countries, including the United States, have been held to extend to commercial uses of water, and have not been limited to the continuation of pre-modern practices and techniques. The law of native title in Australia has not developed in this direction, but that does not detract from the argument that traditional owners should be able to benefit economically from their land holdings without being constrained by a historically static concept of “tradition.”²⁶ Another key problem that must be considered is where water resources are opened up to the market at a time when Aboriginal enterprises have not yet developed the capacity to effectively compete with established enterprises. As a result they may be locked out thereafter.

2.2 Council’s Policy Position

Aboriginal allocations provide scope for the holistic management of water for economic and cultural purposes.

²⁵ Department of Families, Housing, Community Services and Indigenous Affairs, ‘Closing the Gap: The Need to Act’, online at http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/need_to_act.aspx.

²⁶ In the Northern Territory the Tindall Aquifer Water Allocation Plan (Katherine) provides a reserve for “Aboriginal commercial development” which is proportional to the size of the expected landholding if the Katherine native title claim is successful.

The objectives of 'closing the gap' cannot be fully achieved unless appropriate strategies are applied to water policy and sharing arrangements. This means ensuring access to water for:

- 1) economic development;
- 2) recognising the special relationships and responsibilities that link Aboriginal people to land and water;
- 3) granting autonomy in decision-making; and
- 4) building capacity for enterprise.

Governments need to support Aboriginal people with building our understanding about the economic opportunities available to us through the water markets and other water related commercial enterprises.

2.3 Outcomes

2.3.1 STRATEGIC INDIGENOUS RESERVES

The FPWEC endorses the allocation of economic water to Aboriginal groups and representative bodies through Strategic Indigenous Reserves.

The FPWEC respects and recognises the right of Aboriginal groups and representative bodies to negotiate:

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

2.3.2 WATER BUY-BACKS

The FPWEC endorses the buying-back of water from the consumptive pool to provide economic, social and cultural benefits for Aboriginal people and communities.

A key problem is that where water resources are opened up to the market at a time when Aboriginal enterprises have not yet developed the capacity or resources to compete on an equal footing with established businesses, they may be locked out thereafter. Reserves or buy-backs are a way of combating this problem.

2.3.3 ABORIGINAL WATER FUND/TRUST

The FPWEC calls for the establishment of a national Aboriginal water fund to be held in trust by and for Aboriginal people.

The functions of an Aboriginal Water Fund or Trust should include:

- 1) coordinating and facilitating the acquisition and management of special Aboriginal water allocations;
- 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; and
- 3) providing funding through a national framework that ensures equality of access and fairness in the distribution of funding across all jurisdictions and regions, in so far as this is possible.

Guidance in determining fairness and equity in the national distribution of financial resources to support Aboriginal engagement in economic water must be established through a consultative mechanism developed by Aboriginal stakeholders.

2.3.4 EQUITABLE ACCESS TO THE CONSUMPTIVE POOLS

Providing equitable access for Aboriginal people to the consumptive pools must also be a priority. One of the main impediments is cost, but others include a lack of knowledge of water planning and markets, infrastructure and administrative capacity; over-allocation of particular basins; and, in the view of some Aboriginal people, environmental protection legislation in the areas where the enterprises would be run.

2.3.5 CAPACITY BUILDING

Feasibility assessments and economic modeling must be undertaken to advance the development of Aboriginal enterprises that, among other things, trade their water entitlements on the open market.

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

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

First Peoples Water Engagement Council – Policy on Characteristics of Aboriginal Water

3.1 Preamble

Aboriginal peoples are not benefiting from the much-needed economic development opportunities that might be provided by more secure and excludable NWI-consistent water access entitlements.

In allocating Aboriginal water it is critical that important spiritual and cultural values associated with water are not devalued and that it can be implemented in a way that takes account of existing entitlement holders.

Aboriginal water requirements and values are rarely explicitly included in water plans. There is commonly an implicit and often explicit assumption that environmental flows will serve as a surrogate mechanism to meet Aboriginal social, spiritual or cultural requirements.²⁷ While some Aboriginal cultural watering requirements may be met by environmental flows, many Aboriginal cultural water requirements are over and above environmental allocations, and the values behind Aboriginal water requirements are not addressed by or met by environmental flows.

The FPWEC recognises that the characteristics of Aboriginal water entitlements may differ across the wide range of different cultures and water environments in Australia, and may not be easily expressed in a single legalistic definition. For this reason, and to recognise the work of other groups in characterising Aboriginal water entitlements, the FPWEC is establishing a set of principles that could apply to all Aboriginal water entitlements throughout Australia.

3.2 Council's Policy Position

3.2.1 RECOGNITION OF RIGHTS

Aboriginal people should be provided with special Aboriginal water allocations as a right, covering both surface and ground water, in order to reverse historical injustices and oversights. These allocations are justified by:

- a) Aboriginal peoples' historic and ongoing connections, rights and obligations to their traditional lands and waters; and
- b) contemporary social and economic disadvantage in Aboriginal communities.

The FPWEC believes that Aboriginal peoples have certain rights in relation to water:

- The right to access and use water.
- The right to manage and trade water.
- The right to deliver water to culturally significant sites and ecosystems.

These rights are supported by a range of international and human right instruments.²⁸

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

²⁸ *United Nations Declaration of the Rights of Indigenous Peoples*, endorsed by Australia on 3 April 2009, Arts 3, 18, 20, 23, 25, 32; United Nations Committee on Economic, Social and Cultural Rights, 29th Session, General Comment 15, 11-29 November 2002; United Nations General Assembly, 64th Session, Resolution 64/292 "The human right to water and

3.2.2 CHARACTERISTICS OF ABORIGINAL WATER ALLOCATIONS - NATIONAL PRINCIPLES

As a starting point, addressing the question of 'how can water management systems acknowledge and effectively respond to Indigenous water values?' requires taking into account three key considerations²⁹:

- How values are conceptualised in natural resource management debates, including water management;
- The potentially marked differences in world view between Indigenous and non-Indigenous people; and
- The theoretical frameworks that can assist in understanding these values and their relationships to water and subsequently addressing them in water use decisions.

The FPWEC members understand the key characteristics of Aboriginal water allocations in current water entitlement systems in Australia must be consistent with the following non-negotiable principles:

- **Good management.** Aboriginal people have managed their land and water assets sustainably for generations. Aboriginal people have a deep knowledge and understanding of water systems. This experience and knowledge should be used by water managers to sustainably manage fresh water systems into the future. Similarly water allocated to Aboriginal people must be managed by Aboriginal people sustainably.
- **Flexibility.** Aboriginal water managers must have the flexibility to manage their allocations to suit their environment and circumstances. The water can be traded. The water can move from cultural use to economic use and vice versa.
- **Equity.** Water allocated to Aboriginal communities must be allocated equitably to community members. Decisions about sharing of water allocations between competing Aboriginal uses and users can only be made by Aboriginal people who understand the traditions, the history and the culture.
- **Cultural guarantees.** While Aboriginal people will be accountable for the allocation and use of Aboriginal water, cultural intellectual property must be preserved and protected. To this end, water allocations (both cultural and economic) are to be preserved for all future generations and therefore cannot be traded permanently.
- **Sustainability.** Aboriginal water, both cultural and economic, is to be used to improve the economic, cultural, social and environmental sustainability of the people, the communities and the environment. Using water for cultural and economic purposes has been taking place for generations in Aboriginal communities. Water allocations can now help close the gap on Aboriginal disadvantage by providing a sustainable income if managed appropriately.

3.3 Expected Outcomes

With the effective implementation of the FPWEC's objectives/principles for water entitlements, it is expected that the following will be achieved:

- Allocations of water will be made to Aboriginal people and communities for both cultural purposes and for economic development purposes.

sanitation", A/RES/64/292, 3 August 2010; United Nations Human Rights Council, Resolution A/HRC/15/L14, 30 September 2010.

²⁹ Finn M & Jackson S (2011). Protecting Indigenous Values in Water Management: A Challenge to Conventional Environmental Flow Assessments. *Ecosystems*, 14: p.1236.

- The objectives, processes and outcomes of 'mainstream' water planning and management include Aboriginal peoples' input and Aboriginal values, cultural priorities and knowledge.
- Environmental flows are supplemented by additional allocations to meet Aboriginal cultural and economic development priorities.
- Environmental flows are managed and delivered in a way that takes Aboriginal cultural values into account.
- Aboriginal waters are owned, governed and managed by Aboriginal people.
- Water systems to be protected from degradation using traditional Aboriginal knowledge and understanding of water systems.
- The rules for management of Aboriginal water enable maximum beneficial (cultural, social or economic) use by Aboriginal people.
- Water allocations are made for the long term so that future generations of Aboriginal people can maintain cultural practices and continue economic development.

First Peoples Water Engagement Council - Policy on National Water Initiative and Water Planning

4.1 Preamble

Aboriginal water allocations are not specifically addressed in the National Water Initiative (NWI). However, Paragraph 25(ix) of the NWI is one of the clauses which gives jurisdictions an opportunity to include and engage Australia's First Peoples' and states that jurisdictions will:

RECOGNISE INDIGENOUS NEEDS IN RELATION TO WATER ACCESS AND MANAGEMENT.

Also, Section 52 states that parties will provide for Aboriginal access to water through planning processes that ensure:

- i) *INCLUSION OF ABORIGINAL REPRESENTATION IN WATER PLANNING WHEREVER POSSIBLE; AND*
- ii) *WATER PLANS WILL INCORPORATE ABORIGINAL SOCIAL, SPIRITUAL AND CUSTOMARY OBJECTIVES AND STRATEGIES FOR ACHIEVING THOSE OBJECTIVES WHEREVER THEY CAN BE DEVELOPED.*

Cultural values are only mentioned in the Glossary of Terms (Schedule B(i)) as part of the definition of environmental and other public benefit outcomes. Specifically, "other public benefit outcomes" is defined as including "mitigating pollution, public health, Aboriginal and cultural values, recreation, fisheries, tourism and navigation and amenity values."

A recent study of Indigenous participation in water planning and management (Jackson and Robinson 2009) identified a range of barriers to the effective implementation of the NWI requirements to provide for Indigenous access to water resources and include Indigenous representation in water planning. The barriers include:

- difficulties in achieving appropriate Indigenous representation in local, regional and policy level decision making;
- technical difficulties in quantifying Indigenous water requirements;
- the absence of institutions and techniques to enable Indigenous participation in water planning and management; and
- a low capacity for collaboration within the Indigenous sector and water planning agencies.

4.2 Council's Policy Position

The FPWEC acknowledges the need for the increased efficiency to ensure the sustainable use and management of water in Australia. Subject to the points discussed below the FPWEC endorses the NWI as providing the appropriate national policy framework for the use and management of water in Australia.

The ongoing variations between and within jurisdictions creates difficulties and uncertainties for the NWI's objective of a nationally consistent approach to water planning, particularly in that there are no specific legislative provisions for Aboriginal engagement in Australia. These variations contribute to the disadvantage that Aboriginal people face and must be rectified through the appropriate engagement of Aboriginal people in any reforms to the NWI.

Progress in meeting the jurisdictional commitments arising out of the NWI has been uneven and in many cases inadequate. The FPWEC fully endorses the two most recent Biennial Assessments which have noted that:

IT IS RARE FOR INDIGENOUS WATER REQUIREMENTS TO BE EXPLICITLY INCLUDED IN WATER PLANS, AND MOST JURISDICTIONS ARE NOT YET ENGAGING INDIGENOUS PEOPLE EFFECTIVELY IN WATER PLANNING PROCESSES. (2009)³⁰

MOST JURISDICTIONS HAVE IMPROVED CONSULTATIONS WITH INDIGENOUS COMMUNITIES IN WATER PLANNING AND MANAGEMENT, BUT HAVE GENERALLY FAILED TO INCORPORATE EFFECTIVE STRATEGIES FOR ACHIEVING INDIGENOUS SOCIAL, SPIRITUAL AND CUSTOMARY OBJECTIVES IN WATER PLANS, AS ENVISAGED UNDER THE NWI. (2011)³¹

4.3 Expected Outcomes

4.3.1 ACCOUNTING FOR CULTURAL VALUES IN WATER PLANNING

The FPWEC emphasises that cultural values are essential to sustainable water management and the successful implementation of the NWI, and these values need to be considered in their own right as a part of current and future water planning efforts and in the implementation of these plans.

As outlined in the 2011 Biennial Assessment, the FPWEC recommended that Aboriginal people be given greater opportunity to be part of decision making and water planning by:

- ensuring that they are given enough time to provide input and make decisions within each catchment;
- providing resources to build capacity, including culturally appropriate information about water resource management and planning, water infrastructure, water sharing plans, and market trading;
- establishing effective and collaborative partnerships between governments and Aboriginal people, enabling information sharing and capacity building; and
- allowing adequate time for community consultation, decision making and comment on draft water plans.

Furthermore, the FPWEC recommends that cultural values be recognised in water planning mechanisms by scaling up community ownership and capacity through shared responsibility arrangements.

In other water systems, even where Aboriginal cultural values have been clearly identified in water plans, the identification has not generally led to any additional water regime requirements beyond those specified for environmental needs.

4.3.2 MECHANISMS FOR COLLABORATIVE MANAGEMENT

NWI implementation approaches, legislative conditions and mechanisms for allocation and Aboriginal participation in water planning vary from state to state. The emergence and strengthening of Aboriginal-led governance organisations have provided an opportunity for states to move beyond Aboriginal 'representation' in order to engage in a more meaningful participation process in water planning efforts. Examples include the New South Wales Local Aboriginal Land Councils, Victoria's Registered Aboriginal Parties, and the Aboriginal Statewide Advisory Committee in South Australia. Co-management arrangements for specific water resources, either with government or the private sector, are another model which has appeared in Western Australia. Also, official water planning bodies in some predominantly Aboriginal-owned

³⁰ Finding 1.6, p27.

³¹ Finding 1.5, p.46.

areas, such as Tiwi Islands in Northern Territory or Alinytjara Wilurara in South Australia, are controlled by Indigenous people.

Co-management instruments and authentic engagement with Aboriginal-led governance organisations allow for the realisation of rights-based approaches to water management at the basin level. Community involvement allows for increased local capacity, and consistency and stability at the local level to counterbalance potentially shifting political priorities at the national level.

Arrangements for sharing management responsibilities between state administrators and Aboriginal and community groups dependent on the access and use of water resources can be established in various ways. Mechanisms may depend upon the state-wide water planning frameworks in place and the needs, capacity, and cultural context at the community level.

Such partnerships and management mechanisms allow for the incorporation of cultural values into water planning and allocations consistent with Section 52 of the NWI. Furthermore, these approaches foster increased legitimacy in the water planning process, long-term cooperative relationships, and serve to increase both technical and governance capacity for sustainable water resource management amongst Aboriginal communities.

CONCLUSIONS

Despite significant international, national, and state legislation and policies, Aboriginal rights to land and water still have not been fully realised. This policy outlines strategic priorities for guiding both policy and governance developments in the area of water management.

The four policies (Policy on Cultural Flows; Policy on Economic Water; Policy on Characteristics of Aboriginal Flows; and Policy on National Water Initiative and Water Planning) all have a measure of overlap in terms of key priorities and objectives. The unifying themes of authentic engagement, capacity building, institutional support, and decision-making to support Aboriginal economic well-being and livelihoods all require that national, state and local government acknowledge and respect the strong ties that bind Aboriginal people to Country. This connection can be articulated in water planning and water management through knowledge sharing, a continued emphasis on building effective partnerships, and long-term investment of resources to build capacity both from the government and Aboriginal communities.