ENVIRONMENTAL JUSTICE AUSTRALIA

Submission in response to

Water is Life: Draft Roadmap on Aboriginal Access to Water

prepared by

Environmental Justice Australia

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Introduction

1. Environmental Justice Australia (EJA) is a public interest environmental law practice, based in Melbourne but undertaking work across our areas of expertise throughout Australia. We act primarily for community organisations and NGOs on matters concerning environment and natural resources law and policy.

2. EJA's involvement in issues of water justice for Aboriginal peoples extends back to 2014-2015. At that time, we were involved assistance to the Murray and Lower Darling Indigenous Nations (MLDRIN) on their exercise of consultation rights under the *Basin Plan 2012*. Through MLDRIN we advised specific Traditional Owner bodies on Basin Plan implementation. We advised MLDRIN in relation to the South Australian Royal Commission on the Murray Darling Basin. Subsequently, EJA have worked closely with other Traditional Owners on water issues, such as strategies for design and implementation of cultural flows models on the Murray floodplain near Robinvale, advice on VEWH water trading strategies and Traditional Owner interests, and ongoing advice to MLDRIN.

3. Since 2021, EJA has embarked on a wider project concerning use and/or reform of Victorian natural resources laws in order to identify pathways for greater Aboriginal and Traditional Owner control over Country. Achieving Aboriginal control over and access to Country (including its natural resources) is elemental to just outcomes for Aboriginal and non-Aboriginal peoples across Victoria. It is elemental to any pathways that can reasonably be said to reflect true efforts to overcome the terms and effects of the colonial project on Aboriginal peoples across what is now Victorian territory and jurisdiction.

4. The state of Aboriginal control over and access to natural resources in Victoria is reflective of the current conditions, as well as legacy, of the colonial project – the extent and nature of Aboriginal control or influence over water resources (including rivers, wetlands, their diversion, interference and degraded ecological condition) in Victoria is exemplary of this reality and the power imbalances embedded in it. As the Draft Roadmap identifies, that degree of control equates to Aboriginal 'ownership' of 0.2% of water resources in which legal rights are vested through licensing and entitlement mechanisms.

5. At the outset, EJA restates that we are not an Aboriginal organisation. We are a non-Aboriginal organisation consciously seeking to work in support of and alliance with Aboriginal organisations, notably those with which we have or seek partnership arrangements with or for whom we act and to whom we provide legal or related services. EJA's expertise is in environmental and natural resources laws from a public interest perspective. Our work spans formal legal services as well as advocacy, capacity building, and law reform. We are under no illusion that our work provides a panacea or ameliorative to the historic and ongoing functions of law and public administration in the colonial project, the injustices associated with that project, and its intergenerational effects. Law and its administration are cornerstones of the colonial history of this continent and enabled and justified expropriation, violence and genocide. We have decided to work within the law to seek its use for a re-setting of black and white relations in this country. That is a long game. If such an outcome is to occur it requires deep justice in terms of Aboriginal control over Country and legal enabling of the repair of Aboriginal relationships to Country and of Country itself. As

our Aboriginal colleagues remind us that is an ancestral relationship, spiritually profound and founded in law ('First Law'[1] or 'Raw Law'[2]). If law and public policy are to contribute to those outcomes it requires far more than the status quo – or more than the status quo in other guises.

The draft Water Roadmap

6. Our overall assessment of the Draft Roadmap is that it contains promising propositions but embeds certain key and defining features of the status quo. This quality is reflected in the pivotal insistence that the prevailing system of water rights and entitlements, including their existing distribution remains unaffected. That proposition is reinforced by production of an accompanying 'fact sheet' to the same effect. The clear message is one of assurance to water rights holders – one suspects to irrigators and to water authorities. By inference, the message to Aboriginal communities seeking to expand their control over water management is that the 'citadel' remains largely inviolate but for certain access points. The focus of this policy of inviolability of the status quo is:

    a. An emphatic policy of no disruption to existing water entitlements or licences;

    b. A parallel policy of no water buy backs, or in other words no redistribution of access to water resource by way of the water rights system.

7. These policy positions set an unfortunate tone. A preferable approach would be to accommodate existing entitlement- and licence-holders by way of assurances that justice would be achieved through dialogue but concurrently that the Crown, as primary rights holder, is committed to using the water rights system to deliver restorative justice, reverse *aqua nullius*, and establish pathways to accommodate to Aboriginal sovereignty over Country and its resources. That adverts to the need for serious, if strategic, redistribution of control over water resources and construction of the legal and institutional machinery to enable it. Climate trajectories, including greater variability and instability in water regimes, will almost certainly affect those outcomes.

8. Opportunities for substantial water redistribution we understand exist or may do so in Gippsland (by way of progressive mine and power station closures), in the Wimmera (as a result of past infrastructure upgrades), and in the Goulburn (through upgrades – although most of this water has been announced as being sold to irrigators). These opportunities are aside from actions or projects directed to redistribution by way of altering rights or purchasing rights, which in our submission should and need to be on the table in order to achieve redistribution, capacity building associated with it, and concurrently address over-allocation and degrade water systems.

9. While an implicit assumption in the Draft Roadmap appears to be the enabling of economic development agenda by Traditional Owners through cultural recovery and access to Country, a key gap may be the use of water resources to drive economic

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[1] Martuwarra RiverofLife, Anne Poelina, Donna Bagnall and Michelle Lim 'Recognising the Martuwarra's First Law right to life as an ancestral being' (2020) 9 *Transnational Environmental Law* 3 541, https://doi.org/10.1017/S2047102520000163

[2] Irene Watson *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015)

development agenda through Aboriginal-controlled enterprises in established industries (for example, irrigated agriculture) and/or through water trading. Patently, these are economic activities for which (consumptive) uses of water are presently designed and key sources of economic wealth derived from the water rights system. Whether or not Aboriginal people and Traditional Owner entities wish to include these industrial or commercial strategies in overall justice agenda, and how they coordinate an overall strategy, is of course up to them. Absent a program of redistribution of water rights to Aboriginal people, or in any case a policy intention to do so, it seems difficult to foresee how Aboriginal use of commercial enterprise based on water rights could viably be part of the overall strategic mix for access to and recovery of Country – in other words, without at least the potential for substantial redistribution of (unqualified) water rights, where there is strategic value in using that tool, one important justice pathway seems foreclosed before it is even discussed. The *Cultural Water for Cultural Economies* Report identifies specific sources of water rights that could be used at scale for these purposes, such as water held in Goulburn storages, and ancillary issues (such as fees and infrastructure) that need and should to be resolved as the Roadmap process unfolds.[3]

10. All of this is given greater urgency or relief, notably redistribution as a cornerstone of just outcomes, because of the likelihood or capacity of the Roadmap to prefigure or anticipate outcomes in the Victorian Treaty process, where that process may contend with water issues.

11. Notwithstanding the comments above (which we insist should be addressed), in our view the Draft Roadmap is promising insofar as it appears to parallel, or model, the cultural flows approach elaborated by the National Cultural Flows Research Project ('NCFRP').[4] As noted below more detailed consideration and reference to this work would be instructive to the Roadmap.

12. A further opening comment concerns candour and realism as to the biophysical context in which Aboriginal water policy now functions and with which it will be confronted going forward:

    a. The Roadmap should expressly recognise that natural hydrologies, water landscapes and Country have been extensively altered, re-engineered and degraded as a result of more than a century of State-sponsored and -implemented programs and works, which the water rights system has enabled (landscapes have been drained, diverted, degraded, lost and these outcomes are manifestations and presence of the colonial project in the landscape). In almost all basins across Victoria, water is over-allocated for consumptive

[3] O'Donnell et al Cultural Water for Cultural Economies (2021), 40-41, https://law.unimelb.edu.au/__data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf
[4] MLDRIN, NBAN and NAILSMA 'National Cultural Flows Research Project', https://www.culturalflows.com.au/

uses. That is the case is all major regulated basins, both north[5] and south[6] of the Great Dividing Range. This is the baseline from which we commence. Unless this context is recognised and addressed little real progress will be made on Aboriginal water justice. To the extent justice equates with repair of Country and enhancement of Traditional Owner agency over Country and its resources, future policy work on restoration of water landscapes on Country should be signalled in the Roadmap.[7]

b. There is passing reference to climate change in the Draft Roadmap but that reference is arguably fleeting and fails to have full and proper regard to the consequences of climate shift on Aboriginal water policy going forward. Water policy elsewhere recognises the profound shifts already underway and dramatic and potentially catastrophic fate of climate change on water management in upcoming decades.[8] There is little point in setting programs and policy, including (as we argue) for water redistribution, without proper consideration of climate change impacts on water availability, existing deficits, unpredictability, and function of water policy (including restorative Aboriginal water policy) on climate mitigation and adaptation. We recommend a further piece of work be done on these intersections.

Welcome shifts in discourse on colonisation and its effects

13. The shift in official language represented by the content of the Draft Roadmap is important and welcome. Specifically, we refer here to adoption of the language of 'aqua nullius' and restorative justice, acceptance that the system of water regulation is premised on exclusion of Aboriginal peoples from water – and in effect their own Country – and recognition of Aboriginal sovereignty. We note that *Water is Life* may anticipate but it is not part of the treaty-making process.

14. We recommend further that the recognition of Aboriginal peoples' exclusion and marginalisation from their ancestral Country over more than a century, including persistence of that exclusion through contemporary legal and institutional structures, be acknowledged expressly in the Roadmap as a denial of distinct rights held by Aboriginal people to their enjoyment of culture and identity and to relationships with land, waters and resources existing as connections under traditional laws and

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[5] Even leaving aside the controversies over science-based SDLs for the Murray Darling Basin required to address over-allocation and over-extraction, observed flows in the MDB are tracking worryingly below what is expected: Colloff et al *Assessment of River Flows in the Murray Darling Basin: Observed Versus Expected Flows under the Basin Plan 2012-2019* (2020), https://wentworthgroup.org/wp-content/uploads/2020/08/MDB-flows.pdf, and environmental water delivery is tracking well below what is intended. needed and required under the Basin Plan: Chen et al 'A trickle, not a flood: environmental watering in the Murray Darling Basin' (2020) 71 *Marine and Freshwater Research*, https://www.publish.csiro.au/mf/MF20172

[6] DELWP *Long-term Water Resources Assessment* (2020)

[7] Relevant restoration models or ambitions are signalled for example in: Freedman *Bulleen-Banyule Flats Cultural Values Study Report* (Wurundjeri Woiwurrung Corporation, 2020); Lindsay and Moggridge *Reframing 'Net Gain' for the Yarra Birrarung: Report Prepared for the Birrarung Council* (2021), https://www.water.vic.gov.au/birrarung-council/current-projects; Tati Tati Kaejin *Margooya Lagoon Cultural Flows Management Plan* (2021), https://www.margooyalagoon.org.au/margooya-lagoon

[8] DELWP Long-term Water Resources Assessment (2020); DELWP Draft Sustainable Water Strategy for Southern Victoria (2021)

customs (in essence, past and continuing exclusion represents a denial of the right of connection to Country).[9]

15. We agree with the comments at page 4 that investment in Aboriginal access to water resources is an investment in regional and rural Victoria. In key regions of Victoria where restoration of water ecosystems and Country can well be aligned with economic development, social outcomes, and redesign of water resources management models Aboriginal communities are demographically among the largest in the State. This includes regions such as northwest Victoria, Gippsland and South-west Victoria.

Nation Statements

16. We have not had the benefit of reviewing any 'Nation Statements' intended to be produced under the Roadmap process.

17. In our view, the status of Nation Statements under the Draft Roadmap is insufficient and should be amended in the final Roadmap. It appears that, at best, Nation Statements are intended under the Draft Roadmap to have a form of non-binding, referential or symbolic value as statements of aspiration or preference prepared by Traditional Owners. Those Statement may or may not have some interpretive value or function in law or policy.

18. Nation Statements, perhaps like Country Plans, can and should have a meaningful role in land and natural resource management planning. In this case, they should have an effective role in water planning – that is a role beyond the symbolic. At a minimum, this approach could be done in various ways, such as:

    a. Legislative requirements (such as under section 40 of the *Water Act 1989* (Vic) and comparable decision-making schema) that Nation Statements are mandatory considerations on the Minister or other decision-makers;

    b. Legislative requirement that 'all reasonable steps' are taken to give effect to a Nation Statement in the preparation of regulatory instruments, such as a bulk entitlement, environmental entitlement, SWS, regional waterway management plan (or other water management plans), regional catchment strategy, and land management plan for public lands;

    c. Legislative or policy requirements that consideration of Aboriginal uses and values, where ever occurring in decision-making under the *Water Act 1989*, must include, expressly, consideration of and response to a Nation Statement.

Cultural water and 'cultural flows'

19. The concept of 'cultural water' is used in the Draft Roadmap. This concept is described in the following terms:

[9] See *Charter of Human Rights and Responsibilities Act 2006* (Vic), subs 19(2)

Cultural water means water entitlements controlled or held by Traditional Owner Nations to benefit a range of outcomes as determined by each Traditional Owner group.

20. It is likely, but it is not clear, that this concept owes its origins to the discourse of cultural flows. That may be. The Draft Roadmap refers to the cultural flows concept and the Echuca Declaration of 2010. 'Cultural flows' received detailed practical and regulatory consideration under the National Cultural Flows Research Project of 2014-2018.[10] A legal and regulatory model of cultural flows emerged from the NCFRP which included an integrated and tripartite framework for cultural flows[11] including:

    a. Water rights
    b. Complementary environmental, land and natural resources arrangements, and
    c. Supporting governance arrangements.

21. The cultural flows model was originally intended to represent a form of pluralistic or hybrid mechanism of water resources management, or in other words use of the existing water rights system to advance and align with Aboriginal law and obligations. In effect, joint management would result from Aboriginal water holdings (such as in the form of entitlements) operating within the prevailing water management system, including forms of integrated planning, assessment and delivery. Complementary measures include legal access or authority over land and landscapes, control of relevant land management functions (for example, pre-inundation burning regimes, works and evaluation), and reform of regulatory instruments enabling the cultural flows program.

22. Certain elements and measures set out in the Draft Roadmap appear to be consistent with a cultural flows model as devised under the NCFRP. The case study presented at Chapter 4 appears similar in character to what the cultural flows model suggested, although legal control over water appears not to be vested in Traditional Owner entities, even under proposed reformed arrangements.

23. What is less clear and hence more ambiguous is precise identification of the regulatory, legal and policy tools enabling or giving effect to the underpinning proposition the State establishes: its recognition of Aboriginal connection to Country.[12]

24. Additionally, in respect of the third limb of the NCFRP model, supporting governance, the foundational normative framework for the Roadmap is not entirely clear. Reference to self-determination and sovereignty are welcome framing terms. But these terms could or should reference authoritative legal norms and schema. In this regard, concepts of self-determination should reference relevant provisions of the UN *Declaration of the Rights of Indigenous Peoples*, such as Articles 25, 26, 29 and 32.

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[10] MLDRIN, NBAN and NAILSMA 'National Cultural Flows Research Project'. https://culturalflows.com.au/

[11] Nelson et al *Cultural Flows – A Multi-layered Plan for Cultural Flows in Australia: Legal and Policy Design* (MLDRIN, NBAN and NAILSMA, 2018)

[12] Draft Roadmap, 6: 'The Victorian Government understands that Traditional Owners have intrinsic connections to land and waterways; the roadmap must reflect and respect those connections.'

The UNDRIP model of distinctive rights available to indigenous peoples is reproduced in Victoria's *Charter of Human Rights and Responsibilities Act*, specifically under section 19(2). This provision should be a foundational reference in the Roadmap, not least because the administration of the State must give 'proper consideration' to this provision including in implementation of water policy and regulation.

25. What the cultural flows model does explicitly intend is Aboriginal water access to be *unqualified*. This intention is expressed in the notion of *entitlements* held by Aboriginal people. This Draft Roadmap appears to accept this type of approach to some degree, insofar as Aboriginal water-holdings are contemplated.[13] As note elsewhere, this approach appears substantially constrained by unwillingness to upset existing water-holdings or enable serious redistribution. Use of environmental water-holdings as a key means to achieve some form of water redistribution to Aboriginal peoples does pose both opportunities and limitations. Where there is alignment between Aboriginal water planning (however expressed) and environmental water-holdings, use of the latter potentially serves *de facto* cultural flow models. Necessarily however there are constraints on the use of environmental water-holdings as legal mechanisms for cultural flows (legal limitations on their use for environmental purposes). Furthermore, the cultural flows model indicates a threshold of *water security* implied in 'entitlement'. Use of environmental water-holdings to achieve, practically speaking, a form of cultural flows arrangement would require *legally binding* obligations in favour of Aboriginal entities *de facto* acting as water holders (within the statutory constraints of environmental water management under the Water Act), presumably under contracts negotiated for that purpose and which enable broad discretion in terms of 'call' on water.

26. We comment further on the need for integrated land and resources governance as part of the cultural flows model below.

Application of the cultural flows model on Country: the Margooya Lagoon project

27. EJA in collaboration with Tati Tati Kaejin developed a framework for strategic pathways to implement the cultural flows model on Country at a culturally significant wetland called Margooya Lagoon near Robinvale in north-western Victoria.[14] This project was undertaken in parallel to Tati Tati's preparation of a cultural flows management plan for Margooya Lagoon.[15] Jointly, these documents set out a framework for:

    a. Aboriginal agency over and ecological restoration of an important floodplain wetland on the Murray River, including with economic development and social considerations;

[13] For example, Proposed Action 2.3 at 40-43
[14] EJA *Margooya Lagoon: Establishing a Cultural Flows Model on Tati Tati Country* (2021), https://www.margooyalagoon.org.au/margooya-lagoon
[15] Tati Tati Kaejin *Margooya Lagoon Cultural Flows Management Plan* (2021), https://www.margooyalagoon.org.au/margooya-lagoon

b. Method and strategy intended to navigate the complex, fragmented legal and policy conditions applying to management of that cultural landscape and its constituent resources – including water, land and biodiversity.

28. EJA continues to work in partnership with Tati Tati to progress this project and vision.

29. The methods and tools set out in the Draft Roadmap (such as cultural landscapes, use of environmental water holdings, contemplation of some redistribution of water rights, and foundational terms such as cultural water and accompanying discourses) do have affinities with the cultural flows model and program articulated in the Margooya Lagoon project. We welcome those cross-overs and common directions.

30. There remain important distinctions or departures between the proposals in the Draft Roadmap and the Margooya Lagoon case study which are worthy of closer analysis. We provide these reflections on the basis that we think there are useful lessons in the Margooya Lagoon project and its attempts at application of the cultural flows concept/model. At the same time, we readily concede that the Margooya Lagoon example is absent certain relevant and potentially important reforms that we consider do need to be progressed, such as the idea and practice of Aboriginal entities acting directly as water-holders especially in concert with land management powers, and which are contemplated in the Draft Roadmap.

31. Perhaps a key intervention of the Margooya Lagoon study is its survey of the prolific regulatory and policy instruments that need to be, or may be, revised, reformed or produced in order to give effect to Tati Tati's cultural flows management plan for that Country (the latter being an expression of recovery and governance of that Country in accordance with Tati Tati law and obligations). Any discrete and time-bound project directed to control over Country and water landscapes as contemplated under the Roadmap would need to progress through a comparable scheme of recognition and reform of regulatory instruments.

32. In short, a program of reform of water, land and resource instruments on Country will be required – a program that should or needs to defer to Nation Statement or County Plans or like instruments in an integrated manner. As both the proposal under Chapter 4 and the Margooya project indicate a method for devising this type of program is foreseeable. In our view it is also necessary and should be part of the 1-2 year next steps of the Roadmap.

Quantification of policy intention: target-setting

33. The Draft Roadmap acknowledges and reproduces the notorious figure concerning Aboriginal control of water-holdings: that such water-holdings is miniscule. The Victorian Government commitment expressed in the Draft Roadmap is 'increasing' water access and participation.[16] For the purposes of effective and accountable policy-making, we suggest this proposition for qualitative trajectory of change to be reinforced by *quantitative* measures of change, which is perhaps best expressed in terms of *target-setting* for growth in Aboriginal water-holdings (both State-wide and probably on a regional basis also) and for growth in other administrative measures, such as integration of Aboriginal water planning proposals into existing water

[16] Draft Roadmap, 9

planning instruments (such as bulk entitlement orders, regional waterway strategies, and seasonal watering plans) and transfer of waterway management roles and functions to Aboriginal organisations. Each of these actions can be quantified. Their value in the making of policy is the setting of tractable strategic outcomes or objectives, or in other words contribution to SMART goals.

34. Given the current document is expressed as a 'roadmap', it seems appropriate that, if specific and quantifiable outcomes are not themselves set out in the document, the intention, method and principles for so doing should be included in the document. Without quite precise signals and indicators there is high risk that all parties will quickly get lost, disorientated, or dismayed. Target-setting for water re-distribution to Aboriginal peoples (through Aboriginal-controlled water-holders directly or through legal mechanisms enabling control over water-holdings) and for tangible water-planning outcomes provides a measurable horizon for action.

35. Given the desire indicated in the Draft Roadmap to present a paradigm shift in the management of water landscapes (see Chapter 4), in our view there is merit in target-setting in the Roadmap to include:

    a. At least one cultural landscape/cultural flows program prepared and implemented on-Country for each Nation who expresses a desire to do so;

    b. Determination of water required to achieve target programs and, within 5 years, redistribution of water rights sufficient to meet those programs.

Use of environmental water-holdings

36. A key element of the Draft Roadmap platform is reform directed to the use of environmental water-holdings as a base for achievement of water access outcomes. Further evolution in dealings and relationships between Aboriginal communities and the VEWH (and CMAs) are anticipated as part of this strategy. Legislative changes are indicated.

37. Clearly, streamlined, efficient, more transparent and responsive arrangements between Aboriginal communities and entities and environmental water institutions are beneficial and welcome. In addition to the proposed 'environmental water principles', the two sets of proposals directly bearing on environmental water management include:

    a. Aboriginal powers to prepare and submit seasonal watering proposals and undertake agreement-making with the VEWH (2.1);

    b. Emergence of Aboriginal entities as environmental water-holders (2.2).

38. Absent legislative amendment either or both of these options requires Aboriginal entities to use water in accordance with the environmental water reserve (other than where used under assignment to which s 48L or 48M of the Water Act applies). It is arguable that Aboriginal uses subsidiary to and consistent with the governing purposes of use of environmental water would be available, which appears to be contemplated under the Draft Roadmap, such as under the 'environmental water principles' proposed. That proposition may be more problematic in the MDB where

water resources plans and use of environmental water generally (where it is water understood as 'planned environmental water' under the *Water Act 2007* (Cth) cannot be used for purposes other than environmental purposes. This interpretation could be interpreted as a 'sole purposes' test for environmental water in northern Victoria. Whether or to what extent Aboriginal cultural or economic purposes subsidiary to environmental purposes would be permitted in these circumstances is not clear.

39. In general, the proposed plan to move toward greater Aboriginal control or influence over environmental water-holdings, by those means build capacity and authority in water management, and achieve institutional reform – specifically through establishing Aboriginal water-holder(s) to which environmental entitlements are vested – is a positive intention and set of outcomes. More detail and targeted action, however, is necessary in our opinion to achieve what is proposed. An amended program of action should include:

    a. Use Ministerial rule-making powers under section 33DZA and 48P in order to give effect to provisions for Traditional Owner preparation and submission of seasonal watering proposals and agreement-making ('Proposed Action 2.1'), including obligations on the VEWH and CMAs to implement or to 'take all reasonable steps' to implement those actions and aid Traditional Owners in design and delivery of environmental watering programs on Country;

    b. Consistent with other actions and measures in the Draft Roadmap, amend statutory obligations on other key public agencies, such as Parks Victoria or the Secretary DELWP, to prepare and implement instruments (such as management plans) regulating land or other resources in order to enable Traditional Owner design and delivery of environmental watering programs on Country;

    c. Further to (b), the State should use its best endeavours to work with the Commonwealth to design and roll-out Indigenous Protected Areas ('IPAs') that align with Aboriginal water-holdings and/or arrangements vesting control or authority in water-holdings with Aboriginal communities;

    d. Implement the above within 3-5 years;

    e. Design and pass legislative amendments necessary to establish Aboriginal entity(ies) as water-holder(s) and enable their functioning as such. Implement this outcome within 5 years, noting the importance of doing so in advance of shifting and drying climate cycles.

Trading of environmental water allocations and Traditional Owner priority

40. VEWH conduct of water trading in early 2022 highlighted a further opportunity for use of environmental water – in this case relatively unconstrained in terms of uses – namely, use of water deemed as surplus to seasonal allocation/watering requirements. The events of the VEWH trading controversy in early 2022 highlighted both the apparent lack of policy development and capacity on the part of the VEWH (and other water policy actors arguably) to enable Traditional Owner use of that water and a high degree of controversy over that failure.

41. Those events should additionally be a platform for VEWH reform of water trading arrangements in order to prioritise transfer or assignment of seasonal allocations to Traditional Owner watering entities in those seasons where circumstances permit that outcome.

42. Within 12 months VEWH prepares policy for water trading that prioritises transfer or trading of seasonal allocation to Traditional Owner entities (including a water-holder where that mechanism is established) where surplus water exists. To the extent further work is required to implement such policy that should occur within three years from commencement of the Roadmap. Ministerial rules applying to the VEWH should be amended to give effect to the above.

Aboriginal water holdings and water-holders

43. Our understanding from Traditional Owner organisations with which EJA has collaborated is there is a strong desire for legal and institutional reform leading to Aboriginal water-holder entities. It is very positive that this direction has been picked up in the Draft Roadmap. We agree with the proposals contained in Outcome and Action 2.2, although there is likely to be a need to work through carefully the precise remit as well as form (or forms) of Aboriginal water-holding entities. As Outcome and Action 2.2 indicates Aboriginal water-holding entity (or entities) would be confined to parallel holders of environmental entitlements, a status that may well complicate any desire on the part of Traditional Owners for such entities to hold other water assets (such as water shares or licences) and/or other relevant assets such as infrastructure and funds.

44. In our view, it is likely legislative amendment will be needed to facilitate Aboriginal water-holding functions (including as these align with landscape-scale management functions) and the starting point for those amendments should be the enabling of water-holdings for purposes that are broadly public interest in nature driven by and in order to implement Aboriginal uses and values, cultural flows models and connection to Country. The need for these types of reforms are recognised in the Cultural Economies report and in the Draft Roadmap in relation to water licences. Such reforms do not require necessarily any new form of entitlement or licence but rather amendment to the purposes and uses to which water-holdings may be put, specifically when they are held or used by Aboriginal entities.

45. The potential emergence of Aboriginal water-holding entities adverts to the need for what we might term institution-building, which encompasses the development of new forms of water institutions controlled and managed by Aboriginal people and Traditional Owners, or adaption of existing forms of organisation, alongside capacity building enabling the success and progress of those institutions.

46. Support above is qualified by other comment in this submission:

    a. The question of availability of water to Traditional Owners as consequences of infrastructure or water sharing changes should not be confined to mere priority in *consideration* but rather priority in *access or transfer*;

    b. Any relevant guidance prepared should be in addition to statutory bases to commitments, such as through Ministerial rules or similar instrument;

c. Further to points made elsewhere in these submissions the likelihood of any substantial or meaningful redistribution of water via the rights system is arguably undermined from the outset by:

    i. Refusal to countenance any substantial redistribution within the existing allocation of rights and entitlements;

    ii. The fact that almost all water systems are either fully allocated as a matter of law or policy, over-extracted (subject to substantial deficits and degrading processes in terms of extraction presently), or both. The capacity of Traditional Owners to contribute to restoration of water ecosystems and their sustainable function is compromised by absence of a mechanism to address present over-allocation combined with climate change effects.

47. The function of State water institutions in contributing to Aboriginal water-holdings will need to be supported by a statutory mechanism to address present over-allocation, such as obligations on water authorities to meet targeted reductions in extraction/diversion of water from natural sources (surface and groundwater) – this type of mechanism appears under consideration in preparation of the SWS for Southern Victoria.

The fees and charges framework proposed: economic models for Aboriginal water use and water holding

48. The proposal for a fees and charges framework adapted to Traditional Owner holding and use of water resources under the water rights system is summarised in Targeted Outcome and Proposed Action 2.4.

49. We agree that waiver of fees and charges is a step forward in just and preferable outcomes enabling Aboriginal communities and entities to hold and use water resources.

50. What is proposed is a limited step. Arguably, in our view, it does not fully or candidly reflect the nature and extend of the historic and continuing injustice it seeks, in part, to remedy. Historic clearance and expropriation of Aboriginal peoples from their Country and ancestral estates was a *foundational source of non-Aboriginal economic opportunity and wealth (including those generated by re-engineering of water resources) from which Aboriginal communities were subsequently and systematically excluded*. Limiting economic assistance under the Roadmap to fee waiver for water uses that are largely public interest in character (maintaining water in-stream or using water for cultural purposes) represents marginal redress, frequently likely to achieve restorative outcomes benefiting the wider community and the State as well as Aboriginal people (such as maintaining in-stream ecological processes). It is parsimonious recognition that Traditional Owners can and should step into the space of recovery and restoration of water ecosystems and Country, while designed to avoid the conclusion that historically and intentionally Aboriginal communities were excluded from commercial use and development of water resources.

51. This policy may contain the perverse effect of Aboriginal communities delivering public good outcomes, such as ecosystem restoration, at a discounted cost to the State and without full and proper remuneration of those outcomes.

52. The proposal should be amended to include waiver of fees and charges on activities undertaken by Aboriginal communities and water entities for public interest or for commercial purposes or both.

53. That position would contribute to economic development and capacity-building outcomes for Aboriginal communities. Additionally, this position recognises that Aboriginal involvement in commercial water enterprises occurs in an historic context where non-Aboriginal commercial interests benefited from extensive public subsidy in water infrastructure and development.

54. The position aligns with the fact that Aboriginal commercial interests in use and holding of water is highly likely to overlap with or otherwise have a significant public interest component, such as reinvestment in healthy water ecosystems, in Aboriginal-run enterprises, capacity-building and cross-generational social outcomes.

55. Furthermore, one potential policy basis for funding extended waiver and public support to Aboriginal water-holdings and use would be equalization of environmental levies on rural water corporations in order to raise them to those levied by urban water corporations. This action would provide substantial funds for a more effective and genuine economic policy for Aboriginal water use and holding.

Cultural landscapes, living entities, and 'voices': toward new forms of water planning

56. Broadly, the proposition that the State recognise and give effect to cultural landscapes, the existence of Country (including rivers, waterways and wetlands) as 'living entities', adopting in legal form Traditional Owner bodies as 'voices' for those living entities is supported by EJA. Beyond the level of principle, implementation of these measures in a manner that gives maximum, actual effect to Aboriginal aspirations and plans is crucial to the fate of the Roadmap.

57. It is worth noting at the outset that, regardless of recognition in positive (State) law, Country is in Aboriginal law (in the vernacular law) a being – living, spiritual, sustaining, and subject to the impacts of the last two centuries – and Traditional Owners have obligations to speak for Country and for the right people to do so.

58. The endeavours by the State in recent years to recognised in Parliamentary legislation and public policy the 'living entity' status of rivers is an important initiative. In our opinion it has tended to be constrained in practice by operational weaknesses, such as the drafting of specific (weak) duties and limited ambition of administration. To be more than symbolic these framing devices must shift power and alter power balances between public authorities (and potentially commercial interests) and Aboriginal Traditional Owners. It is useful that the Draft Roadmap (Outcome and Action 3.2) talks of transfers of power. The progressive shift in powers, including statutory powers and functions, to Aboriginal entities over resource management is necessary to achieve material, as well as symbolic, achievement of the ambitions set out in Chapter 3.

59. A tangible example of such a material shift (or its lacking) in our view occurred in provision of Wurundjeri Woiwurring representative body the status of a 'responsible public entity' under the *Yarra River Protection (wilip-gin Birrarung murron) Act*, formally comparable to a dozen large statutory institutions but concurrently without any comparable resource base to those public institutions. Despite Parliament's intention that Wurundjeri should have that status and indeed a leadership role, no material 'equality of arms' or parity was available to it, its resource base being orders of magnitude smaller than the State institutions in the room.

60. As we now know, there are various options and pathways available to designing and embedding the 'living entity' type status and accommodating statutory and policy devices to Country plans and similar instruments. The Yarra Birrarung Act model is one option. Formal 'legal personality' is another option. The Yarra Birrarung Act model has since had affinities in the 'distinctive area and landscapes' scheme under planning and the Great Ocean Road legislation (including its influence on public lands management). Certain procedural enabling provisions arise across natural resources and land management laws, such as collaboration obligations and consideration of 'uses and values'.

61. Native title determinations and Traditional Owner Settlement Act arrangements are relevant to the enabling regulatory landscape.

62. International obligations affecting certain water ecosystems, such as at Ramsar sites[17] and the Budj Bim Cultural Landscape, similarly affect and influence the enabling regulatory landscape.

63. It is likely that there are various and diverse regulatory and policy pathways to implementing the 'living entity' and cultural landscapes models. As noted above, the cultural flows model and program proposed for Margooya Lagoon on the Murray River floodplain effectively represents an analogy to what is proposed here, albeit absent the distinct legal devices of 'living entity' status and an express 'voice'. In our view, it is implied in the Margooya Lagoon model that Tati Tati Country (*Tol Tol*) is a living being Tati Tati are the proper mob to speak for that Country.

64. As reference to 'landscapes' suggests, justice and restoration in relation to water landscape concerns land and other natural features (such as flora and fauna), as well as water. As the Draft Roadmap notes, in respect of Country land and water are indivisible. On this point, we reiterate the point that Aboriginal control over land is intimately connected to the fate of water resources. While there are various legal forms that greater control over land might take, we submit that promotion and establishment of Indigenous Protected Areas ('IPAs') can be a tool to enable and progress the Roadmap process. It would be useful for the Roadmap to include reference to IPAs as an enabling mechanism within the policy and regulatory mosaic for promoting Aboriginal access to water.

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[17] On obligations under the Ramsar Convention concerning participation of indigenous peoples in wetland management, see CoP *Guidelines for Establishing and Strengthening Local Communities' and Indigenous Peoples' Participation in the Management of Wetlands* (Resolution XII,8, 7th Meeting of the Conference of the Parties, 1999), https://www.ciesin.columbia.edu/repository/entri/docs/cop/Ramsar_COP07_008.pdf

65. As to specific strategies and strategic principles guiding implementation of the ambitions set out in Chapter we note as follows:

    a. We take the basic premise of this Chapter to provide for a form of statutory integrated water and landscape planning, including its implementation, which would be an important step forward insofar as it achieves substantive outcomes for Aboriginal communities and entities (IPAs could contribute to this approach).

    b. Outcome and Action 3.1 would appear to enable Traditional Owners to identify or nominate Country to which a legal status of 'living entity' (and accompanying machinery such as a 'voice') would apply. That is preferable and could occur as a consequence of existing Country planning or similar. See our comments above on revised status and effect of Nation Statements, Country Plans, or like documents.

    c. Processes of 'mapping' and amending existing regulatory, legal or policy instruments applying in whole or part to nominated Country would be necessary (cf Margooya Lagoon) in order to align actions, obligations, conduct, rights, etc with Nation Statements, Country Plans or like instruments.

    d. Strategies for aligning water rights (cf Ch 2) and transfer of waterway management functions (cf Ch 3) need to be prepared and in the process of implementation within a discernible period of time – a 5 year time horizon target is preferable.

    e. Joint scientific/cultural methods to water assessment and planning should be further developed and applied in rolling out programs foreshadowed in Ch 3,[18] where this has not already been done or where it can continue to be developed and rolled-out in different landscapes/Country.

Waterway managers

66. Further to points made above on the question of Traditional Owners and Traditional Owner organisations assuming waterway management functions as set out in Chapter 3, we make the following comments:

    a. Traditional Owners themselves resolving how a 'living entity' status and 'voice' work in any particular circumstance is supported in principle, although it will likely be necessary for those outcomes not to be confined to Traditional Owner or Aboriginal organisations with existing legal status under Aboriginal heritage, native title or recognition and settlement law. (Refer 3.1)

    b. Any 'living entity' status should reflect Aboriginal law and Country. (Refer 3.1)

    c. Any so-called 'place-based approach' will likely be required to accord with the principles of alignment of regulatory and policy instruments discussed above

[18] See Mackenzie *Cultural Flows: Aboriginal Water Interests For Establishing Cultural Flows – Preliminary Findings* (MLDRIN, NBAN and NAILSMA, 2016)

in relation to cultural flows programs or models, and these outcome should be matters of substance (reflected in reformed instruments and content contained in them) rather than any mere formalization of 'living entity' status. (Refer 3.1)

d. The use of Aboriginal terms, phrases or concepts, where these represent obligations or law, should as far as practicable be reflected in instruments or text as bearing legal meaning. This outcome represents enhanced legal status to Aboriginal terms than mere adoption in preambular text. (Refer 3.1)

e. In respect of our comments on constraints indicated under 'medium term' outcomes for 3.1, see our comments elsewhere in this submission.

f. Agreement-making contributing substantively to genuine shifts in power and agency, distribution of resources, and progress toward cultural flows models is supported. (Refer 3.2)

g. Transfer of substantive responsibilities and powers to Traditional Owner entities/administrators and Aboriginal communities, including in a manner that maximises recovery of Country, economic opportunity and social outcomes, should be reflected in structural changes in fiscal approaches/models, specifically in order to pay for public good outcomes (including ecological, cultural, social and regional development outcomes) and establish Traditional Owner entities/administrators *materially* on an equivalent footing or status to other water institutions (cf comments on Wurundjeri status as a 'responsible public entity' above). Traditional Owner entities/administrator should be able to make direct submission to the Essential Services Commission or, alternatively, an unredacted submission by way of a water authority. (Refer 3.2)

h. Transfer of powers and responsibility needs to occur in coordination with institution- and capacity-building.

i. Outcome and Action 3.2 is supported in principle subject to comments above and below.

Ramsar obligations

67. Obligations contained in the Ramsar Convention represent both foundational propositions for all wetlands[19] and specific obligations applying to designated Ramsar wetlands. The pre-eminent Ramsar obligation to 'promote the conservation… and wise use of wetlands' is to be 'furthered' by the involvement of Indigenous peoples in wetland management.[20]

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[19] Ramsar Secretariat *Wise Use of Wetlands: Concepts and Approaches for the Wise Use of Wetlands* (Ramsar Handbook Vol 1, 4th ed, 2010), [23]: 'The wise use provisions of the Convention apply, as far as possible, to all wetland ecosystems.'

[20] Ramsar CoP *Guidelines for Establishing and Strengthening Local Communities' and Indigenous Peoples' Participation in the Management of Wetlands* (Resolution XII,8, 7th Meeting of the Conference of the Parties, 1999), [3]

68. These obligations are given effect in Commonwealth law, including in our opinion obligations concerning recognition and promotion of Aboriginal interests relating to Ramsar sites.[21]

69. We are aware that Traditional Owners have expressed a strong desire to exercise greater control and authority over Ramsar Sites within their Country, including but not limited to exercise of control or influence over hydrological regimes and decisions affecting them. Frequently, designated Ramsar sites are prominent among wetlands Traditional Owners are seeking greater control and influence over, such as the Barmah for Yorta Yorta, the terminal Wimmera Lakes (Lake Albacutya) for Wotjobaluk, and the Gippsland Lakes for Gunai Kurnai.

70. The Draft Roadmap makes no mention of Ramsar sites, the Convention, or implementing obligations or guidance relating to involvement of Aboriginal peoples in management of wetlands.

71. In our view, this fact reflects a significant gap. No doubt the agenda for Traditional Owner reform – one might say, revolution – in water policy should be led by Aboriginal communities and their leaderships. At the same time, the State and Commonwealth have entered into clear international commitments to important wetlands, which are Country, for which protection and recovery aligned with Traditional Owner management should receive distinctive attention.

72. It is not sufficient to ignore, detach or 'silo' actions or conduct concerned with international obligations under the Ramsar Convention from progress on Aboriginal water policy. The distinction is artificial. The effects strain credulity where maintenance of ecological character of Ramsar sites expressly requires major shifts in water management (including hydrology) and where to do otherwise compromises, or continues to compromise and degrade, the essential components and processes of those wetlands. Perhaps to put this another way:

    a. in most, if not all, instances of Ramsar sites in Victoria, freshwater resources management is integral to the maintenance of their ecological character;

    b. Ramsar obligations apply to water planning and operations affecting all wetlands and designated wetland in particular, including ecological character and sustainability obligations;[22]

    c. Water resources management relevantly affecting Ramsar sites can be characterised equally as actions and conduct affecting water 'as life' and as 'spirit', as an integral component of Country, or in other words fundamental

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[21] See eg *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 334

[22] The cornerstone Ramsar obligation of 'wise use' of wetlands is interpreted under CoP resolution as 'the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development.' Ramsar Secretariat *Handbook 1: Wise Use of Wetlands* (2010), [21]. On the interaction of water resources management and sustainability in the context of a Victorian Ramsar site, see eg EJA *Unsustainable Water Management in the Gippsland Lakes: A Legal Analysis* (2021), https://envirojustice.org.au/publications/report-gippsland-lakes/

Ramsar obligations can be interpreted consistently with Aboriginal law and obligations – and arguably should be;

d. An important and further piece of work emerging from the Roadmap should be the conceptual and practical alignment of Ramsar and Aboriginal obligations attaching to wetlands, including as a foundation point for joint management of Ramsar sites in accordance with CoP resolution and guidance and progress on Aboriginal control over water resources enabling that joint management.

Native title and water resources

73. Determination of native title in Victoria is limited, not without controversy (especially where not determined), but nevertheless significant. Little is said about native title in the Draft Roadmap. We do not dwell at length on the issue here. Interactions between native title to land and waters is complex and an area of law that is still evolving. It is not EJA's particular area of expertise. Having said that, we submit that it is important that the Roadmap signal the role of water policy (including water planning and rights allocations) in supporting native title rights and interests where there is an inherent connection between these two domains. An example of this connection is the intersection of native title rights and interests held on behalf of the Wotjaboluk people on the Wimmera River and the terminal lakes of the Wimmera River. Those native title rights and interests are held in relation to all lands along and forming the bed and banks of those waterways and wetlands and attach to the Traditional Owners rights of enjoyment of that Country and its resources. Absent a water regime that sustains the ecological integrity of those waterways and wetlands native title rights and interests are compromised and impaired. This type of outcome runs contrary to the water access commitments made under the Intergovernmental Agreement on the National Water Initiative in 2004, namely that water allocations may need to be made to native title holders and that such allocations will be accounted for.[23] Whether compensation arises for loss of enjoyment of native title rights or interests as consequence of water planning, policy and allocations may be a relevant question.

74. In our view, the Roadmap should signal work to be done on water policy, planning and allocations in support of native title rights and interests where these are determined or where claims subsist.

[23] NWI, [53]-[54]: 'Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth Native Title Act 1993… Water allocated to native title holders for traditional cultural purposes will be accounted for.'