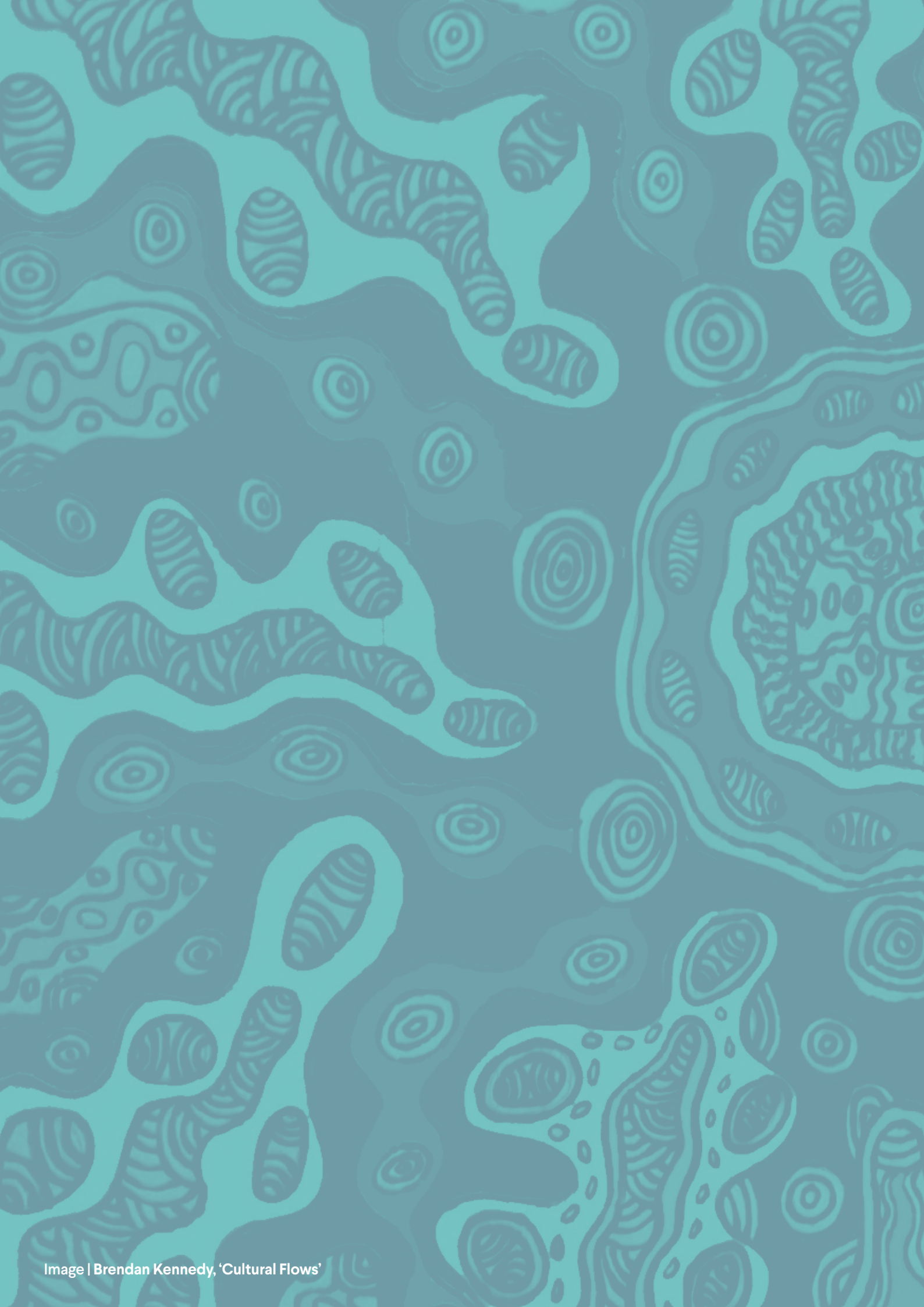

Margooya Lagoon

Establishing a Cultural Flows model on Tati Tati Country



Environmental
Justice Australia







A report by Environmental Justice Australia for Tati Tati Wadi Wadi community ('Tati Tati') and the Murray and Lower Darling Rivers Indigenous Nations ('MLDRIN')

About Environmental Justice Australia

Environmental Justice Australia is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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Front cover images: **Margooya Lagoon | Tim Herbert .
Brendan Kennedy, 'Cultural Flows'**

Purinya Kaiejin kathiwatha. Healthy water flowing.

Declaration of Sovereignty

Tati Tati Wadi Wadi kulingurra thangurra kaiejin parram parram tyalingi wangu warripa tharrayamu thangi nga thiti thalekatha kulingi kungatha delki thangi.

We the Tati Tati Wadi Wadi are the sovereign nation that carry the responsibilities of caring for our Country, including all waterways, landscapes, wildlife, ancestral sites, totemic species, and cultural heritage, as well as language, lore, song, dance, ceremony, and customs. This is our inherent right as Traditional Owners – our connection to place, land and animals dating back over 2000 generations.

We the Tati Tati Wadi Wadi state we have never ceded sovereignty, nor ever relinquished, given or traded our inherent right to Country and culture to any foreign individuals, parties, or governments.

Tati Tati Wadi Wadi do not consent to any foreign individuals, parties, or governments to act on our behalf in managing Country. Our involvement in any capacity does not, and should not, be misinterpreted as Tati Tati Wadi Wadi consent for decision making or management on our behalf.

We are, and will forever be, the rightful people to care for our Country.

Through the attainment and continuation of Cultural Flows, we aspire to achieve sovereign control of water management on Country to uphold our responsibilities of caring for Country.

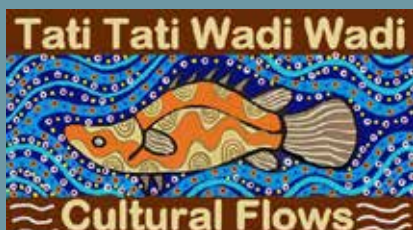
Margooya Lagoon

Margooya Lagoon is a culturally significant ancestral place where we go to connect with Country, our ancestors, each other, and with ourselves. The health of Margooya Lagoon has a direct impact and influence on the health of our people emotionally, spiritually, physically, and culturally. Maintaining the balance of the ecosystem is of equal ecological and cultural importance as many of these species are central to TTWW traditional practices and cultural values.

We must value equally the environmental features of land, water, trees, and animals with the cultural knowledge, practices, history, values, and wisdom of Tati Tati Wadi Wadi Traditional Owners.

Because we are so strongly connected to this place, it is essential that our people are central to the monitoring, care, and decision making of all environmental changes and water dependent outcomes that encompass cultural values and benefits on Country.

This is our responsibility, inherited and bestowed upon us by our ancestors past who have cared for Country and culture since time immemorial.



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Summary

Margooya Lagoon is a permanent wetland on the Murray River floodplain near Robinvale in the state of Victoria. It is part of a cultural land and waterscape also known as Tol Tol to Tati Tati, the Traditional Owners and Custodians of this Country.

As a consequence of historic river regulation in the Murray River, natural flooding and drying regimes of the Murray River floodplains have been disrupted. At Margooya Lagoon, the Lock 13 Weir at Euston inhibits drying at this section of the floodplain. Upstream river regulation means seasonal flooding from overbank flows occurs less frequently than under natural conditions. In recent years, the Margooya Lagoon watering regime has been managed principally by way of a regulator to constrain natural flooding at the northern end of the Lagoon.

Tati Tati have undertaken Aboriginal Waterway Assessments (AWA) at the site. AWA is a tool which helps Traditional Owners assess the cultural health of their Country and set priorities for environmental water delivery. At Margooya, AWAs have informed a biodiversity and cultural plan for the site. That plan includes water, heritage and land management actions consistent with a 'relational' model of management of Country.

Presently, there are no formal cooperative management arrangements for Margooya Lagoon. No formal environmental watering was undertaken for the site in 2019/20. Environmental watering is planned for the 2020/21 season. Public land management laws and policies do not expressly refer to, or incorporate, cooperative arrangements with Tati Tati.

Cultural Flows are a model of integrated land and resource assessment, planning and management developed by the Murray and Lower Darling Rivers Indigenous Nations ('MLDRIN'). The Cultural Flows model proposes a unique assessment model that synthesises scientific and Aboriginal cultural knowledge. Building on that base, Cultural Flows function as a 'package' of legal and policy measures, each directed to achieving objectives set out under the assessment and planning program.

The legal and policy responses required to implement Cultural Flows function across three domains:

- Water law and water rights (which can include water held by, or available to, Aboriginal organisations or other entities and used in favour of Cultural Flows outcomes);
- The management of water landscapes (which include, but are not limited to, laws concerning land management, heritage, planning or environmental protection); and
- Governance, which includes laws and arrangements concerning the 'framing' of the Cultural Flows program and relationships between TOs and other entities.

Each domain, or area of law and policy, has a role to play in

designing and implementing the Cultural Flows arrangements.

'Settler' law and policy is fragmented and complex and does not conform easily to Aboriginal (Tati Tati) lore and custom. One of the purposes of the Cultural Flows model is to produce a clearer reconciliation between the two.

For Margooya Lagoon, there are range of legal and policy responses available to design and advance Cultural Flows.. Key among these are:

- Control and influence over water planning, holdings and delivery across the local landscape (including the Lagoon directly and other drainage lines). Engagement with water authorities, decision-makers and policy-makers should be directed to these outcomes.
- Cooperative and improved public land management arrangements in relation to the Lagoon and the surrounding Tol Tol country. Engagement with Parks Victoria should occur with a view to implementing these outcomes.
- Consideration of formal collaborations with scientific experts and agencies in order to progress toward an integrated (cultural-scientific) resource assessment at Margooya, as exemplified in the National Cultural Flows Research Project case studies.
- Targeting of restoration and recovery for important species, communities and/or the area as a whole.
- Agreement-making with relevant government agencies, which can occur under different statutory schemes (legislation) or at common law, in order to structure and formalise actions, programs and obligations.
- Review of the status of Tati Tati as Traditional Owners and managers of country, with a view to formal recognition via legislative schemes or practise or both.
- Clear shift in language and governance practise toward sharing authority and influence over the Tol Tol landscape (including Margooya Lagoon) and recognition of its bi-cultural character. Advancing governance should be based on that bi-cultural principle.

This report summarises key legal and policy matters requiring consideration of a Cultural Flows program for Margooya Lagoon. The report then summarises the main features of the Cultural Flows model and concept.

Finally, the report proposes three sets of 'strategic opportunities' relevant to using law and policy to advance Cultural Flows at Margooya Lagoon and to achieve revitalisation of Country and connection to Country on this part of the Murray River floodplain.

Introduction

This report considers opportunities and prospects for the design and implementation of a Cultural Flows model at Margooya Lagoon, a natural wetland on the Murray River floodplain near Robinvale, Victoria.

The report has been prepared for the Tati Tati Wadi Wadi community ('Tati Tati') and the Murray and Lower Darling Rivers Indigenous Nations ('MLDRIN') in order to inform their agenda and programs, including but not limited to engagement with government on water management issues.

The purposes of this report include to:

Provide a description and assessment of the principal ('settler') legal frameworks and policy measures most relevant to the management of land, water and natural resources at Margooya Lagoon;

Set out the key components of the Cultural Flows model of resource management and consider their application to Margooya Lagoon;

Identify opportunities for influence on resource management and policy-making applying to Margooya Lagoon.

Where appropriate to inform this report, EJA has sought and taken instructions from Tati Tati and/or MLDRIN, especially on cultural matters. Errors, ambiguities and omissions remain EJA's and EJA has employed its best endeavours to correct errors or ambiguities, including through a process of review by Tati Tati and MLDRIN.

The information in this report is held to be correct as at 30 June 2020.

The report commences with a description of the site and engagement by EJA with Tati Tati and MLDRIN to date.

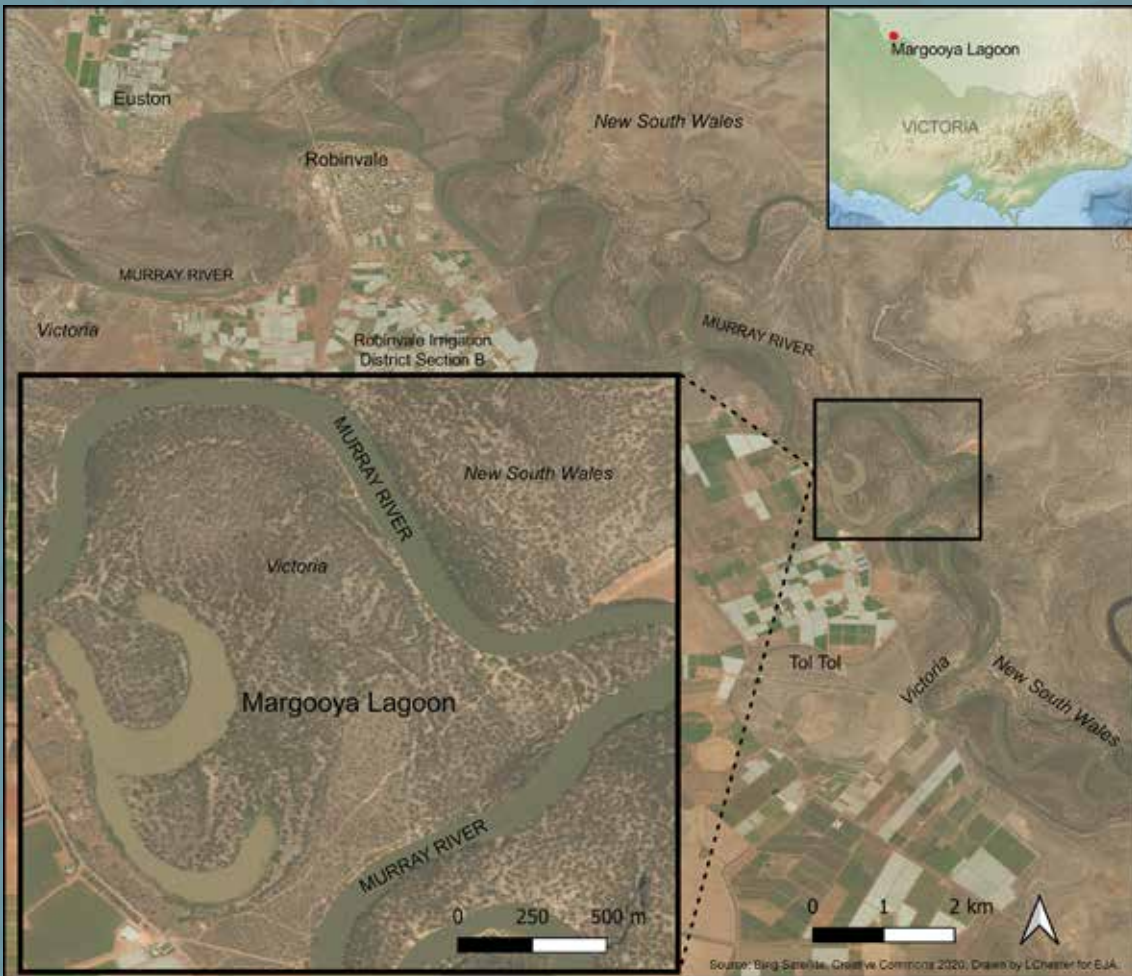


Figure 1: Margooya Lagoon in regional context

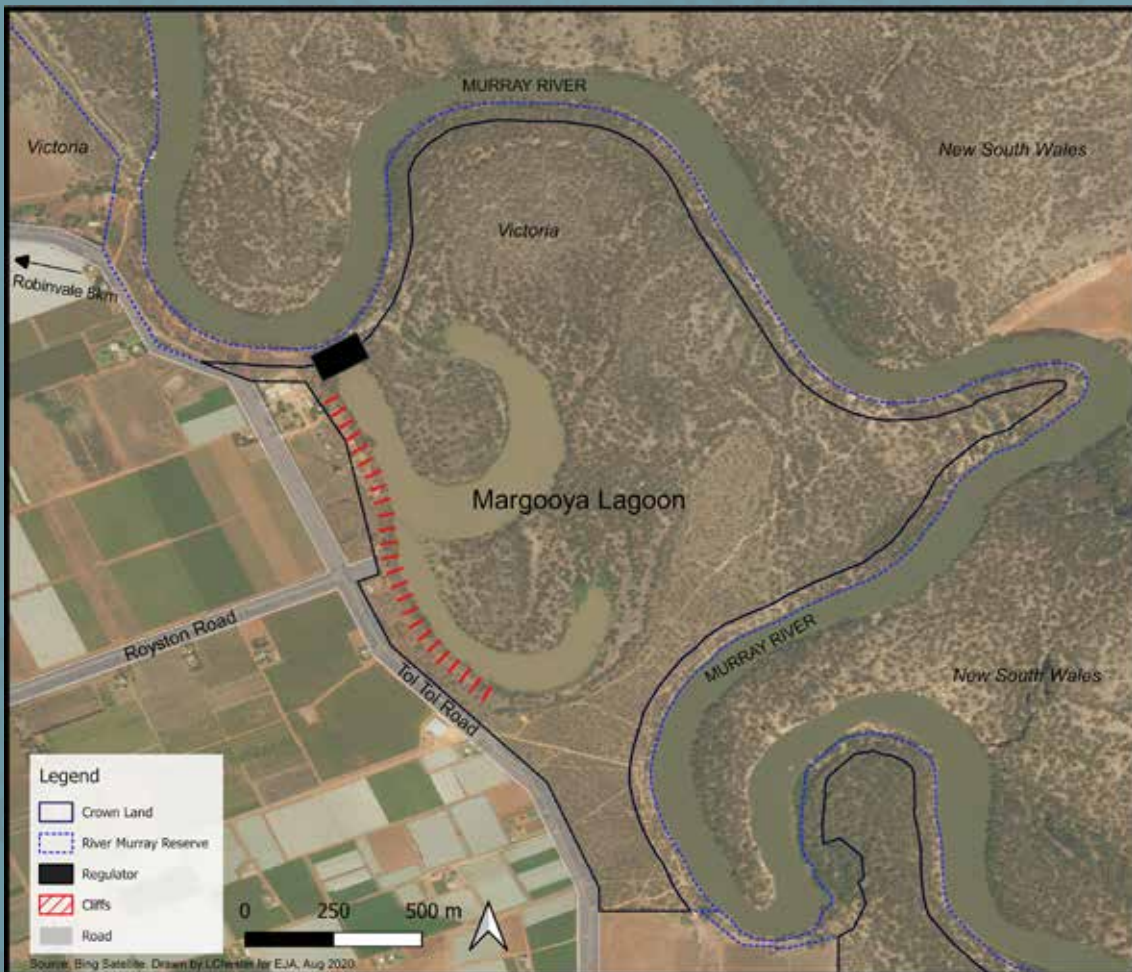


Figure 2: Margooya Lagoon with key landscape features

Margooya Lagoon

Land, ecology and hydrology

Margooya Lagoon is a permanent wetland on the Murray River floodplain approximately 10 km southeast of Robinvale in northern Victoria. The Lagoon covers an area in excess of 40 ha when inundated. It is surrounded by fringing River Red Gum woodlands and with flood tolerant understorey and chenopod understorey on higher ground.¹

The Lagoon is a product of the geomorphic and hydrological processes of the Murray River, including seasonal and periodic flooding, formation of low cliffs to the west of the Lagoon, and long-term changes in flows and the river channel. These processes have been significantly interrupted and influenced by river regulation in the 20th century, including construction of Lock 13 at Euston. The Euston Weir has the effect, along with locks and weirs in the Murray River system generally, of artificially maintaining the minimum water levels in the river channel. This has the effect of maintaining inundation of parts of the adjacent floodplain and/or connection with the river channel. Until 2009, Margooya Lagoon was subject to this permanent inundation regime.

Since 2009 water levels in the Lagoon have been managed by a regulator installed at the northern confluence of the wetland with the river channel. The Lagoon has been dried out and refilled three times since installation of the regulator, including

by pumping, and reconnection of the river channel has occurred via the regulator or overbank flows (such as in 2010/11).² We understand an overbank flow event also occurred in 2016.³

The floodplain land adjacent to the Lagoon includes various drainage lines and depressions to the north and east. It is likely that, pre-regulation, the Murray River channel would regularly have overflowed on to this land and established complex flow patterns between the river channel and the Lagoon. Overbank flows of this type still occur irregularly, such as in 2011 and 2016.

Further scientific description of the site is available in the Environmental Water Management Plan for Margooya Lagoon ('EWMP') prepared by the Mallee CMA.

In many instances, the floodplains and wetlands of the rivers of northern Victoria suffer ecological and hydrological degradation associated with disconnection from river channels, drainage, and artificially regulated flow regimes. Conditions at Margooya Lagoon replicate this experience. Across the wider area of adjacent land wetland disconnection is also evident, for example in the absence of seasonal flooding from the Murray River to the east. As with many riverine floodplain systems, the hydrological disruptions and requirements of wetlands and the floodplain at Margooya Lagoon are quite context-specific.



Land tenure and management

The Lagoon is situated on public land on a bend in the Murray River. The principal areas of land of interest in this report include public lands to the north-east of Tol Tol Road ('Study Area'). Surrounding land has generally been cleared and converted to agricultural uses. The precise tenure of the lands within the Study Area is not entirely clear. A thin strip of land along the river channel is part of the Murray River Reserve. Most of the Study Area is described in the EWMP as 'historically... managed by the Department of Environment, Land, Water and Planning [and its predecessors] as State Forest...' However, in mapping attached to the VEAC Final Report on River Red Gum Forests of 2008, the area appears to be designated as 'unclassified public land'.⁴ This status is supported by mapping presented by the Mallee CMA at a workshop with Tati Tati and others in March 2020.

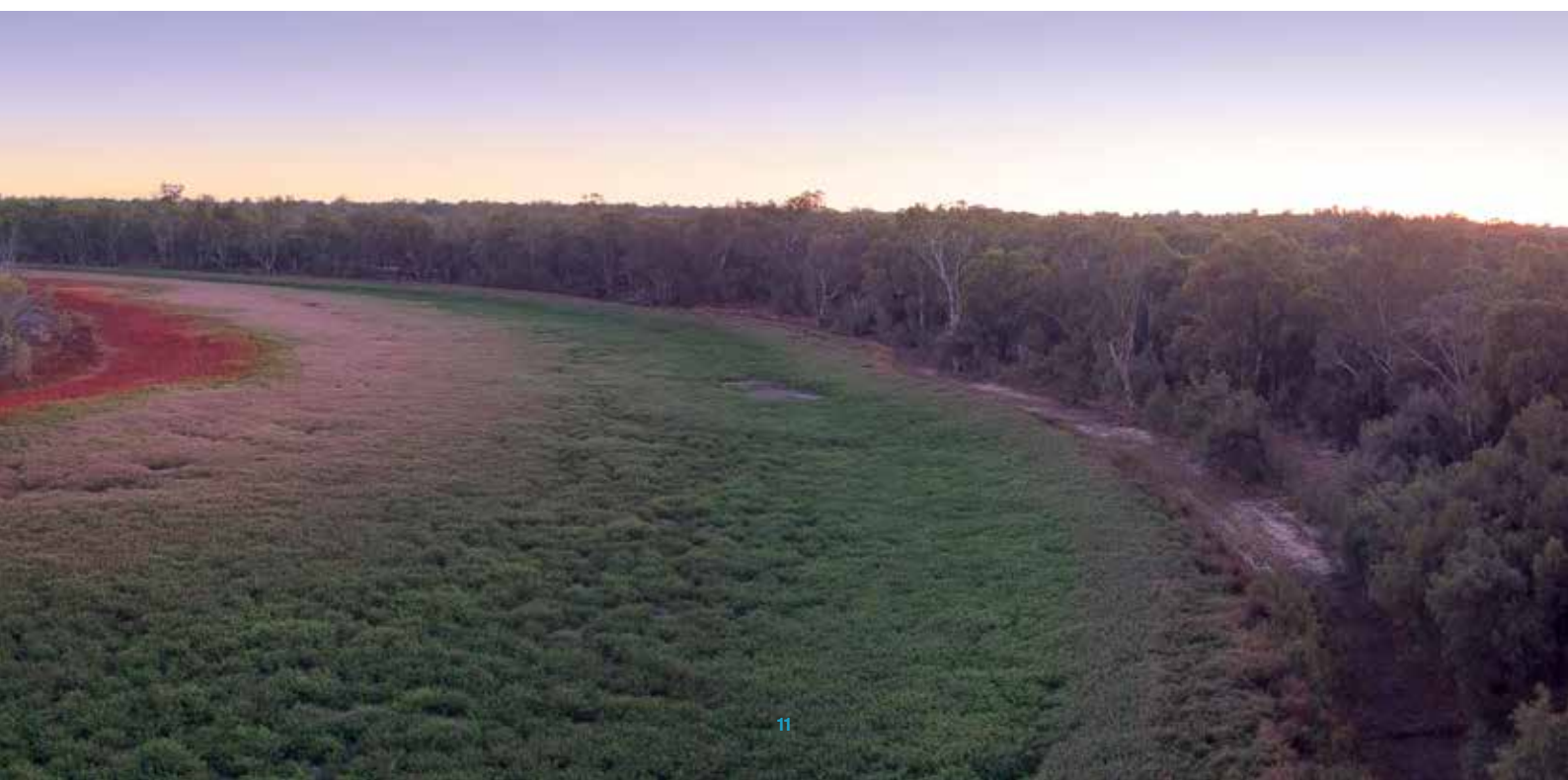
VEAC recommendations for River Red Gum forests include recommendations applying to Margooya Lagoon and the Study Area as part of the 'Murray River Park'.⁵ In response to these recommendations, Parks Victoria prepared a *River Red Gum Parks Management Plan* in 2018. It appears this is intended to be a Management Plan made under Part 4 of the *Parks Victoria Act 2018*. However, the current status of the *River Red Gum Parks Management Plan* is not clear. It is identified as an 'approved' Management Plan and is intended to provide 'strategic guidance'⁶ for land within this network of parks (including the land at Margooya Lagoon). However, this Management Plan has not been gazetted and its formal, legal effect is presently uncertain.⁷

The *River Red Gum Parks Management Plan* contains goals and strategies related to 'engagement' with Traditional Owners and enabling cultural watering objectives for the Red Gum Parks estate.⁸ These will be relevant to Margooya Lagoon. The high-level and somewhat qualified language used in setting out these directions will need to be scrutinised carefully and interrogated thoroughly.

The Study Area also falls within the 'Margooya Lagoon Floodplain Management Unit'. The identification of 'Floodplain Management Units' or 'Wetland Management Units' is a system of administrative arrangements set up by the Mallee CMA in order to manage environmental watering programs.⁹

Both the questions of land tenure and land management are important to any arrangements for formulation of a Cultural Flows program and model. Tenure concerns land *ownership*, including legal rights, privileges, obligations and liabilities attached to the land. Land *management* concerns the manner in which land is used, regulated, developed, and/or protected. These factors are important in inter-relationships of land and water on the floodplain and in the wetlands, regardless of whether the land is permanently inundated (as in the Lagoon) or periodically inundated (for example, where areas of the floodplain flood). These considerations are important in assessing who controls land and how water management can occur on that land.

The Cultural Flows model turns not only on management of water but also management of land and other landscape features, each as essential features of Country and waterscapes.



Tati Tati connection with Margooya Lagoon

Tati Tati continue a connection and relationship to Margooya Lagoon that traverses ancient, colonial and contemporary experiences. Typical of First Nations' connections to land and waters, contemporary connection includes practices and struggles aimed at retaining and adapting relationships to Margooya Lagoon that are founded on ancestral ties. Tati Tati connection to lands and waters along the Murray River, its floodplains and hinterlands to the south is referred to in written documents from the nineteenth century¹⁰ through to current controversies over Traditional Owner representation and recognition in relation to these lands and waters.¹¹ This report expresses no opinions or findings on those controversies.

The fact of Tati Tati connection to Margooya Lagoon and continuing claim to, and exercise of, sovereign authority¹² is assumed in this report. We are instructed on that fact by Tati Tati community members. This report is supplemented by personal communications and field trip notes.

Additionally, this area is identified on maps setting out the extent of heritage applications. Moreover, the fact of Tati Tati connection to Margooya Lagoon and surrounding lands is reflected in a key study underpinning Victorian Government engagement with Tati Tati at the site, the *Margooya Lagoon Cultural and Biodiversity Assessment Project: Final Report*¹³ ('Cultural and Biodiversity Assessment Report'). The Cultural and Biodiversity Assessment Report provides important content on, and explanation of, the connection of Tati Tati to Margooya Lagoon.

Other sources of information, such as native title determinations or claims, or agreement-making under the *Traditional Owner Settlement Act 2010* (Vic), do not exist and hence they are not available to inform this report.

The Cultural and Biodiversity Assessment Report reflects findings from Aboriginal Waterway Assessments (AWA's)¹⁴ undertaken at Margooya Lagoon in 2017 and 2018. In general, AWAs found Margooya Lagoon of high cultural significance but in poor ecological health. The AWA method is a form of integrated cultural-ecological assessment, focused on subjective valuations of site 'health', which is to say health in cultural and biophysical terms. Water management represents the single most significant

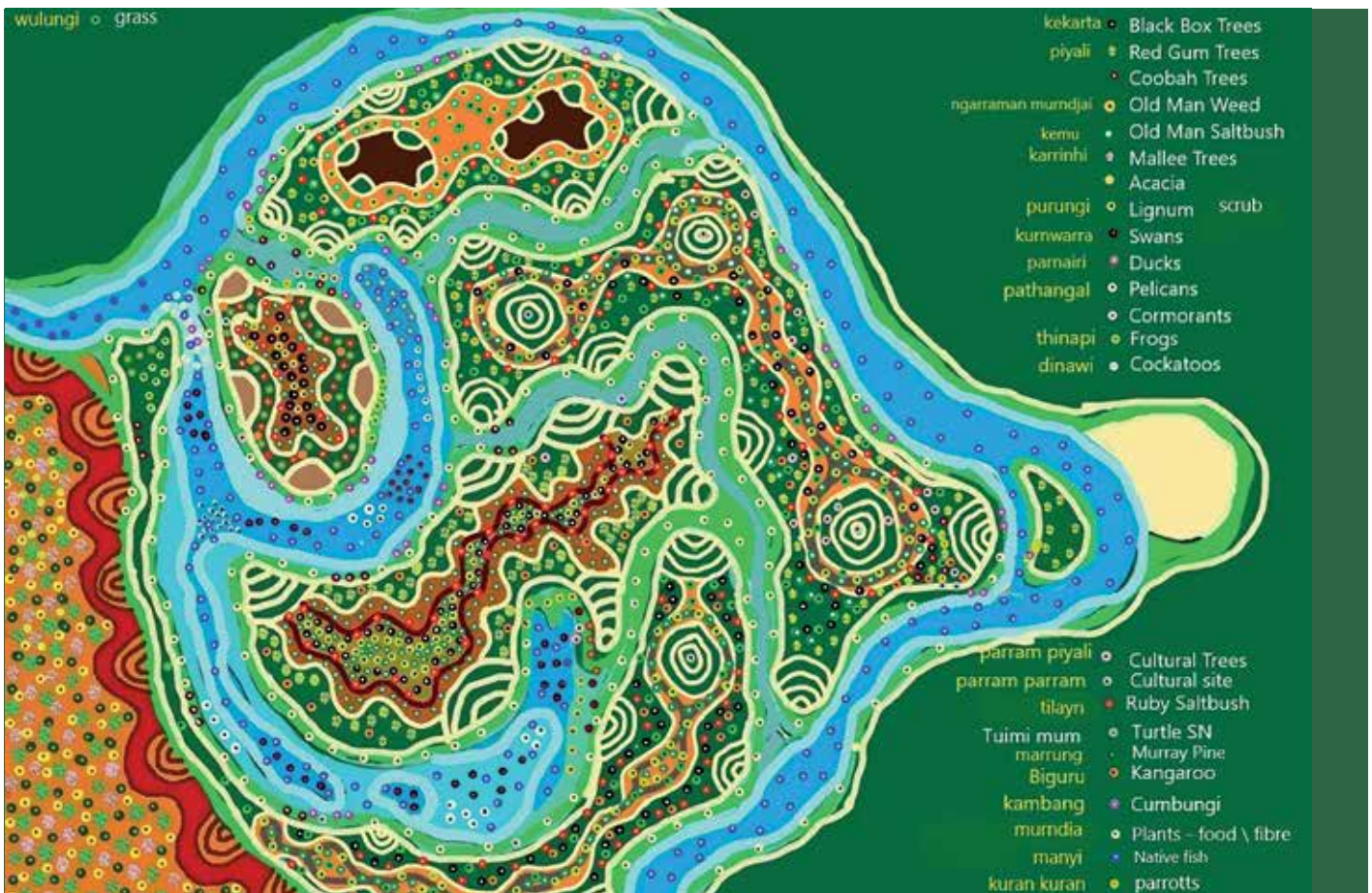


Figure 2: Margooya Lagoon cultural character (Source: Brendan Kennedy)

threat to site health, followed by flora and fauna conditions. Assessments draw on community experience, observations, knowledge, relationships and long-term connections to place. The AWA process itself occurs in the field and in workshops off-site.

The Cultural and Biodiversity Assessment Report sets out in detail Tati Tati values and uses related to Margooya Lagoon and adjacent lands and waters. These are situated within a model of change directed to protection and restoration of Margooya Lagoon's cultural and ecological health. The model of change proposed has short- and long-term outcomes, aspirations and foundational needs or requirements. 'Foundational needs' refer to Cultural Flows but include what might be referred to as a Cultural Flows *program*. Within this model of change, specific objectives attached to a Cultural Flows program for Margooya Lagoon are set out. Aspirations and outcomes in respect of Margooya Lagoon are included in Victoria's Draft Water Resource Plan for Northern Victoria and the Murray, as a 'case study'.¹⁵ In this manner, Tati Tati objectives inform Victorian water policy, albeit distinguishable from broader 'objectives' and 'outcomes' identified in accordance with the Basin Plan.¹⁶

The Tati Tati assessment of Margooya Lagoon is based on a relational model of 'health'. This model informs values and uses. In the Cultural and Biodiversity Assessment Report this relational model is described as a 'web of interconnected elements', at the heart of which is water and healthy plants, animals and people.¹⁷ This model is comparable to those informing 'indigenous science' frameworks. Having regard to those 'elements', the relational model of health is intrinsically cultural and biophysical. Species and landscape elements or processes can be situated within this model as of particular significance, for example, as totemic species.

Alongside the model of the 'web' of elements, Margooya Lagoon and surrounding lands and waters has been described analogously as a body, with waters flowing into the body from the east and out of the body to the north (where the current regulator functions).¹⁸ This analogical description of the land and waters is consistent with an understanding of the area as a whole as a single, if complex, living entity. The area as a whole is referred to as Tol Tol, a term that was used by settlers to name a road to the south of Margooya Lagoon and a nearby nature reserve.



Figure 3: Aboriginal Water Assessment at Margooya Lagoon 2018



Image - Regulator between Margooya Lagoon and the Murray River | Tim Herbert

The legal and policy matrix applying to Margooya Lagoon

Law applying to land and natural resources is fragmented

The settler legal and public policy framework poses inherent challenges to First Nations' active and authoritative relationship to Country. One aspect of these challenges is the fragmented nature of law and policy applying to land, water and natural resources. Symptoms of this fragmentation can include chaotic, inconsistent, inchoate, or patchwork administration of law and policy, alongside uncertainty and/or a proliferation of institutions and legal schemes.

At Margooya Lagoon, the regulatory and policy situation is typical. Key legal frameworks to deal with include, in relation to land and natural resources:

- Public land tenure and management
- Land-use planning
- Water management
- Aboriginal heritage management
- Biodiversity law
- Catchment management.

In addition, the governance and financing of programs at Margooya Lagoon, including any Cultural Flows program, needs to consider the following legal frameworks:

- Public sector finances
- Contracts and agreement-making
- Intellectual property.
- In this section, we will deal with land and natural resources management.

Public land

The land comprising Margooya Lagoon and its surrounds is public land. Online searches suggest that the land is unreserved Crown land. As noted above, the Mallee CMA suggests it is or may have been 'reserved forest' under the *Forests Act 1958*. In either case, it may be managed by Parks Victoria¹⁹ and entered on the Parks Victoria Land Record, although further enquiries would be needed to confirm this fact.

It seems clear that it is, presently, neither reserved Crown land under the *Crown Land (Reserves) Act 1978 (Vic)* nor a State Wildlife Reserve or Nature Reserve under the *Wildlife Act 1975*

(Vic). Nor is it land administered under the *National Parks Act 1975 (Vic)*.

Assuming it is Crown land managed by Parks Victoria, its precise status will be important as to how and why it is to be managed. For example, if it comprises State forest then it may be managed for multiple uses, including resource uses, under the *Forests Act*.²⁰ If it is not administered under the *Wildlife Act 1975* it cannot be used for game hunting. Given the leading role of Parks Victoria as a public land manager, duties of that agency under the *Parks Victoria Act 2018* may also be relevant to its relationship with Tati Tati in land management.

The proposed Red Gum Parks Management Plan²¹ makes no express reference to Margooya Lagoon and its environs. However, certain provisions of that Management Plan in the vicinity of Robinvale may have practical consequences for the management of the area:

- Collection of firewood for domestic purposes subject to annual review;²²
- Dispersed camping permitted on surrounding public lands, such as Belsar Island and some (but not all) public lands around Robinvale;
- Maintenance of tracks and access at certain public lands in the vicinity of Robinvale; and
- Permitting access with dogs on leash in these areas.

The Red Gum Parks Management Plan contains extensive references to collaboration with Traditional Owners and/or reflects Traditional Owner aspirations and goals, including in planning and management.²³ The Management Plan also contains proposals and actions relating to Aboriginal heritage.²⁴ In addition, it makes express references to water management, including in relation to Aboriginal cultural watering²⁵. These actions may be specifically applicable to Margooya Lagoon.

Public land can be the focus of cooperative, co-management or other forms of tenure or land management enabling First Nations' greater control over land. This is particularly the case in Victoria, where public land can be subject to settlement arrangements under the *Traditional Owner Settlement Act 2010* or co-operative land management arrangements under the *Conservation, Forests and Lands Act 1987*.²⁶

Alternative public land tenure or management arrangements could be a specific outcome under a Cultural Flows program – they may in fact be instrumental to facilitating that program.

Land-use planning

Land-use planning operates under the *Planning and Environment Act 1987* (Vic), especially through planning schemes. Each municipality has a planning scheme, which is a statutory code for the use, regulation, development and protection of land.

The Swan Hill Planning Scheme applies to the land at Margooya Lagoon and its environs.

The land is entirely zoned as within the Public Conservation and Resource Zone (PCRZ). The purposes of this zoning include:

- To protect and conserve the natural environment and natural processes for their historic, scientific, landscape, habitat or cultural values;
- To provide facilities which assist in public education and interpretation of the natural environment with minimal degradation of the natural environment or natural processes; and
- To provide for appropriate resource based uses.

In essence, this zoning prioritises the conservation purposes of the land, alongside certain resource uses. For example, there is an apiarist licence applying to the land.²⁷ The zoning sets up certain uses that are permitted where undertaken by or on behalf of the public land manager (Parks Victoria) or in accordance with a plan incorporated into the planning scheme. No such plan currently exists.

The land is also regulated by a Bushfire Management Overlay ('BMO') and by a Land Subject to Inundation Overlay ('LSIO'). The BMO and LSIO are intended to manage the land to take account of these specific types of risks. An Environmental Significance Overlay regulates any use or development along the narrow strip of river frontage land but not the Study Area as a whole.

Depending on the nature of works required to undertake management of the land in accordance with a Cultural Flows program, a permit may be required under these provisions of the planning scheme or other provisions. Careful consideration would need to be given to how the planning scheme could best facilitate an agreed or approved Cultural Flows program.²⁸

Water resources management at Margooya Lagoon

At the heart of any Cultural Flows program and model will be water resources management. Regulation of water management is a discrete area of law and policy, albeit one inherently

connected to law and policy governing land and other natural resources.

Water law and the Lower Murray regulated water system

Water law in Victoria is governed under the *Water Act 1989* (Vic) and legal rights, duties, liabilities and privileges in water derive from that legislation. Water management at Margooya Lagoon is affected by water sharing arrangements in the Murray River. Those arrangements operate under intergovernmental agreements between State Governments and the Commonwealth (Murray Darling Basin Agreement). The Murray Darling Basin Agreement informs the scheme for water management in the MDB which operates under the Commonwealth Water Act and the Basin Plan.

National water policy establishes a requirement for First Nations' participation in water planning.²⁹ Under Commonwealth law, First Nations' (limited) involvement in water planning imposes consultation requirements on Basin States.³⁰ First Nations' engagement in Victorian water law and policy has evolved in recent years.³¹ We deal with the Victorian response more fully below.

In Victoria, the regulated water system in the Lower Murray River, from the Nyah Irrigation District to the South Australian border, operates under a Bulk Entitlement Order administered by Lower Murray Urban and Rural Water.³² This Order represents the principal overarching regulatory instrument for managing water resources allocations to water entitlement holders in this part of the Murray River system, including town water supplies, irrigation water supply, and environmental water allocations. Water diversions and supply under the Bulk Entitlement currently include those in the form of water shares, water licences, environmental entitlements, bulk entitlements to other authorities administered under this Order, and by agreement with other parties. These terms refer to different forms of rights to take, divert, use, or deal in (i.e. trade) water. The volumes and distribution of water rights occurs in accordance with the table of shares set out in a schedule to the Order.

As with other larger, regulated water systems in the MDB, water shares can be traded on the water market. Other forms of rights, such as those created under water licences, can also be transferred. Take, use and distribution of water can also be regulated under agreement.³³ Such agreement-making may be constrained by powers of water authorities to enter into agreements. Private entities, such as irrigators, can also enter into agreements relating to their water-holdings. The detailed machinery of water trading and market operations in the Lower Murray system are not set out in this report.

Margooya Lagoon is part of the Murray River for the purposes of the Murray Darling Basin Agreement, as reproduced in the Bulk Entitlement Order.³⁴ This is because Margooya Lagoon is a lagoon connected to the main course of the Murray River.

The extent of water in Margooya Lagoon and on surrounding land is regulated by works (regulator at northern end of Margooya Lagoon) and by natural flows (for example natural flooding of land or creeks). Take of water from Margooya Lagoon directly under a section 51 licence may occur and have a marginal influence on water levels.³⁵

Water does not currently flow into or from Margooya Lagoon or surrounding land under any water right or entitlement. The inclusion of Margooya Lagoon in the Seasonal Watering Plan (SWP) 2019/20 of the Victorian Environmental Water Holder (VEWH) was removed expressly in August 2019.³⁶ Environmental water holdings are not used presently at Margooya Lagoon. However, the SWP for 2020/21 provides for the use of environmental water to flood partially or fully various Murray River floodplain wetlands, including Margooya Lagoon. More precisely, a section of the floodplain in the vicinity of Margooya Lagoon is scheduled to be watered in Autumn 2021 by pumped flows from the Murray River.³⁷ The cultural significance of the Margooya Lagoon is specifically noted in the SWP in regard to this environmental watering.³⁸

The SWP guides the implementation of flows enabled under environmental entitlements for the Lower Murray held by the VEWH (held environmental water). Environmental entitlements are analogous to Bulk Entitlements but represent water-holdings held and allocated, under Victoria law, for the purposes of maintaining the environmental water reserve or improving the environmental value and health of water ecosystems.³⁹

Given the regulatory source of water in Margooya Lagoon directly (as distinct from the surrounding floodplain) is not water holdings, the legal status of water in the Lagoon is rather more complex. In essence, this water is a form of 'planned' environmental water, or part of the Victorian environmental water reserve outside of water holdings.

Two environmental water management plans prepared by Mallee CMA are relevant to the watering regime at Margooya Lagoon. One is the Environmental Water Management Plan for the Murray River at Lock 15 Weir Pool ('Lock 15 EMP').⁴⁰ The other is the Environmental Water Management Plan for Margooya Lagoon ('Margooya Lagoon EMP').⁴¹

The Mallee CMA must prepare and implement a 'regional waterway strategy', including plans for matters such as environmental watering ('maintenance of the environmental water reserve').⁴² The environmental water reserve can include such

management plans.⁴³ The Margooya Lagoon EMP and the Lock 15 EMP have effect in this way: as guidance to river regulation and as part of the Victorian Environmental Water Reserve.

Water supply into Margooya Lagoon has been identified as regulated flows from the Murray River dependent upon the operation of the Lock 15 at the Euston Weir.⁴⁴ Delivery of water to Margooya Lagoon under any *water holding* (right or entitlement) would likely require works or infrastructure in some form, as well as other resources such as capacity building and technical knowledge. Works or infrastructure would require approvals, such as works licences under the *Water Act* or permissions of the public land manager. It also requires regulation via the VEWH and its SWP.

Water resources will also be influenced by rules and obligations to which water managers, such as water authorities, are subject. These include storage management rules and Statements of Obligations applying to water authorities.

Strategic planning: Sustainable Water Strategies

Strategic planning and management of water resources is governed by policy frameworks set out in Sustainable Water Strategies (SWS). This includes the Northern Victorian SWS which applies to Victoria's management of the Murray River system. The Northern Victoria SWS contains no specific reference to Margooya Lagoon. It does establish policies and reform programs clearly relevant to the management of wetlands and floodplains of the Murray River, although with express reference to environmental purposes not cultural purposes. For example, the NVSWS includes a framework for categorising river, floodplain and wetlands restoration according to a 6-category investment guide to environmental water recovery and management in northern Victoria.⁴⁵ A new NVSWS will be prepared for adoption in 2024.

Waterway management: regional waterway strategies

Waterways are managed by water authorities for environmental, social, cultural and economic values under Part 10 of the *Water Act*.

Water authorities are required to prepare Regional Waterway Strategies in order to identify, plan for and deliver on those values.⁴⁶ More precisely, regional waterway strategies must be prepared for the purpose of water authorities – both water corporations (such as lower Murray Water) and Catchment Management Authorities (Mallee CMA) – performing waterway management functions. Those functions are set out in detail in section 189 of the *Water Act 1989*. There are significant environmental imperatives under that section and Authority

obligations include setting pathways of implementation as well as planning for those imperatives.

The current Mallee Waterway Strategy ('MWS') runs until 2022. It is a principal document and statutory instrument for the current management of Margooya Lagoon. Under the MWS, Margooya Lagoon is identified as a 'priority' wetland within the Bumbang Waterway Management Unit.⁴⁷ Management actions across the 2014-22 period are set out for Margooya Lagoon,⁴⁸ including water regime management, invasive species control (carp, invasive aquatic plants), Aboriginal heritage management, and promotion of native fish populations and habitat.

As noted below, new obligations in relation to Aboriginal uses and values have been included in waterway planning and implementation since 2019.

Native title and settlement legislation

The law of native title can apply to the recognition of First Nations' rights and interests in water. In Victoria, the scheme of recognition operating under the *Traditional Owner Settlement Act 2010* (Vic) ('Settlement Act') creates alternative arrangements for access to water resources (in the form of natural resources management orders).⁴⁹ Neither native title nor the Settlement Act have proved particularly successful in enabling First Nations' interests or control over water resources, especially in south-eastern Australia and the MDB. The impediment to recognition of native title inherent in colonisation's ongoing impacts required remedial legal and policy responses. This fact was instrumental in the emergence of the Cultural Flows concept, as well as the Settlement Act and other statutes.⁵⁰

No determination of native title has occurred at Margooya Lagoon or in this section of the Murray River and adjacent lands. No relevant agreements have been made under the Settlement Act. No preceding steps, such as native title claims, have been commenced.

We have no instructions as to whether the Tati Tati Wadi Wadi community intends to pursue native title or Settlement Act outcomes, including those that would engage the question of influence or control over water resources.

Aboriginal heritage

Land, waters, objects and natural features at Margooya Lagoon are regulated under Aboriginal heritage legislation, particularly Victoria's Aboriginal heritage legislation. The *Aboriginal Heritage Act 2006* (Vic) ('Heritage Act') establishes a scheme for the protection, custodianship, management and conservation of Aboriginal cultural heritage in Victoria. Aboriginal cultural heritage encompasses Aboriginal places, objects and ancestral remains. The Heritage Act establishes a scheme for the registration, protection from harm, management planning and agreement-making in relation to Aboriginal cultural heritage, as well as authorisations for harm. The scheme includes protections for 'intangible' heritage protection where this operates under registered agreements.

All waterways and land within 200m of a waterway are deemed areas of cultural heritage sensitivity.⁵¹ The practical effect of this policy requires proponents of any 'high impact' activities to prepare a cultural heritage management plan,⁵² including an assessment and report on any Aboriginal cultural heritage at the site. 'High impact' activities are defined under the Regulations.⁵³

Whether a cultural heritage management plan would be required under triggering provisions of the Heritage Act in order to enable a Cultural Flows program, would depend on the specific design and impacts of such a program, including works. Generally, it would appear unlikely that works or measures needed as part of a Cultural Flows program would trigger these provisions of the Act. This approach would pose a Cultural Flows program as analogous to harmful works or development. Generally, the presumption of a Cultural Flows program is otherwise – it is intended to be beneficial to and rejuvenate Aboriginal heritage.

Relevant mechanisms under the Heritage Act for the purposes of enabling a Cultural Flows program may include:

- Cultural heritage agreements made under Part 5 of the Act;
- Aboriginal intangible heritage agreements made under Part 5A of the Act; and/or
- Payments out of the Aboriginal Cultural Heritage Fund under Part 10A of the Act.

The principal impediment to using Aboriginal heritage legislation provisions in relation to enabling a Cultural Flows program at Margooya Lagoon is the fact that at present, Tati Tati have no entity established as a Registered Aboriginal Party under the Heritage Act, nor any entity currently recognised as a 'Traditional Owner Group Entity' under the Settlement Act. Even without RAP status recognition, the Settlement Act can enable an intangible heritage agreement.⁵⁴

Biodiversity and environmental protection

Biodiversity laws encompass the protection, conservation and restoration of biological diversity. 'Environmental protection' can refer to biodiversity conservation or, in other contexts, to protection from pollution. Here the former reference is mainly used.

Biodiversity laws will be relevant to Cultural Flows at Margooya Lagoon to the extent that they regulate ecological features of lands and waters at Margooya Lagoon, including protected flora or fauna affected, enhanced or altered by a Cultural Flows program.

Federal biodiversity law⁵⁵ mainly regulates a limited range of matters, including listed threatened species, by requiring assessment and approval of actions harmful to those matters.

Victoria biodiversity laws, notably the recently amended and 'strengthened'⁵⁶ *Flora and Fauna Guarantee Act 1988*, contains broader objectives including managing the State's biodiversity for its recovery and improvement.⁵⁷ New principles under that Act specifically require that a policy, program or process give 'proper consideration' to the rights and interests of Traditional Owners.⁵⁸

These principles do not depend on any other formal, legal status for their application, but they are confined to biodiversity matters and the scope of operation of this particular law across government authorities. It is likely that there is scope for intersection between the Cultural Flows program and opportunities for recovery and restoration of habitat and biodiversity.⁵⁹ These opportunities might focus on species or aspects of Country particularly important to Tati Tati. For example, a Flora and Fauna Management Plan may be made under the FFG Act that is responsive to Tati Tati priorities, objectives and/or lore and custom in relation to a species, ecological communities or the area itself.⁶⁰

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

Cultural Flows

First Nations' contemporary advocacy and policy development in relation to water resources is well-established. We will not rehearse that context here. The concept of Cultural Flows is part of this overall context, which includes the fact of imbalance caused by First Nations' absence from water resources management, as compared for example to access to land, and perpetuated injustices inherent in this experience.⁶¹ This imbalance has been referred to as 'aqua nullius'.⁶²

'Cultural Flows' as a policy response is not one without critique or uncertainty, such as the use of Cultural Flows as a device limiting First Nations' interests in water by association with confined 'traditional' or 'cultural' uses.⁶³ Cultural Flows should not be viewed ahistorically (in absence of proper exposition on settler water regulation as a device of expropriation and removal of First Nations from Country), nor conflated with First Nations' epistemologies of water ('Aboriginal water').

The 'Cultural Flows' idea and model operates as a *form of intersection* of First Nation lore and custom and specific devices functioning under 'settler' water law.⁶⁴ Other forms of intersection or co-existence exist, such as Indigenous water reserves or First Nation-influenced water planning, which are not considered in this report.

A key reference point is the National Cultural Flows Research Project (NCFRP).⁶⁵ A practical model for setting out a Cultural Flows program was devised and tested in Components 2-4 of the NCFRP. The principles of a legal and policy response are set out in Component 5.

The foundations of this model derive from the definition of 'Cultural Flows' in the Echuca Declaration of 2014 and identification of 'cultural' water as a form of water interest distinct from environmental water.⁶⁶

The Echuca Declaration expresses Cultural Flows in the following terms:

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

This approach to First Nations' interests in water reflects prevailing legal and policy trends of water markets, proprietised water interests, and statutory water planning.⁶⁷

The legal and policy response outlined in Component 5 reflects the preferences and approach taken through the Echuca Declaration, specifically establishing First Nations-controlled water rights as a core feature of Cultural Flows, connected inherently to complementary legal and governance frameworks.

Components: assessments, models, implementation

The National Cultural Flows Research Project (NCFRP) set out a step-wise program for formulation, testing and implementation of the Cultural Flows model, including the following:

- Literature review;
- Preliminary findings;
- Ecological studies and assessment at case study sites;
- Hydrological and hydraulic studies and assessment at case study sites; and
- Legal and policy design.

Components 2-4 of the NCFRP provided a detailed, extensive and elaborate model for cultural-scientific resource (water) assessment and planning. This work was crucial to informing the high-level legal and policy response in Component 5. Components 2-4 identify and scrutinise the unique interdisciplinary exercise for this resource assessment and planning model. This includes identifying the opportunities and constraints manifest in the model, especially in regulated (and fully allocated) water systems.

Resource assessment and planning

The case studies of the NCFRP were undertaken at two sites in the Murray Darling Basin: Toogimbie Indigenous Protected Area near Hay on the Murrumbidgee River system, and Gooraman Swamp near Weilmoringle on the Culgoa River system. These particular sites are significant for First Nations' (Nari Nari and Murrawarri respectively) connections to Country and aspirations for water management on Country. The choice of these sites enabled the development and application of distinctive resource assessment and planning methods.

The detail of Components 2-4 will not be restated here. Suffice to say, the resource assessment and planning approach adopted was a form of integrated cultural-scientific assessment leading to a hybrid water planning model (taking account of both cultural and scientific knowledge and values, such as totemic and relational values as well as quantifiable metrics). Central to the projects was a method of joint design and delivery within a partnership between First Nation communities and non-Indigenous scientists.

Integrated assessment/planning and joint/concurrent authority are intrinsic and mutually dependent features of the Cultural Flows methodology established in Components 2-4.⁶⁸ They are

features embedded in the method by way of agreed rules and protocols, such as 'free prior and informed consent', participatory action research, indigenous knowledge protections, capacity building, and beneficial research outcomes for First Nation participants. These features were institutionalised through operation, for example, of a research committee, project teams and research partnerships.⁶⁹

The resource assessment and planning method is at one level distinguishable in what it is seeking to achieve: management objectives, target ecological (species) priorities, and recognition or adoption of First Nation relational viewpoint.⁷⁰ Values consistent with this approach include enabling First Nations' water management, economic and well-being benefits, and synergies with environmental flows. Cultural Flows may be distinctive from environmental or consumptive flows but also can be (or even are likely to be) intertwined with them, and they are sufficiently broad in purpose and content to provide environmental, social, economic and spiritual benefits. To put this another way, the design of Cultural Flows must have regard to the pivotal and defining force of 'culture' in a dynamic, contextual and self-determining manner.

This characterisation of Cultural Flows as a type of 'third way' or 'hybrid' approach to water management is reinforced by the *way in which* this model of integrated resources assessment and planning is undertaken. The *process* of assessment and planning is itself distinctive and essential to the Cultural Flows model. Key features include:

- Intensive engagement and iterative processes, such as in setting objectives;
- Frameworks accommodating dispute resolution procedures;
- Sufficient and appropriate resources;
- Prioritisation of 'traditional Aboriginal knowledge' in ecological and resource characterisations;
- Use and adaptation of existing water management tools, such as scientific and technical platforms;
- Use of participatory research processes as regenerative of culture and capacity.⁷¹

One further factor should be noted regarding resource assessment and planning evidenced in the NCFRP experience: this was in effect a program carried out by joint specialists (First Nations and scientific), with deference to First Nations' priorities and leadership, and at *arms' length from decision-makers or policy-makers*. The program was conducted in an autonomous practical and intellectual space. The result is cultural-scientific synthesis of outcomes and techniques.

We refer to this as an 'integrated resource assessment and planning model' as a form of shorthand. The integrated resource assessment and planning exercise reported on in Components 2-4 provides an example of best practice in resource assessment and planning, combining scientific and First Nations' knowledge systems.⁷²

Legal and policy response

Component 5 of the NCFRP⁷³ sets out principles and a framework by which law and policy can respond to the 'integrated assessment and planning model' of a Cultural Flows program.

Progressing certain aspects of the Component 5 report requires law and policy reform responses. Other aspects do not require reform and can be enabled through use of existing legal or policy mechanisms.

The basic premise of legal and policy responses enabling Cultural Flows are that three levels of action are required:

- A 'core' of water rights, 'to strengthen First Nations' capacity to control water to fulfil cultural responsibilities, to make decisions about water management, and to participate in water resources partnerships'.⁷⁴
- Measures to 'increase influence in water landscapes', through complementary measures related to land, heritage, environmental protection, participation and agreement-making.
- Complementary or supporting governance, including tools such as representation and First Nation 'voice', resource assessment, adoption of a First Nations' rights and perspectives approach in water planning and management, political agreement-making, and tracking against international obligations.

A diagrammatic representation of these levels of action, or elements, and connections between them are set out in Figures 4 and 5.

The Component 5 report also set out principles for implementation of Cultural Flows programs. These are high-level principles intended to be adapted to particular circumstances. They are targeted to 'operationalising' Cultural Flows:

- All levels of action (or 'approaches') are necessary in any Cultural Flows program.
- Partnerships and agreements are central.
- Cultural knowledge must be protected and respected.
- Government clearly and demonstrably accounts for First Nations' values, objectives and capacities.
- Sustainable and ongoing resourcing.
- Shifting perspective in water management.
- Enhance independence and self-determination of First Nations in water decision-making.
- Active and informed involvement in all aspects of water management and operations.
- Clear lines of government obligation to implement outcomes (including via statutory review).
- Implementation scoped broadly but responsive to context.

The Cultural Flows model elaborated in the NCFRP and endorsed by key First Nations' organisations calls for Cultural Flows to be an integrated package of measures delivered through partnerships and through adapted (and innovative) law and policy. Public and potentially private⁷⁵ actors' contributions are essential. In practice, good faith negotiations are necessary across all levels of action, recognising and accommodating imbalances in power and resources where relevant. The result can be powerful restoration and cultural revitalisation outcomes.

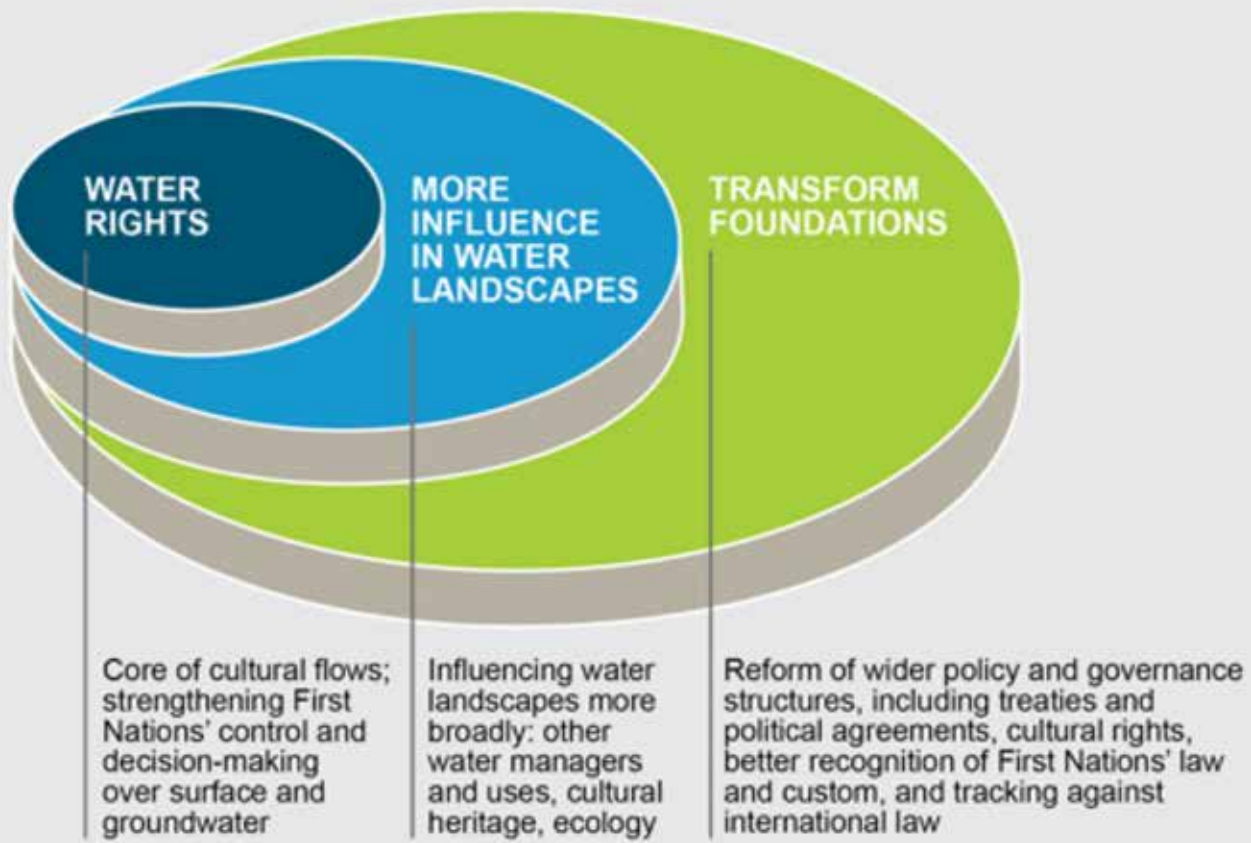


Figure 4: The requirement elements of the Cultural Flows model, National Cultural Flows Research Project (Component 5). (Source: MLDRIN, NBAN and NAILSMA A Pathway to Cultural Flows in Australia (2018))

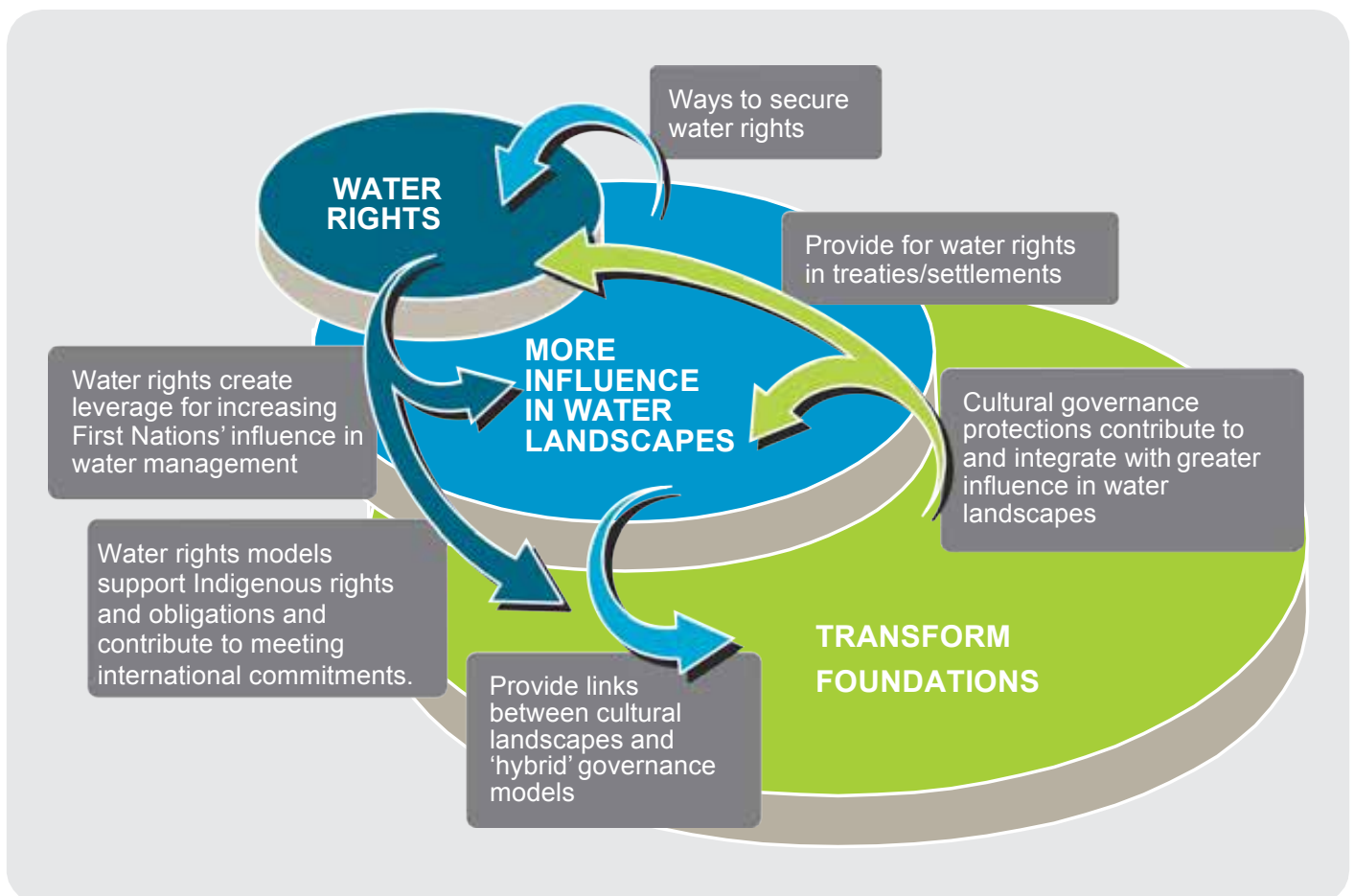


Figure 5: Interactions between elements of the Cultural Flows model. (Source: MLDRIN, NBAN and NAILSMA A Pathway to Cultural Flows in Australia (2018))



Image - Margooya Lagoon | Tim Herbert

***“We are water people and our culture is water-based. When you deprive our Country of water, that has a devastating impact on our culture”
- Brendan Kennedy, Tati Tati Elder***



Image - Tati Tati Elder, Brendan Kennedy, at Margooya Lagoon | Tim Herbert

Tracking toward Cultural Flows for Margooya Lagoon

This report highlights the range of legal and policy frameworks that need to be navigated in order to design and implement a Cultural Flows program for Margooya Lagoon.

The report also highlights the defining work that has been done in order to proceed from a concept of 'Cultural Flows' to the features and practise required to design and implement a Cultural Flows program. This progress includes work within the NCFRP, as well as, in the current study, by Tati Tati and others in relation to Margooya Lagoon. An applied Cultural Flows model is not presently 'starting from scratch'.

All of the relevant barriers, considerations and opportunities to achieve a Cultural Flows program at Margooya Lagoon need to be accounted for if such a program is to be realised, sustainable and successful. A summary of laws and policies as they apply to Margooya Lagoon are set out in **Appendix 1**. Considering the role of each in a Cultural Flows program will be important.

In this light, we now highlight key considerations and opportunities for design and delivery of a Cultural Flows program for Margooya Lagoon.

Partnerships and collaborations undertaken to date inform a program

Engagement between Tati Tati and relevant public agencies, such as the Mallee CMA and DELWP, have been underway for some time. These relationships have produced important outputs for the management of land and water at Margooya Lagoon including:

- Margooya Lagoon Environmental Water Management Plan;
- Margooya Lagoon Cultural and Biodiversity Assessment Project; and
- Modelling of alternative watering events, via eastern inlet.⁷⁶

We have no instructions on collaborations and engagement between Tati Tati and Parks Victoria, the public land manager. Nor do we have any instructions on engagement between Lower Murray Water and Tati Tati.

MLDRIN has played an active role in engagement and facilitating relationships, in particular with DELWP, such as through the Aboriginal Waterway Assessment (AWA) program.

We are not instructed that any written agreements have been entered into between Tati Tati (including a body representative of Tati Tati and their interests) and any public agency.

Agreements have been executed between MLDRIN and

agencies, such as DELWP, to facilitate programs, such as the AWA at Margooya Lagoon.

Ongoing, sustained engagement and negotiations between Tati Tati and relevant agencies is clearly important in design and delivery of any Cultural Flows program at Margooya Lagoon. There is a base of relationships on which to build. There are various statutory obligations on public agencies relevant to relationship-building and other outcomes.

To the extent it has not occurred already consideration might also be given to extending the sphere of relationships building and/or negotiations to other actors, such as the VEW, Lower Murray Water, Parks Victoria, and/or consultants. The value of doing so lies in exploring partnerships directly with other key resource managers and experts.

Cultural Flows about water rights and delivery as well as an integrated package of measures

The Cultural Flows model requires the vesting of legal rights in water (water access or use rights) in some form and/or legal control over water allocations in some manner to First Nations groups. This might occur in various ways at Margooya Lagoon. This condition of Cultural Flows is a matter of exercise by First Nations of power or influence over hydrological conditions of Country, in a manner determined by them.

While now occurring in highly regulated water systems, influence over physical hydrology on Country has in fact occurred for millennia.⁷⁷

The *water rights system* is one part (albeit fundamental) of a Cultural Flows model. *Managing the water landscape* and *managing the governance framework* are each, interconnected parts of this model as well. We will refer to each of these 'parts' as 'levels of action' or 'domains'.

A Cultural Flows *program* for Margooya Lagoon must engage substantively with each constituent level of action (water rights, waterscape management, governance) and their interactions. Arguably, there are arrangements that can enable beneficial outcomes for First Nations' group, and anticipate or approximate Cultural Flows programs, but which do not adopt, comprehensively or substantively, the legal, policy and practical framework set out in the NCFRP. Such arrangements cannot be said to be 'Cultural Flows' in the sense employed in the NCFRP.

A process of engagement may occur informally. For example, at Margooya Lagoon, tacit agreements between Tati Tati and the CMA may govern and enable flows design and delivery from the

'eastern inlet',⁷⁸ as well as the collaboration with Parks Victoria in relation to land and biodiversity management. Under these type of arrangements, formal management of flows rests with the Mallee CMA or other agencies through their works programs, plans, and transactions.⁷⁹ Tati Tati may have a collaborative or consultative role in those programs, plans or transactions. Under these arrangements, *formal* programming and agreement-making for design and delivery of a Cultural Flows program is *mediated* through the control of resources by established agencies and actors.

Strategies for Cultural Flows design and delivery will need to engage the full spectrum of legal and policy considerations (water rights, water landscapes, governance and supporting mechanisms) in order to achieve more direct legal or policy control by Tati Tati over the fate of Margooya Lagoon. This could be through direct-water holdings, agreements in respect of water holdings, public land management arrangements, planning scheme amendments, or biodiversity management plans.

Exercise of sovereignty by Tati Tati over Country at Margooya Lagoon may be a matter of degree, subject to available or chosen forms and strategies (pathways) of action. But minimum thresholds for setting out a Cultural Flows program and model will include legal and beneficial outcomes in respect of water access, management of Country, and governance arrangements.

As discussed below, certain conditions may be necessary to effect strategies, such as existence of appropriate corporate entities or collaborations capable of acting on behalf of Tati Tati.

Legal obligations on public authorities and government in relation to Tati Tati connection to Country are relevant

Recent Victorian reform to water and environmental legislation has included greater focus on First Nation recognition in water, biodiversity and land management. These reforms are additional and parallel to recognition through native title or the Settlement Act. These statutory obligations provide opportunity to advance a Cultural Flows agenda for Margooya Lagoon. They provide important framing and legislative contexts for governance in particular.

Water authorities (water corporations and CMAs)

The Victorian *Water Act* now includes obligations for water planning and water authority functions to 'consider opportunities to provide for... Aboriginal cultural values and uses of waterways...' This obligation applies to:

- A Sustainable Water Strategy⁸⁰ (including the Northern Victoria SWS. A new Northern SWS must be made by 2024);
- The functions of the Victorian Environmental Water Holder⁸¹; and
- The functions, powers and duties of water corporations.⁸²

A water authority with waterway management functions must 'identify and plan for... Aboriginal cultural values and uses...' among other uses and values in relation to waterways.⁸³ Aboriginal cultural uses and values must be taken into account in preparation of a regional waterway strategy.⁸⁴

Additional obligations include a requirement to take into account a recognition and settlement agreement, a cultural heritage land management agreement, or a native title determination.⁸⁵ None of these specific mechanisms apply to Margooya Lagoon or to Tati Tati presently.

These obligations are primarily procedural. They require water authorities and planners to act in certain ways with regard to Aboriginal 'cultural values and uses'. They do not compel any particular outcomes in relation to 'Aboriginal cultural values and uses' in water or waterways. 'Aboriginal cultural values and uses' is not a defined term. It is not necessarily confined to pre-European connections as, for example, native title recognition is confined.

In our view, the obligations set out above create a minimum requirement for relevant authorities (in particular water authorities) to demonstrate genuine and proper identification of 'opportunities' to provide for Aboriginal values and uses, and genuine and proper consideration of their implementation. Genuine analysis and responsiveness is required.

Parks Victoria

Under the Parks Victoria Act 2018, Parks Victoria has statutory obligations to work with Traditional Owners. These obligations are specified in the Statement of Obligations applying to Parks Victoria.⁸⁶ The objects of Parks Victoria include to 'recognise and support traditional owner knowledge of and interests in Parks Victoria managed land.'⁸⁷ While its statutory functions are in similar terms, they apply to supporting involvement of 'a specified Aboriginal party' in management of Parks Victoria-managed land.⁸⁸ A 'specific Aboriginal party' includes an Aboriginal entity with a form of recognition and status under native title, the Settlement Act or Aboriginal heritage legislation.⁸⁹

Presently, this status does not apply to Tati Tati.

PV's Statement of Obligations sets out requirements on the organisation to 'engage and work effectively with Traditional Owners', have regard to 'active involvement of Traditional Owners in park management through joint management and other management arrangements', and 'advance timely, respectful and culturally sensitive collaboration with Traditional Owners...'. Under these obligations, Park Victoria's relationship with First Nations is not limited to entities holding any corporate status.

Parks Victoria obligations require positive and collaborative engagement with Traditional Owners. This conduct extends, in our view, to PV's approach to Tati Tati's role in relation to public land in and adjacent to Margooya Lagoon. These obligations apply to PV's relationships with TO organisations with legal status under other laws,⁹⁰ but that fact is not exclusive of Parks Victoria's conduct and engagement with Traditional Owners, such as Tati Tati, not holding that status.

In circumstances where a form of cooperative management of public land is in place under the *Conservation, Forests and Lands Act 1987*, there are specific obligations on Parks Victoria to assist in the preparation of a management plan for that land.⁹¹ This outcome is a possibility at Margooya Lagoon. There is currently no cooperative management agreement in place over the area known as Tol Tol.

Cultural rights obligations on public authorities

Public authorities are subject to human rights obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter Act'). Charter human rights obligations include obligations in relation to Aboriginal cultural rights. These are set out at sub-section 19(2) of the Charter Act:

Aboriginal persons hold distinct cultural rights and must not be denied the rights, with other members of their community... to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

This provisions applies to public authorities including those exercising functions and powers relating to natural resources management generally. This right must be given 'proper consideration' by those authorities and they must act in ways compatible with this right.⁹² This obligation extends to Tati Tati's relationship to the land and waters at Margooya Lagoon. The intention of the obligation is to require public authorities to shift institutionalised behaviours and conduct themselves in a manner that respects and accommodates human rights (including cultural rights).⁹³

The significance of the Aboriginal cultural rights obligations on public authorities includes their scope to 'reframe' natural resources and land management at sites such as Margooya Lagoon, specifically to establish an indigenous rights 'frame' or normative approach to governance and management. This 'framing' of indigenous rights considerations under the Charter are similar in content to UN Declaration of the Rights of Indigenous Peoples rights and principles.

Tati Tati views expressed in the Biodiversity Report is an example of the expression of the relationships anticipated by section 19(2) of the Charter. It is incumbent on public authorities involved in the management of this site to meet obligations concerning Tati Tati cultural rights.

An integrated resource assessment and planning process as a key precondition of a program

As the NCFRP amply demonstrates, the practical and informational basis for Cultural Flows is a resource assessment and planning process. The scientific focus in these contexts was ecological and hydrological. The assessment process contained iterative and mutually instructive features across knowledge systems.

The unfolding cultural and scientific assessment processes at Margooya Lagoon evidence similar features to the NCFRP, although not necessarily with the same programmatic structure as found in the NCFRP.

The combined (cultural-scientific) assessment and investigative processes undertaken to date for Margooya Lagoon should be reviewed for comparison to the NCFRP methodology. From that basis further recommendations and work programs could be set out for additional resource assessments, design, planning and, implementation of a flows program at Margooya Lagoon.

The legal and policy assessment: identifying impediments and opportunities

As this report identifies, a Cultural Flows program need also commence with review and accounting of legal and policy arrangements affecting the land, waters and resources on Country. 'Settler' law is a fragmented space of resource management overlaid on Country. This fragmented regulatory space contains formally both barriers and opportunities that do need to be negotiated in an informed and strategic manner.

Formal legal and political obligations to engage with First Nations in water and land management provide opportunities in which to progress Cultural Flows models. At Margooya Lagoon, as noted, this progress occurs in the absence of legal status afforded under other legislation. Established water resource frameworks, such as fully allocated market operations and industrial-scale consumptive water interests, are examples of impediments to new forms of water use.

Given preceding work and collaborations at Margooya Lagoon, this site does provide an example of incremental, if ad hoc, progress toward a Cultural Flows model building on existing collaborations.

Even absent native title, settlement or heritage agreement-making, law and policy applying at Margooya Lagoon can accommodate Tati Tati agenda and knowledge through concepts such as 'cultural values and uses' used in the *Water Act 1989*



and the *Water for Victoria* policy. The meaning of 'culture' in this context is not explained. Arguably, its meaning is wider than pre-European culture as fixed in native title law, although that is not certain. If so, the meaning under water law can be inclusive of contemporary expressions of lore/law, custom, knowledge and practices based on ancestral connections.

The qualification of values and uses by 'cultural' purposes can be constraining for First Nations' involvement in water management.⁹⁴ This qualification may depend on how 'culture' is interpreted in the context of 'provision... of values and uses'. For example, a broad interpretation could include commercial water use as enabling cultural purposes or outcomes such as strengthening community connection to Country or enabling First Nations' capacity building in relation to water management. 'Cultural' qualifications to water values and uses may be inconsistent with the Echuca Declaration concept of Cultural Flows if not employed in a broad or liberal sense.

The legal and policy landscape provides a range of other mechanisms and opportunities to engage positively in greater control of water and land management at Margooya Lagoon, such as direct or indirect control over water rights, agreement-making, and/or formal participation in governance or novel governance arrangements. These mechanisms and opportunities would require establishing or using corporate forms to represent Tati Tati interests and/or securing requisite legal status (such as Traditional Owner Group Entity status under the Settlement Act, Registered Aboriginal Party status under Aboriginal heritage law, or native title claimant or holder status). Clearly, resourcing issues present further challenges and, arguably, impediments.

Having regard to the above review of the legal and policy conditions, we discern three strategic opportunities toward a Cultural Flows program at Margooya Lagoon. These approaches are not mutually exclusive. The main distinctions are that Strategic Options 2-3 would require shifting and enhancing formal legal arrangements (Option 2) or law and policy outcomes (Option 3), rather than building within current legal and policy constraints.

Strategic opportunities

Strategic option 1: building on existing relationships and obligations

Strategic option 1 focuses on building on and extending approaches taken to date, especially in dealings between Tati Tati, Mallee CMA and DELWP. Extending relationships with Parks Victoria would be an important part of this option, alongside the possibility of working with Lower Murray Water. These actions would represent complementary and intermediate steps toward outcomes genuinely comprising legal authority over water and other aspects of Country.

Key measures under this approach might include:

- Establish a formal advisory role or other forms of collaboration for Tati Tati in relation to Margooya Lagoon, with Mallee CMA, VEWH and PV. Explore an advisory role with Lower Murray Water.
- Progress assessment processes undertaken to date toward preparation of a Cultural Flows watering plan and program of work for Margooya Lagoon and/or amendment of the EMP to better reflect and implement Tati Tati values and priorities.

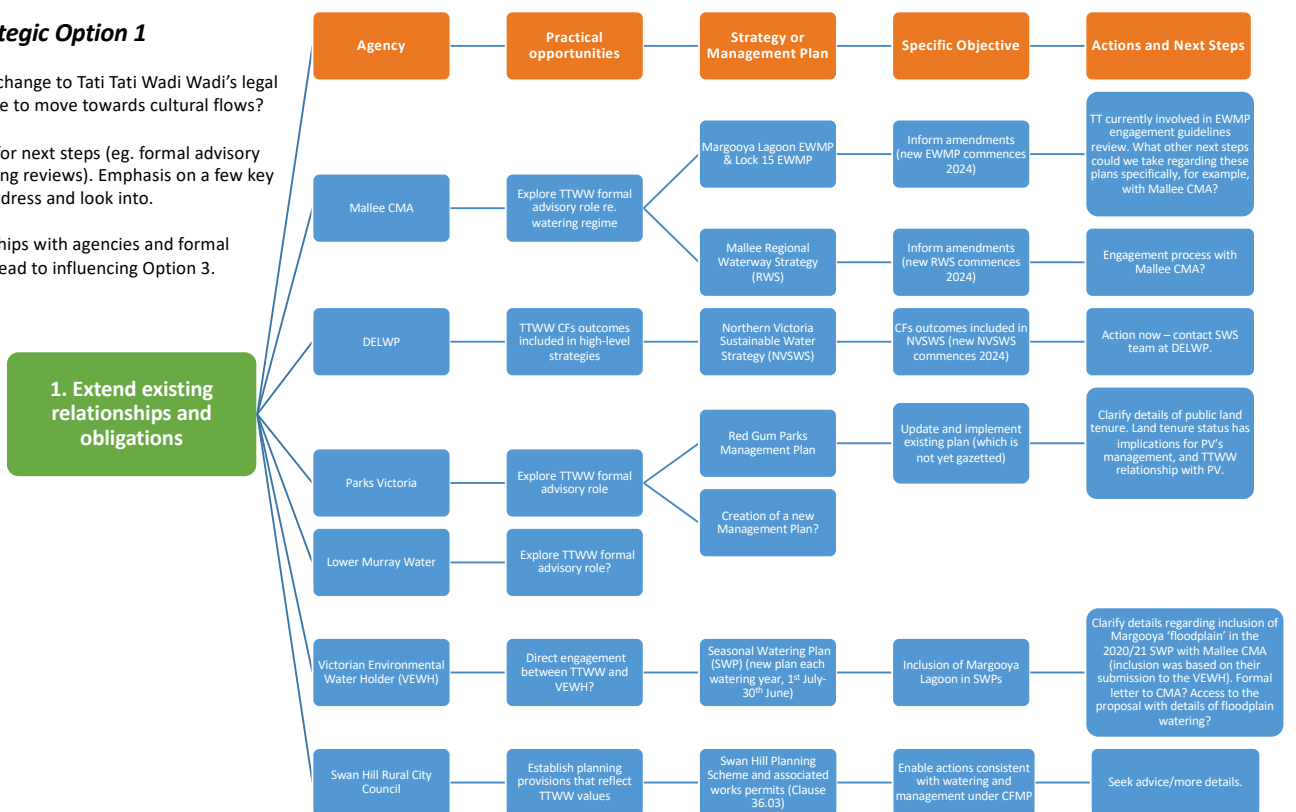
- Engage with PV to update and amend the Red Gum Parks MP to recognise and account for Tati Tati values and priorities for Margooya Lagoon. Alternatively, advocate for a stand-alone management plan for Margooya Lagoon.
- Engage with DELWP, Mallee CMA, Lower Murray Water and the VEWH in anticipation of opportunities to implement Cultural Flows measures under a new NV Sustainable Water Strategy up to 2024, including but not limited to legal rights in respect of water.
- Engage with PV and Swan Hill SC to establish planning provisions reflective of Tati Tati values at Margooya Lagoon, such as enabling actions consistent with watering and management plans (contained in an Incorporated Plan scheduled to cl 36.03 of the planning scheme)

Strategic Option 1

Option 1: If there is no change to Tati Tati Wadi Wadi's legal status, what can be done to move towards cultural flows?

Practical opportunities for next steps (eg. formal advisory roles, input into upcoming reviews). Emphasis on a few key plans and projects to address and look into.

Note: Building relationships with agencies and formal advisory roles can also lead to influencing Option 3.



Strategic option 2: agreement-making

A second set of options turns on updating and strengthening Tati Tati's legal status and building on that through use of corporate form (a Tati Tati corporate entity) to negotiate and enter into agreements with public agencies and/or others. Agreements would concern governance and management of Margooya Lagoon, access to water (directly or indirectly), and access to other resources. Agreement-making can give outcomes, actions and pathways legal form and effect.

These measures include:

- Tati Tati act through existing or new corporate form. Corporate form confers legal status under relevant legislation. While various forms of corporate status potentially are available, depending on the law or jurisdiction at issue, in Victoria the 'Traditional Owner Group Entity' form is now common across different laws for the purposes of agreement-making, such as the Settlement Act, Aboriginal Heritage Act, or Conservation, Forests and Lands Act.⁹⁵
- Negotiate and enter into one or more legal agreements for further integrated *cultural and scientific assessments* enabling preparation and implementation of Cultural Flows program with public agencies such as
 - Mallee CMA; and/or
 - Parks Victoria.

Alongside or further to the above agreement-making, consider agreement-making for the governance and management of Margooya Lagoon and adjacent public lands:

- A Recognition and Settlement Agreement under *Traditional Owner Settlement Act 2010*, or
- An Aboriginal heritage agreement or intangible heritage agreement under *Part 5 or 5A of the Aboriginal Heritage Act 2006*, or
- An agreement establishing and setting out the operations of a Traditional Owner Land Management Board under Part 5A of the *Conservation, Forests and Lands Act 1987*.

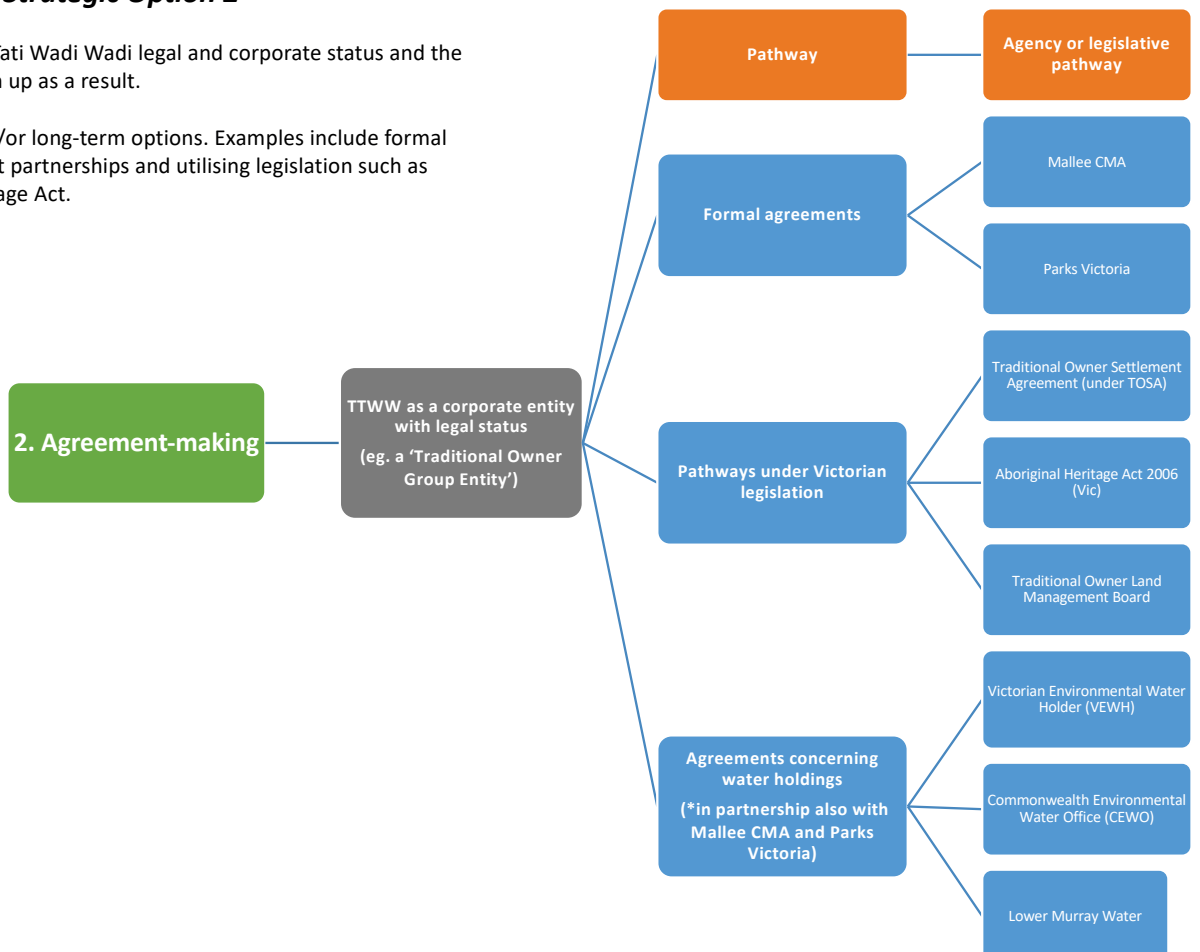
Consider a third avenue of agreement-making for flows management and delivery with:

- VEWH directly, in relation to environmental flows, or tripartite agreement with VEWH and Mallee CMA (and potentially with Parks Vic too), or
- The Commonwealth Environmental Water-Holder in relation to its water-holdings.⁹⁶
- Explore options for, and subsequently secure, water allocation directly, such as through a 'take and use' licence or water share.⁹⁷

Strategic Option 2

Option 2: Relates to Tati Tati Wadi Wadi legal and corporate status and the pathways that might open up as a result.

Lots of bigger picture and/or long-term options. Examples include formal agreements, management partnerships and utilising legislation such as Victorian Aboriginal Heritage Act.



Strategic option 3: complementary regulatory and policy reforms

Strategic option 3 sets out where reform or amendment of regulation or policy could occur that would enable Cultural Flows outcomes for Margooya Lagoon. These measures include:

- Amendment to water instruments, such as the *Mallee Waterway Strategy and/or Northern Sustainable Water Strategy*, in order to establish policy framework for Tati Tati recognition and for a Cultural Flows program. Both instruments will be subject to review in the next two years.
- Amendment to Red Gum Park Management Plan or preparation of separate land management plan, recognising Tati Tati and authorising Cultural Flows program.
- Preparation of VEWH *Seasonal Watering Plans to enable flows into lands adjacent to Margooya Lagoon (Tol Tol) along creek and ephemeral drainage lines, in a manner that has a central role for Tati Tati-led adaptive management.*
- Amendment to planning scheme, adding schedule to clause 36.03 and incorporated document supporting Cultural Flows program and TO recognition

- Engage with DELWP, Mallee CMA and PV to develop a *Flora and Fauna Management Plan* under the Flora and Fauna Guarantee Act 1988, targeted to Margooya Lagoon and Tati Tati priorities, potentially also informing a Public Authority Management Agreement with water authorities in support of Cultural Flows measures.

Strategic Option 3

Option 3: Relates to policy and regulatory reform.

Reflects some immediate actions that we could take to influence reform in this area and how we use the Cultural Flows project in this space.

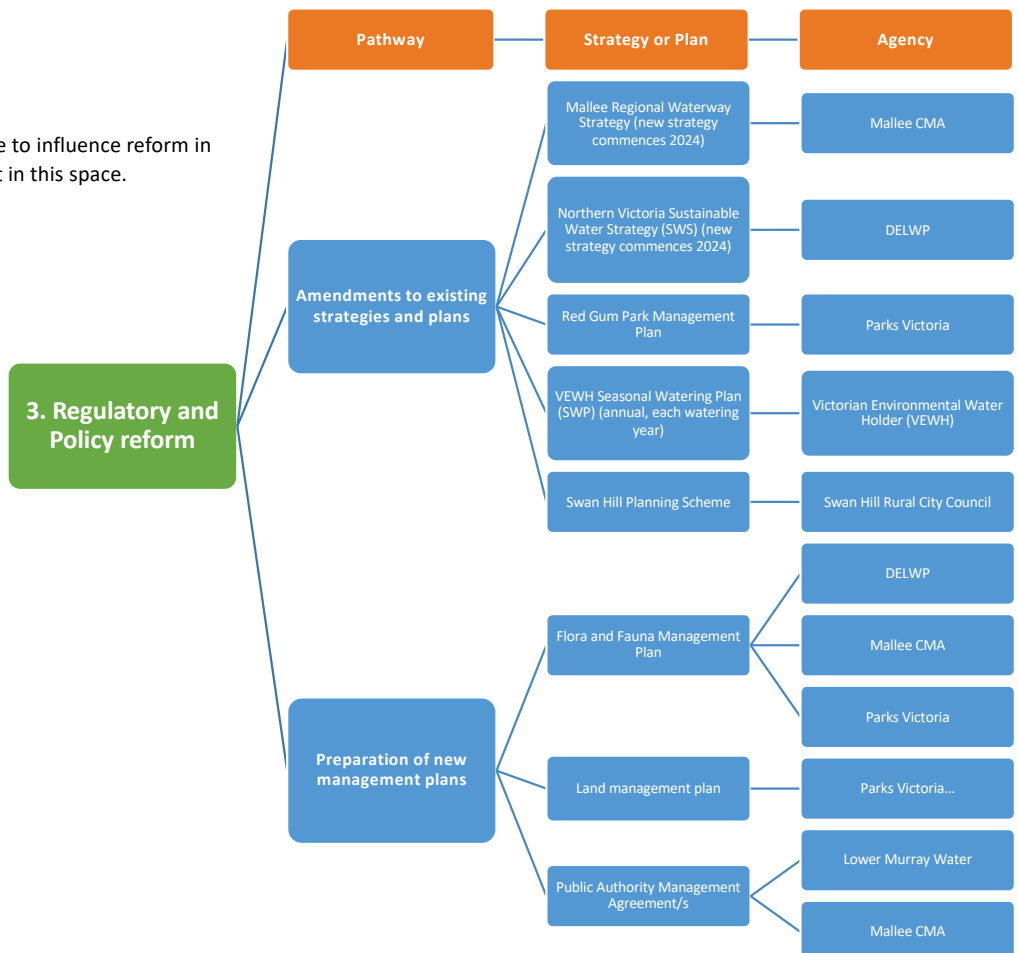




Image - Bruce Lindsay, Senior Lawyer Environmental Justice Australia (left) and Brendan Kennedy, Tati Tati Elder at Margooya Lagoon | Tim Herbert



Image - Tati Tati community participants Aboriginal Waterway Assessment, Margooya Lagoon | Tim Herbert

Framing (and re-framing) policy and governance

Cultural Flows are about water and volumes of water, but not only about water and volumes of water.

Cultural Flows are about resources and land, but not only about resources and land.

Cultural Flows are about partnerships, but not only about partnerships.

Cultural Flows are about Country, but not entirely about Country.

Cultural Flows are also, crucially, about relationships of governance and the concepts embedded in that governance. Governance is about power, authority, respect and leadership.

Cultural Flows will not work in the absence of a genuine shift and re-balancing in the relationship between First Nations and 'settler' institutions and political economy.

First Nations' communities have set out that they are seeking to revitalise culture, build economies and development on their terms, repair Country and ecosystems underpinning it, and exercise sovereignty and self-determination. For Nations whose lore derives from rivers and waters, involvement in water governance is central to those tasks.

Key sectors of 'settler' institutions and society have realised there is no choice but to confront seriously the deficit of moral authority and leadership that is the legacy of *terra nullius* and genocide, which is represented in the ongoing realities of 'aqua nullius'.

The Cultural Flows model can be a meeting place. It can be a hybrid approach to managing water and waterscapes. Cultural Flows must reflect a new approach including terms of language, governance

and the exercise of authorities. This approach must reflect and give effect to justice and to a project of de-colonising landscapes. Margooya Lagoon can be representative of that project. To do so Tati Tati must be part of the governance of the Tol Tol landscape (including Margooya Lagoon) and actions going forward will need to be reflective of accommodation and negotiation at all levels of policy and practice.

Margooya Lagoon is bi-cultural. Law and policy should better reflect that reality.

Drafting a Cultural Flows program needs to include 'framing' or 'reframing' of land, water and resource management and the various legal and policy tools inherent in those processes. This framing is and will be relevant in the wider context of treaty-making.

This framing will also be influenced by earlier First Nations' policy documents, such as the Echuca Declaration and the First Peoples' Water Engagement Council's Water Policy Framework.

Framing policy and governance should include reference to sovereign authority, enduring ancestral connection of Tati Tati to Country at Margooya Lagoon, key totemic values and lore.

The framing of the Cultural Flows model and policy can be influenced by the rights-based approach to as expressed for example in section 19 of the Victoria Charter of Human Rights and Responsibilities and, by extension, the UN Declaration on the Rights of Indigenous Peoples.

Cultural Flows must be built on transformed relationships between Tati Tati, government and public agencies, and, where relevant, third parties. Cultural Flows means Tati Tati unambiguously enjoy a real 'seat at the table'.

Appendix: Legislation, regulatory instruments and policy referred to in this report

Legislation	Regulatory instrument	Policy	Principal domain of operation
Water Act 1989 (Vic)	Mallee Waterway Strategy 2014-22	Water for Victoria (2016)	Water resources management
	<i>Consolidated Bulk Entitlement (Murray River – Flora and Fauna) Conversion Order 1999</i>	Margooya Lagoon Environmental Water Management Plan	
	<i>Bulk entitlement (Murray River – Lower Murray Urban and Rural Water - Irrigation) Conversion Order 1999</i>	Environmental Water Management Plan for the Murray River at the Lock 15 Weir Pool (2015)	
	Licences to take and use water under section 51		
	<i>Northern Victoria Sustainable Water Strategy (2009)</i>	VEWH <i>Variation to the Seasonal Watering Plan 2019-20</i>	
	<i>Statement of Obligations (General) (2015)</i>	Mallee CMA <i>Mallee Waterway Strategy 2014-22</i>	
Water Act 2007 (Cth)	<i>Basin Plan 2012</i>	CEWH <i>Commonwealth Environmental Water: Portfolio Management Plan, Mid-Murray Region 2019-2020 (2019)</i>	
	<i>Victoria's North and Murray Water Resource Plan (Draft)</i>	DELWP <i>Victoria's North and Murray Water Resource Plan: Draft Comprehensive Report (2019),</i>	

Legislation	Regulatory instrument	Policy	Principal domain of operation
Parks Victoria Act 2018 (Vic)	<i>Statement of Obligations – October 2018</i>	<i>River Red Gum Parks Management Plan (2018)</i>	Public land management and biodiversity conservation
Conservation, Forests and Lands Act 1987 (Vic)	Agreements under section 82P		
	Joint Management Plan		
Flora and Fauna Guarantee Act 1988 (Vic)	Public Authority Management Agreement	Flora and Fauna Management Plan	
Aboriginal Heritage Act 2006 (Vic)	Agreement under sections 68, 79D		Aboriginal heritage
	<i>Aboriginal Heritage Regulations (2018)</i>		
Traditional Owner Settlement Act 2010 (Vic)	Recognition and settlement agreement		Traditional owner settlements
Native Title Act 1993 (Cth)			Native title
Charter of Human Rights and Responsibilities Act 2006 (Vic)			Human rights
Planning and Environment Act 1987 (Vic)	Swan Hill Planning Scheme		Land-use planning

Endnotes

- 1 Mallee CMA *Margooya Lagoon Environmental Water Management Plan* (2015), 3-4
- 2 Mallee CMA *Environmental Water Management Plan for the Murray River at the Lock 15 Weir Pool* (2015), 23
- 3 Brendan Kennedy, personal communication, 2020
- 4 VEAC *River Red Gum Investigation: Final Report* (2008), Map A: River Red Gum Investigation Final Recommendations for the Public Land Use
- 5 VEAC *River Red Gum Investigation: Final Report* (2008), 63-64 (B3)
- 6 Parks Victoria *River Red Gum Parks Management Plan* (2018), iii
- 7 A 'Land Management Plan' made under the *Parks Victoria Act 2018* (Vic) must be gazetted before it takes effect: *Parks Victoria Act 2018* (Vic), s 50. The Act commenced on 12 September 2018 and a search of the Victorian Government Gazette reveals no Land Management Plans being made after that date. Parks Victoria's 'Land Management Strategy' is currently the subject of consultation and it may be that specific 'Land Management Plans' will proceed once this strategic framework is established.
- 8 Parks Victoria *River Red Gum parks Management Plan* (2018), 47-49
- 9 Mallee CMA *Margooya Lagoon Environmental Watering Management Plan* (2015), 3, 5, 10.
- 10 National Native Title Tribunal *North West Victoria Murray River Region: Research Report Bibliography* (2003), <http://www.nntt.gov.au/Information%20Publications/North-West%20Victoria%20Murray%20River%20Region.pdf>
- 11 Victorian Aboriginal Heritage Council *Decision of the Aboriginal Heritage Council in relation to an Application by the Tati Tati Aboriginal Corporation*, 21 March 2013, <https://www.aboriginalheritagecouncil.vic.gov.au/rap-applications-declined-or-withdrawn#tati-tati-wadi-wadi-aboriginal-corporation-tati-tati-wadi-wadi>; see also Richie Kennedy *Submission to Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties*, Environment and Natural Resources Committee, Parliament of Victoria (2012)
- 12 On concepts of sovereignty in this context, see *Uluru Statement from the Heart*: 'This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.'
- 13 MLDRIN *Margooya Lagoon Cultural and Biodiversity Assessment Project: Final Report* (2019)
- 14 In relation to AWAs generally, see Will Mooney and Alex Cullen 'Implementing the Aboriginal Waterways Assessment Tool: collaborations to engage and empower First Nations in waterway management' (2019) 26 *Australasian Journal of Environmental Management* 3 197
- 15 DELWP *Victoria's North and Murray Water Resource Plan: Draft Comprehensive Report* (2019), 264
- 16 *Ibid*, 262-263
- 17 Compare ACT Commissioner for Sustainability and the Environment *ACT State of the Environment Report 2019*, 35-36, https://www.envcomm.act.gov.au/__data/assets/pdf_file/0009/1483569/SOFull.pdf; Emma Woodward, Rosemary Hill, Pia Harkness and Ricky Archer (eds) *Our Knowledge, Our Way in Caring for Country: Indigenous-Led Approaches to Strengthening and Sharing Knowledge for Land and Sea Management* (CSIRO, 2020), Ch 1.
- 18 Brendan Kennedy, personal communication (2020)
- 19 Under the *Parks Victoria Act 2018*, Part 4 and *Conservation, Forests and Lands Act 1987*, s 67A
- 20 Any Parks Victoria Land Management Plan eventually gazetted that encompasses Margooya Lagoon and its environs will have to be consistent with the relevant legislation governing its land tenure: *Parks Victoria Act 2018* (Vic), subs 46(2)
- 21 Park Victoria *Red Gum Parks Management Plan* (2019)
- 22 *Red Gum Parks Management Plan* (2019), p 149
- 23 *Red Gum Parks Management Plan* (2019), iv-vii, ix, 8-10, 27-49, 157-159
- 24 *Red Gum Parks Management Plan* (2019), 31-32
- 25 *Red Gum Parks Management Plan* (2019), 49
- 26 *Conservation, Forests and Lands Act 1987* (Vic), Part 8A
- 27 Apiculture is permitted as of right in the PCRZ where the Apiary Code of Practice is complied with.
- 28 For example, for the sake of clarity, a Cultural Flows program could be set out in a document incorporated into the planning scheme to which clause 51.01 (Specific Sites or Exclusions) applies.

- 29 *Intergovernmental Agreement on the National Water Initiative* (2004), cl 52-54
- 30 In particular, *Basin Plan* (2012), Chapter 10 Part 14
- 31 *Water for Victoria* (2016), Ch 6
- 32 *Bulk Entitlement (Murray River – Lower Murray Urban and Rural Water – Irrigation) Conversion Order 1999*, as amended to 8 October 2015; see also *Environmental Entitlement (Murray River – NVIRP stage 1) 2012*; *Bulk Entitlement (Murray River – Flora and Fauna) Conversion Order 1999* as amended to 28 June 2019.
- 33 See *Water Act 1989* (Vic), subs 124(7), s 126
- 34 *Bulk Entitlement (River Murray – Lower Murray Urban and Rural Water – Irrigation) Conversion Order 1999*, cl 4
- 35 The *Environmental Water Management Plan for Margooya Lagoon* (2015) identifies extraction under one licence to take water from the Lagoon: *Mallee CMA Environmental Water Management Plan for Margooya Lagoon* (2015), 10
- 36 VEWH *Variation to the Seasonal Watering Plan 2019-20*, 4, https://www.vewh.vic.gov.au/__data/assets/pdf_file/0003/515325/2019-20-SWP-LM-wetlands-variation.pdf
- 37 VEWH *Seasonal Watering Plan 2020/21*, 227-229. Watering in respect of Margooya Lagoon is identified as a 'high priority' ('Tier 1') action: SWP, 230.
- 38 SWP, 227
- 39 *Water Act 1989* (Vic), subs 48B(2)
- 40 Ecological Associates *Environmental Water Management Plan for the Murray River at Lock 15 Weir Pool – System Characterisation* (Mallee CMA, 2015)
- 41 DELWP *Mallee CMA Environmental Water Management Plan for Margooya Lagoon* (2015)
- 42 *Mallee Water Act 1989* (Vic), ss 189-190; see also DELWP 'Environmental Water Management Plans', <https://www.water.vic.gov.au/waterways-and-catchments/rivers-estuaries-and-waterways/environmental-water/environmental-water-management-plans>
- 43 *Water Act 1989* (Vic), subs 4A(1)(b)(ii)
- 44 *Mallee CMA Environmental Water Management Plan for Margooya Lagoon* (2015), 11
- 45 *Northern Victoria Sustainable Water Strategy* (2009), 131-133.
- 46 *Water Act 1989* (Vic), ss 189-190
- 47 *Mallee CMA Mallee Waterway Strategy 2014-22* (2014), 60
- 48 *Ibid*, 61
- 49 *Traditional Owner Settlement Act 2010* (Vic), Part 6, Division 2
- 50 For example, cooperative management of public lands: *Conservation, Forests and Lands Act 1987* (Vic), Part 8A.
- 51 *Aboriginal Heritage Regulations* (2018), reg 26
- 52 *Aboriginal Heritage Act 2006*, s 46
- 53 *Aboriginal Heritage Regulations* (2018), Part 2 Div 5
- 54 An intangible heritage agreement may be made between 'any person or body' and a Traditional Owner Group Entity (in addition to a RAP): *Aboriginal Heritage Act 2006*, subs 79D(1)(c), in which case it is sufficient for this status to be established under the provisions of the Settlement Act to enable this form of agreement-making.
- 55 *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- 56 Victorian Parliament *Hansard*, Second Reading Speech, Hon. Lily D'Ambrosio (Minister for Energy, Environment and Climate Change), 19 June 2019, 2272
- 57 *Flora and Fauna Guarantee Act 1988* (Vic), s 4
- 58 *Flora and Fauna Guarantee Act 1988* (Vic), s 4A(a)
- 59 See *Flora and Fauna Guarantee Act 1988* (Vic), subs 4(b)-(c) in particular
- 60 *Flora and Fauna Guarantee Act 1988* (Vic), Part 4 Div 3
- 61 See generally Lana Hartwig, Natalie Osborne and Sue Jackson 'Australia has an ugly legacy of denying water rights to Aboriginal people. Not much has changed' *The Conversation*, 24 July 2020, <https://theconversation.com/australia-has-an-ugly-legacy-of-denying-water-rights-to-aboriginal-people-not-much-has-changed-141743>; ACCC *Murray Darling Basin Inquiry – Interim Report* (2020), 168-170.
- 62 Virginia Marshall *Overturing Aqua Nullius: Securing Aboriginal Water Rights* (AIATSIS, 2017)
- 63 See eg Will Mooney and Alex Cullen 'Implementing the Aboriginal Waterways Assessment tool: collaboration to engage and empower First Nations in waterway management' (2019) 26 *Australasian Journal of Environmental Management* 3, 199-201, including consideration in relevant literature to the risk of 'cultural' flows essentialising First Nations' interests and mechanisms for engagement in water management.

- 64 MLDRIN, NBAN and NAILSMA *Cultural Flows: Field Work Results and Findings Report* (2017), [1.4], <http://culturalflows.com.au/images/documents/Field%20work%20findings.pdf>
- 65 MLDRIN, NBAN and NAILSMA *National Cultural Flows Research Project*, http://culturalflows.com.au/index.php?option=com_content&view=article&id=3&Itemid=117
- 66 NCFRP *Aboriginal Water Interests for Establishing Cultural Flows: Preliminary Findings* (MLDRIN, NBAN and NAILSMA, 2016) ('Preliminary Findings Report'), 7-10; NCFRP *Cultural Flows: Field Works Results and Findings Report* (2017), 24-28. Cultural Flows can equally be distinguished from consumptive water in this model, as a third form of water interest in the scheme of water resources management.
- 67 See Preliminary Findings Report, 8: 'The current approach to Cultural Flows reflects the needs of Aboriginal communities to have their interests and rights in water given the commensurate status and security of legally enforceable tenure granted to other consumptive water users...'
- 68 NCFRP *Cultural Flows Field Studies: Final Report* (2017).
- 69 Ibid, p 29-32; NCFRP *Cultural Flows: Field Works Results and Findings Report* (2017), 9-31
- 70 NCFRP *Cultural Flows Field Studies: Final Report* (2017), 24-28
- 71 NCFRP *Cultural Flows: Field Works Results and Findings Report* (2017), iv-vi
- 72 The methodology set out in Components 2-4 might be said to be consistent with but exceed the guidance provided in instruments such as the *Akwe:Kon Guidelines* prepared under the *Convention on Biological Diversity*: <https://www.cbd.int/traditional/guidelines.shtml>. Where the *Akwe:Kon Guidelines* respond to the need for impact assessments on development actions the NCFRP approach more accurately approximates a strategic (proactive) assessment and planning process.
- 73 MLDRIN, NBAN and NAILSMA *A Multi-layer Plan for Cultural Flows in Australia: Legal and Policy Design* (2018), <http://culturalflows.com.au/images/documents/Law%20and%20policy.pdf>
- 74 MLDRIN, NBAN and NAILSMA *Cultural Flows – A Multi-Layer Plan for Cultural Flows in Australia: Legal and Policy Design* (2018), 4
- 75 See eg The Nature Conservancy 'Exploring Gayini – Nar Nari Country', <https://www.natureaustralia.org.au/what-we-do/our-priorities/land-and-freshwater/land-freshwater-stories/gayini/>. This project is an extension of the NCFRP work that included the assessment and planning process at Toogimbie IPA.
- 76 Modelling presented to Tati Tati – CMA – DELWP workshop of 18 March 2020 at Euston.
- 77 See eg Rachael Brown 'Budj Bim, a 6000 year old Aboriginal engineering site, earn World Heritage status', <https://wec2019.org.au/2019/07/10/budj-bim-6000-year-old-aboriginal-engineering-site-earns-world-heritage-status/>
- 78 Modelling presented to Tati Tati – CMA – DELWP workshop of 18 March 2020 at Euston. See VEWH *Seasonal Water Plan 2020/21*.
- 79 For example, VEWH *Seasonal Water Plan 2019-2020* and seasonal allocations.
- 80 *Water Act 1989* (Vic), subs 22(3)(a)(i). This obligation applies to the Minister. Water corporations must act consistently with approved Sustainable Water Strategies: *Statement of Obligations (General)* (2015), s 1-6(2), https://www.water.vic.gov.au/__data/assets/pdf_file/0015/54330/Statement-of-Obligations-General.pdf
- 81 *Water Act 1989* (Vic), subs 33DD(2)
- 82 *Water Act 1989* (Vic), subs 92 (2A). Water corporations must also have regard to the need to integrate long-term and short-term 'Aboriginal cultural considerations' into the exercise of functions, powers and duties: *Water Act 1989* (Vic), subs 93(c)(ii). Water corporations are 'water authorities'. CMAs are 'water authorities' but not 'water corporations'.
- 83 *Water Act 1989* (Vic), subs 189(1)(a)
- 84 *Water Act 1989* (Vic), subs 190(3)(d)(ii)
- 85 In relation to regional waterway strategies: *Water Act 1989* (Vic), subs 190(3)(ba), (bb); in relation to Sustainable Water Strategies: *Water Act 1989* (Vic), subs 22C(3)(b)
- 86 *Statement of Obligations – October 2018*, made under *Parks Victoria Act 2018* (Vic), s 31, Victorian Government Gazette, 30 October 2018.
- 87 *Parks Victoria Act 2018* (Vic), s 7
- 88 *Parks Victoria Act 2018* (Vic), s 8
- 89 *Parks Victoria Act 2018* (Vic), s 3
- 90 That is, under native title law, the *Settlement Act* or *Aboriginal Heritage Act 2006*.
- 91 *Conservation, Forests and Lands Act 1987* (Vic), subs 82PA(1A)
- 92 *Charter of Human Rights and Responsibilities Act 2006* (Vic), subs 38(1)
- 93 *Bare v IBAC* [2015] VSCA 197, [299]
- 94 For example in the use of 'cultural access licences' as a form of water right under NSW water

legislation which have rarely been used because of confined meaning of 'cultural' as well as lack of allocations.

- 95 It is possible that agreement-making under Part 8A of the *Conservation, Forests and Lands Act 1987* or Part 5A (intangible heritage) of the *Aboriginal Heritage Act 2006* can be enabled without further changes to corporate status for Tati Tati. For instance, an agreement made under s 82P of that Act (agreement relating to a Traditional Owner Land Management Board) may be entered into between the Minister and a 'Traditional Owner Group Entity'. That entity has the same meaning as under the *Traditional Owner Settlement Act 2010* and hence may be a corporate entity appointed by a 'Traditional Owner Group' to represent it in relation to the public land at issue. While a 'Traditional Owner Group' under the TOS Act extends to a group recognised under native title law it may also be a group of persons recognised by way of notification in the Victorian Government Gazette as 'traditional owners of the land, based on Aboriginal traditional and cultural associations with the land': *TOS Act*, s 3 ('traditional owner group'). *In effect, the corporate character of 'traditional owners' can be recognised by formal, administrative means where the Attorney-General make a notice to this effect.* To do so can enable agreement-making under the *CFL Act* also. Similar provisions apply to intangible heritage agreements under the *Aboriginal Heritage Act 2006*.
- 96 Whether watering priorities of the CEWH are amenable to delivery of water to Margooya Lagoon will likely depend on specific details of its 'portfolio management' for the mid-Murray system. The Portfolio Management Plan for the Mid-Murray for 2019-20 identifies permanent off-channel wetlands between Hume Dam and Euston as high prior for watering, semi-permanent off-channel wetlands as moderate to high priority, and ephemeral off-channel wetlands as low priority: *CEWH Commonwealth Environmental Water: Portfolio Management Plan, Mid-Murray Region 2019-2020* (2019), p 17. Under this scheme, overland watering into Margooya Lagoon would likely be low priority, given the permanent body of the Lagoon is in effect not 'off-channel' (it is connected to the artificially high channel by way of the regulator) and creeks and drainage lines running into the Lagoon from the east would be characterised as ephemeral drainage lines.
- 97 Consideration would need to be given to how delivery of a form of water entitlement would be managed in terms of physical infrastructure, regulatory arrangements (for example under scheduled entitlements and offtake points set out under the Bulk Entitlement Order for Lower Murray urban and rural water), and practical arrangements if any with the adjacent irrigation scheme.

