

MLDRIN SUBMISSION TO ACCC REVIEW: WATER MARKET ISSUES PAPER

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OVERVIEW

We welcome the opportunity to contribute to the ACCC review of water market operation in the Murray-Darling Basin. The dire drought conditions in New South Wales and the likelihood of increased water scarcity in northern Victoria are causing real hardship to Aboriginal communities across the Murray-Darling Basin.

The issues paper developed by the ACCC identifies five areas of focus: (1) market trends and drivers; (2) market transparency; (3) regulation and institutional settings; (4) market participant behaviours; and (5) competition and market outcomes. The ACCC has been asked to identify potential solutions that enhance water market operation and efficiency, but we are concerned that this opportunity for a broader review of market functionality for all participants (current and future) is not missed.

Water markets are an important tool for managing access to water, particularly during times of scarcity. During the Millennium Drought, water markets played an essential role in maintaining productivity in the southern Murray-Darling Basin in particular (National Water Commission, 2012). However, a water market is not an end in itself: it must be performing a necessary function. Water markets require substantial government investment in defining and enforcing rights to water (including compliance), creating and supporting water registers and water accounting, as well as the essential work of river operations to deliver water to where it is needed. For this investment to be worthwhile, it is important to regularly review the function of the water market, and whether it is actually delivering the desired outcomes for all communities of interest. Water markets are a *form of regulation* (not an *alternative to regulation*), and as a result, water markets can be adjusted where necessary to make sure that they are delivering those outcomes (Loch et al., 2018).

One of the important functions of the water market in the Murray-Darling Basin is to facilitate a re-allocation of water between users. For the most part, water has been re-allocated between irrigators (as water moves to higher economic value uses) and between irrigators and the environment, with some small shifts from irrigation to regional towns. These water transfers only occur via the market, however, when the buyer is willing and able to pay. Australia's colonial history and the exclusion of Aboriginal peoples from holding land when water entitlements were distributed prior to the capping of water extraction and the separation of land and water means that Aboriginal peoples are largely excluded from holding water today (McAvoy 2006). Indeed, Traditional Owner-specific water rights are reported to be less than 0.01% of water use rights in Australia (Jackson and Langton, 2012). The development of the Basin more specifically has left Aboriginal Nations in possession of less than 1% of its land base (Arthur 2010), representing a higher level of dispossession than many other Australian regions (Jackson & Langton, 2012; Morgan, 2011). This history sees Aboriginal peoples in the Basin hold dismal water rights (Altman and Arthur, 2009; Arthur, 2010).

For many First Nations peoples, the separation of water from land, the formulation of water 'products' as commodities that can be held and traded for private profit and the disembodiment of water from its sacred

and spiritual contexts are fundamentally at odds with deeply enshrined water values and custodial responsibilities. Nevertheless, under current governance arrangements, the most viable, immediate pathway for Traditional Owners in the Murray-Darling Basin to access water is via entering the water market. Since the Echuca Declaration in 2007, there has been a consistent push for increased cultural flows to support Aboriginal cultural, economic, environmental, and spiritual values associated with water (Morgan, 2011; Department of Environment Land Water and Planning (Vic), 2016, Woods et al., 2017, National Cultural Flows Research Project, 2018). Water markets can play an important role in addressing the injustice of the 'double dispossession' of Aboriginal people when it comes to water in Australia, but only if market rules and operation enable this outcome (O'Bryan, 2019, Macpherson, 2017).

Given the unaddressed injustices of the dispossession and associated ongoing legacies raised here, many Traditional Owners – and supporters – object to the notion that Aboriginal peoples should have to buy back these rights. Adding to this, historical and structural inequities mean Aboriginal peoples are often without access to financial resources to buy water in this way. While there have been some recent policy and funding commitments by state and federal governments, these are yet to reallocate water to Aboriginal peoples. There is an urgent need to re-allocate water to Traditional Owners. This historic (and ongoing) lack of access to water rights not only deprives Traditional Owners of the means by which to care for Country and support economic development, but it also precludes them from participating in the water market itself (O'Donnell and Garrick, 2019; McAvoy 2006).

SPECIFIC RECOMMENDATIONS

In its review of water market operations in the Murray-Darling Basin, we urge the ACCC to go beyond the mere mechanics of market operation to focus on the outcomes that water markets are designed to achieve. Specifically, we make the following recommendations:

- (1) Any adjustment to water market operation needs to acknowledge the historic exclusion of Aboriginal people from the water market, and actively seek to address this problem. This should include lowering barriers to entry for Aboriginal participants, such as time-limited exemptions to fees and charges, purchasing and reallocating of water entitlements, and other barriers.
- (2) Any adjustment to water market operations needs to strengthen the capacity for water markets to enable re-allocation of water to Aboriginal people in future. Any proposals that alter market operations should be assessed against this existing priority.
- (3) Where possible, any significant reforms for the Murray-Darling Basin water markets should incorporate findings from significant state-level projects which are currently underway, including the *Water Access for Economic Development* project in Victoria. This project is being undertaken as a co-design process with Traditional Owners, peak bodies (MLDRIN and the Federation of Traditional Owner Corporations in Victoria), and the state government, and will provide a clear statement of Traditional Owner interests in and aspirations for water management in the Basin (see Appendix A for Stage 1 discussion paper).

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APPENDIX A

Stage 1 Discussion Paper, *Water Access for Economic Development* project



Federation of
Victorian Traditional
Owner Corporations



Environment,
Land, Water
and Planning

WATER ACCESS FOR ABORIGINAL ECONOMIC DEVELOPMENT

STAGE 1: DISCUSSION PAPER



THE UNIVERSITY OF
MELBOURNE

PROJECT OVERVIEW

For First Nations People, water is a sacred source of life. The natural flow of water sustains aquatic ecosystems that are central to our spirituality, our social and cultural economy and wellbeing. The rivers are the veins of Country, carrying water to sustain all parts of our sacred landscape. The wetlands are the kidneys, filtering the water as it passes through the land.

First Nations Peoples have rights and a moral obligation to care for water under their law and customs. These obligations connect across communities and language groups, extending to downstream communities, throughout catchments and over connected aquifer and groundwater systems.

Source: National Cultural Flows Research Project, 2018.

In 2016, the Victorian Government committed to increasing Aboriginal participation in water resource management, and identified two significant programs to underpin this work: (1) supporting the use of water to meet cultural values, and (2) identifying how to transfer water rights to Aboriginal groups to support economic outcomes, leading to the development of a *Roadmap to Economic Development*. This discussion paper forms part of the work of the Roadmap. However, for First Nations people, cultural and economic outcomes are intrinsically linked. Business concepts developed by Traditional Owners aim to achieve not only an economic return, but also a strengthening of connection to Country, and form part of the obligation to care for Country.

The *Roadmap* program involves three distinct 'streams' of work:

- 1) Water Access for Economic Development: identifying the legal and policy barriers and how to overcome them;
- 2) Funding individual Traditional Owner groups to develop business plans, specifying how much water they need, and how this water would be used to deliver economic returns to the Traditional Owners; and
- 3) Evaluation of the overall program, informing policy recommendations leading to a final *Roadmap*.

This discussion paper is part of the first stage of work in Program 1, but intersects significantly with Program 2 (the individual business concepts developed by Traditional Owners) and Program 3 (which includes much of the evaluation and oversight components of the work). This paper has been prepared by Erin O'Donnell at Melbourne Law School. I gratefully acknowledge the feedback from Murray and Lower Darling Rivers Indigenous Nations (MLDRIN) and the Federation of Victorian Traditional Owner Corporations (FVTOC).

Important disclaimer: *This Discussion Paper reviews the existing water management arrangements to identify opportunities and constraints for reallocating water rights to Traditional Owner groups. It is not legal advice. Each Traditional Owner group should seek legal advice on the precise legal arrangements which will meet their needs as part of developing their own business plans, including the requisite funding mechanisms (if applicable) and the possible need for regulatory reform to support desired actions and outcomes.*

This Discussion Paper is a first step in a much longer process of engagement and consultation with Aboriginal people as part of the Roadmap to Economic Development project.

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1 INTRODUCTION

In 2016, *Water for Victoria* required water planners to ensure greater Aboriginal participation in water planning and management, as well as to better recognise the importance of Aboriginal water values and water rights to support Aboriginal economic development. This overarching policy commitment has since been reflected in the Minister for Water's letter of expectations to all water corporations each year.

More generally, Victoria has a range of other legal and policy frameworks to acknowledge and better recognise the rights of Aboriginal citizens. Under the *Charter of Human Rights and Responsibilities Act 2006*, there are specific obligations on public authorities, including water corporations, relating to the cultural rights of Aboriginal Victorians. Section 19 of the Charter includes recognition of cultural rights distinctive to Aboriginal persons and their 'spiritual, material and economic relationship' to land and waters. In addition, there are specific legal frameworks for recognising Aboriginal rights:

- *Traditional Owner Settlement Act 2010* (TOSA), which establishes an expedited settlement claims process at the state level as an alternative to a native title determination;
- *Aboriginal Heritage Act 2006* (AHA), which includes protections for both tangible and intangible cultural heritage, as well as opportunities for ongoing participation by Aboriginal organisations in the protection and management of cultural heritage; and
- a Treaty negotiation process between the Victorian government and Victorian Aboriginal people legislated in the *Advancing the Treaty Process with Aboriginal Victorians Act 2018*. This legislation recognises that "from time immemorial Victorian traditional owners have practised their laws, customs and languages, and nurtured Country through their spiritual, cultural, material and economic connections to land, water and resources." It emphasises the "leading role and authority of traditional owners" in the Treaty process.

Where Traditional Owners have a settlement under the TOSA, there is a legal requirement for Aboriginal rights and interests in water to be included in many water planning and management processes (e.g. recognition of rights to water under s8A *Water Act 1989*). Where First Nations groups have not been involved in a TOSA process, it is also possible to establish formal status as a Registered Aboriginal Party (RAP) under the AHA. For simplicity, this report uses the terminology of 'Traditional Owner', but it is acknowledged that determination of group identity, boundaries and decision-making structures is an ongoing process.

Water authorities and other public entities are also developing Reconciliation Action Plans, which commit to a range of activities that will increase engagement, consultation, and partnership with Aboriginal people. Some of Victoria's water authorities are signatories to the UN Global Compact (United Nations 2019), and are also committed to advancing the Sustainable Development Goals. Protecting cultural heritage and enhancing community participation (including of Aboriginal groups) in water resource management are key targets identified by the UN for meeting these goals.

This discussion paper acknowledges the broader context in which the *Roadmap to Economic Development* project is taking place. However, in keeping with the specific focus of the *Roadmap*

project, this discussion paper is focused on the existing water allocation framework under the Victorian *Water Act 1989*. It builds on a wide range of existing work, most notably the recent National Cultural Flows Research Project (2018), and builds on the established state government commitments in *Water for Victoria* (Department of Environment Land Water and Planning (Vic) 2016) to increase Aboriginal participation in managing water resources and ownership of water rights.

1.1 CULTURAL FLOWS: A NEW NATIONAL STANDARD

In 2007, MLDRIN released the Echuca Declaration, which defined cultural flows as:

“water entitlements that are legally and beneficially owned by Aboriginal Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Aboriginal Nations. This is our inherent right.”

Although the discussion in *Water for Victoria* distinguishes between ‘cultural’ and ‘economic’ outcomes of water use, it is clear that Aboriginal people consider the multiple uses of water to be interconnected, and this is reflected in the business concepts developed by individual Traditional Owner groups. Economic outcomes are essential, but they are part of broader cultural values and aspirations, and economic development must proceed in a culturally appropriate manner.

In 2018, the National Native Title Council completed a seven-year project, the National Cultural Flows Research Project, which included a law and policy roadmap for identifying and giving effect to the concept of ‘cultural flows’ (Nelson, Godden et al. 2018). The concept of cultural flows requires recognition of the broader context of water entitlements and water resource management, including water landscapes, and water governance frameworks. Giving effect to Aboriginal values and objectives related to water means not only access to water rights, but also enabling Aboriginal people to play a role in water resource management and fulfil their moral responsibility to care for Country (Figure 1).

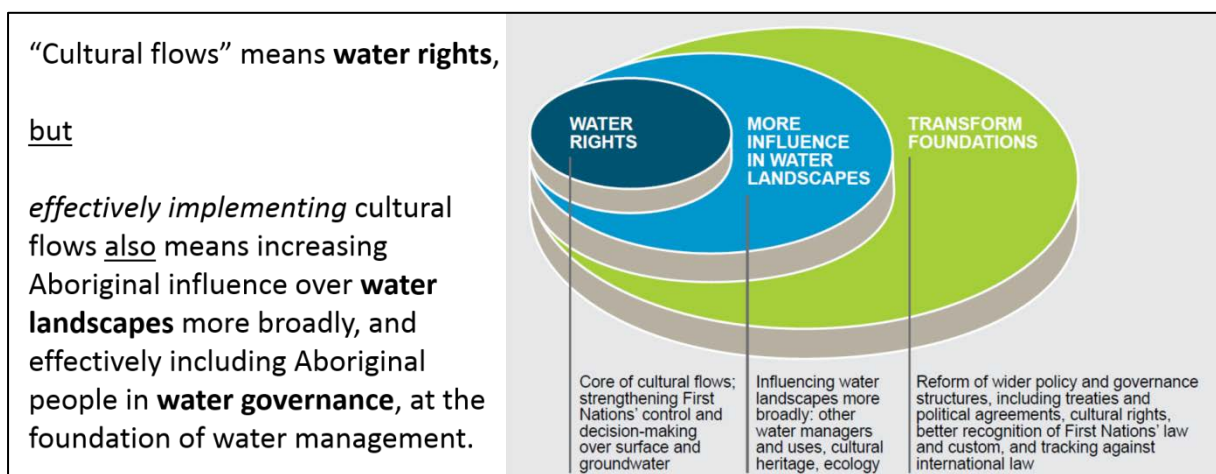


Figure 1: A broad view of implementing and supporting cultural flows (adapted from Nelson, Godden, and Lindsay, 2018)

As a result, the terminology of ‘cultural flows’ has been adopted as an essential framing for this discussion paper. Although water rights remain at the core of the cultural flows framework, simply being able to hold a water entitlement may not fully achieve the desired outcomes for Aboriginal people (for example, a greater voice in water management or restoration of the cultural values of significant locations). This is reflected in the range of business concepts, some of which do not require additional water rights for Traditional Owners, but do depend on Traditional Owners being able to participate effectively in water resource management. Creating a clear role for Aboriginal people in the broader water landscape and water governance arrangements will ensure that cultural flows are complemented, supported, and most importantly, not undermined by water resource management decisions.

The next sections of this report will identify opportunities for water allocation (or transfer) to Aboriginal people, based on the range of options that have been developed by Traditional Owner groups in their Program 2 project proposals.

The main aim of this discussion paper is to empower and inform Traditional Owners to participate in the following stages of the project. To do so, this paper:

- Identifies opportunities and barriers for progressing Traditional Owner access to water in Victoria;
- Describes four mechanisms of water recovery, linked to the Program 2 project proposals, which identify Traditional Owner preliminary water aspirations to support culturally appropriate economic development; and
- Identifies key mechanisms for water access in Victoria, including the organisations who play a role in water resource management (see Appendix for details).

The discussion paper is based on a desktop review and engagement with peak Aboriginal representative bodies (MLDRIN and FVTOC), as well as a one-day workshop with DELWP staff.

2 TRADITIONAL OWNER WATER ASPIRATIONS

The *Roadmap for Economic Development* project is **not** a determination of all Traditional Owner water aspirations or water needs. Not all Traditional Owner groups have been funded to develop these business concepts, nor do they represent the full water aspirations of those who have, because the concept of cultural flows includes spiritual, cultural, environmental and economic outcomes. Although this report focuses on the water aspirations to underpin specifically economic outcomes, the Program 2 project proposals developed by First Nations people operate to deliver economic returns as well as strengthening culture and connection to Country.

2.1 WATER PROPOSALS FOR ECONOMIC DEVELOPMENT

As of March 2019, eight Traditional Owner groups have received funding to develop business plans for how water would be used to deliver economic outcomes:

- Bunorong Land Council Aboriginal Corporation;
- Barengi Gadjin Land Council;
- Gunaikurnai Land and Waters Aboriginal Corporation;
- Gunditj Mirring Traditional Owners Aboriginal Corporation;
- Dja Dja Wurrung Clans Aboriginal Corporation;
- Eastern Maar Aboriginal Corporation;
- Taungurung Aboriginal Corporation; and
- Wathaurung Aboriginal Corporation (trading as Wadawurrung).

It is expected that three or more Traditional Owner groups will also submit funding proposals in 2019. Each of the Traditional Owner groups who have signed a funding agreement have developed a concept plan, but there are no details as yet on the precise volumes of water required. As highlighted above, these business plans represent some of the water requirements of Traditional Owner groups, but this is only a fraction of their overall water aspirations.

Importantly, each of these proposals emphasizes the connection between the cultural and economic outcomes, so that the economic outcomes are important for both the income they generate, as well meeting broader cultural outcomes. For example, a business plan to grow native foods using aquaponics will generate income from the sale of these foods to restaurants, but will also strengthen cultural connections between the Traditional Owners and their native food plants, including developing roles to support the involvement of younger generations in work on Country (see Table 1).

The project plans demonstrate the diversity of water aspirations across Traditional Owners in Victoria, including:

1. Businesses that require no new water rights (such as cultural tours and eco-tourism on lakes and rivers, which do not consume water), but that require involvement of the relevant Traditional Owner group in water resource decision-making bodies;
2. Businesses that require new water rights, but which could be met using treated, fit-for-purpose recycled water or stormwater;

3. Businesses that require new water rights in locations where unallocated water is available; and
4. Businesses that require new water rights in fully-allocated water systems, which would most likely require water purchase.

Each of these options are explored in more detail in the next section.

Table 1 Summary of potential water recovery options for Program 2 participants

| Traditional owner group | Water recovery option indicated in proposal |
|--|--|
| Bunorong Land Council Aboriginal Corporation | Aquaponics Access additional water (options 2, 3 or 4) |
| Barengi Gadjin Land Council | Bushfood farming Access additional water (options 2, 3 or 4) |
| Dja Dja Wurrung Clans Aboriginal Corporation | Aquaculture Access additional water (options 2 or 4) |
| Eastern Maar Aboriginal Corporation | Commercial eel aquaculture and bushfoods Access additional water (options 2, 3 or 4) |
| Gunaikurnai Land and Waters Aboriginal Corporation | Water-based cultural tourism No additional water rights (option 1) |
| Gunditj Mirring Traditional Owners Aboriginal Corporation | Commercial eel and aquaponics Access additional water (options 3 or 4) |
| Taungurung Aboriginal Corporation | Use existing water rights for horticulture May require new water rights (option 4) |
| Wathaurung Aboriginal Corporation (trading as Wadawurrung) | Education programs Formalise water access arrangements which may include additional water rights (options 3 or 4) |

3 INCREASING WATER ACCESS FOR TRADITIONAL OWNERS: OPPORTUNITIES AND CONSTRAINTS

Based on the range of water requirements identified in the Traditional Owner project plans that have received funding, this report identifies broad opportunities and constraints for each of the four types of water business plan. As more detailed work is completed, and the Traditional Owners assess precisely how much water is needed for each business, this assessment of opportunities and constraints will be updated with input from relevant water authorities, catchment management authorities, and DELWP.

3.1 NO ADDITIONAL WATER RIGHTS REQUIRED

In some cases, Traditional Owner groups may need little to no additional water to support their business development, either because existing mechanisms are adequate, or because the business does not consume water.

3.1.1 EXISTING MECHANISMS FOR WATER ACCESS

Traditional Owners may choose to use their section 8A rights as part of their Traditional Owner agreement. However, these rights are likely to be of limited volume, and limited in application to specific uses identified within the TOSA agreement. Where Traditional Owners own land adjacent to a water source, they may also use section 8 rights, but these are limited in application to domestic and stock use, so are unlikely to support substantial new economic enterprises.

In an urban context, new commercial developments may proceed via a planning application, which does not necessarily require acquisition of new water rights. This process would trigger an assessment by the relevant water authority as to whether the water is available for supply. For larger projects, this may include a contract (supply by agreement) between the Traditional Owner and the relevant water authority. This process can be time-consuming and expensive, and would require specialist input to develop the planning application. Water used in this context is also expensive and will be charged at the relevant commercial water rate set by the urban water authority.

3.1.2 NO CONSUMPTIVE USE OF WATER

Even when the business concept does not require consumptive use of water, Traditional Owners will need to be included within water management arrangements. The Minister for Water has already set an expectation that all water authorities will work to increase Aboriginal participation in water management, and all water authorities are working towards this objective.

Traditional Owners develop businesses that depend on the riverine environment (such as canoe eco-tourism on rivers, for example), it will be essential for water authorities to explicitly engage with Traditional Owners as a key stakeholder in water management, and include their cultural as well as their economic values and aspirations. The National Cultural Flows Research Project outlines ways that this may occur (Nelson, Godden et al. 2018). Recent work by Dr Katie O'Bryan has also demonstrated the critical importance of formalising these arrangements in legislation, as without a

formal legal requirement to be included, Aboriginal people remain dependent on the goodwill of water resource managers and the state government (O'Bryan 2019).

3.2 WATER RIGHTS VIA TREATED RECYCLED WATER OR STORMWATER

Currently, the *Water Act 1989* does not deal explicitly with water generated by treating recycled water or harvesting (and treating) stormwater runoff. These sources of water are typically considered problems to be managed, as they each pose a risk to the health of the aquatic environment. However, as water scarcity has increased, there has been a corresponding increase in interest in harnessing these potential water supplies for use (Lloyd, Wong et al. 2002, Brown, Farrelly et al. 2009, Apostolidis, Hertle et al. 2011).

Water authorities with responsibility for managing sewage and sewerage will collect and treat wastewater, which can then be discharged to the environment, or treated to a higher standard, and re-used. For example, the Werribee Irrigation District has been receiving treated wastewater from the Western Treatment Plant. This water is supplied by Southern Rural Water, who obtain the water from Melbourne Water. Due to the high salinity of the recycled water (which is not addressed by the treatment process), it is typically 'shandied' with fresh water.

Traditional Owners could likewise enter into agreements with their relevant water authority for the supply of fit-for-purpose treated wastewater for irrigation, aquaponics, or other uses. These 'supplies by agreement' are essentially contracts between the Traditional Owner group and the water authority for a specific volume of water, at a set price to cover the cost of treating and distributing the water. Highly treated water is expensive, but depending on the level of treatment required, and the support of the relevant water corporation, recycled water may be less expensive than water from other sources.

Stormwater may also be harvested under a special agreement with the relevant planning authority (local government). For instance, the Torquay Golf Club was successful in demonstrating that it would extract only the additional flows into Jan Juc Creek caused by stormwater from earlier developments in the area. This was also a significantly cheaper option for the club (Geelong Advertiser 2010). However, specialist input will be needed to determine the volume of additional flows caused by stormwater, and how these can be harvested without diminishing existing river flows. This is likely to require special licensing arrangements with the relevant water corporation.

Treated waste water (recycled or stormwater) offers a significant (if potentially costly) opportunity for Traditional Owners to obtain water to establish their water businesses. However, this water source will not be fit for all purposes. As a result, this option should not be considered as the sole means to address the historical exclusion of Aboriginal people from access to water, and it is unlikely to be able to meet their broader aspirations for combined cultural and economic outcomes.

3.3 WATER RIGHTS VIA UNALLOCATED WATER

Not all of Victoria's water resources are 'fully allocated'. In some cases, it may be possible to obtain a new right to water without having to acquire this water from an existing user (i.e. purchasing in the water market). The opportunities and processes vary widely across the state, depending on the

water source (surface or ground water) and the water authority. For a map of water authority boundaries, see: <https://www.water.vic.gov.au/water-corporations>

Unallocated water is typically available as a section 51 licence, which tends to have lower annual fees than water shares (largely because the holder of the licence does not have to cover the cost of maintaining and operating water infrastructure, such as large dams and delivery channels). However, in some cases, this may also include water in storage (see discussion of Blue Rock Reservoir below). DELWP and the water corporations are engaged in ongoing work to understand the sustainability of water supplies, so systems considered to have unallocated water now may not have any in future.

3.3.1 MELBOURNE WATER (MW)

MW manages surface water use in a range of peri-urban and rural catchments in the greater Melbourne region. Several of these catchments have been declared as Water Supply Protection Areas, which means that no new licences to water will be issued in these areas. There is also a limit on any new water allocations that increase the total use of water in the Birrarung/Yarra River or its tributaries. This means that even though some Local Management Plans (LMP) have capacity for new allocations, it is extremely unlikely that new licences could be issued without affecting the total water extraction from the Birrarung/Yarra (Melbourne Water 2018).

3.3.2 SOUTHERN RURAL WATER (SRW)

Southern Rural Water's region extends across southern Victoria, from the western state border through to eastern Gippsland, including both surface water and groundwater. Unallocated water is available in both surface water and groundwater management areas throughout this region. SRW makes this water available to water users via an auction. For example, unallocated water is available in Blue Rock Reservoir on a temporary basis, when this water is not required for use as a drought contingency measure. This water is available for purchase by licensed irrigators on the Latrobe River, downstream of the Blue Rock storage, but water has only been made available for purchase once (Southern Rural Water 2019). SRW have also identified specific locations for water sales in the 2018-19 water year, and potential sales in future years. As a result, it may be possible for Traditional Owners to acquire water rights via the auction process.

For more information on the relevant locations, refer to:

<http://www.srw.com.au/wp-content/uploads/2018/11/Future-potential-water-sales.png>

<http://www.srw.com.au/wp-content/uploads/2018/11/Water-sales-map-2018-19.png>

3.3.3 GOULBURN-MURRAY WATER (GMW)

GMW's region extends across northern and central Victoria, centred on the tributaries to the Murray, including the Goulburn, Kiewa, Ovens, Campaspe and Loddon Rivers. Within GWM's region, all surface water catchments are at full allocation and new licences can only be issued via trade (Goulburn-Murray Water 2018).

There is some capacity remaining in some groundwater management areas (except where a Water Supply Protection Area has been declared). For example, in the Broken Groundwater Management Area, there is currently 2,801.4 megalitres per year of groundwater licensed volume and the total limit on use is set by a permissible consumptive volume (PCV) of 3,732.0 megalitres per year (Goulburn-Murray Water 2018). As a result, it may be feasible for Traditional Owner groups to apply for new groundwater licences in some of these groundwater management areas. However the Sustainable Diversion Limit includes both surface water and groundwater, so new water licences may not be feasible after 1 July 2019.

3.3.4 GRAMPIANS WIMMERA-MALLEE WATER (GWMW)

GWMW's region covers western Victoria, between the border of SRW and Lower Murray Water. Surface water supplies are fully allocated in this region, but there is some capacity for increased groundwater use.

For example, the new Local Management Plan (LMP) for the Murrayville Groundwater Management Area identifies an unallocated volume of approximately 1250 megalitres per year. However, this is only available in specific locations, as set out by the LMP (Grampians Wimmera-Mallee Water 2017). Likewise, landholders within the Wimmera catchment, and the Wimmera Mallee Sedimentary Plains area are also able to apply to GWMW for a new section 51 groundwater licence (Grampians Wimmera-Mallee Water 2018). However, water quality varies significantly throughout the GWMW region, and groundwater may be too saline for some applications. In addition, drilling bores to access groundwater is extremely expensive in locations such as Deep Lead.

3.3.5 LOWER MURRAY WATER (LMW)

LMW's region is located at the north-western corner of Victoria, including the Murray River from just north of Swan Hill through to the South Australian border. Within this region, water supply from the Murray is capped under the Murray-Darling Basin Plan (the new Sustainable Diversion Limit comes into effect on 1 July 2019). As a result, no unallocated water is available in this region.

3.4 WATER RIGHTS VIA REALLOCATION OF EXISTING WATER RIGHTS

Reallocation of water from existing users represents the most straightforward opportunity under the existing water allocation framework for Traditional Owners to acquire the water they need for their water businesses.

3.4.1 WATER MARKETS

Where active water markets exist (for example, across northern Victoria), Traditional Owners may acquire temporary (water allocation) or permanent rights to water (water shares) from willing sellers. There are multiple ways to acquire water:

- (1) purchase of water shares (permanent transfer of the right to receive future water allocations) or water licences;
- (2) purchase of water allocation ('temporary' trade of a physical volume of water);

- (3) lease of water (a time-limited agreement to transfer some water allocation each year);
- (4) options contracts (an agreement to buy water if particular conditions arise, such as drought).

However, this water is likely to be expensive, with prices for permanent water shares ranging from approximately \$2500/megalitre to almost \$4000/megalitre in 2017-18 (Aither 2018). Prices for water allocation (temporary water) are lower, but highly variable depending on water availability, ranging from between \$9/megalitre to over \$400/megalitre over the past decade (Hughes, Gupta et al. 2016). Water shares also incur annual fees (regardless of how much water is available for use), and any water use will also be charged a use fee. Where water is delivered via channels, pipes or other infrastructure, there may be additional delivery charges. As a result, although this represents a straightforward method for water reallocation to Aboriginal people, this water is expensive and will require ongoing sources of funding.

In the south of the state, water markets are much less active, although some trading of water licences does occur. DELWP is working with water corporations to develop a framework for efficient use of water across southern Victoria, including the possibility of future interconnected water markets. There is an opportunity for Traditional Owners to be involved in this process from the outset to help support their future water access and management needs, including use of the water grid to move water to new locations and enable more flexible water use.

Many of the Local Management Plans for groundwater use record a significant difference between the total licenced volume and the metered water use. Assuming the meters are accurate, this suggests that some water licence holders are not using their full licensed volume. It may be possible to acquire this water for lower costs, or to enter into a lease arrangement as part of demonstrating a proof of concept for business development. SRW is currently undertaking work to develop an exchange platform to facilitate groundwater trade in the south-west.

3.4.2 AGREEMENTS WITH LARGE WATER HOLDERS

Water corporations, the Victorian Environmental Water Holder, and the Commonwealth Environmental Water Holder all hold large volumes of water for environmental purposes. Some of these organizations sell water via the water market in years (subject to specific conditions). Many of these organizations have committed to supporting increased Traditional Owner participation in water resource management, and may be potential future partners with Traditional Owners seeking access to additional water rights. In some cases, it may be feasible to enter into long-term agreements for water supply at different prices to that set by the water market.

4 BARRIERS FOR WATER ACQUISITION BY TRADITIONAL OWNERS

There are some real barriers for water acquisition and use by Traditional Owners. First and most important is the fact that although the Minister for Water expects water authorities to increase Traditional Owner participation in water resource management, this has not yet been legislated. The National Cultural Flows Research Project provides some guidance for increasing Aboriginal engagement and influence, but many water authorities and Traditional Owners are still in the early stages of determining how to apply these outcomes in Victoria. In addition, Traditional Owner groups need to be funded in an ongoing way to enable their participation. The statewide funding of Aboriginal water policy officers is a welcome step, but this funding needs to be secured for the long term in order to develop enduring relationships and enable two-way learning between Traditional Owners and water authorities.

When it comes to acquiring water rights, in addition to the constraints noted above, there are also additional legal constraints and practical barriers.

Legal constraints include:

- 1) Ownership limitations on water rights imposed by the *Water Act 1989*. For example, section 51 licences must be attached to land, requiring the Aboriginal group to have ongoing land access (either lease or ownership). In another example, section 8A rights require an agreement under TOSA.
- 2) Use constraints, including volume, timing, and application of water. For example, if water allocation is purchased on the water market, use on land will require a water use licence, which must be approved by the relevant water authority.
- 3) Use of water on land requires access to the specific land parcel. Depending on the type of water right, this may be via recognition under TOSA (section 8A rights), ownership, lease or other formal access agreement (for all other water rights).

Practical barriers include:

- 1) Funding to acquire water. As discussed above, water available on the water market varies significantly in price, but drier conditions over the past year have seen prices rise.
- 2) Funding to pay ongoing fees and charges. All water licences and water shares include an annual fee, as well as a use fee based on the water actually used. For water shares, this includes fees charged to cover the cost of maintaining water storages. Where water is obtained under a supply by agreement (such as recycled water), there will also be fees associated with the treatment and delivery of this water.
- 3) Funding for infrastructure to deliver water (both to build and to maintain). Where water is delivered using pipes, channels or other delivery infrastructure, there will be annual and use-based charges to cover the cost of this infrastructure.
- 4) Water quality may not be fit for purpose. For example, some groundwater management areas with unallocated water may have water that is too saline to support the intended use. Where treated water is supplied (waste water or stormwater), water quality can be quite variable, depending on the nature of the treatment available in a given location.

5 CONCLUSION

This discussion paper provides baseline information about the opportunities and constraints for Traditional Owner groups seeking to use water for economic development. The discussion paper has focused on exploring options available under the current Victorian water allocation framework and identifying potential barriers that will need to be addressed as the project progresses. More detail on the background information and the Victorian water allocation framework has been provided in the Appendix (below).

The next step for this work will involve working closely with Traditional Owner groups as they develop their business concepts. As more information becomes available, this project will investigate opportunities and identify pathways to support increased water access for Traditional Owners, based on their specific location, water market context, organisational requirements, and other relevant factors. This will require close engagement with DELWP, water authorities, catchment management authorities, and other operators in this space, including the environmental water holders, water brokers, and NGOs.

6 APPENDIX: WATER ALLOCATION FRAMEWORK

All water in Victoria is vested in the Crown (the State of Victoria). The *Water Act 1989* and the various legal instruments for enabling water to be allocated and used rely on this initial vesting of water in the Crown (represented by the Minister for Water).

The origins of this arrangement can be traced to Victoria's early water legislation in 1896, which replaced the inherited legal system of water rights from England with the statutory regime. However, the legitimacy of the English laws in Australia is grounded in the original claim to terra nullius, and the dispossession of Aboriginal peoples. In this context, it can be seen that both the initial application of English laws and the following statutory frameworks, have formalised dispossession of water as well as land (Marshall 2017, O'Bryan 2019).

As the water allocation framework developed in Victoria, Aboriginal people were excluded in two specific ways:

- 1) Firstly, as non-landholders, they were unable to claim riparian rights (now section 8 rights), nor were they able to receive any initial allocations of water rights when these were still attached to land; and
- 2) Secondly, when water rights were unbundled, Aboriginal people lacked funding to acquire the new water shares and water allocations (O'Bryan 2019).

As a result, Aboriginal people in Victoria have very limited access to water under the water allocation framework as it currently stands. The intent of the *Roadmap to Economic Development* project is to identify opportunities for Aboriginal people to access water to support economic development under the current water allocation framework, as well as critical barriers that may require policy and legal reform.

It is essential to note that this discussion paper does not seek to legitimise the current framework, as it is widely acknowledged to be problematic in its exclusion of Aboriginal people, but rather to establish a common understanding of the existing arrangements as a basis for moving forward.

An overview of Victoria's current water allocation framework is presented in Figure 2. The following sections provide an overview of each element of the water allocation framework.

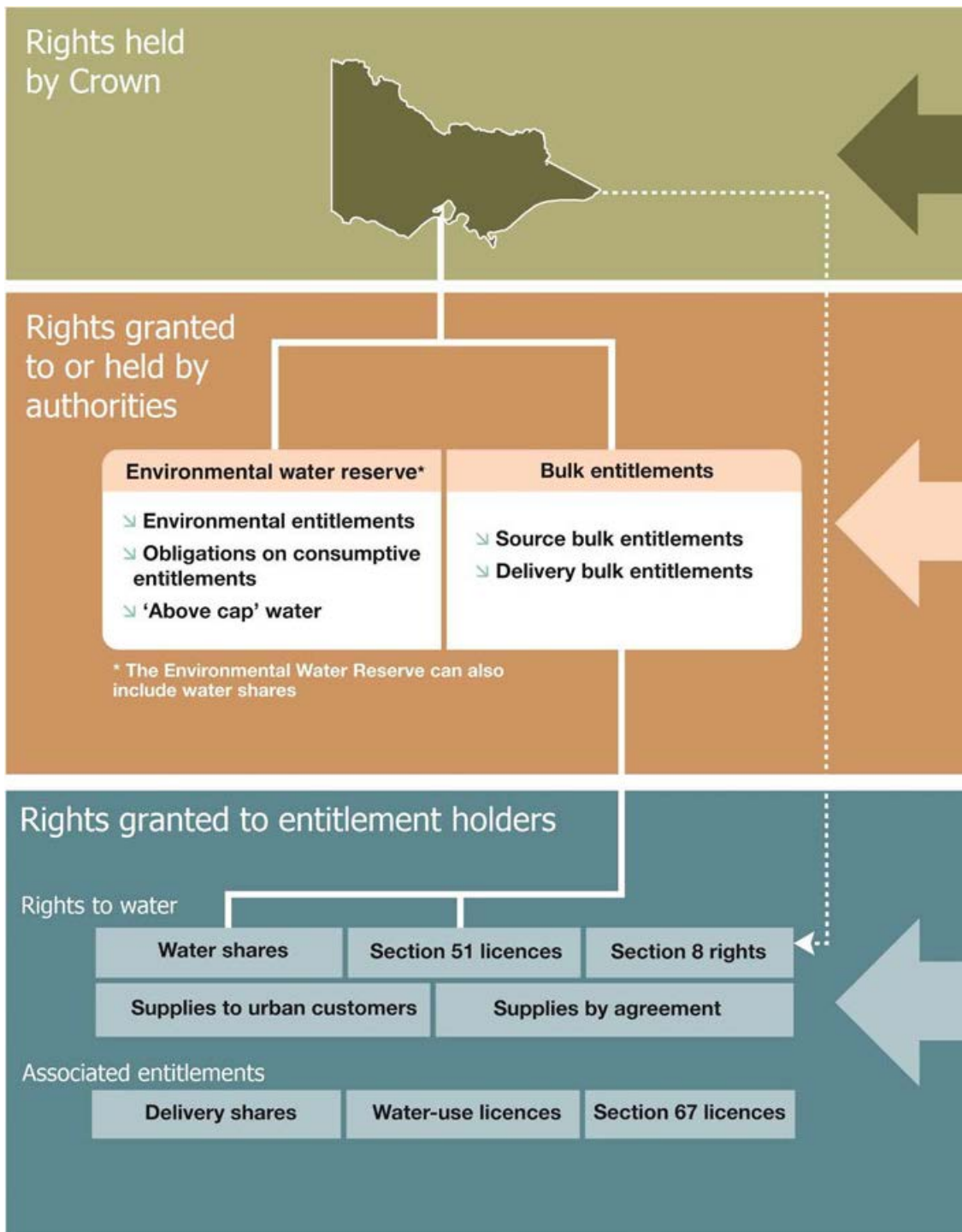


Figure 2: Victoria's water allocation framework (sourced from Department of Environment Land Water and Planning (Vic) (2019))

6.1 RIGHTS TO WATER

6.1.1 SECTION 8 RIGHTS

Australia's water laws stem from the English common law, which includes 'riparian rights', or the right for land holders to access water flowing past their land (Gardner, Bartlett et al. 2009). Although

riparian rights have now been largely replaced by statutory water use rights (discussed below), Victoria has retained the right of individual land holders to access water for their personal use (domestic) or to provide drinking water for stock. This right is codified in section 8 of the *Water Act 1989*, and includes the right to take water from a waterway or a groundwater bore, free of charge. These 'section 8' rights do not require metering (although individuals may be asked for a written summary of what has been used), and do not include the right to pollute or obstruct the waterway.

Section 8A extends the section 8 rights to include land to which Indigenous people have rights under the *Traditional Owner Settlement Act 2010* (TOSA). However, this requires an agreement to be reached under TOSA, which, as highlighted above, many First Nations groups have not yet done.

6.1.2 BULK WATER ALLOCATION AND USE

Water is allocated to authorities as entitlements, which prescribe the volume of water available and the conditions under which that water may be used. Bulk water entitlements are issued to water authorities for access to surface water or ground water, and enable the water authorities to supply this water to individuals or other water authorities (Department of Environment Land Water and Planning (Vic) 2019).

Rural bulk entitlements are held by water authorities with an irrigation function, and include the requirement to supply water to the holders of water shares or other water entitlements. In the urban context, water authorities may hold a bulk entitlement to supply other water authorities or individual users directly. There are no bulk entitlements that include a requirement to provide water to Aboriginal people specifically (although they will receive water from their urban water authority if they live in a town).

Environmental entitlements are held by the Victorian Environmental Water Holder (VEWH), and water available under these entitlements is used in accordance with a seasonal watering plan developed with input from catchment management authorities (O'Donnell 2012). The VEWH is increasingly seeking opportunities to achieve 'shared benefits' of environmental watering, including providing water to protect cultural values of Aboriginal people (Victorian Environmental Water Holder 2017).

Water use for consumptive purposes can also be capped at the bulk level. In the Murray-Darling Basin, the cap is called the Sustainable Diversion Limit (SDL), which is due to come into effect on 1 July 2019. This cap includes both surface water and ground water, and the SDL takes into account varying water availability between years. In Victoria, surface water catchments within the Murray-Darling Basin are considered to be 'fully allocated', which means that no new water shares or water licences can be issued. The reason for this is to protect reliability of supply to existing water rights (including towns, irrigators and the environment). However, in some cases, government has invested in increasing water use efficiency, and the water savings may then be allocated to new water users. For example, the Connections Project in the Goulburn-Murray Irrigation District is intended to generate up to 429GL of water savings per year (as a long term average). These savings are being shared between the environment (the VEWH and the CEWH), the water retailers of Melbourne, and irrigators. In general, all new water users (including Aboriginal people) must purchase water from existing users.

Outside the Murray-Darling Basin, consumptive water use in individual surface water catchments and groundwater management areas may be capped by setting a Permissible Consumptive Volume (PCV). In some areas, current water allocations have not yet reached the PCV, which means that water can be allocated to new uses without needing to acquire that water from other existing users. This 'unallocated' water (mostly available in groundwater management areas) provides an opportunity for Aboriginal people to acquire water (see final section).

6.1.3 INDIVIDUAL WATER ALLOCATION AND USE

In an urban context, water authorities are required to supply water to urban users, including households and commercial uses. New commercial uses will require planning applications via local government, which will include an assessment from the relevant water authority on whether it can supply the necessary water to support the business.

Outside of urban areas, the water rights of individual users are more specific and transferable between users.

Groundwater users can apply for a section 51 licence to take and use water from a groundwater bore. The section 51 licence specifies the volume available and any conditions on how the water is to be taken and used (including the land on which the water will be used). Groundwater users will also require a section 67 licence to construct the necessary works to extract the water, including the pumping and metering equipment. Section 51 groundwater licences can be traded to other users, depending on rules set by the relevant water authority.

Surface water users have access to a wider range of water rights. Section 51 licences are used for access to water available in 'unregulated' rivers (with no large on-stream dams), and a section 67 licence is also likely to be needed for any infrastructure to extract and deliver water to the location of use. Section 51 licences are also available on some 'regulated' systems, but they do not include the right to access any water stored in a dam. As for groundwater, section 51 licences can be transferred, subject to the rules set by the water authority.

Surface water rights in some irrigation districts across Victoria have been 'unbundled', which has separated the water rights into four individual rights:

- (1) Water shares, which provide the right to receive water allocations in a specific water storage;
- (2) Water allocation, which is the physical volume of water available each year (a percentage of the water available under the water share);
- (3) Water use licence, which specifies where the water can be used, and any conditions of use;
- (4) Delivery share, which provides access to delivery infrastructure (such as pipes and channels).

Water shares and water allocation are highly transferable, and there has been significant trade in both of these types of water rights in northern Victoria since 2007 (Department of Environment Land Water and Planning (Vic) 2016). Prices vary significantly from year to year, depending on water availability (Hughes, Gupta et al. 2016), particularly for water allocation.

Individuals can also enter into a contractual arrangement with a water authority to supply water. This can include supply to a location outside of a town or irrigation district, as well as access to other sources of water, including recycled water and stormwater.

6.1.4 ENVIRONMENTAL WATER RESERVE

The environmental water reserve is a collective term for water that has been allocated to the environment (Foerster 2007). There are two main ways that this happens:

- (1) *Specific rights to water* (such as an environmental entitlement, water share, water allocation, or section 51 licence), which are held by the VEWH; or
- (2) *Conditions on other users' rights*, which impose limits on how water can be used to protect minimum flows in stream (or minimum groundwater levels). Meeting these conditions is the responsibility of the relevant water authority, and is reported on as part of the Victorian Water Accounts (Department of Environment Land Water and Planning (Vic) 2019).

The environmental water reserve is primarily for ecological purposes, but may be used to provide multiple shared benefits, including water for cultural purposes.

6.2 ORGANISATIONS RESPONSIBLE FOR WATER MANAGEMENT

The Minister for Water has primary responsibility under the *Water Act 1989*, but some of these powers have been delegated to executives within state government (DELWP) and water authorities. In addition, water authorities and catchment management authorities also have specific areas of responsibility under the *Water Act 1989* for water supply, irrigation, waterway management, sewerage, drainage, and floodplain management.

6.2.1 DEPARTMENT OF ENVIRONMENT, LAND, WATER, AND PLANNING (DELWP)

DELWP is responsible for policy development and water planning, including long-term plans such as the sustainable water strategies and the long-term water resource assessment. DELWP has specific responsibilities at each level of the water allocation framework.

6.2.2 WATER AUTHORITIES

Water authorities hold bulk entitlements to water, and they are also responsible for managing water resources in various ways (including irrigation, water supply, sewerage, and drainage). The Minister for Water expects all water authorities to find opportunities to increase Aboriginal participation in water resource management.

As Traditional Owners develop their business concepts, water authorities can provide useful information about fees and charges, as well as the specifics of water availability in specific areas. Water authorities can also provide avenues for Traditional Owner participation in water resource management.

6.2.3 ENVIRONMENTAL WATER MANAGERS

Both the Victorian (the VEWH) and the Commonwealth (CEWH) environmental water holders are entering partnerships with Aboriginal peoples to support cultural flows. At the Victorian level, this has predominantly involved seeking ‘shared benefits’ by using environmental water delivery to meet cultural outcomes as well.

At the Commonwealth level, the CEWH has entered into specific agreements with First Nations people (such as the Ngarrindjeri in South Australia, and the Nari Nari in NSW), where they provide a volume of water for First Nations to manage. These agreements are important for building water management capacity within First Nations, as well as enabling First Nations to manage water for Country. However, as with the VEWH, such agreements are based on the environmental outcomes achieved, rather than economic development.

Non-government organisations (NGOs) also hold substantial volumes of water for environmental purposes and may be more flexible in how this water can be used. For example, the recent partnership between The Nature Conservancy, the Murray-Darling Wetlands Working Group and the Nari Nari in New South Wales involves protection of large areas of wetland, as well as sustainable grazing, ecotourism, and carbon offsets (Davies 2019).

6.2.4 CATCHMENT MANAGEMENT AUTHORITIES

Victoria’s catchment management authorities (CMAs) have multiple water management responsibilities, including developing annual plans for environmental water use in partnership with the VEWH. CMAs can also provide a mechanism for Traditional Owners to participate in water management, and can be a conduit for TO values to be included in longer term plans as well as seeking shared cultural benefits for environmental water.

7 REFERENCES

In addition to the references listed below, this discussion paper has drawn on the Project Plans for Program 2 (development of business plans by individual Traditional Owner groups).

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