

**CULTURAL
WATER FOR
CULTURAL
ECONOMIES**

AUTHORS

Dr Erin O'Donnell, Professor Lee Godden and Dr Katie O'Bryan. Final report of the *Accessing water to meet Aboriginal economic development needs* Project. Published by University of Melbourne, 2021.



PROJECT PARTNERS



PARTICIPATING TRADITIONAL OWNERS AND FIRST NATIONS ORGANISATIONS

Barapa Barapa Nation
Barapa Wamba Water for Country Steering Committee
Barengi Gadjin Land Council
Bunurong Land Council Aboriginal Corporation
DELWP Aboriginal Water Officers Network
Dalka Warra Mittung Aboriginal Corporation
Dja Dja Wurrung Clans Aboriginal Corporation
First People of the Millewa-Mallee Aboriginal Corporation
Gunaikurnai Land and Waters Aboriginal Corporation
Gunditj Mirring Traditional Owners Aboriginal Corporation
Jaithamathang Nation
Latji Latji Mumthelang Aboriginal Corporation
Ngintait Nation
Tati Tati Wadi Wadi Nations
Taungurung Land and Waters Council
Wadi Wadi Land and Water Indigenous Corporation
Wamba Wamba Traditional Owners
Wurundjeri Woi Wurrung Cultural Heritage Aboriginal Corporation
Yorta Yorta Nation Aboriginal Corporation

The authors acknowledge the First Nations and Traditional Owners of Victoria and their elders past, present and emerging. First Nations and Traditional Owners hold the knowledge, stories, custodial obligations and cultural knowledge that have always ensured the health of waterways and river Country. Each Nation and Traditional Owner group holds the cultural authority to speak for water, rivers and river Country within their traditional region.

The Echuca Declaration states that 'the Crown, Colonies, Commonwealth and States of Australia have been negligent in the management of the lands and waters of the Indigenous Nations causing ecosystem collapse, severe water quality degradation, extreme stress upon river ecologies and species extinction at a scale and rate which is unprecedented.' This negligence has brought 'gross and widespread detriment to the cultural economy of the Indigenous Nations and degradation of significant landscapes and sites of spiritual and cultural importance'.

We recognise that participation by First Nations and Traditional Owners in this project should not be taken as implying that any First Nation or Traditional Owner has approved of or authorised the settler-colonial water regime that has been imposed on their Country.

This is the final report prepared for the *Accessing Water to meet Aboriginal Economic Development Needs* project (Program 1) and reflects the insights and key messages shared by Traditional Owners throughout Victoria during workshops and meetings throughout 2018-2020. We gratefully acknowledge the time, energy and expertise of First Nations and Traditional Owners who participated and we also acknowledge that this paper does not speak for any Nations or Traditional Owners, and some of the options presented may not be appropriate or acceptable to all Traditional Owners.

The nature of the responses provided by participating Nations and Traditional Owners for this project are limited by the compartmentalised nature of the water management regime and by limited resources and constrained access to Country. The detail, depth and complexity of Nations' and Traditional Owners' localised water-related objectives and interests cannot be conveyed in this report alone. Water holders and water management agencies must continue to strengthen engagement with all First Nations and Traditional Owners to support them to articulate objectives for water management and shape water planning in a way that supports self-determination.

We are also grateful for the feedback we have received on this report, including that from participating Traditional Owners, as well as the Murray Lower Darling Rivers Indigenous Nations (MLDRIN), and the Federation of Victorian Traditional Owner Corporations (FVTOC).

Important disclaimer: This report identifies a range of options for First Nations and Traditional Owners in Victoria to hold and manage water rights. **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.

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It's our umbilical cord, it's our lifeline. We need our trees to be green, not dying. Country is looking different, you can see the water is not there.

Traditional Owner,
Stage 6 workshop, 2020

Water is a living being and should be treated accordingly. Many of our ancestral beings are created by and live in water.

Echuca Declaration,
2010

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.

National Cultural Flows Research Project, 2018

Pareeyt poondee-teeeyt [water is life].

Gunditj Mirring Traditional
Owner Corporation, 2019

We see our land (Wurruk) waters (Yarnda), air (Watpootjan) and every living thing as one. All things come from Wurruk, Yarnda and Watpootjan and they are the spiritual life-giving resource, providing us with resources and forming the basis of our cultural practices. We have a cultural responsibility to ensure that all of it is looked after Gunaikurnai Land and Waters Aboriginal Corporation, 2015.

1. INTRODUCTION

Traditional Owners and First Nations assert that their rights to water, like rights to land, have never been ceded (Gilbert, 2015; Marshall, 2017). Nations continue to assert their inherent rights and responsibility to care for and manage Country.

The ongoing processes of colonisation (invasion, to Traditional Owners and First Nations) deprives Aboriginal people of their enjoyment of their inherent rights to water (Echuca Declaration, 2010). In the Murray-Darling Basin portion of NSW, Aboriginal people own 0.2% of water access entitlements and water licences, despite being almost 10% of the population (Hartwig et al., 2020). Complete data has not yet been assembled in Victoria, but evidence suggests that the situation is likely even worse (Altman and Arthur, 2009). More fundamentally, Traditional Owners and First Nations say that:

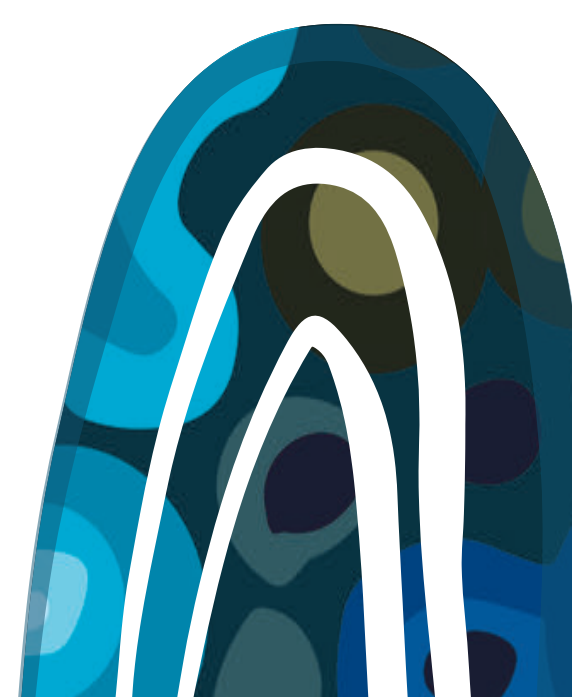
all water is Aboriginal water.

Traditional Owner, Stage 4 workshop, 2020

Addressing this injustice will require the recovery of water rights for ownership and use by Traditional Owners and First Nations, and removing the barriers to water use and water management in accordance with Traditional Owners and First Nations' laws and customs. Such barriers include the cost of acquiring and holding water rights, inability to access land on which to use water, and water planning and management processes that do

not recognise Traditional Owners and First Nations as key decision-makers for water. Many groups have expressed that the existing water entitlement framework is fundamentally at odds with Traditional Owners' and First Nations' laws and customs. This project has identified three opportunities for water reform: (1) pathways to water under the existing water entitlement framework in Victoria; (2) specific reforms to address barriers in the short term; and (3) transformative reforms that may begin to reconcile these foundational differences.

This project has identified key pathways to water access for, as well as the significant barriers to, the use of water by Traditional Owners and First Nations. Increasing water access for Traditional Owners and First Nations requires full support from the state government, consistent with its commitment to self-determination (Victorian Aboriginal Affairs Framework 2018–2023). Any water rights and water management responsibilities handed back to Traditional Owners and First Nations should also be supported by funding commitments that ensure Traditional Owners and First Nations receive genuine water justice.



This project has identified key pathways to water access for, as well as the significant barriers to, the use of water by Traditional Owners and First Nations.

WATER FOR TRADITIONAL OWNERS: A VICTORIAN FIRST



Troy McDonald, Chair of Gunaikurnai Land and Waters Aboriginal Corporation

Credit: Gunaikurnai Land and Waters Aboriginal Corporation

In November 2020, the first formal hand-back of water rights to Traditional Owners by the Victorian government was accomplished. Gunaikurnai Land and Waters Aboriginal Corporation (GLaWAC) will receive 2 GL on the Mitchell River in south-eastern Victoria. This is a 'momentous outcome' (Roger Fenwick, CEO GLaWAC) and an essential first step towards water justice.

This water will be in the form of a s 51 'winterfill' licence (meaning that water can only be extracted from the river during the high flow winter-spring period). Roger Fenwick, GLaWAC CEO said that this commitment

'recognises the importance of gaining rights to water to restore customary practices, protect cultural values and uses, gain economic independence and heal Country'.

In committing to this transfer of water to GLaWAC, Lisa Neville, the Minister for Water reiterated her commitment to Aboriginal participation in water management:

I want to see the water sector and Traditional Owners working closely together, with water entitlements supporting business, cultural, recreational and environmental outcomes for Aboriginal communities and the broader region.

The Minister also acknowledged Traditional Owners' long history of sustainable water management:

Traditional Owners have cultural, spiritual, and economic connections to land, water and resources through their relationship with Country – having managed land and water sustainably over thousands of generations.

1.1 WATER JUSTICE AND CULTURAL FLOWS

We, the Indigenous Nations of the Murray and Lower Darling River have never given up our sovereignty over our Country and it is our Country that has always given us everything.

(Echuca Declaration, 2010)

Enabling Traditional Owners to exercise their inherent rights to water by increasing access to water (especially ownership and control of water) is an urgent water justice issue in Victoria. To understand what water justice involves, we began by building on the 2018 National Cultural Flows Research Project, which set a new national standard for First Nations' water planning' (Woods et al., 2017). The Echuca Declaration defines 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."

The National Cultural Flows Research Project identifies three levels of Traditional Owner participation in water management (Figure 1):

- 1) **Water rights:** Traditional Owners gain access to rights to water within the current law and policy settings (including law reform to address key barriers to access);
- 2) **More influence in water landscapes:** Traditional Owners are empowered to participate in and drive decision-making over water landscapes; and
- 3) **Transform foundations:** re-shape the foundations of the relationship between the settler state and Traditional Owners to build a more just, fair, inclusive, and pluralist basis for managing water and Country (Nelson et al., 2018).

Throughout the Accessing Water to meet Aboriginal Economic Development Needs project, we have focused at the **water rights** level. There are two reasons for this: firstly, delivering water rights to Traditional Owners and First Nations people is an immediate water justice issue, and the lack of Aboriginal ownership of water prevents Aboriginal people from accessing social, economic, and cultural opportunities (Macpherson, 2019; O'Bryan, 2019). Secondly, increasing Aboriginal water ownership can enable Aboriginal people to participate in water management decision-making, and create opportunities to simultaneously work towards increasing Aboriginal influence over water landscapes, as well as aligning with larger efforts to transform foundations.

'Cultural flows' means **water rights**, but

effectively implementing cultural flows also means increasing Aboriginal influence over **water landscapes** more broadly, and effectively including Aboriginal people in **water governance**, at the foundation of water management.

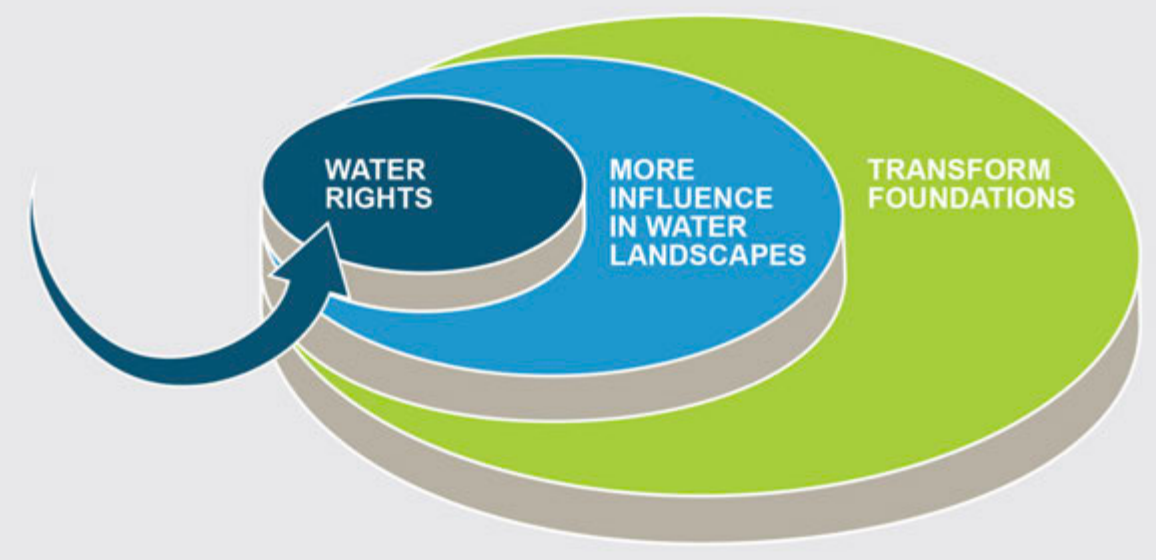


Figure 1 Implementing and supporting cultural flows (adapted from Nelson, Godden, and Lindsay, 2018)

1.2 SOVEREIGNTY AND SELF-DETERMINATION

That is us asserting our ownership and rights to water. This document needs to ensure that this is no admission of Traditional Owners ceding water ownership and rights over to the States.

Traditional Owner, Stage 5 workshop, 2020

Aboriginal people emphasise that they have never ceded 'the sacred, incontrovertible, undeniable right we have to our land' (Gilbert, 2015, p30), and this has been a consistent message from Traditional Owners throughout this project. The *Uluru Statement from the Heart* (2017) explicitly states that sovereignty has 'never been ceded or extinguished, and co-exists with the sovereignty of the Crown'. Although the Uluru Statement was rejected by the federal government, Victoria has acknowledged that 'Victorian Traditional owners maintain that their sovereignty has never been ceded' in the preamble to the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), and named self-determination as the first of the Act's guiding principles.¹

Although this project identifies law and policy pathways to increase Aboriginal access to water rights, it is important to be clear that this project does not seek to endorse the current water allocation framework, nor does it imply that Traditional Owners and First Nations people should be required to operate within it on the same basis as other water users (O'Bryan, 2019). Throughout this project, Traditional Owners have resisted the authority of the state to control all rights to water:

who allowed that? what I mean is, who is the authorised entity that lays claim to this?

Traditional Owner, Stage 5 workshop, 2020

First Nations and Traditional Owners should be able to manage their water in ways that reflect and reinforce their values, including the sacredness of water. Aboriginal law and custom continue to be in force on each Nation's Country, and this will guide their decision-making on how water is used on Country:

We'll stick to our cultural principles on where, how much and the quality of that water.

Traditional Owner, Stage 4 workshop, 2020

Traditional Owners and First Nations were also concerned that water hand back from the state government should be focused on the people with the responsibility to care for Country, and that:

water rights and water for Country should be held by Traditional Owners – Traditional Owner corporation employee.

Stage 6 workshop, 2020

For some Traditional Owners and First Nations, the concept of water rights as defined in settler state law is too different to their own laws and protocols for water management for them to prioritise gaining access to water rights within the existing state legal framework. Other Traditional Owners and First Nations are resigned to accepting the pragmatism of working within the current system, while also working to change it:

So we have to play the whitefella game, as much as we don't want to.

Traditional Owner, Stage 1 workshop, 2019

Water justice is strongly connected to self-determination (Robison et al., 2018). This aligns with DELWP's existing commitment to Aboriginal self-determination:

What that means for Traditional Owners and Aboriginal Victorians is this: their future is theirs by right. Human rights cannot be given or taken away. They are inalienable. Given Australia's history of dispossession, the Victorian Government has an obligation – on behalf of the people of Victoria – to work in partnership with Traditional Owners and Aboriginal Victorians to support their right to self-determination (DELWP, 2019, p5).

To enable Traditional Owners to access and manage water through ownership, as well as collaborate and make decisions with other water managers, DELWP's active commitment to for self-determination will be essential for the completion of the *Roadmap*.

1.3 PROJECT OVERVIEW

In 2016, Action 6.3 of Water for Victoria (DELWP, 2016) committed to developing a 'roadmap' to increasing access to water rights to support economic development. The *Roadmap* program involves three streams of work:

- **Stream 1** – *Accessing Water to meet Aboriginal Economic Development Needs*: identifying the legal and policy barriers and how to overcome them (2018-2020);
- **Stream 2** – Funding individual Traditional Owner groups to develop business plans, specifying how water would be used to deliver economic returns to the Traditional Owners (2018-2020); and
- **Stream 3** – Development of policy recommendations and required enablers, leading to a final *Roadmap* (2021).

We acknowledge that under the laws and protocols of Traditional Owners and First Nations, cultural and economic outcomes are intrinsically linked. This was evidenced through many of the business concepts developed by Traditional Owners in Stream 2, which aim to achieve not only an economic return, but also cultural, social, spiritual and environmental outcomes through connection to Country and an obligation to care for Country, and form part of the obligation to care for Country. This connection between healthy Country, healthy people, and cultural economies has been expressed throughout this work (see also, Burgess et al., 2005). In acknowledgement of this connection, in 2020 the Minister for Water committed to expand the scope of the *Roadmap* to include cultural, social, economic and environmental outcomes.

This report is the final stage of Stream 1, *Accessing Water to meet Aboriginal Economic Development Needs*. This stream included an inception meeting and six stages (Figure 2):

- 1) Inception meeting (December 2018)
- 2) Stage 1: initial discussion paper and workshop with TOs (May 2019)
- 3) Stage 2: workshops with individual TO groups who have received funding to prepare business plans (May-August 2019)

- 4) Stage 3: workshops to explore explore the potential benefits, risks and challenges of using water markets for Traditional Owners and First Nations (September 2019-February 2020)
- 5) Stage 4: workshops that aimed to identify strategies to recover water to meet TO economic aspirations (August-October 2020)
- 6) Stage 5: workshops with individual TO groups to identify preferred water governance options (March-July 2020)²
- 7) Stage 6: final report, including policy recommendations (November-December 2020)

A full list of participating Traditional Owners and First Nations is provided in the Appendix. As noted earlier, this report reflects the contributions from all participants, but does not speak on behalf of any Traditional Owners or First Nations.

Over the past two years, the project team has spoken in-depth with Traditional Owners and First Nations within Victoria on their water interests and aspirations, protocols for water use (including use of water markets), opportunities for water access, and models for water governance. Discussion papers were prepared as part of Stage 1 (pathways to water rights), Stage 5 (water governance models), and Stage 4 (northern Victoria water access options). Detailed minutes were taken at each meeting and workshop, and the quotes from Traditional Owners in this report have been drawn from those minutes. Individual speakers have not been identified in accordance with confidentiality requirements. Individual workshop summaries with greater detail were also prepared for participating Nations in Stages 2 and 5, to reflect the specific discussion with each Nation. In Stages 1-5, the project team conducted over 40 meetings and workshops with representatives from 20 Traditional Owners and First Nations groups, as well as the Aboriginal Water Officers Network (see Appendix). Not every Nation participated in workshops in each stage, but at the request of individual Nations, workshops or informal meetings were held to cover material from earlier stages of work.

¹ *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 22(1)

² Stage 5 was delivered prior to Stage 4 so that the discussions on water governance models could be used to support the workshops to identify specific opportunities to recover water for TOs.

OVERVIEW OF STREAM 1 ACTIVITIES

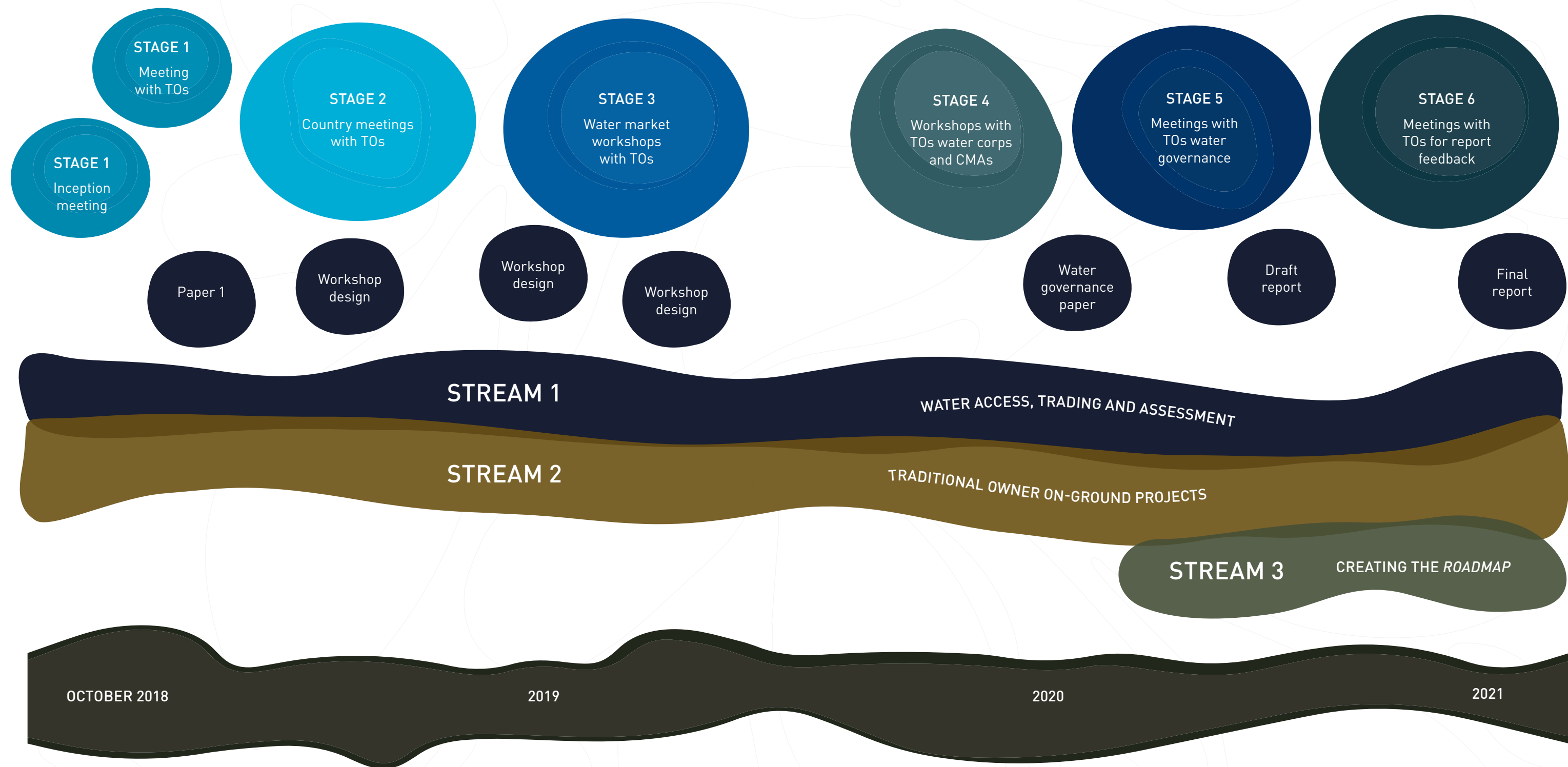


Figure 2 Overview of Stream 1 activities



We want to look after
Country, safekeeping for
the future.

Traditional Owner,
Stage 5 workshop, 2020

We have obligations to care
for country.

Traditional Owner,
Stage 5 workshop, 2020

Rivers are living entities that should flow.

Traditional Owner, Stage 4 workshop 2020

why should we have to fight, why do we have
to justify it? Why do we have to feel bad about
what we deserve?

Traditional Owner, Stage 6 workshop, 2020

We were never compensated
for the loss of that water.

Traditional Owner, Stage 5 workshop, 2020

2. KEY PRINCIPLES: SELF-DETERMINATION, HEALTHY COUNTRY AND HEALTHY MOB

[W]e've got priorities. Economics
comes into it down the track, but it's
not prioritised over the environment,
over our spiritual health, over restoring
our waterways and our biodiversity that
relies on it

Traditional Owner, Stage 4 workshop, 2020

Throughout this project, Traditional Owners have
referred to three key principles: self-determination,
healthy Country, and healthy people. As one
Traditional Owner put it, water is for:

**Aboriginal economic development,
cultural flows, and for Country itself.**

Stage 5 workshop, 2020

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.

National Cultural Flows Research Project, 2018

2.1 SOVEREIGNTY AND SELF-DETERMINATION

Aboriginal sovereignty and self-determination
have been identified as the foundations for water
justice (Robison et al., 2018), and Traditional Owners
describe themselves as:

rights holders not stakeholders.

Traditional Owner, Stage 5 workshop, 2020

Each of the following points reflect comments and
insights from Traditional Owners over the course of
the project.

1. **Sovereignty** Traditional Owners and First Nations have never ceded rights to land and waters, and their cultures determine where, when and how water is used on Country.
2. **Self-determination** Water will be held in perpetuity by each individual Nation, to be used for any purpose as determined by each Nation. Traditional Owners and First Nations will set their own priorities and their decision-making processes will be respected.
3. **Free, prior, and informed consent** Decisions on water management and planning will include timely, meaningful, and culturally appropriate engagement with all affected Nations.
4. **Partnership** Traditional Owners and First Nations are rights-holders and partners in water planning and management, not stakeholders.

2.2 HEALTHY COUNTRY

Traditional Owners and First Nations consider that it is essential to be able to use water to care for Country, and to recognise water’s spirit and agency.

We have obligations to care for country.

Traditional Owner, Stage 5 workshop, 2020

We want to look after Country, safekeeping for the future.

Traditional Owner, Stage 5 workshop, 2020

Where’s water’s own allocation, where TOs can advocate for water as its own entity with rights to progress?

Traditional Owner, Stage 5 workshop, 2020

Rivers are living entities that should flow.

Traditional Owner, Stage 4 workshop 2020

Every time I go on Country I see the Country through my ancestors eyes and the work that we need to do, and through the eyes of the future generations, there’s a lot of work that we need to do.

Traditional Owner, Stage 6 workshop, 2020

Each of the following points reflect comments and insights from Traditional Owners over the course of the project.

1. **Water flows in Country, around Country, through Country** Water management must be holistic and place-based planning processes must reflect the needs of Country. Traditional Owners and First Nations will work together and show how First laws and cultural protocols keep Country healthy.
2. **Water should stay on Country** Traditional Owners and First Nations oppose the transfer of water out of rivers and away from Country via the water grid.
3. **Water has spirit and agency** Water is a spirit that has a right to be treated as an ecological entity, with its own inherent right to exist.³

3 The specific text used here is taken from the Garma Declaration, 2008, but this concept was expressed by many Traditional Owners during the workshops.

2.3 HEALTHY MOB

Water plays an important role in supporting healthy people (physically, mentally, and spiritually):

Our spiritual health is in jeopardy here, [it will] affect our generations to come. Our mental wellbeing.

Traditional Owner, Stage 4 workshop, 2020

We’ve had fish kills, and that’s affecting spiritual health.

Traditional Owner, Stage 4 workshop, 2020

In supporting healthy people, water is also essential for maintaining strong culture:

The future of our culture in this modern world and society is determined by the ways our water is managed and maintained.

Traditional Owner, Stage 4 workshop, 2020

Each of the following points reflect comments and insights from Traditional Owners over the course of the project.

1. **Health and well-being** Caring for Country and building stronger cultural economies is important for physical, spiritual and mental health.
2. **Building a better future for our children** Access to water rights is a first step in a bigger campaign for water justice and the rights of the next generation.
3. **No one gets left behind** Every Nation will have access to water and will be supported to make their own decisions about how the water is used. Nations will learn from each other.
4. **Acknowledge injustice and structural inequity** The impacts of colonisation are ongoing and must be acknowledged.



Credit: Taungurung Land and Waters Council.

‘THE RIVERS ARE THE VEINS OF THE COUNTRY’

Taungurung Land and Waters Council (TLaWC) owns water shares on the King River, and in June 2019, TLaWC transferred 39 ML of their water allocation to the Victorian Environmental Water Holder. This water was released as environmental flows in the King River, providing an increase in habitat for fish and aquatic invertebrates, and making an important contribution to healing Country.

Shane Monk, Taungurung man, said:

The rivers are the veins of the Country, if you take too much water from them Country would get sick. Taungurung has a responsibility and we are only doing the right thing for Country by bringing water back to the river. We are working with the North East CMA, VEWH and GMW to achieve this. We feel confident we can do more if we continue working together.

Source: Victorian Environmental Water Holder, Community Highlights (Ovens System), 2019

3. CULTURAL WATER FOR CULTURAL ECONOMIES

As part of Stream 2, several First Nations and Traditional Owners from across Victoria received funding to develop business proposals that identified economic benefits from increased access to water rights and increased influence over water landscapes (Table 1).

ABORIGINAL CORPORATION / NATION	STREAM 2 PROJECT
Barengi Gadjin Land Council Aboriginal Corporation	Aboriginal Farming
Bunurong Land Council Aboriginal Corporation	Bunurong Aquaponics
Dja Dja Wurrung Clans Aboriginal Corporation	Healing Water Aquaculture
Eastern Maar Aboriginal Corporation	Eeling and Bushfoods
First People of the Millewa-Mallee Aboriginal Corporation	Native Fish Aquaculture
Gunaikurnai Land and Waters Aboriginal Corporation	Water-based Cultural Tourism
Gunditj Mirring Traditional Owners Aboriginal Corporation	Killara Kooyang Water
Taungurung Land and Waters Council	Water for Bushfoods Horticulture
Wadawurrung Traditional Owners Aboriginal Corporation	Water and Culture Education
Barapa Barapa and Wemba Wemba nations	Water for Economic Development

Table 1 Stream 2 project funding: cultural economy development (DELWP, 2020)

The Stream 2 projects demonstrate a wide variety of water needs, ranging from requiring no additional rights to water (such as eco-tourism and educational projects) to projects that require significant volumes of additional water, as well as infrastructure to apply it to land (such as bush foods farming and aquaculture). In all cases, the business proposals form part of integrated, whole-of-Country planning, and aim to achieve multiple outcomes for healthy Country and healthy people.

Managing water for Country can improve the abundance of resources and condition of the assets. This might not provide a commercial return immediately but it is economic development. Knowledge is another asset.

Traditional Owner, Stage 2 workshop, 2019

Each Nation has progressed their initial concepts in different ways. For example, the Killara Kooyang project developed by Gunditj Mirring Traditional Owners Aboriginal Corporation led to practical testing of the eel farming arrangements at Budj Bim, in partnership with Deakin University and Wannon Water. Gunditjmara people have received training in animal handling and a pilot eel farming facility has been established on site. Receiving the project funding under Stream 2 was important for the progress of this project:

to have that funding for us to activate something, that's been really good. [It] provided substance to this conversation.

Traditional Owner, Stage 2 workshop, 2019

We don't want to trade culture for economics.

Traditional Owner, Stage 1 workshop, 2019

That's our way of being economical. If we're able to grow our bush medicines, bush tucker, from free water that actually belonged to us in the first place, then we're doing well.

Traditional Owner, Stage 5 workshop, 2020

We need cultural water for our cultural economies.

Traditional Owner, Stage 4 workshop, 2020

For other nations, the initial funding has supported the development of a range of different ideas that have extended the original project. For instance, through their conversations with water authorities, one Nation identified the possibility of using recycled water to grow crops, noting that:

we could make the treated water project happen quite easily through a consultant and [water authority] assistance.

Traditional Owner, Stage 2 workshop, 2019.

The Stream 2 project funding has supported increased engagement and relationship building between nations and water authorities, catchment management authorities, and other government agencies that support regional development. The funding has enabled Nations across Victoria to strengthen their capabilities and deepen their capacity to advocate for their water rights, as well as specific water policy outcomes.

However, the initial limitations on Stream 2 meant that not all Traditional Owners and First Nations were given equal opportunities to obtain funding as part of this project. Some projects have progressed faster than others, and the impacts of the COVID-19 pandemic have caused delays for all participants

Furthermore, the lack of access to water remains a fundamental constraint to the development of water management capacity in Traditional Owner organisations. Without the ability to plan and manage water use on Country, the proposals for water use remain unrealised. This project has been able to identify, in most cases, sources of water that could feasibly be allocated to Traditional Owners to meet their Stream 2 water needs. However, although water access sufficient to support each of the Stream 2 projects is essential, these projects represent only a tiny fraction of each Nation's water interests.

4. PATHWAYS TO WATER ACCESS

In this section, we focus on specific pathways to water access for First Nations and Traditional Owners. However, before we go into this detail, it is important to note the context of these conversations with Traditional Owners and First Nations.

Throughout this project, all Nations have repeatedly expressed their desire for formal decision-making powers in water planning and management on Country. This includes handing over responsibility for environmental water management to Aboriginal people:

Long run view needs to be that the [Victorian Environmental Water Holder] and [Commonwealth Environmental Water Office] are Aboriginal controlled.

Aboriginal corporation staff member,
Stage 5 workshop, 2020

One step towards this long-term view is the opportunity for specific agreements between Nations and the environmental water holders. For example, the Ngarrindjeri Regional Authority has entered into an agreement with the Commonwealth Environmental Water Holder for the management of environmental water in accordance with cultural protocols. This has been an important nation-strengthening exercise (Hemming et al., 2019).

Some Traditional Owners in Victoria are also proposing to re-set the current relationship between catchment management authorities and Traditional Owners:

[our] aspiration is to take over the CMA's responsibility, and therefore have final say on how, where and when environmental water is delivered and managed, which reflects the need for environmental and cultural uses of water to be managed side by side.

Traditional Owner, Stage 2 workshop, 2019

an example of 'transform foundations' would be [Aboriginal Corporation] as the CMA.

Aboriginal corporation staff member,
Stage 2 workshop, 2019

One step towards this long-term view is the opportunity for specific agreements between Nations and the environmental water holders.

It is our human right – the rights of the Indigenous people of Australia. To be involved in water, have the right of access to water, and be participating players in the decisions made regarding water.

Traditional Owner, July 2017 (DELWP, 2020)

Long run view needs to be that the VEW and CEWO are Aboriginal controlled.

Aboriginal corporation staff member,
Stage 5 workshop, 2020

If you control water you control a lot. There's power, an attitude, around that.

Traditional Owner,
Stage 2 workshop, 2019

Such changes could be achieved in a staged manner, beginning with building strong partnerships between Traditional Owners and CMAs, and leading to eventual shifts in power and control to Traditional Owners. Others emphasised the possibilities of co-management as a path to participation and power-sharing with water authorities:

Native Title led to the idea of co-/joint-management of parks and reserves. Maybe the same thing should happen in terms of water? Therefore we immediately become part of decision making

Traditional Owner, Stage 2 workshop, 2019

Parks Victoria are heading towards more co-management; the same thing should be happening with water authorities. Real outcomes.

Traditional Owner, Stage 2 workshop, 2019

Since 2016, the state government has made some progress in increasing Aboriginal participation in water management. Every year since 2017, the Minister for Water has formally written to water authorities and stated her expectation of increased Traditional Owner participation in water resource management. Aboriginal employment at water authorities (including at the board level) has increased, but this expectation is presently not a formal obligation on water authorities, and their ability to include the costs of meeting this expectation in their pricing submissions to the Essential Services Commission is consequently limited.

In addition, the statewide funding of Aboriginal water officers is a welcome first step, and has directly supported Traditional Owners and First Nations across the state to build their water management capacity. However, not all Nations have an Aboriginal Water Officer, and of those that do, each Nation has only one funded role (one full-time equivalent funded for a fixed term). Funding also 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:

As a AWO it's frustrating, because my hands are tied; there's so little going on. A lot of talk, same words, but we need to get our people out here, on the ground, working, building up the relationships, two-way learning. Rolling out AWAs [Aboriginal Waterway Assessments] on a monthly basis. All these things need to be funded and resourced. I just feel like my hands are tied. There's only so much we can or can't do.

Aboriginal Water Officer, Stage 5 workshop, 2020

Enabling Traditional Owners to give effect to their laws and customs for managing water on Country should be a central plank of the forthcoming *Roadmap*. An essential step to achieving this is to hand over water rights to Traditional Owners for their use and management:

if you control water, you control a lot. There's power, an attitude, around that.

Traditional Owner, Stage 2 workshop, 2019.

In the course of this project, we have identified four main pathways to increased water access for Aboriginal people in Victoria.

4.1 INCREASED USE OF EXISTING WATER RIGHTS

There are a very small number of Aboriginal-owned water entitlements in Victoria, most of which are owned by Aboriginal-owned corporations, but not Traditional Owners (the exception being Taungurung Land and Waters Council, which owns water shares on the King River). However, there are two existing sources of rights to water that are currently not being fully utilised by Nations: section 8 and section 8A rights.

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 a settlement to be reached under TOSA, and not all Traditional Owners and First Nations have engaged in this process.

Where Nations have freehold title to land adjacent to a waterway or groundwater bore, they will hold section 8 rights. Such rights can be used to support pilot projects, such as Guntitj Mirring's Killara Kooyang project, which relies on section 8 rights to access water from Killara (Darlot's Creek). However, section 8 rights cannot be used to support commercial projects, so they have limited capacity to support economic development.

For Nations with a Traditional Owner Settlement Agreement, where their agreement includes water-dependent cultural values and uses, and provided that the water is taken from a source specified in section 8 (*Water Act 1989*), any member of that Traditional Owner group can use water to support those values and uses.⁴ No Nations are currently making use of their section 8A water rights. Even Nations with TOSA agreements have expressed the desire for more certainty on how much water they are entitled to use, and for what specific purposes.

4.2 UNALLOCATED WATER

In some locations, it is possible to obtain a new right to water without having to acquire this water from an existing user. The opportunities and processes vary widely across the state, depending on the water source (surface or groundwater) and the water authority.

Across southern Victoria there are large volumes of both surface water and groundwater still available for allocation. Southern Rural Water has identified significant volumes of surface water in both south-western and south-eastern Victoria. In 2020, Gunaikurnai Land and Waters Aboriginal Corporation (see Box 1) and Gunditj Mirring Traditional Owners Aboriginal Corporation formally expressed their interests in the unallocated water to both Southern Rural Water and DELWP (see Part 5 below).

The Sustainable Diversion Limit (SDL) on water use in the Murray-Darling Basin limits accessibility to unallocated water in northern Victoria, and there is no remaining unallocated surface water in the north. However, there are some remaining unallocated groundwater volumes in north-western Victoria (in Grampians Wimmera Mallee Water's region) as well as small volumes in multiple groundwater management areas across Goulburn Murray Water's region. Any application for new section 51 licences to access this water would need to comply with existing state regulations, and the Murray-Darling Basin SDL.

There is strong interest from Traditional Owners in groundwater in both northern and southern Victoria, predominantly for the purpose of caring for Country. Unallocated groundwater can be difficult to access for a variety of reasons (high salinity, drilling depth, infrastructure costs, and recharge rates), but there are opportunities for increased access, especially in south-west and south-eastern Victoria. Many Traditional Owners argue that groundwater is:

Not useable in sense of white use; but it's there for a reason.

Traditional Owner, Stage 5 workshop, 2020

There is interest from Traditional Owners in obtaining rights to this water to care for Country, which may not necessarily involve extracting the water. Groundwater rights for Traditional Owners would also increase their power to influence future water allocation policies and processes for managing groundwater (an essential step identified in the National Cultural Flows Research Project).

Unallocated surface water and groundwater is typically available as a section 51 licence (and may also require a works licence),⁵ which historically has required the ownership of (or formal access to) land on which the water will be extracted and used. This has historically been a barrier to access for Traditional Owners. In southern Victoria, discussions with Southern Rural Water indicate that this requirement could be altered, especially where surface water is used as an in-stream flow. In these cases, the increased in-stream flows will also need to be protected by changing the conditions on other water users' licences to ensure that the increased flow remains in-stream, and is not extracted by other users.

⁴ Traditional Owner Settlement Act 2010 (Vic), ss 79, 84.

⁵ Licence allocation (s 51) and works licence (s 67) are issued under the *Water Act 1989*.

4.3 WATER REALLOCATION

Reallocation of water is a viable opportunity under the existing Victorian water allocation framework for Traditional Owners to acquire water rights, although it can also be one of the most politically charged and expensive pathways.

4.3.1 WATER PURCHASE

Where active water markets exist, there are multiple ways Traditional Owners may acquire water from willing sellers:

- (1) purchase of water shares (which are permanent rights 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, permanent water purchases are likely to be expensive. For example, prices for permanent high reliability water shares reached \$4500/ML in northern Victoria in 2019 (Aither, 2020). Prices for water allocation (temporary water) are lower, but highly variable depending on water availability and demand, ranging from between \$9/megalitre to over \$900/megalitre over the past decade (Hughes et al., 2016; Aither, 2020). Water shares also incur annual fees (regardless of how much water is available for use), and any water user 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 water purchase is a pathway for the reallocation of water to Aboriginal people, this water is expensive to acquire, and will require ongoing sources of funding to enable its use (Hartwig et al., 2020).

Traditional Owners have stated very clearly that they are opposed to buying back what they consider to be their own water:

It's like paying our own ransom.

Traditional Owner Stage 5 workshop, 2020

My position was no, we would not be paying for the water coming from [Nation] Country - that it is coming from [Nation's] mountains and clouds.

Aboriginal Water Officer, Stage 5 workshop, 2020

Moreover, many Traditional Owners also argue that water justice should include compensation for both the loss of the water, and the damage to Country:

What about compensation, for 100 years when they wrecked the rivers?

Traditional Owner, Stage 5 workshop, 2020

In the south of the state, water markets are much less active, although some trading of water licences does occur, and this pathway exists there too.

4.3.2 'UNDER-UTILISED' WATER

There are also volumes of 'under-utilised' water in northern and southern Victoria, or as one Traditional Owner described it: '*uncared-for water*' (Stage 4 workshop, 2020). The term 'under-utilised' water describes water that has been formally allocated to someone (so it is not unallocated water) but is not being used for the purpose for which it was allocated, and thus there may be an opportunity for reallocation.

Many of the Local Management Plans for groundwater use across the state record a significant difference between the total licenced volume and the metered water use. In northern Victoria, approximately 40% of licenced groundwater volume is being used across Goulburn Murray Water's region, although this varies significantly between groundwater management areas (GMW, 2016). This suggests that some water licence holders are not using their full licensed volume, and it may be possible to acquire this water for lower costs (although any increased usage of licensed volume may also create sustainability challenges for groundwater management).

Two additional examples of under-utilised water identified across the state are discussed in Parts 5 and 6 below. These include water on the Birrarung/Yarra River (the former Amcor entitlement, some of which is now held by DELWP), as well as water entitlements held in northern Victoria by the three Melbourne metropolitan water corporations.

The changing status of coal mines and power stations in the Latrobe Valley may also provide opportunities for future re-allocation of existing bulk entitlements, although it is worth noting that the impacts of climate change on the Latrobe Valley water resources may be substantial (DELWP, 2020). The opportunity to re-allocate this water to Traditional Owners should be explored as a priority.

4.4 TREATED, FIT-FOR-PURPOSE RECYCLED WATER

Water authorities with a sewerage responsibility 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 receives treated wastewater from the Western Treatment Plant. This water is supplied by Southern Rural Water, who obtain the water from Melbourne Water after treatment. Due to the high salinity of the recycled water (which currently cannot be addressed by the treatment process), it is typically diluted with fresh water.

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. Adopting options like this requires specialist input to determine the volume of additional flows caused by stormwater, and how these can be harvested without diminishing existing river flows.

Traditional Owners could likewise enter into agreement with their relevant water authority for the supply of fit-for-purpose treated stormwater or wastewater for irrigation, aquaponics, or other uses. These 'supplies by agreement' would essentially be 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. Prices of recycled water vary significantly, depending on the level of treatment required.

As water scarcity is predicted to increase under climate change, recycled water is likely to increase in value as a water source. Some water authorities are actively investigating opportunities to substitute existing water use with recycled water, and handing over water savings to Traditional Owners for management. Others are exploring how they could create 'rights' to recycled water, and hand these over to Traditional Owners, to be either used by Traditional Owners or sold to generate income. It is not clear how this would proceed under the existing legal framework, and there is a risk that it could result in Traditional Owners becoming responsible for the costs of treatment and disposal of the treated wastewater.

It is essential to note that the Echuca Declaration requires water of 'sufficient and adequate quantity and quality'. Although some Traditional Owners and First Nations have considered the possibility of making use of recycled water of appropriate quality in limited circumstances, other Nations have consistently rejected recycled water as a pathway to water justice:

Our ancestors didn't swim or fish or get food from wastewater; it was from freshwater, from the River.

Traditional Owner, Stage 5 workshop, 2020

4.5 MAJOR BARRIERS

Identifying these four key pathways to water access for Traditional Owners and First Nations also helps to highlight the significant barriers to progressing actual water access. Addressing these barriers needs urgent attention.

In addition to these longer term reforms, there are also short-term solutions that can help build momentum for water justice. Where there are immediate opportunities for water handover that can be achieved without major additional funding or legal reform, these should be progressed as a priority. For example, unallocated water should be allocated to Traditional Owners without further delay. The decision of the Minister for Water to support the allocation of 2 GL on the Mitchell to Gunaikurnai Lands and Waters Aboriginal Corporation shows that this can be achieved ahead of the *Roadmap* and the longer-term reform process.

4.5.1 FUNDING

I struggle with the concept of paying for something that should be free. In the past, it would've come naturally to us.

Traditional Owner, Stage 2 workshop, 2019

The biggest barrier to increased water access for Traditional Owners in Victoria is access to adequate funding. Water can be expensive to acquire, and under the existing water allocation arrangements, annual fees and charges mean that ongoing funding is necessary. Experience from NSW shows that without adequate funding to use and manage water on Country, Nations may have no choice but to sell water to cover these costs.

This has contributed to a 17% decline in water rights held by Aboriginal people in NSW in the past decade alone (Hartwig et al., 2020). Traditional Owners in Victoria see this as a significant risk:

the fees and licensing is another way to lose money... It needs to be factored into whichever model we pursue, right from the start. I'd be very interested in what smaller TOs might think, coz I don't want them to be stung for fees and charges that they can't cover.

Traditional Owner, Stage 5 workshop, 2020

One response to this problem in southern Victoria is new policy adopted by Southern Rural Water in December 2020. Under this policy, water licences issued for cultural purposes (which does not exclude economic returns on the water use, provided that the use of water is not solely for commercial purposes) will not be charged annual licence fees. This important step addresses a key barrier to water access for Traditional Owners in southern Victoria.

In addition, as many Traditional Owners and First Nations noted, they need access to infrastructure to deliver water:

Manipulation of the landscape means we can't water it. How do we secure that investment for infrastructure as well?

Traditional Owner, Stage 5 workshop, 2020

Water management capacity also requires funding:

They have to engage with us and support us with resources

Traditional Owner, Stage 5 workshop, 2020

This should include not only funding for Aboriginal Water Officers, but also funding for ongoing monitoring, evaluation and research (including cultural survey work), as well as paying for Elders to spend time on Country with younger generations:

[We need] the resources to get out on Country to do it as well. Young ones need to be able to take Elders out on Country; I've learnt so much from taking [specific Elders] out on Country.

Traditional Owner, Stage 5 workshop, 2020

In the context of Victoria's commitments to increasing Aboriginal access to water rights and participation in water management, there is an opportunity to amend the existing statements of obligations to formally include obligations on water corporations to deliver these outcomes.⁶ In addition to enabling water corporations to include activities supporting Aboriginal water access within their pricing submissions, this reform also provides an opportunity to shift the conversation away from 'providing funds' (which can be seen as optional), to paying a fee to Traditional Owners for service provision:

Government has mandated these rules, therefore it is a legitimate business operation cost... Fees for engagement and a formal obligation to engage. Funding of projects, no obligation...

Always sounds like a handout. "Fees for service": they're obliged to do this, and it costs a fee.

Traditional Owner, Stage 5 workshop, 2020

4.5.2 LAND ACCESS

cultural flows is water and land

Traditional Owner, Stage 6 workshop, 2020

our biggest problem is, we all talk about water, but we're never gonna get water if we don't own land. If we don't own land, how are we going to get water?

Traditional Owner, Stage 5 workshop, 2020

Although water shares and water allocations in declared systems can be held without requiring the water to be linked to land, land access and/or ownership remains a legal requirement for some water rights (such as s 51 licences, water use registrations, and s 8 rights). More fundamentally, access to land on which to use water is essential for building cultural economies and caring for Country. Increasing Aboriginal access to water must, therefore, also be accompanied by commitments to increase Aboriginal access to land for both economic and cultural purposes.

Co-management or joint management agreements for public land can be one way to tackle this barrier, and embed Traditional Owners as decision-makers for land and water management. However, it is worth noting that co-management has a fraught history in terms of who really has the decision-making authority. Some Nations have identified land access options that would enable them to develop cultural economies on private land that is connected to public land on which they are already joint managers (which could be used to facilitate water delivery to the additional land not covered by the joint management agreement). However, there is a real need for the *Roadmap* (and other reform initiatives such as the TOSA First Principles Review) to include recommendations that increase land and water access for Traditional Owners and First Nations.

4.5.3 ENTITLEMENT REFORM

Traditional Owners and First Nations have highlighted the limits in the current entitlement framework to provide rights to water that reflect their laws and cultural protocols. In some cases, such as groundwater, there is a desire to use entitlements to water as a mechanism for leaving the water in the ground. For surface water entitlements, there is a desire to be able to use the water for cultural purposes, including in-stream flows, watering wetlands, and cultural economic uses. There has also been some interest in placing limits on the further transferability of water rights once they have been handed to Traditional Owners:

Really need to explore the question of if an entitlement was given, that it should then stay with TOs, rather than being able to be trading out and potentially gone.

Traditional Owner corporation employee, Stage 5 workshop, 2020

However, there are also risks in creating specific water entitlements for only one type of water user, as these entitlements are likely to be more vulnerable to qualification by the Minister for Water during times of water scarcity (O'Donnell, 2012).

More specifically, as Traditional Owners and water authorities work through the process of allocating water to Traditional Owners under a section 51 licence, a range of technical issues have been identified that need to be addressed.

Firstly, the use of water for cultural purposes needs to be a recognised use of water for the purpose of section 51 licences. These cultural purposes should be highly flexible, and include both in-stream use as well as economic development. Secondly, the s 51 licence is currently linked to a specific land parcel, and more flexibility is required here to support water allocation to Traditional Owners who do not own freehold title. Thirdly, a clear policy that prioritises the interests of Traditional Owners and First Nations in unallocated water would facilitate compliance with section 40 (*Water Act 1989*) when it comes to issuing a new section 51 licence to Traditional Owners.

The *Roadmap* will further develop specific positions on entitlement reform to enable all Traditional Owners and First Nations to hold and use water in accordance with their cultural protocols.

4.6 LESSONS FROM OTHER STATES

Victoria is not the first Australian jurisdiction to explore opportunities to hand back water rights to Aboriginal people. In this section, we briefly highlight some reforms in other states that have useful lessons for Victoria.

In NSW, one of the objectives of the *Water Management Act 2000* is to recognise the multiple benefits to Aboriginal people from their 'spiritual, social, customary and economic use of land and water' (s 3). Under NSW water sharing plans, special purpose licences have been developed for Aboriginal uses of water. Godden et al. (2020) describe the limits on these licences, which 'will only be granted to take a fixed and small amount of water for cultural purposes, and... cannot be traded or used for commercial purposes' (p 669). As a result, Aboriginal people seeking to use these licences must still find the necessary funding to establish and maintain infrastructure (such as water pumps), but some of these licences have no ability to provide a commercial return. Further, being 'special purpose' licences, they are not the same as other water access entitlements, and therefore have limited capacity to increase First Nations' participation in water management. Very few such licences have been issued, further underscoring the point that they are not meeting the needs of First Nations in NSW.

⁶ *Water Industry Act 1994* (Vic), s 41. Statements of obligation may be amended under the existing legal framework, but it may be useful to consider a specific set of obligations relating to Aboriginal people under s 41 (3).

In the Northern Territory, the state government has now established the Strategic Aboriginal Water Reserve (SAWR), which is 'a reserve of water allocated in a water allocation plan for Aboriginal economic development in respect of eligible land' (s 4, *Water Act 1992* (NT)). The definition of eligible land is quite broad (s 4B), but the land must be designated in a water allocation plan (s 22C). Indigenous peoples currently have land rights to over half of the land in the Northern Territory, but only 5% of the NT is covered by water allocation plans (Nikolakis and Grafton, 2021). In addition, although land rights are a pre-requisite for the SAWR, available water is capped at 30% (regardless of how much land is owned by Indigenous peoples), and in cases of 100% Indigenous ownership, the SAWR will not apply, as it is deemed unnecessary (Godden et al., 2020). Where water is already fully or over-allocated, the SAWR remains as a 'notional' allocation, requiring water recovery before water licences can be issued to Aboriginal people (Godden et al., 2020). Lastly, the emphasis on economic development is at odds with the expressed desires of the Central and Northern Land Councils, who argued that a definition including cultural uses and values was needed (Nikolakis and Grafton, 2021).

In Queensland, water reserves for Aboriginal people have been created in Cape York as well as the Great Artesian Basin. The Cape York Water Plan increased Aboriginal access to 94% of unallocated water, and enables water rights issued to Aboriginal corporations and individuals to be traded. However, where water is already fully allocated, water access remains a significant barrier to economic development (Godden et al., 2020). In the Queensland portion of the Great Artesian Basin, only 3.5% of unallocated water has been set aside for Aboriginal economic use (880 ML).

In reviewing the experience of other states, some key lessons emerge for Victoria, including the need to create fit-for-purpose entitlements that deliver meaningful volumes of accessible water to Traditional Owners and First Nations, and a commitment to lasting change by breaking the cycle of small reforms that may be vulnerable to future shifts in government policy priorities (Taylor et al., 2016).



Stage 3 Water Markets Workshop, 2020. Credit: Erin O'Donnell

...for the governance of it all, we need our
own Traditional Owner water authority down this way.

Traditional Owner, Stage 6 workshop, 2020

Water ownership should acknowledge
“communal” rights and interests.

Traditional Owner, Stage 2 workshop, 2019

This is a significant milestone for
Traditional Owners – the first time that
water has been made available in this
way – and a step that recognises both
their connection to Country and our
responsibility to protect it.

Gabrielle Williams, Minister for
Aboriginal Affairs

This is a momentous outcome for the
Gunaikurnai that recognises the importance
of gaining rights to water to restore
customary practices, protect cultural
values and uses, gain economic
independence and heal Country.

GLaWAC CEO, Roger Fenwick

The Gunditjmarra people claim these rights
to water as part of our inherent rights to
cultural flows, which include the use of this
water for spiritual, cultural, environmental,
social and economic outcomes. In doing so,
we are fulfilling our moral obligation to care
for water and Country in accordance with
our law and customs.

Letter to SRW, 2020

All mobs have their own water

Traditional Owner, Stage 5 workshop, 2020

5. SOUTHERN VICTORIA: WATER ACCESS OPPORTUNITIES FOR TRADITIONAL OWNERS

Over the past two years, this project has identified some practical opportunities for water hand over to Traditional Owners in southern Victoria.

Each of the opportunities outlined below can be considered as the ‘low-hanging fruit’, in that they do not require legal reform to be actioned, although there are some remaining barriers. These opportunities are an important first step, however, they do not constitute water justice and they should contribute to a program of longer term reform.

In addition to the key principles in Part 2 above, Traditional Owners have identified some further core conditions that underpin engaging in water access opportunities in Southern Victoria. These are:

- 1) In engaging with these opportunities, **First Nations and Traditional Owners are not ceding any inherent rights to lands and waters** without free, prior and informed consent and explicit agreement.⁷
- 2) **Water must be an asset, not a liability.** DELWP needs to learn the lesson of Aboriginal water rights in NSW and make sure that Aboriginal people don’t have to sell their water rights just to cover the fees (Hartwig et al., 2020). All annual fees associated with storage or use of the water should be waived (or paid by the state), and additional funding for water management and infrastructure should be provided.

- 3) **Flexibility of use.** Decision-making on water use rests with the Nation holding the water, and the water can be used for multiple purposes in accordance with the cultural values and protocols of each Nation.
- 4) To enable **free, prior and informed consent**, each participating Nation will need independent legal advice, and will need funding to pay for this.
- 5) **Access to Country as well as water.** The transfer of water should be supported by a *Roadmap* that commits to increasing First Nation access to Country on which water can be used, as well as funding to support infrastructure to deliver water.

⁷ This condition relates to the specific opportunities identified in Part 5. Traditional Owners may choose to enter other agreements between Traditional Owners and the state government that involve an agreement regarding these ‘unceded’ rights.

Each of the opportunities outlined below can be considered as the ‘low-hanging fruit’, in that they do not require legal reform to be actioned, although there are some remaining barriers. These opportunities are an important first step, however, they do not constitute water justice and they should contribute to a program of longer term reform.

5.1 UNALLOCATED WATER IN THE SOUTH-EAST AND SOUTH-WEST

Southern Rural Water (SRW) have identified specific volumes of unallocated surface water and groundwater within their management area. Traditional Owners across the south have expressed their interests in this water. Although much of the unallocated groundwater is expensive to access (and in some cases, of poorer quality), there remains interest from Traditional Owners in this water for the purposes of caring for Country. The unallocated surface water across multiple catchments also represents an important opportunity for transferring water rights to Traditional Owners, and there are two specific opportunities for water hand back in the short term.

Firstly, in the south-east, Gunaikurnai Land and Waters Aboriginal Corporation (GLaWAC) have received a formal commitment from the Minister of Water to allocate them 2 GL of the 6 GL of unallocated surface water on the Mitchell River. As part of the Stage 3 workshop for south-eastern Victoria, GLaWAC met with SRW and discussed options to advance this claim, and has since met with the DELWP Deputy Secretary. This commitment was announced on 12 November 2020 (see Box 1), and Gabrielle Williams, Minister for Aboriginal Affairs noted:

This is a significant milestone for Traditional Owners – the first time that water has been made available in this way – and a step that recognises both their connection to Country and our responsibility to protect it.

GLaWAC continue to assert their interests in surface and groundwater in other catchments with unallocated water on their Country.

In the south-west, Gunditj Mirring Traditional Owner Aboriginal Corporation (GMTOAC) have formally written to Southern Rural Water to claim 2.5 GL of unallocated surface water in the Fitzroy River, Killara/Darlots Creek, Condah and Louth Drain catchments:

The Gunditjmarra people claim these rights to water as part of our inherent rights to cultural flows, which include the use of this water for spiritual, cultural, environmental, social and economic outcomes. In doing so, we are fulfilling our moral obligation to care for water and Country in accordance with our law and customs. Letter to SRW, 2020

As part of Stage 4 of this project, GMTOAC met with SRW to progress this claim. This discussion covered the specific process for applying for the water licence, opportunities to waive fees and charges, and changes to the management of Lake Condah to increase GMTOAC's capacity to control water flows in Budj Bim. GMTOAC have also expressed interest in remaining unallocated surface and groundwater on their Country, and have highlighted the need for SRW to engage with all Traditional Owners in the south-west to assess all their interests in unallocated water.

Each of these opportunities includes some specific barriers that need to be addressed:

- 1) **Removing the requirement to link the s 51 licence to specific land when the water is being used in-stream.** Preliminary conversation with SRW indicates that this can be achieved without requiring immediate legal reform, although longer term entitlement reform to better reflect Traditional Owner values and uses of water may be desirable (see point 4).
- 2) **Waiving of annual fees for the s 51 licence when the water is being used in-stream.** SRW incurs costs associated with water licences as part of metering and monitoring water use, but these costs are not incurred when water is left in-stream.
- 3) **Policy clarity on the process for allocating this water to Traditional Owners.** SRW has made unallocated water available for purchase in the past via an auction process. Existing DELWP policy on Traditional Owner water access (including *Water for Victoria* and the annual letter of expectations from the Minister) supports the transfer of this water directly to Traditional Owners.
- 4) **Commitment to longer term entitlement reform.** Traditional Owners have indicated that the s 51 licence is not likely to be an appropriate form of water entitlement for their water use needs, which include in-stream flows as well as future economic uses. Long-term reform must also consider funding or waiving annual fees associated with water ownership.

Addressing these barriers will also support longer term reform to increase Traditional Owner access to unallocated water in Victoria. As the example of the transfer of the water in the Mitchell River to GLaWAC demonstrates, none of these barriers requires the transfer of these water rights to Traditional Owners to be delayed. By acting on these opportunities the state government is demonstrating its good faith in the *Stream 3 Roadmap* process.

5.2 'UNDER-UTILISED' WATER ON THE BIRRARUNG

In 2012, after the Amcor facility at Fairfield was decommissioned, the company 'gifted' its water licence of 2.2 GL to the state government. In 2015, 0.1 GL was transferred to the Royal Botanic Gardens, and in 2017, 0.7 GL was transferred to the City of Melbourne. The remaining 1.4 GL is currently held by DELWP.

Wurundjeri Woi Wurrung have formally expressed their interest to DELWP and Melbourne Water in the remaining 1.4 GL. They have also requested a review of the decisions to allocate water to the Royal Botanic Gardens and the City of Melbourne, on the grounds that they have never ceded their rights to water, and at least one of these allocation decisions (City of Melbourne) occurred after *Water for Victoria* required water corporations to notify Traditional Owners when opportunities to access water entitlements arise. Wurundjeri Woi Wurrung are consequently requesting that the full 2.2 GL be allocated to the Wurundjeri Woi Wurrung Cultural Heritage Aboriginal Corporation.

As above, there are several issues to be addressed to support the transfer of this water to Wurundjeri Woi Wurrung:

- 1) **Enabling the s 51 licence to be used at multiple locations, including Bolin Bolin wetlands.** Wurundjeri Woi Wurrung have multiple watering opportunities and responsibilities on the Birrarung, and need the flexibility to use this water at multiple wetland watering sites.
- 2) **Waiving of annual fees for the s 51 licence when used by Wurundjeri Woi Wurrung.** Metering and monitoring will occur in partnership with Melbourne Water and the Victorian Environmental Water Holder, and should not be passed through to Wurundjeri Woi Wurrung.
- 3) **Policy clarity on the process for allocating this water to Traditional Owners.** As noted above, DELWP has already allocated some of this water to others, and clarity on the decision-making process, as well as potential for reallocation of this water will be needed.

At the time of writing, the process for allocating the remaining 1.4 GL to Wurundjeri Woi Wurrung is underway, and the decisions to allocate the 0.8 GL are being reviewed. This process should be pursued by the state as a matter of priority, as this water entitlement is an essential step towards water justice on the Birrarung/Yarra.

5.3 SUBSTITUTION AND RECYCLED WATER

Urban water corporations are currently exploring options to substitute water withdrawn from rivers with treated recycled water. This would leave additional surface water in-stream, and this water would be available for reallocation to Traditional Owners. Opportunities for this substitution arrangement are available on Wadawurrung, Wurundjeri Woi Wurrung, and Bunurong Country. Some of the water corporations have had preliminary discussions with some Traditional Owners about these options, but have not yet developed specific proposals. These opportunities meet multiple state government policy goals: increasing water rights for Traditional Owners, re-using treated, fit-for-purpose wastewater, and improving integrated water management. In highly urbanised catchments, this substitution is a rare opportunity for water transfer to Traditional Owners, and these opportunities should be given a high priority.

As part of integrated water management, urban water corporations are also identifying opportunities for Traditional Owners to use recycled water directly. This is not an opportunity that all Nations are equally interested in, but where it suits individual Nations, it would be worth pursuing. For example, where treated wastewater is of an appropriate quality, there may be interest in using it to grow crops:

we could make the treated water project happen quite easily through a consultant and [water authority] assistance.

Traditional Owner, Stage 2 workshop, 2019

At least one urban water corporation has also been developing an option to hand over the rights to recycled water to Traditional Owners. This could be for direct use, or as a source of income in future, where Traditional Owners could sell the treated wastewater to other water users.

It is not clear to what extent this option would be of interest to Traditional Owners, and the water corporation providing the treated wastewater would need to retain responsibility for treatment and disposal.

The substitution and recycled water pathway requires further conversations between water corporations and Traditional Owners on a case-by-case basis. What works for one Traditional

Owner group may not be of interest to another. The substitution arrangements should be prioritised, as this results in transfer of rights to river water rather than recycled water. There are opportunities to develop these proposals in both the forthcoming Central Region Sustainable Water Strategy and the water corporation pricing submissions.

5.4 WATER PURCHASE

Water trade is an opportunity to acquire water rights from willing sellers to hand over to Traditional Owners. There are water markets in southern Victoria, centred around the Werribee Irrigation District and the Thomson-Macalister Irrigation Districts. In 2019-20, water prices for water shares in the more active Thomson-Macalister were approximately \$2000/ML, but only two trades (for zero dollar prices) were listed for the Werribee Irrigation District. There has also been trade of s 51 licences across southern Victoria, but price data is highly specific to the location of these licences.

The lack of highly active water markets in southern Victoria means that this option is less procedurally straightforward than in northern Victoria, but it remains a genuine pathway to water for Traditional Owners. The specific barriers that need to be addressed here are:

- 1) **Funding to acquire the water.** A commitment to water justice requires government funding to acquire water rights, as noted above.
- 2) **Process for water acquisition.** Given the lower levels of water market activity, it is also likely to require an alternative reverse auction or tender process.
- 3) **Removing the requirement to link the s 51 licence to specific land when the water is being used in-stream.** Preliminary conversation with SRW indicates that this can be achieved without requiring immediate legal reform, although longer term entitlement reform may be desirable.
- 4) **Waiving of annual fees for water rights.** The possibility of waiving all fees should be considered to ensure any water hand back is a genuine asset.
- 5) **Commitment to longer term entitlement reform.** Traditional Owners have indicated that the s 51 licence is not likely to be an appropriate form of water entitlement for their water use needs, which include in-stream flows as well as future economic uses.

5.5 WATER GOVERNANCE

Traditional Owners who participated in a Stage 5 workshop in southern Victoria were most interested in a governance model in which water ownership rested with the Traditional Owner corporation:

all mobs have their own water.

Traditional Owner, Stage 5 workshop, 2020

a single water holder [for a region or a state], I don't think we would have that requirement.

Traditional Owner, Stage 5 workshop, 2020

However, there is recognition that where Country management requires collaboration between multiple Traditional Owners, there could be a need for a collaborative water governance model:

We'd go for [the water ownership option] and see how [collaborative management with a shared water manager] would work with relationships across Country for Traditional Owner groups.

Traditional Owner, Stage 5 workshop, 2020

There was also strong support for recognising collective interests in water:

Water ownership should acknowledge "communal" rights and interests.

Traditional Owner, Stage 2 workshop, 2019



Gunditjmara Killara Kooyang pilot project. Credit: Will Mooney



Budj Bim. Credit: Erin O'Donnell

6. NORTHERN VICTORIA: WATER ACCESS OPPORTUNITIES FOR TRADITIONAL OWNERS

There are some very clear messages from the participating Traditional Owners and First Nations of northern Victoria:

- 1) water should not be traded or piped out of the Murray-Darling Basin river systems, and
- 2) water should be transferred to Traditional Owners and First Nations, through a process determined and designed by Traditional Owners and First Nations.

The opportunities identified in Part 6 are more complex and require longer time frames than the options identified in Part 5. There are multiple reasons for this, including the fully allocated surface water (and limited unallocated groundwater under the Murray-Darling Basin's SDL requirements) and the interconnected nature of the river systems and water law frameworks in northern Victoria. Caps on water extraction in the Murray-Darling Basin (and the current processes to reduce over-allocated water systems) means that there is no longer any unallocated surface water in northern Victoria, and only limited sources of unallocated groundwater. The lack of large urban centres also

limits the opportunities for using recycled water (either directly, or as a substitution arrangement as discussed for southern Victoria), but this opportunity should still be considered where practicable.

Without a commitment from government (state and federal) to support water reallocation, there are no clear pathways for substantive restoration of surface water access rights to Traditional Owners and First Nations in northern Victoria.

Aboriginal people have been systematically excluded from water access and water management throughout the MDB's colonial history. This is both an injustice, and a missed opportunity:

'Aboriginal nations have unmet water needs, unresolved claims for political, economic and cultural recognition, as well as knowledge to contribute to the resolution of Basin conflicts'.

(Jackson, et al., 2021, p314)

At the end of the day,
it is Aboriginal water.

Traditional Owner,
Stage 4 workshop 2020

[We want] water to repair
our damaged waterways and
watering sacred places.

Traditional Owner,
Stage 4 workshop 2020

Over the past two years, this project has identified some practical opportunities for water hand over to Traditional Owners in northern Victoria.

Over the past two years, this project has identified some practical opportunities for water hand over to Traditional Owners in northern Victoria. These opportunities for water handover are an important first step, but they do not constitute water justice as envisaged by Traditional Owners, and they should be part of long-term law and policy reform.

The interconnected nature of the river system in northern Victoria also creates opportunities for alternative governance arrangements that enable water to flow in Country, through Country, and around Country. However, this also requires longer term commitments to establish governance arrangements between Nations.

In addition to the key principles in Part 2 above, there are some core conditions that Traditional Owners have identified as needing to be met to be a genuine water handover:

- 1) In engaging with these opportunities, **First Nations and Traditional Owners are not ceding any of their inherent rights to lands and waters** without free, prior and informed consent and explicit agreement.⁸
- 2) **Water must be an asset, not a liability** DELWP needs to learn the lesson of Aboriginal water rights in NSW and make sure that Aboriginal people don't have to sell water rights just to cover the fees (Hartwig et al., 2020). All annual fees associated with storage or use of the water should be waived (or paid by the state), and additional funding for water management and infrastructure should be provided.
- 3) **Flexibility of use** Decision-making on water use rests with the Nation holding the water, and the water can be used for multiple purposes in accordance with the cultural values and protocols of each Nation.
- 4) **We need to know what we're signing up for** To enable **free, prior and informed consent**, each participating Nation will need independent legal advice, and will need funding to pay for this.
- 5) **Access to Country as well as water** Transfer of water should be supported by a *Roadmap* that commits to increasing First Nation access to Country on which water can be used, as well as funding to support infrastructure to deliver water.

6.1 UNALLOCATED GROUNDWATER

To get the groundwater right as soon as we can, that's really important.

Traditional Owner, Stage 5 workshop, 2020

There are volumes of unallocated groundwater available in some regions of northern Victoria, particularly the highlands of the Upper Murray and Upper Goulburn groundwater management areas, as well as Murrayville in the north-west. Any groundwater licence application would need to comply with the list of factors in section 40 of the *Water Act 1989*, including ensuring that there would be no impact to existing users or the environment. Where Traditional Owners are seeking rights to this water to ensure that it remains in the ground, demonstrating a lack of impact on other users would likely be much more straightforward than an application to take and use groundwater. This may be a useful option for those seeking to protect groundwater against future development. However, the licence would need to specifically include these conditions, (which are novel conditions to place on a licence to take and use water), and may also limit the potential uses of the water in future.

Any application for a groundwater licence would also require access to land, in the form of land ownership, lease, or an agreement with the landowner. In addition, water corporations charge fees for the application for new licences, as well as ongoing annual fees, which depend on the volume of the water licence. Following the example of Southern Rural Water in the south, there may be an opportunity to waive annual fees and charges where water is not being extracted. If there is an intention to extract water, the cost of the infrastructure (including bore construction) would also need to be funded.

The specific barriers to be addressed include:

- 1) **Removing the requirement to link the s 51 licence to specific land when the water is not being pumped from the ground.**
- 2) **Waiving of application and annual fees for the s 51 licence when the water is not being pumped from the ground.** Water authorities incur costs associated with water licences as part of metering and monitoring water use, but these costs are not incurred when water is not extracted.

- 3) **Policy clarity on the process for allocating this water to Traditional Owners.** Traditional Owners may not want to use groundwater for economic development, but have strong interests in holding the water and protecting it in situ.
- 4) **Commitment to longer term entitlement reform.** The s 51 licence currently does not recognise cultural use of water, nor was it designed for allocating water that is not intended to be taken and used.

6.2 WATER PURCHASE AND DONATION

[W]e're all here to get water for our people. There's an opportunity today to get water for our Country and our people. Opportunity to progress our people's campaign for water rights and water for our people.

Traditional Owner, Stage 4 workshop, 2020

Water markets in the southern connected Murray-Darling Basin are some of the most active in the world (O'Donnell and Garrick, 2019), and this creates a clear pathway to water ownership for Traditional Owners and First Nations. Water purchases from willing sellers enables water to be acquired at the locations, and of the reliability, that best suit the needs of each Nation. However, this pathway will be expensive, as water prices have increased substantially over the past decade. During 2020, high reliability water shares on the Victorian Murray peaked at \$6500/ML.

In addition, state governments have focused on reducing the movement of water entitlements out of the consumptive pool (where water is used for economic returns or household consumption) and into the environmental water pool (where water is used for ecological outcomes). Although Traditional Owners and First Nations may use water for many purposes, including caring for Country, which may generate environmental and ecological outcomes, it is essential to note that water held by Aboriginal people is not the same as environmental water. As a result, any water reallocation to Aboriginal people should not be perceived as leaving the consumptive pool.

In 2018, the Commonwealth government committed \$40 million to acquire water for Traditional Owners and First Nations in the Murray-Darling Basin, with \$20 million to be spent in the southern connected Murray-Darling Basin (NSW, Victoria, and South Australia). MLDRIN and all Nations in the southern-connected Murray-Darling Basin are engaging with the Commonwealth Department of Agriculture, Water and Environment to develop a process for the use of this funding to acquire water for the benefit of all Nations. Sadly, delayed release of this funding as well as increasing water share prices means that the available funding will now cover the cost of less water than was possible in 2018.

Although the Commonwealth government funding is a welcome first step, this is only a tiny fraction of the funding required to restore water to Traditional Owners and First Nations in northern Victoria:

we don't even get one per cent... we have to jump through hoops.

Traditional Owner, Stage 6 workshop, 2020

State government funding for water purchase should also receive priority. In 2019, households across the MDB states (Victoria, NSW, SA, Queensland and the ACT) were surveyed, showing almost 70% support for funding to acquire water for First Nations and Traditional Owners in the MDB. Households were willing to pay almost \$80 million to support this acquisition (Jackson et al. 2019). This is twice as much as the 2018 Commonwealth government funding commitment, and demonstrates a real opportunity for states to match this funding.

There are also opportunities from water donation. For example, state government funding could be used to acquire the less expensive low reliability water shares, which could then receive donations of unused water allocation from other water users at the end of each water year. Philanthropic funders could also provide some necessary seed funding to acquire water shares (although such funding may be harder to obtain following the economic impacts of COVID-19).

The major barriers to this pathway to water access are:

- 1) **Funding to acquire the water shares**
A commitment to water justice requires government funding to acquire water rights, as noted above.

⁸ This condition relates to the specific opportunities identified in Part 6. Traditional Owners may choose to enter other agreements between Traditional Owners and the state government that involve an agreement regarding these 'unceded' rights.

⁹ In exchange for access to the water, other water corporations (Barwon Water, South Gippsland Water, Western Water and Westernport Water) have also contributed \$9.3 million, so the total cost paid by the three Melbourne metro water corporations was \$90.7 million, although they retain full ownership of the bulk entitlements.

- 2) **Clear process for water acquisition** Depending on the volume of water being acquired, and over what period, it may be possible to acquire water from the market directly.
- 3) **Funding for annual fees and charges** Water shares include substantial annual fees to cover the costs of maintaining storage infrastructure, and Traditional Owners should not be required to cover these costs.
- 4) **Infrastructure to deliver water where it needs to go** As one Traditional Owner commented: *if ‘we are securing the water, we also need a mechanism for delivering the water to those sites of significance’* (Stage 4 workshop, 2020). Traditional Owners should not be required to cover the costs involved in acquiring, using and maintaining infrastructure.
- 5) **Agreement on how water would be shared between Nations** Each Nation should be the decision-maker for water on Country, and this water flows through the river system from the mountains to the sea. All Nations should be involved in deciding how the water is shared and used.
- 6) **Commitment to longer term entitlement reform** Water shares are designed for consumptive water use, and are difficult to use to provide in-stream flow benefits for Traditional Owner purposes (see Box 2, where Taungurung transferred the water allocation to the VEWH). Long-term entitlement reform could deliver a more specific entitlement that better reflects the needs of Traditional Owners and First Nations, although this may also limit the potential to transfer water in future.

6.3 MELBOURNE’S WATER ENTITLEMENTS IN EILDON AND HUME

As TOs are we losing our rights to self-determination over water? Are we just gonna watch 75 GL come out of the Murray-Darling Basin?

Traditional Owner, Stage 4 workshop, 2020

We’ve been fighting for 40 years for water to be returned to the river; when John Howard separated land from water, as a tradeable commodity that no longer sits with the land... [Then they] stole water out of the Goulburn, built that pipeline. They stole that water; we should be demanding that the pipeline should be shut down

Traditional Owner, Stage 4 workshop, 2020

In 2007, the Victorian Government committed to saving 225 GL of water via irrigation efficiency upgrades in the Goulburn-Murray Irrigation District (Department of Sustainability and Environment (Vic), 2007). One third of those savings (75 GL) will be held by the Melbourne metropolitan urban water corporations (Yarra Valley Water, City West Water, and South East Water). In 2012, each of the Melbourne urban water corporations paid \$100 million for one third of the water savings (25 GL), at a price of \$4000/ML.¹⁰ In addition to the water entitlements, the Melbourne water corporations also contributed \$750 million for the construction of the north-south pipeline (O’Donnell et al., 2019).

The original intent of the project was to enable Melbourne to receive a transfer of 75 GL every year, which would have built up a considerable buffer against future droughts (O’Donnell et al., 2019). However, the state government has since ruled that the Lake Eildon water allocation can only be used in times of critical human need: when Melbourne’s total water storages are less than 30% full on 30 November. Under these rules, the maximum volume that can be transferred to Melbourne is 75 GL per year, which is less than one-sixth of Melbourne’s annual water needs, which were 461 GL in 2018-19 (Melbourne Water, 2019). Melbourne water users have paid for this infrastructure, and continue to pay for water savings and the fees and charges associated with the water entitlements, but they have only received marginal improvements in water security. All three water corporations are trading their annual allocation on the water market to cover the costs of water fees and charges.

It is feasible for the metropolitan water authorities to transfer some or all of this water to Nations whose Country is connected to the rivers through which the water flows (the Murray and Goulburn rivers, from Hume and Eildon storages). We acknowledge the challenges that this option represents in terms

of transparency and accountability of water funding for the water corporations and the water customers of Melbourne. However, the current difficulties in using this water for the purpose for which it was intended (providing water security for Melbourne) create an opportunity to consider an alternative use of the water that would meet multiple outcomes for the Victorian state government, including increasing Aboriginal access to water.

There was strong consensus from Traditional Owners and First Nations that this water needs to remain in the Murray-Darling Basin, and support caring for Country:

this water needs to stay in Country and meet our cultural, environmental flows for our cultural sites and wetlands on our Kaiela/Goulburn River then follow the natural river course which meets Dhungula/Murray River at its junction above Echuca

Traditional Owner, email communication, 2020

Traditional Owners also recognised that transfer of this water could result in a price rise for the customers of the water corporations in Melbourne, and that this may be blamed on Aboriginal people:

They make it hard for us... they also need to recognise that we are doing it tough; government making us go against each other to get what is ours... it’s going to make the blacks look bad. We’re trying to have reconciliation here. But they keep making us look bad

Traditional Owner, Stage 4 workshop, 2020

Achieving a water transfer of this magnitude would not be easy, and may require negotiation as part of the Victorian Treaty process, or other long-term agreement-making processes between Traditional Owners and the Victorian state government.

In the short term, however, there is an opportunity to transfer some or all water allocation on an annual basis to Traditional Owners. This option could make substantial volumes of water available for Traditional Owners to use on Country (or trade) and demonstrate culturally appropriate water governance in the interconnected rivers of northern Victoria:

We’ve been managing the river as custodians from the beginning of time, but governments are not asking us how we did that

Traditional Owner, 2021¹¹

6.4 WATER GOVERNANCE

The interconnected nature of the rivers across northern Victoria creates opportunities for water governance arrangements that support Nations to work together as water flows through Country (Nelson, et al., 2018). As part of Stage 5 of this project, individual workshops were held with Nations across northern Victoria to discuss a range of water governance models in detail, and each participating Nation has received a short summary of these discussions. Each Nation expressed clear preferences for a water governance model (or combination of models) that is adapted by them, to meet their own needs:

It needs to be tailor made for each of us.

Traditional Owner, Stage 5 workshop, 2020

There was also some recognition that Nations can be stronger together when trying to achieve common goals:

We’ve still got to join together to make our voice stronger.

Traditional Owner, Stage 4 workshop, 2020

However, there was also a strong emphasis on the need for all governments to speak directly with each Nation, on Country, about issues affecting them:

the government needs to speak to nations individually.

Traditional Owner, Stage 4 workshop, 2020

When it came to owning and managing water, there was interest in establishing a mechanism for joint management between multiple Nations, but in a way that still enabled each Nation to have clear rights to a specific share of the water:

We could divide water up equally amongst a whole number of TOs, irrespective of where the state derives that water from.

Traditional Owner, Stage 4 workshop, 2020

¹⁰ In exchange for access to the water, other water corporations (Barwon Water, South Gippsland Water, Western Water and Westernport Water) have also contributed \$9.3 million, so the total cost paid by the three Melbourne metro water corporations was \$90.7 million, although they retain full ownership of the bulk entitlements.

¹¹ Grant Rigney, quoted in Foley, 2021.



Water Markets Workshop, 2019. Credit: Will Mooney

...understanding the framework that these guys are operating in to better understand the system that we're operating in.

Traditional Owner, Stage 3 workshop, 2019

not leaving groups behind but also supporting sovereignty.

Traditional Owner, Stage 4 workshop, 2020

need to make sure we're not creating additional barriers for our TOs to access their water. [One] option is our own state-based TO water authority. State deposits water into our authority. Could have every nation listed, and that water is divided up equally. ... If we created our own statewide water authority with all TOs listed, and receiving water annually, that gives us the opportunity to trade water within groups, and strengthens our position collectively.

Traditional Owner, Stage 4 workshop, 2020

There was also acknowledgement that a collaborative arrangement could be a pathway to ownership of water by each Nation, provided that there was an emphasis on training and skill-development:

[collaborative management of water] makes sense to me to begin with, and then we can build up our capacity to then move to [management and ownership by each Nation]. As long as they are training us, teaching us.

Traditional Owner, Stage 5 workshop 2020

Rather than concentrate on the question of which Nation should own the water, some Traditional Owners suggested that the rivers themselves should be the 'owners' of the water:

The water should be owned by the river; that should be the priority.

Aboriginal Water Officer, Stage 5 workshop

it's for the river to stay in the river.

Traditional Owner, Stage 4 workshop, 2020

However, others also saw it as important to distinguish between the different uses of water, so that water for Country was managed differently to water for commercial uses as part of a cultural economy:

we need to quarantine the different parts of it... non-commercial conversations, versus commercial conversations. Each distracts from the other.

Aboriginal Corporation staff member, Stage 5 workshop, 2020

Lastly, Nations saw the potential water hand back as an opportunity to learn by doing, and demonstrate cultural water governance in action:

we have to learn how to handle the water ourselves... gotta crawl before you walk.

Traditional Owner, Stage 5 workshop, 2020

7. REALISING THE OPPORTUNITIES

Over the past two years, Traditional Owners and First Nations across Victoria have participated in over 40 workshops and meetings to develop the pathways to water access and to identify the specific opportunities in northern and southern Victoria that are detailed in this report. This final report represents a huge investment of time, energy, and expertise from all participating Nations. To acknowledge and respect this investment, the state government should work on realising the opportunities identified.

Throughout this project, Traditional Owners have very clearly expressed their interests in water ownership and management.

We want to own the water, we want to have a say, we want to have control over it.

Traditional Owner, Stage 6 workshop, 2020

[we want water] to safeguard it, and for us to use for cultural purposes... you wouldn't want to trade it away.

Traditional Owner, Stage 6 workshop, 2020

There has been an equally strong emphasis on the importance of self-determination.

We want to run our own affairs with water on Country, decision makers with our own water on Country and our people.

Traditional Owner, Stage 5 workshop, 2020

We'll have an agreement, but don't tell us what to do with it.

Traditional Owner, Stage 6 workshop, 2020

Shouldn't put too much emphasis on what we're going to do with it, shouldn't have to explain ourselves. The emphasis shouldn't be strong on what we're going to do with it. It's a distraction.

Traditional Owner, Stage 5 workshop, 2020

To support self-determination, Traditional Owners identified a need for ongoing resourcing to support the wide range of activities they want to undertake, as well as those activities they are expected to contribute to in response to state water policy.

Fees for service. Not a handout.

Traditional Owner corporation employee, Stage 6 workshop, 2020

Over the past two years, Traditional Owners and First Nations across Victoria have participated in over 40 workshops and meetings to develop the pathways to water access to identify the specific opportunities in northern and southern Victoria.

Give us our water and we'll show you what we can do with it.

Traditional Owner,
Stage 5 workshop, 2020

Water brings us all together.

Traditional Owner,
Stage 4 workshop, 2020

we have to make sure that this opportunity is to further strengthen our ongoing struggle to achieve significant water rights.

Traditional Owner,
Stage 4 workshop, 2020

two statements that summarise the key point of everything: 'just as we are country, we are water', and 'our ways with water are not everyone else's ways with water'. People can't get their head around the fact that we are the land, how can they get their head around the fact that we are water?

Traditional Owner, Stage 6 workshop, 2020

we've gotta have land and water, gotta come together.

Traditional Owner,
Stage 6 workshop, 2020

We need to be embedded in water management. We have people who would love to work, on [TO organisation] books as casuals, but we can't fund them. We need people in ongoing employment.

Traditional Owner corporation employee,
Stage 6 workshop, 2020

the bottom line is having more workers on the ground that are not just reacting, but are being able to provide support and do the work that the organisation needs.

Traditional Owner, Stage 6 workshop, 2020

where water is being piped in different directions, what scope there is to increase TO influence over those decisions, in that modified network?

CMA employee, Stage 6 workshop, 2020

So not only the allocation of water, and ability to hold water, but we need that capacity to evaluate existing bores and new bore applications.

Traditional Owner, Stage 6 workshop, 2020

one of our dreams long ago, instead of us going to the government, we're set up where the government come to us.

Traditional Owner, Stage 6 workshop, 2020

Since the very first project meeting in December 2018, Traditional Owners and First Nations have been concerned that there is no clear commitment from the state government to achieving the handover of specific water rights:

The amount of talk, meetings, planning, with nothing ever coming through to fruition. Each time nothing comes through, it kills you a little bit... We're dealing with so many different agencies, departments. We're hopeful, but it would help to see something actually happen; after a while the visualisation starts to die. Deliver something, come good with something, otherwise we can't immerse ourselves in any project or program, doesn't feel real, it's all talk.

Traditional Owner, Stage 5 workshop, 2020

Some also expressed scepticism with regards to the information available from government on water availability:

DELWP talk about there not being much water lying around, [we] need an audit on all those irrigators taking water, why haven't the government departments done an audit? ... I keep asking for audits. Who do we go to to get an audit done?

Traditional Owner, Stage 6 workshop, 2020

There was a strong desire for water hand backs to occur as soon as practicable, and for water hand backs not to be delayed unnecessarily.

If we waited on the *Roadmap*, the [Sustainable Water Strategy] process is a lost opportunity.

Traditional Owner corporation employee,
Stage 6 workshop, 2020

we need the water as quickly as possible. We know what to do and how to use it, into the future. Have to remember that the seasons are changing... We need action straight away before that comes... While we're sitting having meetings all the time, the sun is getting hotter, the water is evaporating; the seasons won't wait for us.

Traditional Owner, Stage 6 workshop, 2020

very powerful words have been discussed today, I hope there's some good news in the future, because otherwise we're going to go round and round in circles.

Traditional Owner, Stage 6 workshop, 2020

that's an important point to make, if we look at the climate change projections, 10-20 years or more, there's going to be a lot more competition for that water.

Traditional Owner, Stage 6 workshop, 2020

The formal commitment to transfer 2 GL to GLaWAC made in November 2020 is an important demonstration of genuine outcomes for Traditional Owners (Box 1). This first step will hopefully continue to build momentum for further transfers to, and continued participation from, Traditional Owners in water policy reform.

7.1 AVENUES FOR REFORM

There are a number of policy processes that are already underway that can be used to hand water over to Traditional Owners and First Nations. Existing water policy reform processes such as the Sustainable Water Strategies are already providing an avenue for Traditional Owners in south-central and Gippsland regions to progress their claims to water. Wadawurrung, Wurundjeri Woi Wurrung, Gunaikurnai and Bunurong have worked together to write an Issues Paper for the Central-Gippsland SWS that identifies some key opportunities and barriers to water hand back in this region. Importantly, this paper also emphasises the importance of holistic reform to embed Traditional Owners as decision-makers for water on Country.

The First Principles Review of the *Traditional Owner Settlement Act 2010* (Vic) is also underway, and Traditional Owner rights to water have been included in this process. It is telling that despite the 2010 reforms to the *Water Act 1989* (Vic) to create the s 8A rights for Traditional Owners, not a single Traditional Owner organisation has made use of these rights in Victoria. Going forward, the Treaty process in Victoria is also an opportunity to transform the foundations of the relationship between the state and Nations in relation to land and water, and could include long-term funding arrangements to support water acquisition and management on Country.

Lastly, there is the *Roadmap* (Stream 3), which will bring Nations together across Victoria to co-design Aboriginal water policy. This is the final stream of work as part of the *Water for Victoria* action 6.3, and will be an important opportunity for all Nations and the state government. The *Roadmap* should aim to achieve all three elements of cultural flows: (1) water rights for Aboriginal people; (2) increasing Traditional Owner influence and power in water landscapes; and (3) transforming the foundations of the relationship between the state and the Nations so that there can be genuine leadership from Nations in water management on Country:

[Nation's] aspiration is to take over the CMA's responsibility, and therefore have final say on how, where and when environmental water is delivered and managed, which reflects the need for environmental and cultural uses of water to be managed side by side.

Aboriginal Corporation staff member,
Stage 2 workshop, 2019.

Early responses from Traditional Owners and First Nations to the proposed approach to developing the *Roadmap* have been varied. The *Roadmap* has been designed to bring Nations together to share ideas and develop policy positions:

It is great to share this with each other, it is uplifting and important.

Traditional Owner, Stage 2 workshop, 2019

We are all looking out for each other. We want to make sure groups aren't left behind or others don't get too far ahead

Traditional Owner, Stage 2 workshop, 2019

It's really important that we share information.

Traditional Owner, Stage 2 workshop, 2019

It's also really useful for mobs coming in to learn and share lessons.

Traditional Owner, Stage 2 workshop, 2019

However, others have also emphasised the importance of supporting each Nation to work with government individually:

[The Roadmap is] centralising, and overarching... that is so at odds with self-determination... the government needs to speak to nations individually.

Traditional Owner, Stage 4 workshop, 2020

Although Nations have demonstrated great interest and commitment throughout this project, there remains enduring scepticism about whether Nations will eventually receive water rights as a result:

over the years I have seen similar processes, where the report goes upstairs and then nothing happens.

Traditional Owner corporation employee, Stage 2 workshop, 2019

What's left at the end is the Traditional Owner with empty hands and Country that really hasn't benefited from it.

– Traditional Owner, Stage 5 workshop, 2020

The state government should recognise the investment that Nations have already made in this process by making rapid progress to deliver some of the practical opportunities for water hand over that are identified in Parts 5 and 6 above. Not only will this demonstrate good faith, but it will also help to build momentum for the *Roadmap* and wider water policy reform:

Decision-making on this broader scale should not stop anything that [Traditional Owner corporation] wishes to do now. We still need to go first. This [Roadmap] is quite some way from landing.

Aboriginal Water Officer, Stage 5 workshop, 2020

7.2 FUTURE ENGAGEMENT

To support the development of partnerships between the state government and Traditional Owners and First Nations, participants have offered several practical suggestions on engagement protocols and the importance of engaging directly with each Traditional Owner/Nation group.

don't treat us all the same, there are obligations to come to us, might be as a collective group, but also speak to us individually.

Traditional Owner corporation employee, Stage 6 workshop, 2020

Need to stop coming through the back door, go straight to State government. Show and tell them that we are serious about our water, our people, our land.

Traditional Owner, Stage 5 workshop, 2020

The recent shift in state government policy in Victoria to include all Traditional Owners and First Nations (rather than only those that have been recognised under the Traditional Owner Settlement

Act or as a Registered Aboriginal Party) has been an important step in the right direction, but some Traditional Owners have also highlighted that this can create new problems. Where there is contested land:

we need to seriously know where the line in the sand is with groups where no RAP exists. If these types of discussions are to take place, this is serious, it's critical to know who you're dealing with and where that line is.

Traditional Owner corporation employee, Stage 6 workshop, 2020

It is also important to recognise that although there are multiple avenues of reform that can all increase Traditional Owner participation in water ownership and water management, it is essential to use the appropriate policy process:

water corps have a desire to deliver their obligations through Reconciliation Action Plans, when in fact these are very different things.

Traditional Owner corporation employee, Stage 6 workshop, 2020



8. APPENDIX

Based on the work at each stage of this project, the project team has produced a range of supporting reports.

STAGE 1

E. O'Donnell (2019) Water Access for Aboriginal Economic Development (Stage 1 Discussion Paper).

STAGE 2

Stage 2 meeting summaries (shared only with participating Traditional Owners):

- Taungurung Land and Waters Council
- Dja Dja Wurrung Clans Aboriginal Corporation
- Gunaikurnai Land and Waters Aboriginal Corporation
- Gunditj Mirring Traditional Owner Aboriginal Corporation
- Barengi Gadjin Land Council Aboriginal Corporation

STAGE 5

E. O'Donnell, L. Godden and K. O'Bryan (2020) *Water governance: By Traditional Owners, For Traditional Owners* (Stage 5 Discussion Paper).

Stage 5 meeting summaries (shared only with participating Traditional Owners and First Nations):

- Taungurung Land and Waters Council
- Dja Dja Wurrung Clans Aboriginal Corporation
- Gunaikurnai Land and Waters Aboriginal Corporation
- Gunditj Mirring Traditional Owner Aboriginal Corporation
- Barapa Wamba Water for Country Steering Committee
- Bunurong Land Council Aboriginal Corporation
- Dhudhuroa Theddora Mittung and Jaithmathang Mittung
- First People of the Millewa-Mallee Aboriginal Corporation
- Wadi Wadi Land and Water Indigenous Corporation

Following the inception meeting in December 2018, the project team has conducted 41 meetings and workshops with representatives from Traditional Owners, Nations and other Aboriginal organisations.

MLDRIN WATER ACCESS FOR ECONOMIC DEVELOPMENT P1 PARTICIPATION	STAGE					
NATION/ORGANISATION¹	1	2	3	4	5	6
Barapa Barapa Nation	💧		💧		💧	💧
Barapa Wamba Water for Country Steering Committee			💧	💧	💧	💧
Barengi Gadjin Land Council		💧	💧	💧		
Bunurong Land Council Aboriginal Corporation		💧	💧	💧	💧	💧
DELWP Aboriginal Water Officers Network			💧	💧	💧	
Dalka Warra Mittung Aboriginal Corporation				💧	💧	
Dja Dja Wurrung Clans Aboriginal Corporation	💧	💧	💧	💧	💧	
First People of the Millewa-Mallee Aboriginal Corporation			💧	💧	💧	
Gunaikurnai Land and Waters Aboriginal Corporation		💧	💧	💧	💧	💧
Gunditj Mirring Traditional Owners Aboriginal Corporation	💧	💧	💧	💧	💧	💧
Jaithamathang Nation					💧	
Latji Latji Mumthelang Aboriginal Corporation	💧			💧	💧	💧
Ngintait Nation			💧		💧	
Tati Tati Wadi Wadi Nations	💧		💧	💧	💧	💧
Taungurung Land and Waters Council	💧	💧	💧	💧	💧	💧
Wadawurrung Aboriginal Corporation	💧				💧	
Wadi Wadi Land and Water Indigenous Corporation	💧		💧	💧	💧	💧
Wamba Wamba Traditional Owners	💧			💧		
Wurundjeri Woi Wurrung Cultural Heritage Aboriginal Corporation	💧			💧		💧
Yorta Yorta Nation Aboriginal Corporation	💧		💧	💧		
Number of workshops/meetings²	1	6	5	7	13	9

Notes:

1. Representatives from this Traditional Owner organisation or Nation attended. This does not imply that the organisation or Nation endorses the outcomes of the project.
2. Some meetings included representatives from multiple Traditional Owner organisations and/or Nations.

- 💧 Formal meeting or workshop with notes taken by MLDRIN and University of Melbourne
- 💧 Informal conversations and meetings (notes taken but no formal agenda)
- 💧 Expert panel review of discussion paper (notes taken for paper feedback)

It is great to share this with each other, it is uplifting and important.

Traditional Owner, Stage 2 workshop, 2019



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