



GLOBAL JOURNAL OF RESEARCHES IN ENGINEERING: J  
GENERAL ENGINEERING  
Volume 21 Issue 1 Version 1.0 Year 2021  
Type: Double Blind Peer Reviewed International Research Journal  
Publisher: Global Journals  
Online ISSN: 2249-4596 & Print ISSN: 0975-5861

# Establishing a Cultural Flows Commission: A Framework for Joint Action on Indigenous Water Rights

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**GJRE-J Classification:** FOR Code: 091599



*Strictly as per the compliance and regulations of:*



# Establishing a Cultural Flows Commission: A Framework for Joint Action on Indigenous Water Rights

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## I. INTRODUCTION

Australia's landscape is defined by a complex variety of biospheres, including a wide range of water-dependent ecosystems. The diversity of the landscape is reflected in the myriad of different Indigenous societies, cultures and legal systems present in Australia. Aboriginal and Torres Strait Islander peoples maintain a special relationship with both land and water. Water systems hold deep cultural significance and have various uses under Indigenous law (Cooper & Jackson 2008, p. 54; Marshall & Kirby 2017, p. 2). This connection to water is characterised by customary rights and custodianship of water resources that extends beyond surface waters to include underground waters too (Cooper & Jackson 2008, p. 54). Until relatively recently, the dispossession of Indigenous peoples from their land and waters has consistently featured in Australia's history. The High

Court's decision in the 1992 case, *Mabo v The State of Queensland and Ors* [No. 2], overturned the legal doctrine of terra nullius and formally recognized Indigenous land rights for the first time (Mason et al. 1992). Consequently, the Commonwealth Parliament passed the Native Title Act 1993 (Cth). Although an important victory for Indigenous Australia at the time, in many respects, the native title system has failed to deliver as much change as hoped.

Indigenous property rights over water remains a highly disputed topic in Australian law. Section 223 of the Native Title Act (hereinafter 'NTA') states that native title means 'the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters'. Despite this, jurisprudence on native title has not readily recognised Indigenous rights and interests in water resources. Some allege that in practice, there remains an unofficial 'doctrine of aqua nullius' with respect to Indigenous water rights that must be overturned (Marshall & Kirby 2017, p. 48). In addition to the degradation of the environment, failure to recognise Indigenous water rights contributes to the extreme disadvantages in health, wealth creation and wellbeing experienced by Indigenous peoples, including the poor quality of water resources relied upon to sustain some Indigenous communities (Marshall & Kirby 2017, p. 7; Mitrou et al. 2014; Wensing & Porter 2016).

There are several factors that have complicated Indigenous water rights. First are the fundamental epistemic differences (perhaps even incompatibilities), that exist between Indigenous and Western legal, cultural and philosophical concepts of property and ownership.<sup>1</sup> Australia's legal system was built on Western knowledge and ideals, which influence the creation and interpretation of statutes, judicial precedents and decision-making at all levels of government. The Western concept of property ownership as a 'bundle of rights' (Arnold 2002, p. 281;

<sup>1</sup> For further explanation on these epistemic incompatibilities, and the difficulties these present when building understanding between Indigenous peoples and the modernist settle-colonial state see generally:

Armstrong (2002); Mignolo (2013); Mignolo (2011); Mignolo (2017); Quijano (2000); Quijano (2013); and Wolfe (2006)

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as per Marshall & Kirby 2017), is alien to the values of country and communal custodianship so prevalent in Indigenous law (Gammage 2012; Pascoe 2014; Port of Melbourne Corporation 2012; Porter & Barry 2016). There is limited common ground between the two value systems (Marshall & Kirby 2017, p. 156). Native title is one of the key areas where they interact and where this conflict is most evident (Pearson 1997).

Currently, the native title system only recognises 'basic landholder rights'. The Act does not mention rights to use water for commercial purposes or communal rights to water, and jurisprudence has made the recognition of such rights under the common law exceedingly difficult (Blackshield 2007; Macpherson 2017, 2019; Marshall & Kirby 2017). Even if communal rights were to be recognised, the compensation available under the Act would not be struggle to be of a sufficient quantity to be reparative for the loss of beneficial ownership of water resources. Furthermore, this would not be a recognition of an Indigenous water right – merely compensation from the extinguishment of this right.

Misinterpretations of Indigenous values and simplistic understandings of 'traditional' uses of water have made various attempts at law reform ineffective (Marshall & Kirby 2017, p. 8). Reforms to the NTA have progressively narrowed the scope for recognising title, as have changes to state and territory-based Indigenous land tenure legislation (Macpherson 2017; O'Bryan 2017). Deficiencies in the legislation have made it difficult for the judiciary to recognise Indigenous water rights in the current legal framework (Blackshield 2007; Macpherson 2017). The courts have also restricted the scope of native title and taken a narrow approach to how native title claims should be processed. The High Court's decision in *The Members of the Yorta Yorta Aboriginal Community v. The State of Victoria & Ors* in December 2002 is an example of how adopting a narrow interpretation of rights led to a finding that native title had been extinguished. Of the approximately 350 native title determinations made thus far, in none have the courts recognised Indigenous rights to use water for commercial consumptive purposes (Macpherson 2017, p. 15). As Jackson et al. (2019, p. 3) surmise, water law and policy in Australia have narrowly prescribed Indigenous rights and therefore, have limited capacity to deliver socioeconomic benefits. Some have gone as far as to characterise the native title determination process as being a regime of extinguishment, rather than recognition (Wensing & Porter 2016).

Another ongoing challenge is the complex interaction between federal, state and territory water legislation and the National Water Initiative (hereinafter 'NWI'). Agreed in 2004, the NWI is an intergovernmental agreement between Commonwealth, state and territory governments that established a water management reform framework and action plan, driven by 'the

continuing national imperative to increase the productivity and efficiency of Australia's water use, the need to service rural and urban communities, and to ensure the health of river and groundwater systems by establishing clear pathways to return all systems to environmentally sustainable levels of extraction' (Commonwealth Parliament of Australia et al. 2004; Department of Agriculture, Water and Environment 2004, p. 1). The NWI introduced the 'unbundling' of property rights over land from water rights, making them separate unmodified legal interests. This means that native title claimants' land rights, if recognised, no longer include rights to the water resources on their land (Macpherson 2017, pp. 4–5). Instead, water access entitlements must be purchased on the water market.

To remedy these problems, fundamental change must be pursued. Some have called for a national discussion over the sharing of water resources and a national response based on a dialogue with all the stakeholders (Marshall & Kirby 2017, p. 162). Others argue that Indigenous peoples should be given 'full jurisdiction' over the use of their resources (Macpherson 2019, p. 215). Central to proposals to redress inequities experienced by the Indigenous communities is 'Cultural Flows', a framework developed by Murray and Lower Darling Rivers Indigenous Nations (hereinafter 'MLDRIN') to recognise and promote Indigenous water rights and self-determination. In Part I, Article 1 of the 'Echuca Declaration', MLDRIN defined Cultural Flows as:

"... Water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations" (Murray and Lower Darling Rivers Indigenous Nations 2007, p. 2).

The 2014 'Independent Review of the Water Act 2007' made three recommendations in relation to First Nations and the NWI, each of which called for greater Indigenous engagement in the decision-making process for water governance and management plans (Morton et al. 2014). However, little action has been made by the government in implementing these recommendations. Addressing Cultural Flows could provide the means to do improve upon the deficiencies noted in the report.

#### *Purpose and scope of this paper*

Drawing upon the law and policy approaches proposed by Nelson et al. (2018, p. 6), this paper argues that implementing Cultural Flows is an important step forwards for Indigenous self-determination, one that could play a key role in improving socioeconomic outcomes for Indigenous communities and in 'closing the gap' between Indigenous Australia and the rest of

the country.<sup>2</sup> One way to achieve this is through an intergovernmental agreement to establish a joint Cultural Flows Commission. This Commission would engage with Commonwealth, state, territory and local governments on water issues. Most importantly, it would seek leadership and direct involvement from First Nations as a body politic. The Commission would make recommendations for law and policy reforms, particularly with respect to the NTA, water legislation and the NWI. It would also undertake research into how Indigenous and Western concepts of property law could be better integrated. Other political measures, like treaties and an Indigenous 'voice' to parliament, could assist and support the implementation of Cultural Flows but this process would not be contingent upon their creation.

It is not within the scope of this paper to lay out an exact blueprint for the legislative changes required, nor how water entitlements should be managed by or on behalf of Indigenous peoples. The aim of this paper is to explore one approach to implementing Cultural Flows, through a Cultural Flows Commission. While there is no single 'silver bullet' solution for Indigenous water rights—because each First Nation has its own legal system and water values, and each jurisdiction has its own legal idiosyncrasies—a Cultural Flows Commission would provide an effective starting point.

The analysis and recommendations in this paper are based on the author's socio-legal research and in-depth academic literature review on native title and water management. The author acknowledges the biases that may be inherent in this paper stemming from its lack of quantitative and qualitative empirical research conducted in collaboration with Indigenous peoples. The resources to conduct such research were not available to the author in the creation of this paper. Further, as a matter of respect for the Indigenous peoples of Australia, the author identifies themselves as a white, upper-class male who is writing from a position of privilege and who has not lived the Indigenous Australian experience.

## II. AN INTERGOVERNMENTAL AGREEMENT ON CULTURAL FLOWS

In Australia, there is currently no national treaty between First Nations and the Commonwealth. Similarly, there is no national charter on human rights (although some jurisdictions have their own human rights legislation). Legal researchers consider it significant that Australia has opted to pursue anti-discrimination

legislation rather than rights-affirming legislation (Williams 1999, p. 3). This poses a challenge for Cultural Flows, which will likely require changes to rights-based legislation. Nelson et al.(2018, p. 6) propose a three pronged approach:

1. Creating clear legal protections and definitions around Indigenous water rights
2. Reforming laws that effect water rights and the broader landscape (such as land use, planning, heritage and environmental protection laws)
3. Implementing changes to water governance, including increased Indigenous engagement in water planning.

In particular, water legislation must be reformed to recognise Indigenous peoples as a body-politic with specific rights that enable them to be consumptive users of water resources(Nelson et al. 2018). Instead of current arrangements, which consider Indigenous peoples as only having either basic land holder rights, or as environmental and other public benefit outcomes water users (Nelson et al. 2018).Although the courts have recognised native title rights and interests in water for "personal, domestic, and non-commercial communal purposes" (best equated with basic landholder rights), they have not been willing to recognise rights and interests in water beyond this (Rares 2014; as per Macpherson 2017, p. 14). A water access entitlement of the scale described in the Echuca Declaration, would be akin to a consumptive use. Evidently this is a larger amount of water than the equivalent basic landholder rights water access entitlement would be capable of providing. Jurisprudence has not recognised the existence of such rights under Native title(Rares 2014; as per Macpherson 2017, p. 14).

The Initiative explains that only water allocated for holders of Native title for traditional cultural purposes, will be accounted for (Macpherson 2017, p. 6). Cultural Flows are not considered 'traditional' because they would require entitlements to large amounts of water – entitlements greater than those given under basic landholder/stock and domestic rights. This ensures Native title rights and interests in water resources will be relegated to basic landholder rights and entitlements congruent with environmental and public benefit outcomes, and not consumptive uses.

An intergovernmental agreement between the Commonwealth, states, territories and First Nations would provide the framework for a collaborative national response to these issues. Inter governmental agreements can take many forms. Some agreements are scheduled to legislation; some are approved, ratified or authorised by legislation in some other way; whilst some are tabled in parliament(Saunders 2005, p. 7). In some instances, an agreement is created through joint legislation implemented by a lead state, which the remaining state, territory and Commonwealth

<sup>2</sup> The 'Closing the Gap' report series is a number of reports produced annually that detail the progress of the Australian Government in achieving targets set in 2008 (Australian Government & National Indigenous Australians Agency 2019; Australian Indigenous Health Info Net 2016, 2016)

parliaments recognise through mirror legislation (Saunders 2005, p. 7). Complimentary Applied Laws,<sup>3</sup> and Mirror Legislation,<sup>4</sup> are the two legislative techniques recommended for the intergovernmental agreement.

a) *Benefits of an intergovernmental agreement*

There are many Australian examples of successful intergovernmental agreements for joint action, and there are already precedents for joint management of Indigenous water resources, such as the Kungun Ngarrindjeri Yunan Agreement (Hemming et al. 2017). An intergovernmental agreement based on the Complimentary Applied Laws approach, allows all levels of government to coordinate and cooperate with one another, which is why this approach is so desirable when dealing with a national issue that may be politically divisive (Painter 1998). As a national response is called for, an intergovernmental agreement on creating a Cultural Flows Commission is worthy of consideration. Some of the key benefits of creating the Cultural Flows Commission through an intergovernmental agreement are:

1. Intergovernmental agreements can circumvent certain constitutional restrictions on Commonwealth spending, as states can simply accept payments made to them by the federal government. The funding arrangements in an intergovernmental agreement provide a clear path for Commonwealth funding to states. In addition, an agreement provides accountability for state and territory spending, preventing states from procuring funding from the Commonwealth for specific projects and diverting it elsewhere (Painter 1998). The Commission will require government funding of some description and an intergovernmental agreement would provide the appropriate pathways.
2. Intergovernmental agreements allow the parties to pool executive capabilities, financial reporting and administrative oversight, which promotes efficiency (Painter 1998, p. 100).
3. Thanks to consistent advocacy by Indigenous communities, the idea of Cultural Flows has slowly begun to enter the mainstream Australian political consciousness. Already, this has manifested in the inclusion of Indigenous engagement clauses in

water legislation and water sharing plans. An intergovernmental agreement for the creation of a joint Cultural Flows Commission would add a great deal of political and moral weight to the issue, highlighting its legitimacy (Painter 1998, p. 102).

Intergovernmental agreements have been described as a political act, rather than a legally binding contract (Betts 1964, p. 459; Dixon et al. 1962). Whilst this may seem to undermine the effectiveness of these means to federal-state cooperation as these agreements have no penalty for violation, this gives the parties to the agreements much greater flexibility in carrying out their commitments (Painter 1998, p. 102). Additionally, the joint resources invested by the parties provide an incentive for them not to opt out of the agreement (Painter 1998, p. 102). The greatest risk to intergovernmental agreements is neglect and default by the associated parties. Without consistent monitoring, such schemes can lose focus. This can be avoided by incorporating safeguards and contingencies into the enabling legislation and emphasising the symbolic, moral and political importance of in this instance Cultural Flows (Painter 1998, p. 103).

b) *Key parties to the agreement*

For intergovernmental agreement on Cultural Flows Commission to be effective, it must include as signatories:

1. First Nations, either corporately or as individual nations, as a body politic. Rather than treating them merely as special interest groups, First Nations should be engaged with as a political entity with a 'seat at the table' in water management (Hemming et al. 2017, p. 1).
2. Local governments, because this layer of government is often responsible for implementing and monitoring water management laws and related legislation in their local areas. They should be involved in the intergovernmental agreement and engage directly with the Commission once it is established.
3. Commonwealth, state and territory governments, because they are responsible for making the laws and policies that govern water management.

Ordinarily, local government and First Nations are rarely included as parties to such agreements. This must change to implement Cultural Flows effectively. All the key stakeholders should be represented in the intergovernmental agreement and the process should be characterised by collective decision-making and respect for Indigenous self-determination (Tsatsaros et al. 2018, p. 2). An intergovernmental approach to Cultural Flows is the most effective way to manage expectations and relationships between the parties.

<sup>3</sup> Complimentary Applied Laws are recommended for the creation of a joint Cultural Flows Commission because this allows for national uniformity in laws which enable the creation of this commission, however this approach does not require the states to refer powers to the Commonwealth, and lose control of legislative capacity in water.

<sup>4</sup> Mirror Legislation is recommended as this allows for a more flexible approach that can be tailored to the needs of Indigenous communities, different water resources, and different jurisdictions.

### III. FUNCTIONS OF THE CULTURAL FLOWS COMMISSION

Once the intergovernmental agreement has been executed, the first step in establishing the Cultural Flows Commission (hereinafter 'the Commission') will be to define its mandate and powers. A charter detailing the Commission's role and responsibilities should be written. It is important that First Nations be allowed to lead the development of this charter, in collaboration with local, state, territory and federal governments. The charter developed by the Mackenzie River Basin Management Board in Canada is an example of a robust charter developed by incorporating Indigenous voices (Morris & de Loë 2016), which might serve as a model for the Commission's charter. In the Australian context, it is envisioned that the Commission will undertake work in four main areas:

1. Functioning as a mediator between First Nations and various levels of government in negotiations over water management, including investigating ways to create a First Nations Water Holder entity to purchase and manage water access entitlements on behalf of Indigenous communities
2. State/territory water legislation reviews and recommendations on law reform
3. Reviewing and advising on revisions to the NWI and the NTA
4. Research into how the Australian, and Indigenous legal system can be better mediated between by law, especially with respect to concepts of property and ownership.

The substantive reforms that would enable a proper 'meeting, shoulder to shoulder' between First Nations and the various levels of Australian government to reform property laws is not within the remit of this article. The first three areas of the Commissions' work will be explored in further detail below.

#### a) *A First Nations Water Holder*

This paper envisages a First Nations Water Holder as an independent agency or organisation that would act as a legal representative for First Nations in water matters; specifically, water entitlements. Although determining the exact form or structure of the First Nations Water Holder is not within the scope of this paper, it is proposed that this entity play a key role in Cultural Flows. In 2012 the First Peoples' Water Engagement Council was convened by the former National Water Commission, and it proposed that an Aboriginal Water Trust or Fund be developed to acquire and manage water rights, water reserves and a water fund for Indigenous peoples (Duncan & First Peoples Water Engagement Council 2016, p. 8; National Water Commission 2012; as per Macpherson 2019, p. 96). The National Water Commission "also stressed" the need for both an Indigenous water fund and water reserve

(National Water Commission 2012; as per Macpherson 2019, p. 94). This was recommended on the basis that, in water systems that are already fully allocated (meaning all available water entitlements have been purchased), creating such a fund would ensure Indigenous communities in these systems could still access water for Cultural Flows (Macpherson 2019, p. 96). A similar approach is advocated for in this paper, although it should be designed with great care. As Macpherson notes there is "still a great variance of opinion" both "within government and between and within Aboriginal communities" on the appropriateness of such a fund (Macpherson 2019, p. 97). If this fund were to be pursued, the Commission could assist in creating a First Nations Water Holder to represent Indigenous interests in the water market.

Indigenous land tenure is recognised and distributed unevenly across Australia. Even if water rights were to be recognised under the native title system, some Indigenous communities whose native title has been extinguished, or communities whose native title rights had not been recognised, would still be without water rights. This presents a problem of equity, because it would mean different rights for different communities.

A First Nations Water Holder could work to ensure a more even distribution of water entitlements. Further, the First Nations Water Holder's water fund could be used in circumstances where the capital outlay required to purchase water access entitlements on the open market in over allocated water systems would otherwise make Cultural Flows impossible. In systems that are not fully allocated, specific reserves of water could be set aside in planning processes to ensure that even if the water resources in those systems become fully commodified, a set amount will always remain available for Indigenous peoples to draw upon for Cultural Flows (Macpherson 2019, p. 95).

Nelson et al. (2018, p. 5) recommend a First Nations Water Holder as an immediate solution to Cultural Flows and a key part of ongoing reforms. Specifically, they reference the Chilean Indigenous Water Fund as an example of how a fully commodified water entitlements system such as ours, could include an entity dedicated to purchasing entitlements on behalf of Indigenous peoples (Nelson et al. 2018, p. 12). Comparative research has been undertaken on the Chilean model, which concluded that a similar approach would be the most immediately effective way of enabling Cultural Flows in Australia (Macpherson 2017).

Whilst the creation of a First Nations Water Holder is recommended in this paper, it is recognised that this is only one part the proposed solution. Such a fund would not 'create' Indigenous water rights, but merely purchase entitlements that could be used in the fulfilment of activities which constitute such rights. If this route is to be followed, the purchase of water

entitlements must only be undertaken based on direction from Indigenous communities, to ensure the process reflects their self-determination agenda.

b) *Setting a law reform agenda*

Introducing new substantive Indigenous water rights will require reform of state, territory and Commonwealth legislation. This could include new rights to use water for consumptive and commercial uses, instead of only the basic landholder rights/stock and domestic rights that are currently available. Alternatively, a scheme that allows water access entitlements to be acquired and held by a trust, in perpetuity, for the benefit of Indigenous communities could be pursued. The latter option could fall within the scope of the proposed First Nations Water Holder. To implement Cultural Flows for communities that would otherwise lose out, Indigenous water rights that are not tied to native title determinations still need to be pursued. This will allow for equal access to such water rights. The Commission could lead legislative reviews and make recommendations to all levels of government for law and policy reform initiatives to support Cultural Flows.

*Key areas for reform*

Some of the key areas the Commission could address are:

1. Indigenous Land Use Agreements (hereinafter 'ILUAs') were introduced under the Native Title Amendment Act 1998 (Cth). They were developed as an alternative to the native title claims determination process. ILUAs are long-term agreements that can be struck between First Nations, government and third parties (Neate 1999). ILUA' scan only be undone by agreement between the parties (National Native Title Tribunal 2014, p. 1). ILUAs have several limitations. They cannot recognise communal Indigenous water rights because they are still subject to the NTA (and its jurisprudence), which does not provide for such rights. ILUAs do not generally address the full range of Indigenous interests and often reflect the unequal balance of bargaining power between Indigenous peoples and other parties (Durette 2008, p. 35; Howard-Wagner & Maguire 2010, p. 82). Further, ILUAs are not a viable option for groups whose native title is deemed to be extinguished (Australian Human Rights Commission 2012). Reforming the rules relating to ILUAs could provide a way to recognise universal Indigenous water rights that do not depend on a successful native title claim. However, this would still require a reworking of legislation to widen the scope of interpretation for native title rights and interests as they relate to Indigenous water rights.
2. State and territory-based Indigenous land tenure legislation is also problematic. Generally, state and

territory governments have adopted a similar approach to ILUAs and sought to develop their own Indigenous land tenure legislation in response to the confrontational nature of native title determinations (Cowie 2018, p. 4). One of the advantages of the state and territory-based approach has been negotiated settlements, which have enabled cross-cultural learning. Arguably, successful cross-cultural negotiations have promoted co-management of resources to a limited degree (Son 2012). However, this approach cannot be relied upon as an effective legal basis for Cultural Flows. State and territory legislation has often been criticised as onerous and complex (Cooper & Jackson 2008). In addition, some state-based regimes merely mimic the federal native title system and in some cases, only provide rights that are the same as those already afforded to Indigenous peoples as ordinary members of the public (O'Bryan 2017, p. 593). Law reform at the state and territory level would support the broader changes needed to implement Cultural Flows. In particular, recognition of Indigenous water rights through state and territory water legislation, by altering the definitions of who 'owns' water and to what extent they may 'own' it, will play an important role.

3. The NTA is in dire need of reform. Under Section 109 of the Australian Constitution (hereinafter 'the Constitution'), Commonwealth laws prevail when there are inconsistencies between federal and state legislation. This means that state-based solutions to Cultural Flows cannot replace or override the NTA. The fact remains that the NTA is the primary vehicle through which Indigenous property rights have been recognised in Australia at the federal level (Durette 2008; Macpherson 2017, 2019; Marshall & Kirby 2017; O'Donnell et al. 2011). Therefore, reforming the NTA is essential for implementing Cultural Flows.
4. At an even higher level, there may also be scope for new treaties or constitutional reforms to support Cultural Flows. To the extent that such reforms are possible, recognition and protection of rights through treaties or constitutional amendment will provide legislative backing for Indigenous water and related rights. Although treaties and constitutional amendment may not be on the political agenda yet, they are worthy of mention here. A constitutionally enshrined Indigenous voice to parliament is already on the political agenda. The initiatives proposed in this paper are not contingent upon these other national level reforms. However, treaties and constitutional amendment would facilitate the implementation of Cultural Flows in Australia. Researchers Kildea and Williams have argued for a new constitutional settlement that is especially sensitive to environmental issues, and designed to

handle the current challenges in Australian water law (2010, p. 615). They have argued that there has always been potential for the Constitution to play a decisive role in the management of Australian waterways (Kildea & Williams 2010, p. 615); and hence a constitutional review to determine how the Constitution can promote and support a more cooperative approach to water management should be considered (Kildea & Williams 2010, p. 616). The Cultural Flows Commission could investigate this possibility further. The approach advocated in this paper seeks to circumvent the question of federal balance overwater management and legislative capabilities, instead opting for joint action by mutual consent. The continued tension between the states and the Commonwealth over constitutional remit, especially with respect to water resources, is reason enough for the Commission to avoid engaging in thorny constitutional matters too often (Kildea & Williams 2010). There is a danger that doing so could derail the Commission, if it oversteps its role. As such, the Commission should focus more on coordinating the national response and assisting in negotiating agreements wherever they are required.

5. Assisting as a mediator between First Nations and the various layers of government in relation to water entitlements, Indigenous water rights and their realisation, changes to state/territory water legislation, changes to the NWI and the NTA, changes to laws affecting the wider landscape through which water travels, and generally water governance in Australia.

The political reality of over allocated water resources in a drought-prone country like Australia means a pragmatic response is required to ensure Indigenous water rights do not become a partisan issue. The complexity of striking the balance between states, territories and Commonwealth powers, in addition to the volatile politics over water management in the Murray–Darling Basin, serve as a cautionary tale about why broad consensus is needed when pursuing water law reform in Australia (Twomey 2008).

#### *Implementing reforms*

Putting the necessary legal and institutional reforms into effect to enable the Commission will require joint action utilising what is termed ‘Complimentary Applied Laws’ (Wanna, Phillimore, Fenna, & Harwood 2009). This type of intergovernmental agreement is defined by one lead state implementing the legislation first, then all the other state, territory and Commonwealth governments doing the same. This approach has already been used successfully numerous times, one example being when the South Australian Parliament implemented the with the National Electricity Law, by passing the National Electricity (South Australia) Act 1996 (SA). The process allows governments to adopt a

uniform set of laws without granting exclusive legislative remit over water, to the Commonwealth. State-based Indigenous heritage legislation would also be relevant here. Linking the enabling legislation for the Commission to heritage legislation would help entrench Indigenous water rights in the broader legislative framework.

As Nelson et al. (2018) have argued, a single uniform legal response to Cultural Flows cannot be expected to work for all Indigenous communities. A nuanced approach to implementation is necessary, and as Marshall & Kirby argue, reform must be led by Indigenous communities (2017). While the approach proposed in this paper focuses on creating a single institution, the Cultural Flows Commission, the legislation developed to recognise Indigenous water rights, and to manage and govern water must be adapted to each jurisdiction. A balance must be struck between a unified national focus and each jurisdiction and each Indigenous community’s specific context (Marshall & Kirby 2017, p. 162; Nelson et al. 2018) Nelson et al. 2018). Further, it is imperative that considerable consultation work which is led by First Nations, be undertaken prior to implementation of Indigenous water rights’ affirming legislation. This will ensure the reforms properly meet the needs of Indigenous communities.

#### *c) Revising the National Water Initiative*

The product of an intergovernmental agreement made in 2004, the NWI was one of the first national attempts to incorporate Indigenous values and customs into water planning and to remedy some of the inequities experienced by Indigenous communities in relation to water rights. However, the NWI includes only limited duties to consult with Indigenous peoples, which have been criticised for being discretionary and non compulsory (Macpherson 2017; Marshall & Kirby 2017, p. 84). Firstly, the languages adopted in the NWI calls for consultation with Indigenous communities ‘wherever possible’ rather than consultation ‘always’, and ‘each and every time’ (Durette 2008, p. 35). In effect, this undermines the consultation requirement, making it more akin to a guideline than a requirement, one that may be readily ignored (O’Donnell et al. 2011). Other aspects of Indigenous engagement in the NWI are similarly discretionary, which means there is no enforceable power to include Indigenous interests in NWI implementation plans (Marshall & Kirby 2017, p. 84). Secondly, the NWI only accounts for Indigenous interests formally recognised under the native title system (Marshall & Kirby 2017, p. 84). Groups without formal native title are excluded completely.

Prior to the NWI, riparian water rights (imported into Australia’s legal system from the Imperial British common law) and the rights to use water for agriculture and industry were directly linked to land ownership



(Macpherson 2017, p. 6). The NWI introduced the 'unbundling' of property rights over land from water rights, making them separate legal and commercial interests in the Murray-Darling Basin. This meant that native title claimants' land rights, if at all recognised, no longer included rights to the water resources on their land (Macpherson 2017, pp. 4\_5).

One of the main aims of the NWI was reforming water and property legislation to encourage more efficient use of water through increased competition on an open market, the idea being that water will flow to its most valuable usage (Tietenberg & Lewis 2016), this being due to water markets "creat[ing market] incentives" for water to be traded as a commodity (Murray-Darling Basin Authority 2019, p. 1). The establishment of 'water markets' required the division of water rights from land holdings. This has complicated Indigenous access to water resources (Macpherson 2017, p. 6). Whereas previously, water entitlements were incidental to land tenure, the changes introduced by the NWI mean that native title claims and other Indigenous land tenure legislation do not provide access to water entitlements (Macpherson 2017, p. 6). Instead, water access entitlements must be purchased on the open water markets. By creating trade able water rights decoupled from land title, the NWI has added to, rather than remedied, the exclusion of Indigenous peoples from the water economy (Jackson et al. 2019, p. 3).

The NWI divided water usage into 'consumptive uses' requiring water access entitlements (which includes irrigation, industry, urban and 'stock and domestic' uses, although the latter may not require an entitlement) and 'environmental and other public benefit' uses (Macpherson 2017, p. 6). The basic landholder rights available under native title fall within the same category as stock and domestic uses and usually do not require a formal water access entitlement (Macpherson 2017, p. 6). The NWI's categorisation of water uses and separation of water from land rights is antithetical to Cultural Flows, which by their very nature, require Indigenous access to large volumes of water and the freedom to use water in many different ways to 'maintain the spiritual, cultural, environmental, social and healthy livelihoods of Indigenous peoples of Australia' (Murray and Lower Darling Rivers Indigenous Nations 2007, p. 2). It is envisaged that the Cultural Flows Commission would play a key role in negotiating changes to the NWI that would support Indigenous self-determination and wellbeing.

#### IV. CONCLUSION

This paper has demonstrated that existing legislation is ill equipped to truly engage with Indigenous water rights, much less the complexity of Cultural Flows. Wholesale reform of water legislation is required, but also reform of other legislative regimes that relate to the

land through which water travels, and water governance in Australia. It is proposed that an intergovernmental agreement between First Nations and all levels of government be entered into with the aim of creating a joint Cultural Flows Commission. This intergovernmental approach has a long history in Australia as an effective means to coordinate a national response. From there, the Commission would take the lead in engaging First Nations as a body politic, rather than merely as special interest groups, and inviting all levels of government to work collaboratively on the legal and policy reforms necessary to implement Cultural Flows. New human rights charters, treaties, constitutional amendment and an Indigenous voice to parliament are not essential for the approach recommended in this paper, but they would help give substance to Cultural Flows.

The United Nations Permanent Forum on Indigenous Issues has raised concerns about other countries' ineffective handling of contentious water rights issues (Marshall & Kirby 2017). Australia is not immune to these same problems. Indeed, it is incumbent upon Australia's governments to address Indigenous water rights concerns to ensure compliance with the United Nations Declaration on the Rights of Indigenous Peoples (Marshall & Kirby 2017). Australia's obligations under international law should provide additional incentives for implementing Cultural Flows and may even be used to inform federal, state and territory legal reforms. While there are other mechanisms available that can assist in moving the Cultural Flows agenda forwards, this paper takes the view that as a strong, independent national body with a specific remit in this area, the Cultural Flows Commission would be best placed to ensure all stakeholders are afforded equal respect and influence in decision-making. Specifically, it is envisaged that the Commission will function as a mediator between First Nations and government to facilitate agreements for managing water resources; contribute to the prospective establishment of a First Nations Water Holder (that will purchase and manage Indigenous water access entitlements); undertake legislative reviews and make recommendations for reforming state, territory and Commonwealth water legislation, the NTA and the NWI; and conduct research into how Indigenous perspectives (and concepts of property) can mediate between the Australian and Indigenous legal systems.

Implementing Cultural Flows requires a new national framework, one that places First Nations at the centre of water management in Australia (Marshall & Kirby 2017; Nelson et al. 2018). Although various recommendations have been offered in this paper, the exact routes by which this will be achieved cannot be stated with certainty at this stage. Questions about matters such as the First Nations Water Holder, the mediation functions of the Commission, how new Indigenous water rights should be constructed or how

the existing native title system might be reformed should be answered by Indigenous communities, in collaboration with the other stakeholders. It is envisaged that First Nations will play a key role in leading the Commission as well as in law reform and negotiating new water sharing agreements and governance structures. Recognising and protecting Indigenous waters rights will help to empower Indigenous peoples, both economically and culturally. Implementing Cultural Flows will contribute to improved health and socioeconomic outcomes for Indigenous communities. It will also benefit the environment and Australian society at large (Weir 2010, p. 138). An inter governmental agreement on Cultural Flows and the establishment of a Cultural Flows Commission will provide Australia with a unique opportunity to demonstrate bipartisan commitment to 'closing the gap' (Australian Human Rights Commission 2019; Australian Indigenous Health Info Net 2016).

### ACKNOWLEDGEMENTS

The author would like to make acknowledgement of the Marcus Lancaster and Angus Frith who gave insights and advice on this paper when it was first drafted in requirement of the completion of a Masters of Laws subject. The author thanks Arkadi Ren Kai who provided meticulous proofing, and Capstone Editing who assisted me by providing professional editing services, and a substantive rewrite of this paper. They also acknowledge Jane Bloomfield for their assistance in writing this paper.

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