



Background Paper
National First Nations
Water Roundtable

Securing Water rights for
First Nations' self determination

ANU, Canberra

16-17 May 2023

Galing, guugu, Ngadyang (water) | *Gadygigadyi, nguramayang* (Water bag of skin) | *Marrunba* (Water bag) | *Galing balun* (Water is evaporated) | *Munun, bigun* (Water rat) | *Ngurru* (Water reeds) | *Burragu* (Water, that is stagnant) | *Galinbundinya* (waterfall) | *Weereewaa* (place of council/Lake George) | *Jullergung* (Queanbeyan River) | *Murrumbidyaa* (river) | *Kamberri* (river) | *Molongolo* (river) | *Goodradigbee* (river) | *Goobragandra* (river) | *Gudgenby* (river) | *Ngulburnan* (waterhole) | *Winyu* (Waterhole without water) | *Galinginbanga* (Waterless place, or country, a dry desert) | *Yuyuwi* (Waterless, dry, a dry plain) | *Bila* (river) | *Dhandaang* (River catfish) | *Biyal, yarra, murungal* (River red gum tree) | *Bilawi* (River she oak) | *Yiramal, badha* (River, bank of river) | *Yiramir* (Steep bank of the river) | *Yurung, walung, yubaa, galing* (Rain) | *Guwang, guwaang* (Rain, fog or mist) | *Dangaay* (Rain water, old water) | *Yubanirra* (Rain, cause to rain) | *Milgi* (Rain, large drops of rain) | *Yulubirngiin, gunhunggurran* (rainbow) | *Galimbang* (Rainy weather) | *Guwunggan* (Flood) | *Baalmanha* (Floating) | *Wirramarri* (Fish, a large cod fish) | *Gubir* (Fish, black bream, macquarie perch) | *Gagabal, gudung* (Fish, murray cod) | *Gagalin, bidyin* (Fish, golden perch, yellow belly) | *Guyaabadhambildhaany* (Fisherman) | *Ngalamarra* (Fishing) | *Maya* (Fishing net) | *Biyamby* (Fish hook, a hook) | *Yanara* (Fish spear) | *Guya* (Fish) | *Bugal* (Fish line) | *Widyarra* (Drink) | *Galindyrangurang* (Drink of honey and water) | *Yabung, yalgu, burang* (Drought) | *Bambinya* (swim) | *Dharwal, giyimbirr* (swamp) | *Dhundu, ngiyaran, gunyig* (Swan, black) | *Gunir* (Swamp wallaby) | *Gulambali, gulaygali, birriyag* (pelican) | *Dhurilaang* (River) | *gurradula* (River junction) | *bulingog* (Salt water) | *Guanamaa* (snow) | *Malundi* (Deep water) | *Mundang, murtin, murriny, wagang*

Yindyamarra bala biladha birri bina birra wuurawin Ngambri (Kamberri) ngurambangga

Respect is in the rivers moving quietly through Kamberri country

The earliest European settlers and travellers (the latter acting on information from the local settlers) referred to the Molonglo River, as it flowed through Ngambri (Kamberri) country, as both Canberra River and Canberra Creek [also Ngambra, Ngambra, Ngambri, Kamberri, Kambury, Kemberry, Kembury, Canberra Creek and, later, the Limestone River]. The reference to the river as ‘Canberra Creek’ was no doubt related to its size, which was not considerable compared to the wider and deeper Murrumbidgee River downstream.

A small stream, also referred to as ‘Canberra Creek’, runs into the Ngambri River at the foot of Black Mountain near the ANU at Acton. This creek is now known as ‘Sullivan’s Creek’ and its headwaters are located at Gooroo Hill (Goorooyaroo) east of Ginninderra Creek. Further upstream from the Ngambri River (parts of the original River are now beneath Lake Burley Griffin) is the junction of the Yealambidgee (Molonglo River) and Jullergung (Queanbeyan) Rivers, known as South Fish River and head waters being the Tinderry Ranges. East of Ngambri Creek is Weeweera (Lake George) and Bundang (Lake Bathurst), and upper Yass River (Boongaroon) and Amungula Creek. The upper or headwaters of Galari/Kalari (Lachlan River) was known as ‘Fish River’. West-South-West and downstream of Ngambri Creek is the Murrumbidgee, Gudgenby, Cotter, Goodradigbee, Goobragandra, Numeralla Rivers and numerous tributaries flowing out of the Namadgi/Brindabella/Garouk/Tinderry Ranges. The headwaters of the Murrumbidgee River are located on the Coolman Plains in the area of Blue Waterholes.

The title *Mayiny-galang-ngadyang*, the words in the flag graphic and the knowledge of the rivers in the country on which we meet were kindly gifted by Paul Girrawah House, Ngambri (Kamberri), Ngunnawal and Wiradyuri Custodian.

Background Paper

Mayiny-galang-ngadyang

Peoples' Water

National First Nations Water Roundtable

Securing Water rights for First Nations' self determination

Hosted by

Australian National University

National Native Title Council

Indigenous Land and Sea Corporation

16-17 May 2023, Canberra

Contents

Foreword	1
Context of this Roundtable	3
1. Where are we now?	5
1.1 Current status of First Nations' water rights	5
1.2 Current Policy settings.....	6
1.3 International commitments and First nations' water rights	8
2. Where do we want to get to?	10
2.1 Earlier recommendations.....	10
2.2 Prerequisites for change	12
2.3 Opportunities.....	13
3. How will we get there?	14
3.1 Options within the current system	14
3.2 Options through structural reforms.....	15
3.3 Monitoring change.....	16
In Conclusion	16
References	
Appendix A: Water statutes across jurisdictions	A1-27
Appendix B: UNDRIP	B1-2
Appendix C: Implementing UNDRIP	C1-4

Acknowledgments

This meeting is being held on the Country and Waterways of the Ngunnawal and Ngambri (Kamberri) peoples. We pay our respects to their elders past and present.

We acknowledge all First Nations people and organisations who have paved the way for water rights, interests and responsibilities. Decades of hard work have provided the foundation for this Roundtable.

This paper has benefited from the contributions of many people, with the primary authors being Ed Wensing, Kat Taylor, Pele Cannon and Lorrae MacArthur. The draft was reviewed by Prof Peter Yu (Vice President, First Nations Portfolio, ANU), Jamie Lowe (CEO, National Native Title Council), Dr. Joe Morrison (CEO, Indigenous Land and Sea Corporation) and Rene Woods (Co-Chair, Council on Indigenous Water Rights). The analysis in Appendix A was provided by Dr. Emma Carmody. Watertrust Australia coordinated external review and completion of the paper.

The cover photo is courtesy of Lorrae McArthur, ANU.

Disclaimer

Although reasonable efforts have been made to ensure that the contents of this document are factually correct, no claims are made and no responsibility taken for the accuracy or completeness of the contents. The paper is prepared solely to support the deliberations of the Roundtable.

Indigenous people should be aware that this publication may contain names of deceased persons.

Foreword

Water is a vital part of the health, well-being, and survival of all peoples, and is an intrinsic and inseparable feature of the holistic social, cultural, and economic worldview of First Nations People. Water is of core importance to cultural distinctiveness, and the ability of First Nations people to fulfil their responsibility and obligation to sustainably manage Country in accordance with laws and customs.

This perspective has not been reflected in the way that water is managed as a ‘natural resource’ in the domain of settler law, policy, and regulation, nor does it allow for the achievement of commitments to First Nations nation building through self-determination. In the context of Australia, inland water is managed in a reductive and partial way, and separately to land and sea. As a consequence, First Nations People have very limited rights to inland waters and decision-making processes compared to our recognised land and sea rights.

In the context of current policy reforms, such as the renewal of the National Water Initiative and the growing movements towards an Indigenous Voice and Treaty, there is a need to bring together First Nations Peoples’ perspectives from across the country to discuss the complex situation of First Nations water rights in Australia.

As such, the Australian National University is partnering with the National Native Title Council and the Indigenous Land and Sea Corporation to safeguard meaningful impact and inclusion of First Nations People in this significant debate through the delivery of the *Mayiny-galang-ngadyang* (Peoples’ Water) National First Nations Water Roundtable being held in Canberra at the Australian National University, 16-17 May 2023.

This background paper serves as a preamble to the Roundtable. It recognises the significant work and views that First Nations People have delivered in response to continued water reform measures. It also considers current paradigms for securing First Nations Peoples’ water rights and interests.

I look forward to discussing at the Roundtable, the primary challenges, gaps and opportunities for securing water rights for First Nation Peoples’ self-determination.



Professor Peter Yu AM
Vice President
First Nations Portfolio
Australian National University

A key part of understanding Aboriginal Water is to recognise that it is not simply about the physical delivery of water to specified locations. It is as much about the positioning of Aboriginal people in the process as it is about achieving particular physical outcomes.

Aboriginal involvement in the decision-making process is a central and inherent objective, not simply an instrumental means for identifying what it is that water resource managers should do. Aboriginal Water is not capable of being 'delivered' as a passive product or service. It is about the empowerment of Aboriginal peoples to exercise true self-determination and custodianship over their country.

First Peoples' Water Engagement Council. *Advice to the National Water Commission*. First Peoples' Water Engagement Council, 2012

Context of this Roundtable

The Australian National University (ANU), the Indigenous Land and Sea Corporation (ILSC) and the National Native Title Council (NNTC) are convening this Mayiny-galang-ngadyang (Peoples' Water) National First Nations Water Roundtable to provide a platform for prioritising national water reforms and issues impacting First Nations Peoples' self-determination.

The Roundtable comes at a time of renewed opportunity to amplify the voice and influence of First Nations Peoples on the water reform process in Australia.

A roundtable on *First Peoples' water rights and interests in national water reform* was held on 6 December 2022, co-chaired by Dr Phil Duncan (chair of the MDBA Basin Community Committee) and the Hon Tanya Plibersek MP (Minister for the Environment and Water). Minister Plibersek committed to improved coordination on First Nations' interests in water policy, not just within her portfolio but with the portfolio of the Minister for Indigenous Australians, the Hon Linda Burney.

Subsequently, on 28 April 2023, Ministers Plibersek and Burney issued a joint media release announcing that the federal Government is 'embarking on an ambitious initiative to deliver First Nations water across Australia'. Minister Plibersek commented that "Water runs through the heart of many First Nations. And it's central to First Nations development and economic self-determination, particularly in rural and remote Australia". She added that "It's important we get this right. It's a crucial step in reversing the legacy of Indigenous dispossession and under representation in water ownership and decision-making".

Through this announcement the Commonwealth Government has committed to working in "close partnership with First Nations groups to consult and design an enduring arrangement for First Nations Peoples to own, access and manage water in Australia" and "to ensure that communities are leading discussions around what the arrangements will look like, where they will sit and how they will work".

Mr Rene Woods (co-chair of the Committee on Aboriginal Water Interests) commented that "Australia has the opportunity to lead the world and to develop water holding arrangements in partnership with First Nations Peoples that meet the needs of today and can meet tomorrow's ambitions".

Prof Peter Yu AM (Vice President, First Nations Portfolio, ANU) therefore highlights that "This Roundtable is far more than a gathering to voice First Nations positions based on practical experiences and extensive research concerning First Nations rights to water. It will be an important contribution to the process of engaging governments about ensuring that their policy commitments are implemented collaboratively and with clear practical benefit for First Nations People".

This paper provides background to support the discussions in the Roundtable on three themes relating to First Nations' Water Rights:

1. Where are we now?

- 1.1. The current status of First Nations' water rights
- 1.2. Current policy settings that affect First Nations' water rights
- 1.3. International commitments that affect First Nations' water rights

2. Where do we want to get to?

- 2.1. Earlier recommendations
- 2.2. Prerequisites for change
- 2.3. Opportunities

3. How will we get there?

- 3.1. Options within the current system
- 3.2. Options through structural reforms
- 3.3. Monitoring change

1. Where are we now?

1.1. Current status of First Nations' water rights and interests^{1,2}

Aboriginal and Torres Strait Islander Peoples, the First Peoples of Australia, are the traditional owners and managers of Australia's lands and waters, have always maintained strong and vital relationships with their lands and waters since time immemorial, and share a sense of spiritual and cultural connections to, and custodial responsibilities for, water [1]. First Peoples do not divide water into separate environmental, economic, cultural, social or spiritual components. The land and the water – both above and below the ground – give life to First Peoples, their livelihoods, their cultural identity and their spiritual well-being. First Peoples have responsibilities to their lands, territories and waters, and in turn they sustain First Peoples.³

First Peoples' rights and interests in water across the Australian continent are diverse and there is no 'one-size-fits all' policy response. Given hundreds of First Nations, each with their own language, cultural practices and beliefs, First Peoples' interests and priorities differ, just as there are substantial differences in water and catchment management regimes across state and territory jurisdictions. Major spatial differences also arise from Australia's geography, ecology, hydrological regimes, and history of settlement, land use, water resources development and management.

Major disparities exist between First Nations' native title rights and land holdings under statutory land rights schemes and First Peoples' rights to water in Australia. First Nations currently have legal rights or interests over half of the Australian continental land mass [2, 3]. In contrast, First Nations' water entitlement holdings are less than 1% of all entitlements on issue [4-6]. Even where First Nations have native title rights and interests or statutory traditional ownership rights over land, their access to water entitlements and influence over water policy remain very limited [7].

Consumptive water use often dominates cultural and environmental water use. First Peoples' values in relation to water are often poorly understood or overlooked. Settler systems of law and governance over water use are often at odds with First Peoples' approaches, knowledge systems and values [8]. Water-sector language is highly technical and results in the alienation of First Peoples' knowledge and values in water use and management [1]. A rapprochement is needed between the two different values systems of water management institutions and First Nations Peoples.

¹ Throughout this paper the term 'rights and interests' includes the concepts of First Peoples' rights and interest arising from international human rights norms and standards as well as domestic statutes within Australia, their knowledges and values and their needs and aspirations.

² Throughout this paper the terms 'First Nations', 'First Peoples' and First Nations Peoples' are used to acknowledge the diversity of Australia's First Peoples. Other terms including 'Aboriginal and Torres Strait Islander Peoples' and 'Indigenous peoples' are used where they originate directly from references and statutes.

³ This discussion paper focuses on inland waters, not marine or coastal Sea Country.

Furthermore, a misconception remains that First Nations water rights, interests and needs can be met by environmental allocations. The environmental flow concept in some jurisdictions is deemed to satisfy all environmental (ecological) values, including First Nations' cultural values [1]. While there are some opportunities for synergies between environmental flows and cultural flows, in the majority of cases First Peoples' involvement in environmental water decisions is relatively rare and Indigenous ecological or traditional knowledge tends to be neglected [2, 3]. Although definitions of cultural flows include the potential for commercial or consumptive use, implementation can be framed in ways that limits contemporary commercial or consumptive uses.

The targets for water ownership and control in the *National Agreement on Closing the Gap* are yet to be finalised. However, the commercial and consumptive use of water by First Nations has important links to *Closing the Gap* targets in respect to economic development and employment opportunities to address persistent disadvantage. The Productivity Commission has recommended that where access to water entitlements supports economic development, water should be bought from the market by governments (where the consumptive pool is fully allocated), or Indigenous reserves should be created (where the consumptive pool has not been fully allocated) as has happened in the Northern Territory, Queensland and Western Australia.

In some jurisdictions, Strategic Aboriginal Water Reserves (SAWRs) have been created but not always appropriately designed. Where SAWRs have been created in overallocated systems, the SAWR is notional only and cannot be provisioned.

Climate change poses a significant and disproportionate burden on First Nations communities, their Country and cultural values. First Peoples across Australia are already observing changes to seasons, coastlines, waterways, flora and fauna that impact not only the health of Country, but also Indigenous knowledge systems and cultural economies. Extreme events such as heatwaves, cyclones, intense flooding and severe droughts have the effect of exacerbating existing pressures on freshwater resources and further entrenching First Peoples' socio-economic disadvantage – and are likely to become increasingly frequent into the future [6, 9].

1.2 Current policy settings and First Nations' water rights

Current water policy, planning and management regimes in Australia are characterised by conceptual, jurisdictional and spatial differences that pose challenges for First Nations' consequential involvement in water policy reform. The regulation and management of water in Australia is both technically complex and politically challenging. Settler water resource management regimes based on science, economics and engineering can make it difficult for water authorities to genuinely acknowledge and incorporate First Nations' knowledge and values into water policy, planning and management processes [7]. This needs to change. The joint media release by Ministers Plibersek and Burney on 28 April 2023 (*Delivering water ownership for First Nations*⁴) creates a new opportunity for First Nations' consequential involvement in water policy reform.

⁴ <https://minister.dcceew.gov.au/plibersek/media-releases/delivering-water-ownership-first-nations>

In the twentieth century, each State acquired the right to the ‘use, flow and control’ of surface and groundwater and implemented a statutory system of water licences and concessions (water use rights) to authorise the ‘consumptive use’ of water. Today, the States and Territories determine who may and may not take and use water, and they regulate the way in which it can be used. This is done through water legislation and corresponding water resource plans, which set the amount of water that can be taken from particular water resources for particular purposes.

In the Murray Darling Basin, the Commonwealth has enacted specific water legislation (*Water Act 2000 (Cth)*) and a Basin-wide water resource plan (*Basin Plan 2012 (Cth)*). The legislation established a sustainable limit on water extractions in the Basin, and the Basin Plan formed the basis for an ambitious project for water recovery for the environment via water purchase programs and efficiency projects [10]. While the Basin Plan requires water resource plans to identify Indigenous Peoples’ objectives and desired outcomes for water resource management, the Basin Plan states that in identifying these matters, regard must be had to Indigenous water values and uses as ‘social, spiritual and cultural.’ Despite acknowledging Indigenous Peoples’ interests in water in the Murray Darling Basin, the Plan does not require water resource plans to provide for Indigenous Peoples’ economic or commercial interests in water.

It was not until the end of the twentieth century that Australian governments began to recognise and allocate land titles for First Peoples under land rights legislation and the recognition of native title pursuant to the *Native Title Act 1993 (Cth)*. These actions coincided with the unbundling of water rights from land titles under the National Water Initiative (NWI) when it was first conceived in the early 1990s. These actions reinforced First Nations’ exclusion from water law frameworks, notably because First Nations Peoples did not own land from which separate water rights could be created [10].

The statutory land rights schemes, where they have been enacted in several States and Territories have overlooked the issue of First Peoples’ water rights and interests. Aboriginal People are entitled to use the land and are only entitled to use the water on the land for domestic and stock purposes without the need for a water use right. The beds and banks of watercourses and lakes may be included, but the land rights grants do not enable the recipients to use or harvest the water for any other purposes [10].

The very limited recognition of water rights under the native title system is seen as an incomplete response to the exclusion of First Peoples from water law and policy frameworks. Native title determinations only ‘serve to formalise the traditional water interests that have continued to be practiced by Indigenous Peoples despite colonisation, and which are not consistent with the allocation of water use rights to other users’ [10]. This characterisation of First Nations’ water rights is evident in the National Water Initiative (NWI), clause 53 of which states:

Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth *Native Title Act 1993 (Cth)*.’

Deep tensions remain between the native title and statutory land rights systems and water planning and governance systems. Cultural authority and governance systems will be undermined by simplistic engagement geared towards satisfying minimum procedural requirements needed to recognise enduring rights, connections to and responsibilities of First People to Country. ‘Consequential influence’ across water policy processes will be enabled by recognition and respect for the United Nations Declaration of Rights for Indigenous People (UNDRIP) principles of self-determination and free, prior and informed consent that recognises the enduring rights and connections to and responsibilities of First Peoples to Country [6, 8].

There are situations where specific water legislation or plans allocate water rights to First Peoples, but each of these operates independently of the native title system or the statutory land rights systems. State-based water legislation and water resource plans usually treat First Peoples water interests as being covered by environmental or cultural flows, or domestic and stock rights (neither of which was designed with First Peoples' interests in mind). Such entitlements are limited in scope and cannot be used for consumptive purposes. Unlike other water allocations, they also bring with them the assumption that First Peoples' water rights are, or should be, restricted to traditional, cultural purposes only. New South Wales is the only jurisdiction where its water legislation specifically provides for the allocation of water rights to Aboriginal groups, but they are highly circumscribed in nature, timebound and only allowed for cultural uses [10].

There are examples of statutory systems for recognising First Peoples' water rights from which lessons can be learned for improving future approaches. For example, the Cape York Water Management Protocol provides 485GL of water for a Cape York Peninsula Heritage Area (CYPHA) reserve. This water "is reserved for Aboriginal People and Torres Strait Islanders in Cape York to achieve their social, economic and cultural aspirations". [11]

While water ownership and control are vitally important, acknowledging First Nations' rights and interests in water requires First Nations to also have greater influence in water policy, planning and decision-making. The unfinished business of Australia's national water reforms includes securing First Nations' interests in water and their consequential influence in water policy and management decision making, not just water allocations. Recognition of First Nations' values, rights and interests in water, for water should be an integral part of the national water reform agenda and the renewal of the National Water Initiative.

1.3. International commitments and First Nations' water rights

The Commonwealth Government's recent commitment to delivering water ownership for First Nations will require a nationally consistent set of principles, protocols and practices for involving First Peoples in water policy and management decision-making. Nationally consistent principles should situate First Peoples' water rights in the context of broader transformations in Australia's relationship with its First Peoples, such as constitutional recognition and treaty making. They should also be consistent with international commitments, notably UNDRIP and the UN Sustainable Development Goals (SDGs).

In 2009, Australia endorsed the UNDRIP, which affirms the rights of Indigenous People to own, use and develop waters they traditionally owned. Victoria, ACT and Queensland have introduced human rights statutes which include provisions consistent with UNDRIP recognising First Peoples' rights to have their material and economic relationships with their lands and waters recognised and protected. Conforming with UNDRIP's standards requires governments to cease making decisions affecting Indigenous Peoples' rights and interests by imposition and instead consult with Indigenous Peoples on the basis of free, prior and informed consent [9]. This requires co-design with First Peoples that ensures their consequential influence in policy, planning and management decision-making.

UNDRIP’s principles of self-determination and of free, prior and informed consent provide the ‘gold standard’ for government engagement with Indigenous Peoples because ‘it allows for the highest form of participation’ in matters that will affect them [12].

UNDRIP stipulates their rights to self-determination and direct participation in decision-making on the basis of their free, prior and informed consent, and recognises Indigenous Peoples’ rights to their traditional lands and waters. It provides governments with a standard for fair, independent, impartial, open and transparent processes of decision-making with regard to First Peoples’ lands and waters.

A Joint Standing Committee inquiry into the application of UNDRIP in Australia is progressing. The inquiry is assessing (i) the international experience of implementing the UNDRIP; (ii) options to improve adherence to the principles of UNDRIP in Australia; and (iii) how implementation of the Uluru Statement from the Heart can support the application of the UNDRIP.

Human rights treaties like UNDRIP need to be enacted in legislation to be binding under Australian law. Separately from the Joint Standing Committee inquiry, the Australian Human Rights Commission (AHRC) has recently released a Position Paper on the need for a National Human Rights Act in Australia [13]. The paper suggests that First Nations cultural rights should be included in a new national Human Rights Act in Australia including the following rights:

“First Nations people must not be denied the right, with other members of their community...

- d. to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal Tradition or Island custom
- e. to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources”

This recommendation is consistent with Article 25 of UNDRIP, noting that all the Articles of UNDRIP should be equally applied.

Under UN Sustainable Development Goal 6 (*Ensure availability and sustainable management of water and sanitation for all*), Australia made commitments for First Peoples living in remote communities. Many remote Aboriginal and Torres Strait Islander communities have poorer quality and access to WASH (water, sanitation and hygiene) services than the national population [14, 15]. First Peoples living on Country, maintaining language and culture, and fulfilling traditional obligations to care for Country are exposed to significant adverse health outcomes because of inadequate water supply and sanitation services (estimated around 500 communities plus 1,000-1,200 homelands lack regular water quality monitoring) [15]. Despite recent initiatives in relation to improving WASH services in remote communities, these issues persist and are likely to intensify under future climate changes [16, 17], including additional threats to Torres Strait Islander and coastal Aboriginal communities already facing saltwater inundation of freshwater supplies.

2. Where do we want to get to?

First Nations Peoples have long highlighted their collective and diverse rights and interests in water and advocated for policy reform, including through the:

- Boomanulla Statement (2002)
- Garma International Aboriginal Water Declaration (2008)
- Policy Statement on North Australian Indigenous Water Rights (2009)
- Mary River Statement (2009)
- Echuca Declaration (2010)
- First Peoples' Water Engagement Council Policy Framework (2012)
- First Peoples' National Water Summit (2012)
- Fitzroy River Declaration (2017), and
- National Cultural Flows Research Project (2018).

These declarations, statements, governance frameworks and recommendations all suggest what is possible if governments increase First Nations' self-determination and influence in water policy and management decision-making across the policy cycle.

While many of the goals and recommendations from this earlier work have not been actioned, **some positive developments in partnerships between First Peoples and Commonwealth, state and territory government institutions provide models for what can be achieved.**

These include the:

- Ngarrindjeri Yarluwar-Ruwe program in South Australia.
- Gayini (Nimmie-Caira) wetlands in NSW.
- The Cape York Water Plan and the CYPHA Indigenous Reserve in Queensland.
- The *Willip-gin Birrarung Murrone Act* (2017) (Vic) and associated Yarra River Action Plan in Victoria establishing the Birrarung Council as a statutory body to provide independent advice with Traditional Owners as members of this Council.
- The collaborative governance framework developed by the Martuwarra Fitzroy River Council for the Fitzroy River (Martuwarra) in Western Australia.

2.1. Earlier recommendations

As this roundtable will consider options for consequential influence of First Nations Peoples in water policy and management decision making, previous recommendations that may remain relevant need to be on the table for interrogation by the roundtable participants.

The 2012 First Peoples' Water Engagement Council (FPWEC) made recommendations that remain relevant today. Specifically, FPWEC advised that the Council of Australian Governments (COAG) establish and implement a National Aboriginal Water Strategy and that an Aboriginal Economic Water Fund be established to facilitate the Strategy. Any body created to manage the Strategy and Fund would need to be:

- an independent body managed by Aboriginal people,
- accessible at the local level with local voices, and
- accountable, transparent and providing a flow of services to people on the ground.

FPWEC further advised that Australian governments provide “the necessary capacities and opportunities for Aboriginal people to compete in the water market, including infrastructure costs, administrative costs and the purchase of water entitlements”. [18]

Other recommendations and policy opportunities include:

- Re-establishing a national First Peoples advisory body for water.
- Advocating for policy changes that would alter or create the statutory and administrative frameworks required to ensure First Peoples are able to fully participate in water policy, planning and management on their own terms.
- Ensuring that long-term funding arrangements for Indigenous Ranger programs include sufficient resourcing and support to enable a focus on First Peoples' leadership in water management regimes.
- Encouraging specific partnerships between First Peoples and government institutions to continue to demonstrate the potential of successful collaborative and other 'hybrid' governance frameworks in practice. [7]

The National Cultural Flows Research Project (2018) recommended Commonwealth, state and territory water legislation be developed that recognises the rights of First Peoples to 'access, use and sustainably manage water resources'. The Project recommended the following four models for legislative change that would improve First Peoples' water rights consistent with UNDRIP principles:

- Provision of water rights (entitlements and shares) – the allocation or grant of water entitlements or shares to First Peoples under existing state and territory legislation and for 'any purpose'.
- Protection and enhancement of water rights linked to native title and statutory land rights – options here include amendments to the *Native Title Act 1993* (Cth) and statutory land rights acts to establish clear connections between First Peoples' land and water management rights and regimes.
- Provision of statutory First Peoples' water reserves – outside the consumptive pool for the exclusive use of Indigenous communities, and for 'any purpose'.
- Development of institutions, led by First Peoples, empowered to hold, govern and manage First Peoples' water holdings as per their objectives, values and interests.

The above models, if enacted, would create portfolios of different water rights for Indigenous communities and therefore there is likely to be a need for institutions to manage these rights across First Nations communities. [7, 19]

Additional approaches to provide First Peoples with access, management and control of water within existing water markets and water planning processes (including where native title has been extinguished permanently) include:

- Working directly with First Peoples to build capacity to understand water legislation, water markets and water planning processes and developing the capacity and networks to allow First Peoples to work together, across the nation, on future water management policies and decisions.
- Building capacity of government agencies to engage authentically with First Nations Peoples on issues of water rights and interests, using the UNDRIP principles of free, prior and informed consent.
- Providing the required infrastructure (e.g. pipes and pumps) to move water from a river or aquifer to on-Country storage or to places that no longer receive water that may be culturally significant or provide opportunities for economic development.
- Providing financial assistance to purchase water allocations and entitlements within existing water markets. This financial assistance could come from governments establishing First Peoples' water funds or from the private or philanthropic sectors.
- Contracts between First Peoples' communities and government agencies that provide for First Peoples' access, management and control of water or co-management of existing water holdings. An example of this approach is the agreements between the Ngarrindjeri Regional Authority and the South Australian Government and subsequently the Commonwealth Environmental Water Holder.
- Brokering arrangements with private landholders to enable First Peoples to access riparian areas of cultural significance on those properties, to benefit from temporary trade and/or to benefit from voluntary restrictions on pumping.
- Developing alternative governance and legal models that are consistent with First Peoples' values and interests (as distinct from frameworks anchored in settler notions of property rights). [20]

The concept of First Nations strategic water reserves has gained traction in recent years, with the inclusion of Indigenous water reserves into some water allocation plans in the Northern Territory, Queensland and Western Australia. Water allocation plans define the consumptive pool of water that can be made available for consumptive use in a given water system. Possible uses of water reserves include making sure water is available for future economic development; leasing water as part of negotiations with third parties or in some cases, accessing water for future trading water in water markets. In water planning areas that are still under-allocated, Indigenous water reserves can be introduced strategically in overall water planning. Where water allocation planning areas are already fully allocated and there is nothing left to 'reserve', Indigenous water reserves need to become an integral part of existing water allocation planning. [21]

2.2. Prerequisites for change

Changes to Australian water rights regimes to improve outcomes for First Peoples must begin with approaches that empower First Nations to define water governance and management frameworks for their lands and waters, followed by their genuine incorporation into water policy and planning processes.

New frameworks will need to be devised which must incorporate the principles of self-determination and free, prior and informed consent consistent with UNDRIP, and be backed by significant improvements to Commonwealth, State and Territory laws.

Essential prerequisites are:

- That First Nations are involved in all decision making about inland waters, catchment management and groundwater management, especially in relation to the economic and cultural values to First Nations.
- That the representation of First Nations includes those with appropriate cultural authority from across Australia.
- That the diversity of ways First Nations need to be involved in decision-making across regulated and unregulated systems, and fully allocated and unallocated systems, is appropriately reflected in water policy, planning and decision making.
- The difference between First Peoples' rights as Australian citizens and their rights as Australia's First Nations are recognised, understood and accommodated.

2.3. Opportunities

Based on the analysis in this paper, at least five opportunities emerge for enabling First Peoples' consequential engagement in the national water reform process. These are proposed for consideration, comment, change and addition by the roundtable participants:

1. **A nationally consistent but flexible set of principles, protocols and practices** to ensure First Peoples have consequential influence in decision making across the water policy, planning and management cycle.
2. **A significant reframing of water policy, planning and governance frameworks with a shift away from tokenism to genuine structural reform [7, 18].** Recognition of water ownership and control is vital, but greater influence over how water is managed is also required. **Appendix A** provides a high-level overview of how current water allocation/water sharing statutes across jurisdictions provide for First Peoples' values, rights and interests.
3. **Application of the full suite of international human rights, norms and standards to water policy, planning and management decision making**, the most significant of which is the United Nations Declaration on the Rights of Indigenous Peoples [22, 23, 24]. The key mechanisms for implementing UNDRIP are the principles of self-determination and free, prior and informed consent (see **Appendix B**). These two principles are inextricably intertwined [25]. A preliminary approach to implementing these principles is set out in **Appendix C**.

4. **Recognition of the fact that First Peoples' rights and interests in water across the Australian continent are diverse and a 'one-size-fits all' policy response is inappropriate.** New approaches to water planning and management decision-making will need to be devised that recognise different values systems and are capable of accommodating place-specific governance arrangements, including 'nation-based' approaches in some jurisdictions.
5. **Capacity building in water management institutions and First Nations communities** to build a bridge between different values systems and to ensure First Peoples have a consequential influence in decision making.

3. How will we get there?

Two pathways for achieving better outcomes for First Nations Peoples in the water reform process are (i) to pursue a range of options within the current system and (ii) to pursue structural reforms. These are not mutually exclusive pathways and there may be value in pursuing elements of both. Listed below for consideration by roundtable participants are several options for both pathways. They are provided to stimulate discussion and are all open for comment, amendment, addition or rejection.

3.1. Options within the current system

Buying water and support for licence applications. One practical way of returning water to First Peoples is for governments to buy water entitlements from the open market. While this appears to be simple, it is fraught with political difficulties. It also requires willing sellers, which is problematic in overallocated systems and competition for water entitlements is fierce. Furthermore, First Nations have not contributed to the over-allocations, and the First Nations in over-allocated systems should not be further penalised. In under-allocated systems First Nations can be supported to purchase water licences, but that only works where unallocated water is available. In the Murray Darling Basin (MDB), First Nations who temporarily traded water on the market reported that it provided an important source of income, but those who aspired to use the water on their Country, didn't have access to the necessary capital and infrastructure to make beneficial use of the water.

Establishing First Nations water holding bodies or a First Peoples Water Trust. The First Peoples' Water Engagement Council in 2012 suggested the establishment of an Indigenous Economic Water Fund (IEWF). The idea is that the IEWF would acquire water entitlements in locations where water entitlements will provide economic benefit to First Peoples, based on a strategy which would define the consumptive use or uses in a location that will provide the optimal cultural and economic benefit to the Indigenous People in that location. The IEWF would not be available for human needs water as human needs water should be available to all Australians as a priority over other consumptive uses. There are several different models for such an approach, with varying levels of First Peoples' involvement. In some situations, governments may still have over-riding authority for water allocations.

Strengthening the National Water Initiative (NWI). Reviews of the NWI by the Productivity Commission highlighted it is lacking in several key areas, including climate change and First Peoples' water rights. The Commission proposed that a new NWI element be co-designed to include dedicated Aboriginal and Torres Strait Islander Peoples' interests in water and involvement in water management; improve cultural outcomes by using existing frameworks; and Improve access to water for economic development [4]. The Commission further proposed that the new elements be developed by the Committee on Aboriginal Water Interests (CAWI) to achieve cultural and economic outcomes and to address the targets in the National Agreement on Closing the Gap [4].

Further leveraging the native title system and other legislation. There is some scope for making better use of current legislation, including existing water acts and regulations through, for example, the creation of strategic reserves or specific allocations for cultural flows, the recognition of water rights in the native title system, and through heritage legislation. There are a wide range of options that could be pursued, but in many cases positive outcomes for First Peoples are more likely to be sporadic, very dependent on local circumstances, and constrained by other State/Territory legislative and regulatory frameworks.

New water legislation. Water laws in eastern Australia provide for environmental flows but pay scant regard to First Peoples' water rights. Arguably there is a need for new water legislation which specifically redistributes water in a way that accords binding rights to First Nations Peoples in recognition of how people relate to water places. There is increasing support for exploring this concept of relationality as a basis for water authority, use, rights and governance [26].

3.2. Options through Structural Reforms

Imposing a moratorium on giving away more water. Given the various commitments to treaty discussions and developments in most jurisdictions around Australia and the forthcoming referendum on inserting an Aboriginal and Torres Strait Islander Voice into Australia's Constitution, there is a justification for pausing new water licence applications and/or a moratorium on the issue of new licences or water entitlements being issued. Some governments may, however, argue they are not able to take such actions as the legislation under which they operate obligates them to issue valid licences or allocations if all other regulatory requirements are satisfied.

Treaty and other negotiated settlements. Treaty making aims to build a new relationship between governments and First Peoples based upon mutual recognition and respect for each other's sovereignty. This is where the principles of self-determination and free, prior and informed consent are highly relevant, such that First Peoples decide First Peoples' issues. The Victorian Government and the First Peoples Assembly of Victoria recently reached agreement on a Treaty Negotiation Framework which provides for a State-wide treaty and treaties at the Traditional Owner or First Nation level. Clause 25 of the Negotiation Framework provides "There are no matters that cannot or must not be agreed in the course of Treaty negotiations". Clause 25.2 includes "land and water justice" as one of many matters that State-wide and Traditional Owner treaty negotiations could consider.

Co-governance or other collaborative arrangements. Co-governance means that governance responsibilities can be shared between a government and First Peoples. Co-governance arrangements could also have several First Nations groups working together with governments as a council or commission. Many such arrangements already exist in an advisory capacity. The challenge is to ensure that First Nations organisations or groups on such bodies have decision making powers as self-determining peoples.

Alternative property rights frameworks. Alternative frameworks for water "property" rights could be developed. First Peoples' world views and values about water are inextricably linked. Land and water – above and below the ground – give life to First Peoples, their livelihoods, their cultural identity and their spiritual well-being. Settler water resource management regimes are based on science, economics and engineering, and water authorities have difficulty incorporating First Peoples' knowledge and values into water policy, planning and management processes. This needs to change. One way is to change the way water is owned, accessed and managed. While this may be difficult in areas with high allocations given resistance from existing water interests, there could be more scope to make such changes in areas with low levels of water allocations. A useful starting point would be to recognise First Peoples' special association to water as a first right before other water rights and interests are recognised.

Legal personhood for nature/rivers. Legal personhood for nature (including surface water, ground water and ephemeral flows) is a new way of giving nature legal standing. Legal personhood is achieved by writing a new piece of legislation that establishes the new legal entity that represents the river (or other thing) and define its rights, duties, and governing structure. There is a wide variety in the ways that legal personhood for nature has been enshrined in law, all with advantages and disadvantages. Opinions are divided about legal personhood for nature. Advocates say that the legal recognition of nature's rights is consistent with many Indigenous worldviews and law, while opponents say that the structure emerges from a 'Western' environmental legal tradition and may actually undermine Indigenous rights [3]. Rather than creating a new legal entity that expresses a river's rights, it may be preferable to instead empower First Nations People to take a pivotal, even primary, role in caring for Country.

3.3. Monitoring change

Monitoring change in First Nations' consequential involvement in water policy reform, whether it be through pursuing a range of options within the current system or pursuing structural reforms, will be important. Benchmarks for monitoring change include:

- That First Nations are fully and meaningfully involved in all decision making about inland waters, catchment management and groundwater management, especially in relation to the economic and cultural values to First Nations.
- That the representation of First Nations includes those with appropriate cultural authority from across Australia.
- That the diversity of ways First Nations need to be involved in decision-making across regulated and unregulated systems, and fully allocated and unallocated systems, is appropriately reflected in water policy, planning and decision making.
- The difference between First Peoples' rights as Australian citizens and their rights as Australia's First Nations are recognised and fully understood.

In Conclusion

First Nations Peoples have used, managed and cared for rivers, streams, creeks and lakes on their ancestral lands and in accordance with their laws and customs for generations. Through the impacts of colonisation, these rights have been taken away or severely eroded. It is time therefore to imagine a different future. A future where the cultural, environmental and commercial interests of First Nations Peoples are recognised and provided for in the laws that govern this country.

This paper has assessed some options to increase the consequential and ongoing engagement of First Peoples on issues around their water rights and interests, especially relating to a renewed National Water Initiative and broader water and catchment decision making. With a new commitment from the Commonwealth to delivering water ownership for First Nations, and progress towards treaties in some jurisdictions, the time is right to amplify the voice and influence of First Peoples in the national water reform agenda.

“As First Nations Peoples, we have the jurisdiction to be the guardians of water for present and future generations, not just for our Peoples, but for everyone. We look forward to being able to do so.” (Prof Peter Yu, ANU)

References

- [1] Bradley J Moggridge and Ross M Thompson. "Cultural value of water and western water management: An Australian indigenous perspective". In: *Australasian Journal of Water Resources* 25.1 (2021), pp. 4–14.
- [2] Rohan Jacobsen, Claire Howell, and Steve Read. *Australia's Indigenous land and forest estate: Separate reporting of Indigenous ownership, management and other special rights*. Tech. rep. ABARES Research Report 20.15., (2020).
- [3] Productivity Commission et al. *National Water Reform 2020*. Productivity Commission, (2021).
- [4] Sue Jackson and Marcia Langton. "Trends in The Recognition of Indigenous Water Needs in Australian Water Reform: The Limitations of 'Cultural' Entitlements in Achieving Water Equity". In: *Journal of Water Law* 22.2-3 (2011), pp. 109–123.
- [5] Sue Jackson. "Enduring and persistent injustices in water access in Australia". In: *Natural Resources and Environmental Justice: Australian Perspectives* (2017), pp. 121–32.
- [6] Lana D Hartwig et al. "Water colonialism and Indigenous water justice in south-eastern Australia". In: *International Journal of Water Resources Development* 38.1 (2022).
- [7] Point Advisory and Alluvium Consulting. *Australian Freshwater Study – First Peoples' Water Rights Issues Paper*. Report prepared for The Ian Potter Foundation and The Myer Foundation, Melbourne, (2019).
- [8] Virginia Marshall. *Overturing aqua nullius*. Aboriginal Studies Press Canberra, ACT, (2017).
- [9] Ed Wensing. "Indigenous peoples' human rights, self-determination and local governance-part 1". In: *Commonwealth Journal of Local Governance* 24 (2021) pp. 98-123.
- [10] Macpherson, Elizabeth. *Indigenous Water Rights in Law and Regulation. Lessons from Comparative Experience*. Cambridge Studies in Law and Society, Cambridge University Press, Cambridge (2022).
- [11] Department of Natural Resources, Mines and Energy, Qld. *Cape York Water Management Protocol*. (2019).
- [12] UNFAO. *Free Prior and Informed Consent - An indigenous peoples' right and a good practice for local communities. Manual for project practitioners*. Food and Agriculture Organization of the United Nations (2016).
- [13] AHRC. *Free and Equal. Position paper: a Human Rights Act for Australia*. Australian Human Rights Commission (2022).
- [14] NAILSMA. *A Policy Statement on North Australian Indigenous Water Rights – Issued by the North Australian Indigenous Land and Sea Management Alliance and the Indigenous Water Policy Group November 2009*. 2009.
- [15] Nina Lansbury Hall. "Challenges of WASH in remote Australian Indigenous communities". In: *Journal of Water, Sanitation and Hygiene for Development* 9.3 (2019), pp. 429–437.
- [16] CD Beal et al. *Exploring community based Water Management Options for Remote Australia. Final Report for the Remote and Isolated Communities Essential Services Project*. (2019).
- [17] Paul R Wyrwoll et al. "Measuring the gaps in drinking water quality and policy across regional and remote Australia". In: *npj Clean Water* 5.1 (2022), pp. 1–14.
- [18] First Peoples' Water Engagement Council and Phil Duncan. *Advice to the National Water Commission*. First Peoples' Water Engagement Council (2012).
- [19] National Cultural Flows Research Project. *Cultural Flows. A Multi-Layer Plan for Cultural Flows in Australia: Legal and Policy Design*. Final Report (2018).

- [20] S Hemming et al. "Indigenous nation building. A new direction for water planning". In: *Special Edition, Sustainably managing fresh water resources, Journal of Ecology and Society* 22.2 (2017).
- [21] Taylor, K., Poelina, A., Nikolakis, W., Larsen, L. and Grafton, R.Q. *Indigenous water reserves in Australia: 2022 policy brief*, version 1.0. Water Justice Hub and Martuwarra Fitzroy River Council. (2022)
- [22] Referendum Council. *Final report of the Referendum Council*. Department of the Prime Minister and Cabinet (Australia), 2017.
- [23] Referendum Council. *Uluru statement from the heart: Statement of the First Nations national constitutional convention*.
- [24] Megan Davis and George Williams. *Everything you need to know about the Uluru Statement from the Heart*. UNSW Press/NewSouth Publishing, 2021.
- [25] Grace Nosek. "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision Making; Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions". In: *UBCL Rev.* 50 (2017), p. 95.
- [26] Macpherson, Elizabeth. "Can Western water law become more 'relational'? A survey of comparative laws affecting water across Australasia and the Americas." *Journal of the Royal Society of New Zealand* 53.3 (2023) pp 395-424.
- [27] United Nations. *Report of the Special Rapporteur on the rights of Indigenous Peoples, General Assembly Sixty-eighth session, A/68/317*. 2013.
- [28] E Wensing. *Land Justice for Indigenous Australians: How Can the Two Systems of Land Ownership, Use and Tenure Co-Exist with Mutual Respect Based on Parity and Justice?* PhD thesis. Australian National University, (2019).
- [29] UNHRC. *Final report of the study on indigenous peoples and the right to participate in decision-making - Report of the Expert Mechanism on the Rights of Indigenous Peoples*. 18th session, agenda item 5: United Nations Human Rights Council, Aug. 17, 2011.
- [30] Australian Human Rights Commission. *The community guide to the UN Declaration on the Rights of Indigenous Peoples*. (2010).
- [31] Iulia Antoanella Motoc. *Expanded working paper offering guidelines to govern the practice of implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources /*. Geneva: United Nations, July 2005.
- [32] Australian Government and First Nations Heritage Protection Alliance. *Partnership Agreement with Australian Government and First Nations Heritage Protections Alliance on Indigenous Cultural Heritage*. (2021).
- [33] UNHRC. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*. Type: dataset. United Nations Human Rights Council, July 15, 2009.
- [34] Theresa Buppert and Adrienne McKeehan. "Guidelines for applying free, prior and informed consent: a manual for conservation international". In: *Conservation International, Arlington, VA, USA* (2013).
- [35] The Nature Conservancy *Human Rights Guide* (undated). <https://www.tnchumanrightsguide.org/wp-content/uploads/TNC-Full-Guide-01-01.pdf>

Appendix A: Water statutes across jurisdictions

The tables in this appendix are not legal advice. They are a preliminary review of water allocation/water sharing legislation only and as such do not cover all possible applicable provisions in enabling Acts. Nor do they review associated delegated legislation (for example water plans) in detail, or examine individual Indigenous Land Use Agreements (ILUAs) and their intersection with water legislation.

The Tables are listed by jurisdiction with details provided under three sub-headings as follows:

- Core provisions;
- Provisions for water plans at catchment scale; and
- Provisions for licensing, approvals and unallocated water.

For each of the jurisdictional tables in this appendix, it should be noted that:

1. Under the heading **Recognises First Nations Peoples' values, rights and interests...**

The objects of legislation are not in-and-of-themselves legally binding. However, they can be used to assist decision-makers and courts to interpret (potentially ambiguous) substantive (binding) provisions. In the case of multiple, competing objects in a statute, one of these (pertaining, for example, to Indigenous rights and interests) is highly unlikely to trump the others in any such interpretive exercise. Finally, and as a related point, the wording of objects (precise and directed v general and aspirational), together with the number of objects that focus on a particular subject (in this case Indigenous rights and Interests) will determine how they can be used to interpret relevant substantive provisions.

2. Under the heading **Provides that water plans must set aside water for the environment...**

Most of these statutes provide little guidance as to how the environment's share of water is to be determined.

3. Under the heading **Provides for native title rights in relation to water managed under the legislation...**

No water legislation includes duties or other legally binding obligations to protect water resources so that native title rights can be effectively exercised in the affected river, wetland etc.

4. Under the heading **Water rights unbundled ...**

Generally speaking, for all the jurisdictions, the term 'unbundled' refers to various components (water extraction licence, use rights, works approvals for pumps etc.) being broken into individual water extraction licences and approvals. Unbundled water extraction licences are separate property rights that can be traded in accordance with relevant rule (as can their constituent parts in certain circumstances). They are usually perpetual in nature (although can be revoked in certain circumstances). Further, they can generally be mortgaged in the same way as land. These unbundled licences and approvals are also separated from land titles.

Commonwealth

Water Act 2007 (Cth)

Core Provisions

Recognises First Nations Peoples' values, rights and interests	No.
Establishes a hierarchy of water sharing principles or equivalent that provide for First Nations Peoples' rights, values and interests	No.
Establishes water management principles or equivalent to guide decision making that explicitly recognise Indigenous rights, interests and values	No.
Establishes environmental water holder or equivalent that is legally entitled to deliver water to care for country	<p>Part 6 of the Act establishes the Commonwealth Environmental Water Holder (CEWH). Pursuant to s.105(3), (4), its functions focus on achieving environmental outcomes in accordance with various criteria, including the contents of the environmental watering plan (see Chapter 8 of the Basin Plan).</p> <p>Dual environmental and cultural outcomes are arguably possible, but the legislated emphasis is on the former.</p> <p>Note: Chapter 8 of the Basin Plan states that in developing the Basin-wide environmental water strategy and annual environmental watering priorities for the Basin, the MDBA must have regard to 'Indigenous values and Indigenous uses' - see cl. 8.15(4)(e) and cl. 8(3)(g).</p>
Establishes First Peoples' water holder(s) or equivalent	No.

Provisions for water plans at catchment scale

Establishes statutory water plans	Yes. See Part 2, Division 1 which provides for the creation of the Basin Plan. See also Part 2, Division 2 which provides for the creation of 'water resource plans' (WRPs).
Provides that water plans must set aside water for the environment	Yes. The Basin Plan must contain a Basin-wide sustainable diversion limit (SDL) which reflects an 'environmentally sustainable level of take (ESLT)' and which is based on best-available science and socio-economic evidence. See ss.23(1) and s.21(4)(b).

Provides for native title rights in relation to water managed under the legislation	No. <i>Additional Note:</i> Section 13 provides that nothing under the Act affects the operation of the <i>Native Title Act 1993</i> .(Cth).
Provides that water plans must set aside water for First Peoples' purposes (beyond native title rights)	No. <i>Additional note:</i> The Basin Plan contains 'soft requirements' regarding the cultural matters that must be identified in WRPs. It also contains mandatory consultation provisions. See Chapter 10, Part 14.
Requires water plans to include legally binding cultural flow targets linked to Country	No. <i>Additional note:</i> Pursuant to s.43(1)(b), a WRP must state the desired cultural outcomes of the management and allocation of water under the plan.

Provisions for licensing, approvals and unallocated water

Water rights unbundled	This is provided for under State and Territory legislation.
Requires allocation of a minimum percentage of newly unbundled or issued licences to First Nations Peoples	Licences are issued under State and Territory legislation.
Establishes First Nations' water licensing regimes for a) cultural purposes b) other purposes	Licences are issued under State and Territory legislation.
Provides for embargos on licensed and other extractions to protect Country /meet cultural flow targets set out in water plans/ensure native title rights can be exercised	No.
Provides mechanism to compulsorily acquire water licences (to reallocate to Indigenous Peoples)	No. Pursuant to s.255, compulsory acquisition of water licences (water access rights) is explicitly prohibited. Any acquisition of water access rights is therefore voluntary and must be compensated – see s. 254.
Contains provisions which set out a) how unallocated water to be allocated b) requires % of unallocated water to be allocated to Indigenous Peoples	No.

<p>Reviews</p>	<p><i>Water Act 2007</i> (Cth) review – pursuant to s. 253, the Minister must cause a review of operation of Act and the extent to which its objects have been achieved to occur before the end of 2024.</p> <p>Basin Plan (2012) review – pursuant to s.50 of the Act, these must occur every 10 years. Next review must be completed during 2026.</p> <p>The Basin Plan also includes a number of provisions which allow for reviews to be undertaken. See for example cl. 6.06, which provides for the review of SDLs and which must take into account climate change.</p> <p>There are a number of other provisions in the Basin Plan which allow for the review of the environmental watering strategy (cl.8.17) long-term watering plans (cl.8.22), annual environmental watering priorities (cl.8.31), water quality targets and salinity management plan (cl.13.08).</p> <p>WRP – accreditation period set out in cl. 64 (10 years as per s. 50 of the <i>Legislation Act 2003</i> (Cth)) or earlier if certain amendments are made to the Basin Plan.</p>
-----------------------	--

Australian Capital Territory

Water Resources Act 2007

Core Provisions

Recognises First Nations Peoples' values, rights and interests	No.
Establishes a hierarchy of water sharing principles or equivalent that provide for First Nations Peoples' rights, values and interests	No.
Establishes water management principles or equivalent to guide decision making that explicitly recognise Indigenous rights, interests and values	No.
Establishes environmental water holder or equivalent that is legally entitled to deliver water to care for country	No.
Establishes First Peoples' water holder(s) or equivalent	No.

Provisions for water plans at catchment scale

Establishes statutory water plans	The Act refers to a 'water resource plan' (which is not defined). It is implied that this is a reference to the water resource plans that must be prepared under the Water Act 2007 and Basin Plan.
Provides that water plans must set aside water for the environment	Part 3 of the Act provides for the creation of 'environmental flow guidelines' ¹ , which are a disallowable instrument. Section 17 notes that diversions must stay within the SDLs for surface and groundwater resources (as per the Cth Water Act 2007).
Provides for native title rights in relation to water managed under the legislation	No.
Provides that water plans must set aside water for First Peoples' purposes (beyond native title rights)	No.
Requires water plans to include legally binding cultural flow targets linked to Country	No.

¹ See <https://www.legislation.act.gov.au/di/2019-190/>

Provisions for licensing, approvals and unallocated water

Water rights unbundled	Yes
Requires allocation of a minimum percentage of newly unbundled or issued licences to First Nations Peoples	No.
Establishes First Nations' water licensing regimes for a) cultural purposes b) other purposes	No.
Provides for embargos on licensed and other extractions to protect Country /meet cultural flow targets set out in water plans/ensure native title rights can be exercised	No. <i>Additional note: s.71 empowers the Minister to restrict water extraction in certain circumstances, including where extractions may adversely affect the environment.</i>
Provides mechanism to compulsorily acquire water licences (to reallocate to Indigenous Peoples)	No. However, land can be acquired under the Land Acquisition Act 1994 which could affect associated water infrastructure and licences.
Contains provisions which set out a) how unallocated water to be allocated b) requires % of unallocated water to be allocated to Indigenous Peoples	Pursuant to s. 17(4), the Minister can reserve water in a water management area for future use. There is no obligation to transfer unallocated water to Indigenous peoples.
Reviews	Act: not specified. Environmental flow guidelines – cl. 1.5 of the guidelines states that they will be reviewed in 5 years (which would be 2024).

New South Wales

Water Management Act 2000 (NSW)²

Core Provisions

Recognises First Nations Peoples' values, rights and interests	Section 3 of the Act includes 8 objects. Object 3(c) includes 4 sub-objects, two of which pertain to Aboriginal culture and heritage. These two sub-objects are framed by the words 'recognise and foster'.
Establishes a hierarchy of water sharing principles or equivalent that provide for First Nations Peoples' rights, values and interests	Section 5(3) of the Act includes a hierarchy of water sharing principles (environment, basic landholder rights). The definition of basic landholder rights includes native title rights.
Establishes water management principles or equivalent to guide decision making that explicitly recognise Indigenous rights, interests and values	Section 5(2) includes 8 principles that 'should' be followed and which are preceded by the word 'generally'. 2 of these 8 principles pertain to Aboriginal rights, values and interests. 5 of these principles concern various components of the environment.
Establishes environmental water holder or equivalent that is legally entitled to deliver water to care for country	<p>The Act does not formally establish an environmental water holder. However, licenced water for environmental use is held by an entity known as the Water Administration Ministerial Corporation which has a range of functions prescribed by the Act (Chapter 8, Part 2). None of these relate specifically to environmental water, but its powers include, at s. 372(1)(c), the acquisition of water rights.</p> <p>In practice, the licensed water that it purchases or otherwise acquires is managed by the Department of Environment and Planning³.</p> <p>The Act does not limit the use of this water to environmental outcomes. As such, it could be used to achieve dual environmental and cultural outcomes.</p>
Establishes First Peoples' water holder(s) or equivalent	No.

² This review does not analyse the *Water Act 1912 (NSW)*, small vestiges of which are still in force. That is, it has been almost entirely replaced by the *Water Management Act 2000 (NSW)*.

³ A list of current holdings can be found here: <https://www.environment.nsw.gov.au/topics/water/water-for-the-environment/about-water-for-the-environment/current-water-holdings>

Provisions for water plans at catchment scale

<p>Establishes statutory water plans</p>	<p>Yes. See Chapter 2, Parts 2 to 5. Almost all of the state’s water resources are covered by this Act and associated ‘water sharing plans’ (WSPs).</p> <p>A very small number of groundwater resources and associated licences still fall under the <i>Water Act 1912</i> (NSW).</p>
<p>Provides that water plans must set aside water for the environment</p>	<p>Sections 8(1A),(2) provide that WSPs must set aside some water for the environment (known as planned environmental water). Section 8(1) states that that this must not be ‘taken or used for any other purpose’.</p>
<p>Provides for native title rights in relation to water managed under the legislation</p>	<p>As previously noted, s. 20(1) states that a WSP must identify water requirements for basic landholder rights, which includes native title rights.</p> <p>The Barwon-Darling WSP intersects with the Barkandji native title determination area and as such usefully illustrates how native title is addressed in a WSP. Specifically, cl. 20 of this plan states that:</p> <p><i>The requirement for water to satisfy native title rights is the water that may be taken in the exercise of native title rights in accordance with the Native Title Act 1993 of the Commonwealth, including—</i></p> <ul style="list-style-type: none"> <i>a) the native title determination for the Barkandji Traditional Owners #8 (Parts A and B, National Native Title Tribunal references NCD2015/001 and NCD2017/001),</i> <i>b) any other determination of native title,</i> <i>c) any indigenous land use agreement.</i> <p>Put differently, the Barwon-Darling WSP merely refers to the native title determination. It does not specify how that determination will be given effect via, for example, legally binding cultural flow targets (designed to ensure sufficient flows are available for cultural practices to occur).</p>

<p>Provides that water plans must set aside water for First Peoples' purposes (beyond native title rights)</p>	<p>No.</p> <p><i>Additional notes:</i></p> <p>Section 20(1)(b) states that WSPs must include provisions that allow for the 'identification' of water required for basic landholder rights, which includes native title rights.</p> <p>Sections 21(e), 24(g), 27(e), 30(f), 33(e) state that a WSP 'may' include additional measures to give effect to the objects of the Act and the water management principles.</p> <p>Section 35(1) states that a WSP must include a vision statement, objectives consistent with that statement, strategies for reaching those objectives and performance indicators re the strategies.</p> <p>In practice, the requirements set out in s.35(1) translate into (largely) high level, aspirational provisions in relation to Indigenous rights, values and interests. Alternatively, they piggyback other environmental obligations (such as the requirement to set aside some water for the environment). See for example cl.12 of the Water Sharing Plan for the Barwon-Darling Unregulated Water Source 2012 (Barwon-Darling WSP).</p>
<p>Requires water plans to include legally binding cultural flow targets linked to Country</p>	<p>No.</p>

Provisions for licensing, approvals and unallocated water

<p>Water rights unbundled</p>	<p>Yes, with some limited exceptions.</p>
<p>Requires allocation of a minimum percentage of newly unbundled or issued licences to First Nations Peoples</p>	<p>No.</p> <p><i>Additional note:</i> NSW is in the process of issuing a new category of licences known as 'floodplain harvesting licences' across 5 of catchments in northern NSW. Licences None of these licences have been set aside for Indigenous Peoples.</p>

<p>Establishes First Nations' water licensing regimes for a) cultural purposes b) other purposes</p>	<p><i>Cultural purposes</i></p> <p>Section 61(1)(a)(i) states that a person may apply for a subcategory of 'specific purpose' licence if the regulations or a WSP provides that they may do so in relation to that specific subcategory.</p> <p>Clause 4(2) of the Water Management (General) Regulation 2018 (NSW) (WM Regulation) specifies one such 'Aboriginal' subcategory that may be applied for, namely an 'Aboriginal cultural' licence, which may only be used for 'Aboriginal cultural' purposes.</p> <p>These provisions must be read in conjunction with relevant clauses in WSPs. Analysis of the Barwon-Darling WSP provides a useful illustration of how this works in practice. Specifically, cl. 40(2) limits such licences to 10ML/year, while cl.40(4) states (broadly) that it may only be granted for cultural purposes undertaken by Aboriginal people.</p> <p>Uptake of these licences is reportedly very low.</p> <p><i>Other purposes</i></p> <p>Schedule 3 of the WM Regulation sets out a range of other special purpose subcategories that apply to different Aboriginal uses (such as 'Aboriginal commercial'), but none of these have been activated under the Regulation.</p> <p>However, the subcategory of 'Supplementary water (Aboriginal Environmental)' is provided for in cl. 40(3),(5),(6) of the Barwon-Darling WSP. It is limited to 500ML/year per licence and a total of 2000ML/year overall. It may only be used by an Aboriginal person or community to enhance Aboriginal cultural values of important billabongs and lagoons.</p> <p>Note: supplementary licences are lower order (lower reliability) licences.</p> <p>It appears that no such licences have been issued.</p> <p>A review of all WSPs in the state would need to be undertaken to determine whether any other subcategories of 'Aboriginal' licences are provided for therein.</p>
<p>Provides for embargos on licensed and other extractions to protect Country /meet cultural flow targets set out in water plans/ensure native title rights can be exercised</p>	<p>Section 324(1) provides that the Minister may temporarily prohibit water extractions if they are satisfied that it is in the public interest to do so.</p> <p>While the provision does not explicitly link embargos on pumping to cultural outcomes and is entirely discretionary in nature, it could arguably be used for the purpose (including because the concept of the 'public interest' is quite broad and legally nebulous).</p>

<p>Provides mechanism to compulsorily acquire water licences (to reallocate to Indigenous Peoples)</p>	<p>Yes. See s. 79(1) which provides that the Minister may compulsorily acquire licences if they are of the view that, in the 'special circumstances of the case', it is in the public interest to do so.</p> <p>The provision is worded broadly and does not specifically mention acquisition to enable reallocation to Indigenous Peoples. However, 'public interest' could arguably apply to such circumstances.</p>
<p>Contains provisions which set out a) how unallocated water to be allocated b) requires % of unallocated water to be allocated to Indigenous Peoples</p>	<p>a) Yes, s. 65 provides for what are known as the 'controlled allocation' of unallocated water.</p> <p>b) No, there is no requirement for any such unallocated water to be allocated to Indigenous Peoples.</p> <p>Note a number of controlled allocation orders⁴ have been made over the last few years in relation to groundwater resources. The water was put out to tender. None was specifically set aside for Indigenous Peoples.</p>
<p>Reviews</p>	<p>Act: The Act was only required to be reviewed within the first 5 years of its existence – see s.404. Thus, no review is scheduled.</p> <p>WSPs: The duration of WSPs is 10 years – see s. 43(1).</p> <p>A WSP can be extended by a further 10 years in certain circumstances – see s.43A.</p> <p>The Minister is to review WSPs (other than provisions re water sharing) in the 5 years preceding their expiry – see s. 43(2),(3).</p> <p>The Minister is to ensure that WSPs are audited by the Natural Resources Commission in the first 5 years of their existence to determine if their provisions are being given effect to – see s.44.</p>

⁴ <https://www.industry.nsw.gov.au/water/allocations-availability/controlled>

Northern Territory

Water Act 1992

Core Provisions

Recognises First Nations Peoples' values, rights and interests	No.
Establishes a hierarchy of water sharing principles or equivalent that provide for First Nations Peoples' rights, values and interests	No.
Establishes water management principles or equivalent to guide decision making that explicitly recognise Indigenous rights, interests and values	No.
Establishes environmental water holder or equivalent that is legally entitled to deliver water to care for country	No.
Establishes First Peoples' water holder(s) or equivalent	No.

Provisions for water plans at catchment scale

Establishes statutory water plans	Part 3, Division 1 provides for the Minister to declare 'water control districts' and within these, 'water allocation plans (WAP)'. However, these declarations are not mandatory. Consequently, only 5% of the NT is covered by a WAP ⁵ .
Provides that water plans must set aside water for the environment	If a WAP is created, s.22B(b) provides that some water must be allocated to the environment.

⁵ <https://www.tandfonline.com/doi/full/10.1080/07900627.2021.1882406>

<p>Provides for native title rights in relation to water managed under the legislation</p>	<p>Not directly. Section 22C provides for the creation of Strategic Aboriginal Water Reserves (SAWR) in relation to ‘eligible land’, which is defined to include land subject to <i>exclusive</i> native title or land rights legislation, or otherwise owned by Aboriginal people.</p> <p>A SAWR can only be declared when a WAP has been created. Further, there must be unallocated water to allocate to the reserve. By the time a WAP is declared, all water may have already been allocated or the resource may be overallocated⁶.</p> <p>No actual licences for SAWRs have been granted, including due to the failure to create regulations under s.71BA⁷.</p> <p>This paper provides a thorough critique of Indigenous water reserves, including in the NT.</p>
<p>Provides that water plans must set aside water for First Peoples’ purposes (beyond native title rights)</p>	<p>No. See comments on SAWRs.</p> <p>Further, s. 22A states that ‘beneficial uses’ for each WAP may be declared in the gazette. These include (but are not limited to) the environment and Aboriginal economic development – see ss.4(3) and 22A(2).</p> <p>Notices in the gazette regarding beneficial uses for water control districts refer to cultural uses. It is unclear what this means in practice</p>
<p>Requires water plans to include legally binding cultural flow targets linked to Country</p>	<p>No.</p>

Provisions for licensing, approvals and unallocated water

<p>Water rights unbundled</p>	<p>No.</p>
<p>Requires allocation of a minimum percentage of newly unbundled or issued licences to First Nations Peoples</p>	<p>No.</p>
<p>Establishes First Nations’ water licensing regimes for a) cultural purposes b) other purposes</p>	<p>See previous comments re SAWRs.</p>
<p>Provides for embargos on licensed and other extractions to protect Country /meet cultural flow targets set out in water plans/ensure native title rights can be exercised</p>	<p>No.</p> <p><i>Additional note:</i> Section 96 empowers the Minister to restrict extractions under licences in times of actual or likely water shortages or if it is required to protect human health.</p>

⁶ See for example https://depws.nt.gov.au/_data/assets/pdf_file/0004/753628/oolloo-dolostone-aquifer-wap-2019-2029.pdf

⁷ For a thorough critique see https://openresearch-repository.anu.edu.au/bitstream/1885/280411/3/IWR%20Report_FINAL_2022_WIH_MFRC.pdf

<p>Provides mechanism to compulsorily acquire water licences (to reallocate to Indigenous Peoples)</p>	<p>No. However, property can be acquired under the <i>Northern Territory (Self-Government) Act 1978</i> (Cth) which could affect associated water infrastructure and licences.</p>
<p>Contains provisions which set out a) how unallocated water to be allocated b) requires % of unallocated water to be allocated to Indigenous Peoples</p>	<p>Not within the Act.</p> <p>The NT Water Allocation Planning Framework⁸ is a high-level policy document which guides allocations for areas that are not covered by a WAP.</p> <p>It divides the NT into the Top End and Arid Zone. It is not legally binding and has been departed from on occasion to allow licensing to occur.</p>
<p>Reviews</p>	<p>Act: Not specified.</p> <p>WAPs: s. 22B(2),(3) - duration of up to 10 years, reviewed every 5 years.</p> <p>Note: the NT Govt has indicated that it will draft and table new water legislation to replace this Act by 2026.</p>

⁸ https://depws.nt.gov.au/_data/assets/pdf_file/0011/476669/nt-water-allocation-planning-framework.pdf

Queensland

Water Act 2000

Core Provisions

Recognises First Nations Peoples' values, rights and interests	Section 2 sets out 4 main purposes, of which one is the sustainable management of QLD's water resources. 'Sustainable management' is defined in the section by way of a long list of elements, one of which is to 'recognise the interests of Aboriginal people and Torres Strait Islanders and their connection with water resources.'
Establishes a hierarchy of water sharing principles or equivalent that provide for First Nations Peoples' rights, values and interests	No. <i>Additional note:</i> s.95 rights, which allow Aboriginal and Torres Strait Island Peoples to take water without a licence in specified circumstances, are impliedly higher order water rights.
Establishes water management principles or equivalent to guide decision making that explicitly recognise Indigenous rights, interests and values	No.
Establishes environmental water holder or equivalent that is legally entitled to deliver water to care for country	No.
Establishes First Peoples' water holder(s) or equivalent	No.

Provisions for water plans at catchment scale

Establishes statutory water plans	Yes – almost all of the state's water resources are covered by water plans. See Chapter 2, Part 2 of the Act.
Provides that water plans must set aside water for the environment	Section 43(1)(d) requires a water plan to provide for environmental flows.

<p>Provides for native title rights in relation to water managed under the legislation</p>	<p>Pursuant to s.95, 'An Aboriginal party or Torres Strait Islander party may, in the area of the State for which the person is an Aboriginal or Torres Strait Islander party, take or interfere with water for traditional activities or cultural purposes.' That is, no licence is required.</p> <p>Cultural purposes are defined to include hunting, fishing, gathering or camping; performing rites or other ceremonies; visiting sites of significance.</p> <p>The definition of an 'Aboriginal Party' or 'Torres Strait Islander Party' is linked to that contained in the <i>Aboriginal Cultural Heritage Act 2003 (Qld)</i>, section 35 and the <i>Torres Strait Islander Cultural Heritage Act 2003 (Qld)</i>, section 35.</p>
<p>Provides that water plans must set aside water for First Peoples' purposes (beyond native title rights)</p>	<p>No.</p> <p><i>Additional note:</i> Section 43(1)(c) provides for the creation of 'unallocated reserves' in water plans. This could extend to the creation of an Aboriginal water reserve in a water plan area.</p> <p>See for example cl. 32(1) of the Water Plan (Cape York) 2019 which allows for unallocated water in the Cape York Peninsula Heritage Area to be granted to eligible Aboriginal and Torres Strait Island Peoples to achieve social and economic goals. This appears to be the only such example in QLD.</p>
<p>Requires water plans to include legally binding cultural flow targets linked to Country</p>	<p>No.</p>

Provisions for licensing, approvals and unallocated water

<p>Water rights unbundled</p>	<p>Yes and no.</p> <p>Water allocations are tradeable water rights unbundled from land – see Chapter 2, Part 3, Division 4.</p> <p>Water licences are generally attached to land – see s.106(2).</p>
<p>Requires allocation of a minimum percentage of newly unbundled or issued licences to First Nations Peoples</p>	<p>No.</p>
<p>Establishes First Nations' water licensing regimes for a) cultural purposes b) other purposes</p>	<p>No.</p> <p><i>Additional note:</i> see comments re s.95 licensing exemptions which apply in certain circumstances and unallocated reserves.</p>

<p>Provides for embargos on licensed and other extractions to protect Country /meet cultural flow targets set out in water plans/ensure native title rights can be exercised</p>	<p>No.</p> <p><i>Additional note:</i> Sections 28 and 29 allow the Minister to restrict or prohibit extractions etc. due to either water shortages or harmful levels of contamination. The wording is very narrow.</p>
<p>Provides mechanism to compulsorily acquire water licences (to reallocate to Indigenous Peoples)</p>	<p>No. However land can be acquired under the <i>Acquisition of Land Act 1967</i> (Qld) and this could affect any associated water rights.</p>
<p>Contains provisions which set out a) how unallocated water to be allocated b) requires % of unallocated water to be allocated to Indigenous Peoples</p>	<p>Yes, Chapter 2, Part 2, subdivision 2 provides for how unallocated water may be allocated. Section 43(1)(c) also provides for the creation of 'unallocated reserves' in water plans.</p> <p>No, there is no requirement for any such unallocated water to be allocated to Indigenous Peoples. The creation of an Indigenous water reserve is discretionary (see for example the <i>Water Plan (Cape York) 2019</i>).</p>
<p>Reviews</p>	<p>Act: not specified.</p> <p>Water plans: expire after 10 years (unless extended) – s. 53.</p>

South Australia

Landscape South Australia Act 2019

Core Provisions

Recognises First Nations Peoples' values, rights and interests	The Act's overarching objective (s.7) is to support and enhance ecologically sustainable development (ESD). This is broken down into 9 elements or sub-objects. One of these 9 sub-objects is to, amongst other things, '...support the interests of Aboriginal peoples'
Establishes a hierarchy of water sharing principles or equivalent that provide for First Nations Peoples' rights, values and interests	No. <i>Additional note:</i> Cl. 31 of the Landscape South Australia (Water Management) Regulation 2020 (WM Reg) allows for a water allocation plan to specify different principles for the allocation of water amongst different entitlement holders.
Establishes water management principles or equivalent to guide decision making that explicitly recognise Indigenous rights, interests and values	The Act includes, at s.7(3), 10 principles that 'must be taken into account' in relation to achieving ESD. These include 2 principles that relate to Indigenous values and interests.
Establishes environmental water holder or equivalent that is legally entitled to deliver water to care for country	The Act does not formally establish an environmental water holder. However, under s.9(1)(a)(i) the Minister has broad powers to take action to protect the environment. Relevantly, they hold different classes of licences which are used for environmental purposes ⁹ . Further analysis of relevant water allocation plans and the licences themselves is required to determine if they could be used to achieve cultural or other outcomes desired by Indigenous Peoples.
Establishes First Peoples' water holder(s) or equivalent	No.

Provisions for water plans at catchment scale

Establishes statutory water plans	Yes – see Part 4, Division 2. They are known as water allocation plans (WAP).
Provides that water plans must set aside water for the environment	Yes – water must be set aside for the environment in a WAP. See s.53.

⁹ <https://www.environment.sa.gov.au/topics/river-murray/improving-river-health/environmental-water>

Provides for native title rights in relation to water managed under the legislation	Pursuant to s.105(1), the Minister may publish a notice in the gazette authorising the taking of water from a prescribed body of water for a prescribed purpose (i.e. without a licence). See this document which includes a summary of such notices re-native title ¹⁰ .
Provides that water plans must set aside water for First Peoples' purposes (beyond native title rights)	No. <i>Additional note:</i> The WAP for the River Murray Prescribed Water Course includes sections on Aboriginal values, rights and interests. In terms of actual water rights, it places heavy emphasis on the use of environmental water (held and provided for in the plan) to deliver outcomes for Aboriginal people. It does not specify any specific Aboriginal water entitlements or shares in the pool.
Requires water plans to include legally binding cultural flow targets linked to Country	No.

Provisions for licensing, approvals and unallocated water

Water rights unbundled	Yes – all water licences have been separated from land. However, only some licences have been broken down into their constituent parts (licence, allocation, works approval etc.), with each of these elements forming a separate, potentially tradeable property right under the Act. This has occurred in the River Murray Prescribed Watercourse, the Southern Basins and Musgrave Prescribed Wells Area and the Far North Prescribed Wells Area.
Requires allocation of a minimum percentage of newly unbundled or issued licences to First Nations Peoples	No.
Establishes First Nations' water licensing regimes for a) cultural purposes b) other purposes	No.

¹⁰ <https://cdn.environment.sa.gov.au/environment/docs/statewide-region-wide-notices-authorisation.pdf>

<p>Provides for embargos on licensed and other extractions to protect Country /meet cultural flow targets set out in water plans/ensure native title rights can be exercised</p>	<p>No. <i>Additional note:</i> Section 109 empowers the Minister to impose restrictions on extractions due to inadequate supply or overuse. Broadly speaking, this is linked to risks associated with an inability to meet demand and to the environment.</p>
<p>Provides mechanism to compulsorily acquire water licences (to reallocate to Indigenous Peoples)</p>	<p>No. However, land can be acquired under s. 225 of the Act and under the <i>Land Acquisition Act 1969</i> (Qld).This may affect associated water infrastructure and licences.</p>
<p>Contains provisions which set out a) how unallocated water to be allocated b) requires % of unallocated water to be allocated to Indigenous Peoples</p>	<p>a) Yes, ss.160 and 161 are general provisions with provide the Minister with discretion to reserve unallocated water within a water allocation area and to then to reallocate this reserve water. b) No, there is no requirement for any such unallocated water to be allocated to Indigenous Peoples.</p>
<p>Reviews</p>	<p>Act: s.249 requires that the Act be reviewed as soon as practicable after 3 years have passed since its commencement. 3 years post commencement would have been December 2022. Water allocation plans: s. 54 provides that they are to be reviewed every 10 years</p>

Tasmania

Water Management Act 1999

Core Provisions

Recognises First Nations Peoples' values, rights and interests	No.
Establishes a hierarchy of water sharing principles or equivalent that provide for First Nations Peoples' rights, values and interests	No.
Establishes water management principles or equivalent to guide decision making that explicitly recognise Indigenous rights, interests and values	No.
Establishes environmental water holder or equivalent that is legally entitled to deliver water to care for country	No.
Establishes First Peoples' water holder(s) or equivalent	No.

Provisions for water plans at catchment scale

Establishes statutory water plans	Yes – see Part 4. However, the creation of these 'water management plans' is at the discretion of the Minister.
Provides that water plans must set aside water for the environment	Part 4 provides for (but does not require) water to be set aside for the environment in a water management plan.
Provides for native title rights in relation to water managed under the legislation	No.
Provides that water plans must set aside water for First Peoples' purposes (beyond native title rights)	No.
Requires water plans to include legally binding cultural flow targets linked to Country	No.

Provisions for licensing, approvals and unallocated water

Water rights unbundled	Yes
Requires allocation of a minimum percentage of newly unbundled or issued licences to First Nations Peoples	No.
Establishes First Nations' water licensing regimes for a) cultural purposes b) other purposes	No.

<p>Provides for embargos on licensed and other extractions to protect Country /meet cultural flow targets set out in water plans/ensure native title rights can be exercised</p>	<p>No. <i>Additional note:</i> Part 6, Division 6 empowers the Minister to restrict water extractions in certain circumstances (notably where demand may not be met or extractions are or are likely to have unacceptable negative impacts on the affected water resource).</p>
<p>Provides mechanism to compulsorily acquire water licences (to reallocate to Indigenous Peoples)</p>	<p>No. However, land can be acquired under the Land Acquisition Act 1993 which could affect associated water infrastructure and licences.</p>
<p>Contains provisions which set out a) how unallocated water to be allocated b) requires % of unallocated water to be allocated to Indigenous Peoples</p>	<p>The Minister may in certain circumstances sell water allocations (s.85) and reallocate water allocations (s.87).</p>
<p>Reviews</p>	<p>Act - s.301A: only requires a single review of the operation of the Act (which would have been required approximately 10 years ago).</p>

Victoria

Water Act 1989

Core Provisions

Recognises First Nations Peoples' values, rights and interests¹¹	Section 1 includes 14 'purposes'. One of these includes a sub-purpose that concerns Aboriginal cultural values.
Establishes a hierarchy of water sharing principles or equivalent that provide for First Nations Peoples' rights, values and interests	No. <i>Additional note:</i> section 8A rights – the right to take and use water exists where there is an agreement under the <i>Traditional Owner Settlement Act 2010</i> (Vic) – are impliedly higher order rights.
Establishes water management principles or equivalent to guide decision making that explicitly recognise Indigenous rights, interests and values	No.
Establishes environmental water holder or equivalent that is legally entitled to deliver water to care for country	Yes. Part 3AA establishes the Victorian Environmental Water Holder (VEWH). Pursuant to s. 33DD(2)(a), in performing its functions (which primarily relate to environmental outcomes), the VEWH is to consider opportunities to provide for Aboriginal cultural values and uses of waterways.
Establishes First Peoples' water holder(s) or equivalent	No.

Provisions for water plans at catchment scale

Establishes statutory water plans	Water sharing and allocations are provided for under a range of statutory and non-statutory instruments. The main means by which water is allocated (especially in regulated systems) is under bulk entitlements (provided for in Part 4 of the Act).
Provides that water plans must set aside water for the environment	Water must be set aside for the environment pursuant to a number of different mechanisms. See s.4A which creates the 'environmental water reserve'.

¹¹ For additional information on the pathways to change in Victoria see https://www.water.vic.gov.au/_data/assets/pdf_file/0035/599390/Water-is-Life-Section-A-Victorian-Government-Policy.pdf

Provides for native title rights in relation to water managed under the legislation	Section 8A – right to take and use water exists where there is an agreement under the <i>Traditional Owner Settlement Act 2010</i> (Vic) (subject to certain criteria being met). In practice, this provision is not used. ¹²
Provides that water plans must set aside water for First Peoples’ purposes (beyond native title rights)	No.
Requires water plans to include legally binding cultural flow targets linked to Country	No.

Provisions for licensing, approvals and unallocated water

Water rights unbundled	Yes and No. Unbundled water rights are mostly in the north (MDB). Bundled rights (take and use rights) include, for example, s.51 licences.
Requires allocation of a minimum percentage of newly unbundled or issued licences to First Nations Peoples	No.
Establishes First Nations’ water licensing regimes for a) cultural purposes b) other purposes	No.
Provides for embargos on licensed and other extractions to protect Country /meet cultural flow targets set out in water plans/ensure native title rights can be exercised	No. <i>Additional note:</i> there are mechanisms to restrict water extractions in certain circumstances. For example, s. 141 empowers water authorities (e.g. Goulburn Murray Water) to restrict water supply to address current or potential future water shortages).
Provides mechanism to compulsorily acquire water licences (to reallocate to Indigenous Peoples)	No.

¹² For more details see https://law.unimelb.edu.au/_data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf

<p>Contains provisions which set out a) how unallocated water to be allocated b) requires % of unallocated water to be allocated to Indigenous Peoples</p>	<p>Unallocated water is provided for via a variety of different mechanisms depending on the area of the state, the relevant water authority and whether it is surface or groundwater. In some instances, unallocated water has been put to market.</p> <p>There is no obligation to transfer unallocated water to Indigenous Peoples.</p> <p><i>Additional note:</i> 2GL of unallocated water was transferred to Traditional Owners (Gunaikurnai Land and Waters Aboriginal Corporation) in the Mitchell River.</p>
<p>Reviews</p>	<p>Act: Not specified.</p> <p>Pursuant to s. 22K, a long-term water resource assessment must be undertaken by the end of Jan 2025 for northern water resources and by 2033 for other water resources.</p>

Western Australia

Rights in Water and Irrigation Act 1914

Core Provisions

Recognises First Nations Peoples' values, rights and interests	No.
Establishes a hierarchy of water sharing principles or equivalent that provide for First Nations Peoples' rights, values and interests	No.
Establishes water management principles or equivalent to guide decision making that explicitly recognise Indigenous rights, interests and values	No.
Establishes environmental water holder or equivalent that is legally entitled to deliver water to care for country	No.
Establishes First Peoples' water holder(s) or equivalent	No.

Provisions for water plans at catchment scale

Establishes statutory water plans	Water allocation plans (WAPs) in WA are non-statutory. As such, they are of limited legal significance.
Provides that water plans must set aside water for the environment	The Act was amended in 2000 (Part III, Division 3D) to allow statutory water plans to be made (on a discretionary basis) that could be used to set aside water for the environment. However, no statutory water plans have been declared under these provisions. There is no legal requirement under the Act to set aside water for the environment.
Provides for native title rights in relation to water managed under the legislation	No.
Provides that water plans must set aside water for First Peoples' purposes (beyond native title rights)	No. ¹³

¹³ See these two examples (actual and proposed) of Indigenous water reserves in non-statutory WAPs in WA: https://openresearch-repository.anu.edu.au/bitstream/1885/280411/3/IWR%20Report_FINAL_2022_WJH_MFRC.pdf and <https://static1.squarespace.com/static/5e86add4e98f7421bace70f1/t/6125af23a1ddbd70f2e40f6e/1629859622843/19th+August+2021+MFRC+WJH+EDO+FINAL+Derby+Submission.pdf>

Requires water plans to include legally binding cultural flow targets linked to Country	No.
--	-----

Provisions for licensing, approvals and unallocated water

Water rights unbundled	No.
Requires allocation of a minimum percentage of newly unbundled or issued licences to First Nations Peoples	No.
Establishes First Nations' water licensing regimes for a) cultural purposes b) other purposes	No.
Provides for embargos on licensed and other extractions to protect Country /meet cultural flow targets set out in water plans/ensure native title rights can be exercised	No. <i>Additional note:</i> Sections 26CG and 26D empowers the Minister to restrict extractions in a range of circumstances. None of these are directly linked to the protection of Indigenous rights and interests. However, there is scope to interpret elements of these provisions in a way that would enable the Minister to exercise their powers for that purpose.
Provides mechanism to compulsorily acquire water licences (to reallocate to Indigenous Peoples)	No. However, property can be acquired under the <i>Land Administration Act 1997 (WA)</i> which could affect associated water infrastructure and licences.
Contains provisions which set out a) how unallocated water to be allocated b) requires % of unallocated water to be allocated to Indigenous Peoples	No. <i>Additional note:</i> In the absence of statutory water plans, there are no clear statutory limits on allocations in a given area. This also means that there can be no clear statutory pathway for distributing unallocated water.
Reviews	Act: Not specified. <i>Additional note:</i> WA has been reviewing its water legislation for a decade. It is possible that a new bill will be introduced into parliament in the coming months.

Appendix B: UNDRIP

The United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) was adopted by the United Nations General Assembly in 2007. Australia initially opposed the Declaration, but reversed its position and endorsed it in 2009. The Declaration is an extension of the standards found in many other human rights treaties that have been ratified by and are binding on Member States, including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Convention on the Elimination of All Forms of Racial Discrimination* [27]. Declarations adopted by the UN General Assembly are considered to be universally applicable and do not need to be signed or ratified.

UNDRIP is based on the principles of non-discrimination and equality and elaborates the general principles and human rights standards contained in the other UN covenants and conventions as they specifically relate to the historical, cultural and social circumstances of Indigenous peoples. It expresses Indigenous peoples' rights and by doing so it explains how Indigenous peoples want nation-states (and others) to conduct themselves in relation to matters that may affect their rights and interests [9, 28].

The Aboriginal and Torres Strait Islander peoples of Australia are increasingly demanding that the full suite of international human rights, norms and standards apply to their affairs and to dealings with them, including UNDRIP. This demand is reflected in the *Uluru Statement from the Heart* and in the Referendum Council's final report [22, 23], the most recent of no fewer than a dozen such declarations by Aboriginal and Torres Strait Islander peoples since the 1930s [28].

The right to self-determination

UNDRIP includes the right to self-determination, in particular, in relation to the following matters:

- as Indigenous peoples, to 'freely determine their political status and freely pursue their economic, social and cultural development' (Article 3)
- their internal and local affairs, including ways and means for financing their autonomous functions (Article 4)
- maintaining their distinct political, legal, economic, social and cultural institutions, and to participating fully in the political, economic, social and cultural life of the State (Article 5)
- in decision-making in matters affecting their rights, choosing their own representatives in accordance with their own procedures, and to maintaining and developing their own Indigenous decision-making institutions (Article 18)
- in determining and developing priorities and strategies for their right to development, in particular in relation to health, housing and other economic and social programs affecting them, and to administering such programs through their own institutions (Article 23)
- the right to self-determination in UNDRIP cannot be invoked in support of secession (Article 46).

Together, the free, prior and informed consent (FPIC) provisions and the self-determination provisions in UNDRIP are aimed at reversing the historical pattern of exclusion of Indigenous peoples from decision-making and avoiding the imposition of decisions that may adversely impact on Indigenous peoples and their culture. Violation of any of the elements of FPIC and self-determination may invalidate the outcomes of any agreements with Indigenous peoples about their rights and interests [29].

Free, prior and informed consent

The principle of free, prior and informed consent (sometimes referred to as 'FPIC') is enshrined in several Articles of UNDRIP (UN 2007), including Articles 10 (relocation), 11 (cultural property), 19 (regulatory measures), 28 (land and territories), 29 (environment) and 32 (development and use of land/territories and other resources). In particular, Articles 19 and 32 detail what is entailed in enacting free, prior and informed consent.

The UN Working Group on Indigenous Populations and the Australian Human Rights Commission [30] articulated the four interlinked elements of FPIC as follows:

1. Free means no coercion, force, bullying, pressure, or improper influence.
2. Prior means that Indigenous peoples have been consulted before the activity begins.
3. Informed means Indigenous peoples are given all of the available information and informed when that information changes or when there is new information. If Indigenous peoples do not understand this information, then they have not been informed. An interpreter or other person might need to be provided to assist.
4. Consent means Indigenous peoples must be consulted and participate in an honest and open process of negotiation that ensures:
 - all parties are equal, none having more power or strength.
 - Indigenous peoples' group decision-making processes are allowed to operate, and
 - Indigenous peoples' right to choose how they want to live, and their worldviews are respected. [31, 32]

These four elements 'are interlinked and should not be treated separately' [12]. The United Nations Food and Agriculture Organization's good practice guide on the concept of free, prior and informed consent states that:

"consent should be sought before any project, plan or action takes place (prior), it should be independently decided upon (free) and based on accurate, timely and sufficient information provided in a culturally appropriate way (informed) for it to be considered a valid result or outcome of a collective decision-making process (consent)" [12].

The principle of free, prior and informed consent therefore raises the level of engagement with Indigenous peoples by switching the relationship from consultation to consent and provides a safeguard to Indigenous peoples' full participation in decisions affecting their rights and interests [25].

Applying the principles of free, prior and informed consent and self-determination creates a process whereby Indigenous peoples and governments, NGOs, developers and resource companies can talk to each other on an equal footing and come to a solution or agreement that all parties can accept [33]. It also means that Indigenous peoples must be involved in the design, development, implementation, monitoring and evaluation of all programs, policies, projects and legislation that affects them. It involves an ongoing process of engagement with Indigenous peoples throughout the life of a program, project or initiative [34] and sometimes well beyond a specific project or initiative. The process of free, prior and informed consent must therefore be incorporated into all the components of a program or project when working with Indigenous people. Equally, it also means that the right to refuse consent must be respected [12].

Appendix C: Implementing UNDRIP

The First Peoples of Australia have long been excluded from policy decision-making that affects their ancestral lands and waters and their connections to and responsibilities for Country have been disrespected. They have consistently articulated their commitment to a holistic way of managing Country that respects the interconnection between people, land and water.

The following is an outline of how the UN *Declaration on the Rights of Indigenous Peoples* could be applied in the context of water policy, planning and management decision-making, and in particular, respecting First Peoples' rights to self-determination and free, prior and informed consent (FPIC).

The intent is to strike a balance between broad principles and prescriptive standards, while also allowing for flexibility for different circumstances and to encourage maximum use across the full suite of circumstances relating to First Peoples' water rights and interests.

Principles and Safeguards

The following Principles and Safeguards¹ have therefore been distilled from several sources, including:

- The UN *Declaration on the Rights of Indigenous Peoples*
- The ILO *Convention No. 169 on Indigenous and Tribal Peoples*
- Guiding Principles of the *Conservation Initiative on Human Rights*
- *The Nature Conservancy Human Rights Guide* [35], and
- *The Guiding Principles* developed by the Referendum Council in 2017 [22].

Does not diminish First Peoples' sovereignty

What is it: The First Peoples of Australia have never ceded their sovereignty and they do not want to do so.

How to support: Delegates at the Regional Dialogues on Constitutional recognitions do not want constitutional recognition or reform to derogate from their sovereignty.

Advances Self-Determination

What is it: Recognise the status and rights of First Peoples and their law and governance and their right to self-determination and autonomy, with no threats of adverse consequences or coercion.

How to support: Have conversations with First Peoples and understand the historical and present-day impacts of colonisation, oppression and power imbalances. Tell the truth of history.

Substantive, structural reforms

What is it: Reforms to water policy and management decision-making must be substantive, meaning that minimal reform or symbolic reform is not enough. Any reforms must not have the unintended consequences of interfering with beneficial arrangements already in place, or with future positive arrangements that may be negotiated.

How to support: Devise new approaches to water policy and management decision-making that recognise and accommodate place-specific governance arrangements, including 'nation-based' approaches in some jurisdictions.

¹ Adapted from Referendum Council (2017) and The Nature Conservancy (no date)

Prior Engagement and Collaborative Relationships

What it is: Early engagement with First Peoples on any initiative that may affect them.

How to support: Centre First Peoples leadership and meaningful participation in design and planning decisions. Build trust over time.

Informed Decision-Making

What it is: Active support of First Peoples' access to all information about activities that may affect them, in settings, languages and formats that meet their needs.

How to support: Invest time and resources in capacity building for the IPLC and TNC staff. Commit to impact assessment, transparent communication, respect for multiple ways of knowing and mutual learning as the foundation for decision-making.

Right to Withhold Consent

What it is: Respect for First Peoples' right to withhold consent to initiatives that they determine may have a significant impact on them.

How to support: Supported by honouring First Peoples' decision to say "yes" or "no," as well as "yes, but with conditions" and "no, but let's continue to discuss."

Meaningful Consultation

What it is: First Peoples' right to participate in a thorough consultation process on any initiative that might affect them.

How to support: Identify and consult the First Peoples' institutions and representatives, and provide staff time and resources for the discussions.

Agreement-making

What it is: Article 37 of UNDRIP provides the right to recognition, observance and enforcement of treaties, agreements and other constructive agreements.

How to support: Provide mechanisms for First Nations' agreement making based on mutual respect for difference.

Equity

What it is: A commitment to fairness and respect for First Peoples' value systems, world views, governance and decisions.

How to support: Share power, opportunities, resources and benefits that do not foreclose on future advancement for First Peoples.

Inclusion

What it is: A commitment to hearing and valuing diverse voices and contributions.

How to support: Use non-discriminatory, culturally responsive and accessible forums, structures and processes to solicit contributions from all social identities.

Accountability

What it is: A commitment to transparency, taking responsibility for mistakes and correcting them, resolving conflicts fairly, and monitoring and improving activities and approaches.

How to support: Establish conflict resolution strategies before problems arise, collaboratively implement and update plans, and document work in culturally responsive ways.

Overarching Good Faith

What it is: A commitment to across-the-board honesty, respect, humility, service and Integrity beyond reproach, and to negotiation in good faith consistent with Article 32 in UNDRIP.

How to support: Listen. Applying learnings from continual discussions, seek points of alignment, build consensus, and pursue shared goals in equitable partnership.

The process of implementing UNDRIP revolves around three key elements:

- Understanding the local context
- Understanding First Peoples' legal and customary rights, and
- Identifying and respecting First Peoples' decision-making.

The process comprises four stages that enable collaboration with First Peoples in any context (See **Figure C1**).

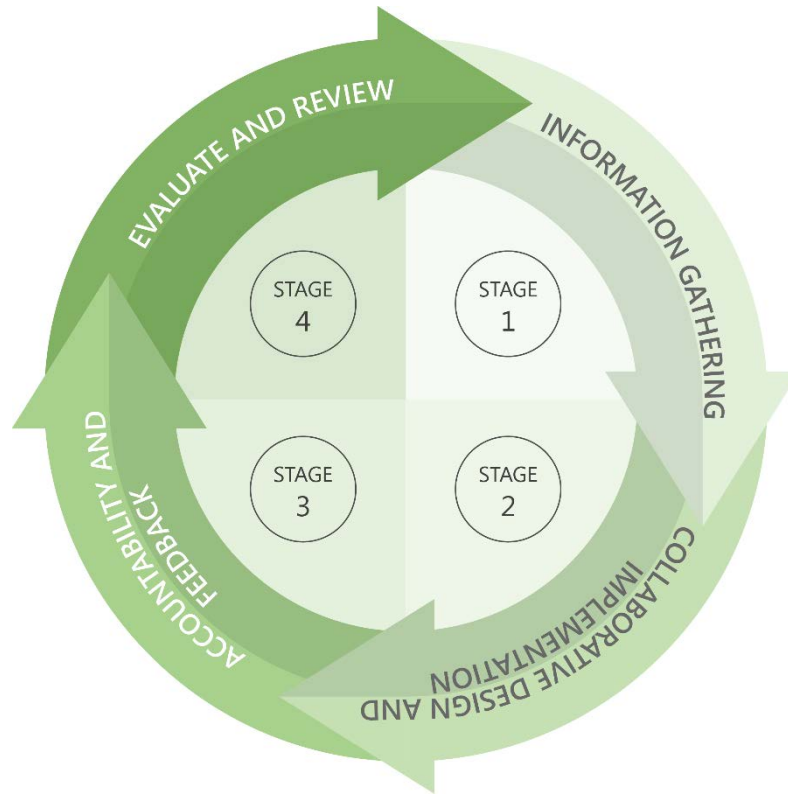


Figure C1: A cyclical approach to implementing UNDRIP

The four stages consist of

Stage 1: Information Gathering

- Establishing the scope of the proposed program.
- Understanding the local context, including statutory land rights grants/transfers, native title determinations/claims and any existing water entitlements.
- Establish whether there are local laws providing protection of First Peoples' cultural and intellectual property rights.
- Respect traditional decision-making processes and/or structures, establish who the rights holders are, and their willingness to participate.

Stage 2: Collaborative Design and Implementation

Develop a culturally sensitive approach, including respect for First Peoples' laws and customs and decision making.

- Ensure full and effective participation of all members of the community.
- Ensure full information exchange in an understandable manner, in a language the community can understand and in a culturally appropriate timeframe and manner.
- Reach consent on the course of action.
- Develop a negotiated agreement.

Stage 3: Accountability and Feedback

- Develop or adopt a grievance mechanism that includes FPIC.
- Monitor, evaluate and adapt commitments, include how FPIC is applied consistently.

Stage 4: Evaluate and Review.

- Document lessons learned.
- Undertake a review and adaptation of processes.

Ideally, the first three stages occur sequentially, but they may also occur concurrently. There may also be some overlap between the stages. For example, understanding a community's legal and customary rights may be a single step that should be established from the outset. However, these matters may also need to be taken into consideration in the design and implementation stage and the accountability and feedback stage. The process is intended to reflect the essential tenets of Self-Determination and Free, Prior and Informed Consent (FPIC). This process may not be definitive about the full scope of these concepts, as First Peoples develop their understanding and applicability to their law and custom.

The fourth stage is essentially a review stage to assess the effectiveness of the process and to enable continual improvement.

Each circumstance will be different, and it may be necessary therefore to adapt the steps and actions, and seek additional information or take alternative actions in order to fulfil the spirit of each stage, and to meet First Peoples' requirements for working with them.