

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

Elliott Leonard Provis

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Abstract

The enactment of the Native Title Act 1993 (Cth) (hereinafter ‘the Act’) is the most significant change that has occurred in Australian property law in the past 27 years. A much-celebrated milestone, the Act formally recognized traditional Indigenous legal systems and introduced legal pluralism into Australia’s legal system. However, in practice, the native title system remains beset with problems. One of the key issues is native title’s failure to protect Indigenous water rights. ‘Cultural Flows’ is a policy framework conceived of by Indigenous peoples to further advance Indigenous water rights and to include Indigenous voices in water planning and management. This paper proposes the creation of a joint Cultural Flows Commission to assist in implementing Cultural Flows. The paper explores how an intergovernmental agreement could be used to establish the Commission and how the Commission could play a vital role in reforming water law and policy to advance Indigenous self-determination in Australia. Most importantly, the Commission would address the many calls for ‘national focus’ when implementing Cultural Flows.

Index terms— native title, cultural flows, aqua nullius, indigenous australians, water rights, land rights.

1 Introduction

Australia’s landscape is defined by a complex variety of biospheres, including a wide range of water-dependent ecosystems. The diversity of the landscape is reflected in the myriad of different Indigenous societies, cultures and legal systems present in Australia. Aboriginal and Torres Strait Islander peoples maintain a special relationship with both land and water. Water systems hold deep cultural significance and have various uses under Indigenous law (Cooper & Jackson 2008, p. 54; Marshall & Kirby 2017, p. 2). This connection to water is characterised by customary rights and custodianship of water resources that extends beyond surface waters to include underground waters too (Cooper & Jackson 2008, p. 54). Until relatively recently, the dispossession of Indigenous peoples from their land and waters has consistently featured in Australia’s history. The High Court’s decision in the 1992 case, *Mabo v The State of Queensland (Mabo)* [No. 2], overturned the legal doctrine of terra nullius and formally recognized Indigenous land rights for the first time (Mason et al. 1992). Consequently, the Commonwealth Parliament passed the Native Title Act 1993 (Cth). Although an important victory for Indigenous Australia at the time, in many respects, the native title system has failed to deliver as much change as hoped.

Indigenous property rights over water remains a highly disputed topic in Australian law. Section 223 of the Native Title Act (hereinafter ‘NTA’) states that native title means ‘the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters’. Despite this, jurisprudence on native title has not readily recognised Indigenous rights and interests in water resources. Some allege that in practice, there remains an unofficial ‘doctrine of aqua nullius’ with respect to Indigenous water rights that must be overturned (Marshall & Kirby 2017, p. 48). In addition to the degradation of the environment, failure to recognise Indigenous water rights contributes to the extreme disadvantages in health, wealth creation and wellbeing experienced by Indigenous peoples, including the poor quality of water resources relied upon to sustain some Indigenous communities. There are several factors that have complicated Indigenous water rights. First are the fundamental epistemic differences (perhaps even incompatibilities), that exist between Indigenous and

Western legal, cultural and philosophical concepts of property and ownership. 1 1 For further explanation on these epistemic incompatibilities, and the difficulties these present when building understanding between Indigenous peoples and the modernist settle-colonial state see generally: Armstrong (2002); Mignolo (2013); Mignolo (2011); Mignolo (2017); Quijano (2000); Quijano (2013); and Wolfe (2006) Australia's legal system was built on Western knowledge and ideals, which influence the creation and interpretation of statutes, judicial precedents and decision-making at all levels of government. The Western concept of property ownership as a 'bundle of rights' Arnold 2002, p. There is limited common ground between the two value systems Marshall & Kirby 2017, p. 156). Native title is one of the key areas where they interact and where this conflict is most evident (Pearson 1997).

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

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

Another ongoing challenge is the complex interaction between federal, state and territory water legislation and the National Water Initiative (hereinafter 'NWI'). Agreed in 2004, the NWI is an intergovernmental agreement between Commonwealth, state and territory governments that established a water management reform framework and action plan, driven by 'the continuing national imperative to increase the productivity and efficiency of Australia's water use, the need to service rural and urban communities, and to ensure the health of river and groundwater systems by establishing clear pathways to return all systems to environmentally sustainable levels of extraction' (Commonwealth Parliament of Australia et al. 2004; Department of Agriculture, Water and Environment 2004, p. 1). The NWI introduced the 'unbundling' of property rights over land from water rights, making them separate unmodified legal interests. This means that native title claimants' land rights, if recognised, no longer include rights to the water resources on their land Macpherson 2017, pp. 4-5). Instead, water access entitlements must be purchased on the water market.

To remedy these problems, fundamental change must be pursued. Some have called for a national discussion over the sharing of water resources and a national response based on a dialogue with all the stakeholders (Marshall & Kirby 2017, p. 162). Others argue that Indigenous peoples should be given 'full jurisdiction' over the use of their resources Macpherson 2019, p. 215). The 2014 'Independent Review of the Water Act 2007' made three recommendations in relation to First Nations and the NWI, each of which called for greater Indigenous engagement in the decision-making process for water governance and management plans (Morton et al. 2014). However, little action has been made by the government in implementing these recommendations. Addressing Cultural Flows could provide the means to do improve upon the deficiencies noted in the report.

2 Purpose and scope of this paper

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

3 An Intergovernmental Agreement on Cultural Flows

One way to achieve this is through an intergovernmental agreement to establish a joint Cultural Flows Commission. This Commission would engage with Commonwealth, state, territory and local governments on water issues. Most importantly, it would seek leadership and direct involvement from First Nations as a body politic. The Commission would make recommendations for law and policy reforms, particularly with respect to the NTA, water legislation and the NWI. It would also undertake research into how Indigenous and Western concepts of property law could be better integrated. Other political measures, like treaties and an Indigenous

'voice' to parliament, could assist and support the implementation of Cultural Flows but this process would not be contingent upon their creation.

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

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

In Australia, there is currently no national treaty between First Nations and the Commonwealth. Similarly, there is no national charter on human rights (although some jurisdictions have their own human rights legislation). Legal researchers consider it significant that Australia has opted to pursue anti-discrimination legislation rather than rights-affirming legislation ??Williams 1999, p. 3). This poses a challenge for Cultural Flows, which will likely require changes to rights-based legislation. ??elson et al.(2018, p. 6) propose a three pronged approach: 1. Creating clear legal protections and definitions around Indigenous water rights 2. Reforming laws that effect water rights and the broader landscape (such as land use, planning, heritage and environmental protection laws) 3. Implementing changes to water governance, including increased Indigenous engagement in water planning.

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

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

An intergovernmental agreement between the Commonwealth, states, territories and First Nations would provide the framework for a collaborative national response to these issues. Inter governmental agreements can take many forms. Some agreements are scheduled to legislation; some are approved, ratified or authorised by legislation in some other way; whilst some are tabled in parliament (Saunders 2005 There are many Australian examples of successful intergovernmental agreements for joint action, and there are already precedents for joint management of Indigenous water resources, such as the Kungun Ngarrindjeri Yunan Agreement (Hemming et al. 2017). An intergovernmental agreement based on the Complimentary Applied Laws approach, allows all levels of government to coordinate and cooperate with one another, which is why this approach is so desirable when dealing with a national issue that may be politically divisive(Painter 1998). As a national response is called for, an intergovernmental agreement on creating a Cultural Flows Commission is worthy of consideration. Some of the key benefits of creating the Cultural Flows Commission through an intergovernmental agreement are:

1. Intergovernmental agreements can circumvent certain constitutional restrictions on Commonwealth spending, as states can simply accept payments made to them by the federal government. The funding arrangements in an intergovernmental agreement provide a clear path for Commonwealth funding to states. In addition, an agreement provides accountability for state and territory spending, preventing states from procuring funding from the Commonwealth for specific projects and diverting it elsewhere (Painter 1998). The Commission will require government funding of some description and an intergovernmental agreement would provide the appropriate pathways.

2. Intergovernmental agreements allow the parties to pool executive capabilities, financial reporting and administrative oversight, which promotes efficiency (Painter 1998, p. 100).

3. Thanks to consistent advocacy by Indigenous communities, the idea of Cultural Flows has slowly begun to enter the mainstream Australian political consciousness. Already, this has manifested in the inclusion of

5 A) A FIRST NATIONS WATER HOLDER

Indigenous engagement clauses in 3 Complimentary Applied Laws are recommended for the creation of a joint Cultural Flows Commission because this allows for national uniformity in laws which enable the creation of this commission, however this approach does not require the states to refer powers to the Commonwealth, and lose control of legislative capacity in water. 4 Mirror Legislation is recommended as this allows for a more flexible approach that can be tailored to the needs of Indigenous communities, different water resources, and different jurisdictions.

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

4 b) Key parties to the agreement

For intergovernmental agreement on Cultural Flows Commission to be effective, it must include as signatories: The substantive reforms that would enable a proper 'meeting, shoulder to shoulder' between First Nations and the various levels of Australian government to reform property laws is not within the remit of this article. The first three areas of the Commissions' work will be explored in further detail below.

5 a) A First Nations Water Holder

This paper envisages a First Nations Water Holder as an independent agency or organisation that would act as a legal representative for First Nations in water matters; specifically, water entitlements. Although determining the exact form or structure of the First Nations Water Holder is not within the scope of this paper, it is proposed that this entity play a key role in Cultural Flows. In 2012the First Peoples' Water Engagement Council was convened by the former National Water Commission, and it proposed that an Aboriginal Water Trustor Fund be developed to acquire and manage water rights, water reserves and a water fund for Indigenous peoples ??). This was recommended on the basis that, in water systems that are already fully allocated (meaning all available water entitlements have been purchased), creating such a fund would ensure Indigenous communities in these systems could still access water for Cultural Flows ??Macpherson 2019, p. 96). A similar approach is advocated for in this paper, although it should be designed with great care. As Macpherson notes there is "still a great variance of opinion" both "within government and between and within Aboriginal communities" on the appropriateness of such a fund ??Macpherson 2019, p. 97).If this fund were to be pursued, the Commission could assist in creatinga First Nations Water Holder to represent Indigenous interests in the water market.

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

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

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

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

6 b) Setting a law reform agenda

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

7 Key areas for reform

Some of the key areas the Commission could address are:). There is a danger that doing so could derail the Commission, if it oversteps its role.

As such, the Commission should focus more on coordinating the national response and assisting in negotiating agreements wherever they are required. 5. Assisting as a mediator between First Nations and the various layers of government in relation to water entitlements, Indigenous water rights and their realisation, changes to state/territory water legislation, changes to the NWI and the NTA, changes to laws affecting the wider landscape through which water travels, and generally water governance in Australia.

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

8 Implementing reforms

Putting the necessary legal and institutional reforms into effect to enable the Commission will require joint action utilising what is termed 'Complimentary Applied Laws' (Wanna, Phillimore, Fenna, & Harwood 2009). This type of intergovernmental agreement is defined by one lead state implementing the legislation first, then all the other state, territory and Commonwealth governments doing the same. This approach has already been used successfully numerous times, one example being when the South Australian Parliament implemented the with the National Electricity Law, by passing the National Electricity (South Australia) Act 1996 (SA). The process allows governments to adopt a uniform set of laws without granting exclusive legislative remit over water, to the Commonwealth. State-based Indigenous heritage legislation would also be relevant here. Linking the enabling legislation for the Commission to heritage legislation would help entrench Indigenous water rights in the broader legislative framework.

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

9 c) Revising the National Water Initiative

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

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

Establishing a Cultural Flows Commission: A Framework for Joint Action on Indigenous Water Rights *Global Journal of Researches in Engineering* () Volume Xx XI Issue I Version I J ??Macpherson 2017, p. 6). The NWI introduced the 'unbundling' of property rights over land from water rights, making them separate legal and commercial interests in the Murray-Darling Basin. This meant that native title claimants' land rights, if at all recognised, no longer included rights to the water resources on their land ??Macpherson 2017, pp. 4 -5).

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

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

10 IV.

11 Conclusion

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

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

Implementing Cultural Flows requires a new national framework, one that places First Nations at the centre of water management in Australia (Marshall & Kirby 2017; Nelson et al. 2018). Although various recommendations have been offered in this paper, the exact routes by which this will be achieved cannot be stated with certainty at this stage. Questions about matters such as the First Nations Water Holder, the mediation functions of the Commission, how new Indigenous water rights should be constructed or how the existing native title system might be reformed should be answered by Indigenous communities, in collaboration with the other stakeholders. It is envisaged that First Nations will play a key role in leading the Commission as well as in law reform and

345 negotiating new water sharing agreements and governance structures. Recognising and protecting Indigenous
 346 waters rights will help to empower Indigenous peoples, both economically and culturally. Implementing Cultural
 347 Flows will contribute to improved health and socioeconomic outcomes for Indigenous communities. It will also
 benefit the environment and Australian society at large ??Weir 2010, p. 138) ^{1 2}

Figure 1:

1. First Nations, either corporately or as individual nations, as a body politic. Rather than treating them merely as special interest groups, First Nations should be engaged with as a political entity with a 'seat at the table' in water management (Hemming et al. 2017, p. 1). 2. Local governments, because this layer of government is often responsible for implementing and monitoring water management laws and related legislation in their local areas. They should be involved in the intergovernmental agreement and engage directly with the Commission once it is established. 3. Establishing 1. Functioning as a mediator between First Nations and various levels of government in negotiations over water management, including investigating ways to create a First Nations Water Holder entity to purchase and manage water access entitlements on behalf of Indigenous communities 2. State/territory water legislation reviews and recommendations on law reform 3. Reviewing and advising on revisions to the NWI and the NTA 4. Research into how the Australian, and Indigenous legal system can be better mediated between by law, especially with respect to concepts of property and ownership.

Figure 2:

Figure 3:

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

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