

A PATHWAY TO
CULTURAL FLOWS
IN AUSTRALIA



**NATIONAL
CULTURAL FLOWS**
RESEARCH PROJECT



This report has been developed by Dr Rebecca Nelson, Professor Lee Godden and Dr Bruce Lindsay for the National Cultural Flows Research Project, which aims to help embed Aboriginal water allocations in Australia's water management framework. Funding for the Research Project has been generously provided by the Murray-Darling Basin Authority, the Commonwealth Environmental Water Office, the National Water Commission and the Department of Families, Housing, Community Services and Indigenous Affairs.

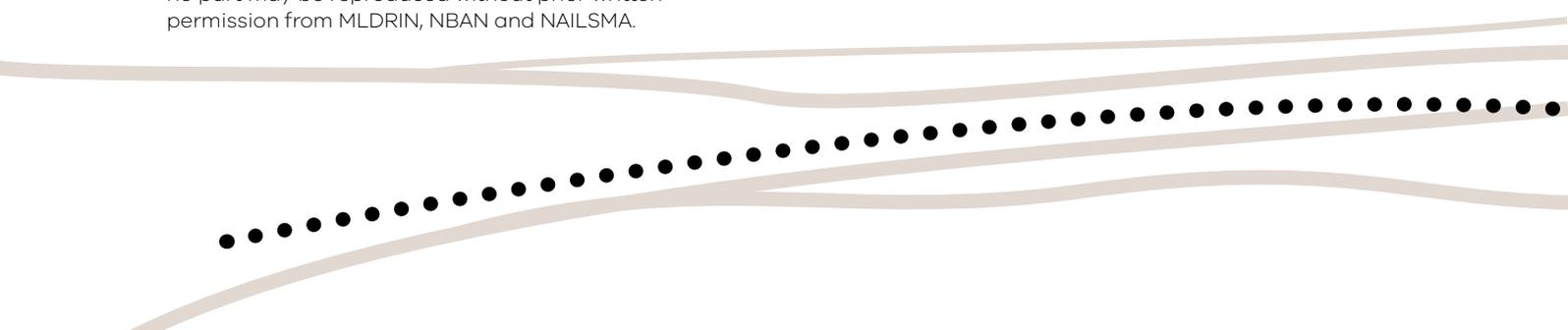
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For First Nations People, water is a sacred source of life. The natural flow of water sustains aquatic ecosystems that are central to our spirituality, our social and cultural economy and wellbeing. The rivers are the veins of Country, carrying water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

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

The Project Partners acknowledge all of the Traditional Owners across Australia who care for these waterways that sustain our Country. We pay deepest respects to our Ancestors and Elders who have protected and maintained water resources for thousands of years, and passed on the knowledge, stories and lessons through the generations.

We acknowledge the nations of Murray Lower Darling Rivers Indigenous Nations and Northern Basin Aboriginal Nations who continue to fight for their inherent right to water, and who had a pivotal role in creating and directing the National Cultural Flows Research Project.

We gratefully acknowledge the Murrawarri and Nari Nari nations, who worked tirelessly as part of the research team to develop this cultural flows approach.



Cultural flows: reforming water law and policy

Cultural flows for First Nations can build a pathway of reform in water law and policy across Australia. This pathway can:

- strengthen First Nations' interests and roles in water management;
- support cultural values and responsibilities for country;
- enhance environmental outcomes; and
- build socio-economic opportunities around water.

Governments across Australia are partnering with First Nations and other interests to re-set water management along this pathway.

The Murray Lower Darling Rivers Indigenous Nations (MLDRIN) and the Northern Basin Aboriginal Nations (NBAN) endorsed the concept of cultural flows in the Echuca Declaration. As part of the National Cultural Flows Research Project, this report has been developed to describe different ways that the Echuca Declaration concept of cultural flows can be implemented using law and policy. It builds on earlier work about cultural flows to show how First Nations' values about water can be translated into laws and policies to make change happen on the ground.

Implementing cultural flows using law can help to:

- show proper recognition of First Nations' roles in relation to water
- give responsibilities to different entities (including governments) to bring about cultural flows
- strengthen water governance and outcomes
- make sure organisations carry out their responsibilities for cultural flows
- help make an approach to cultural flows more permanent.



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

Echuca Declaration, 2010

Why are law and policy important for cultural flows?

The legal system organises how people can access, value and protect water across the country. For too long, that system excluded or marginalised First Nations. Unlike laws relating to Indigenous rights in land, First Nations’ laws and culture have rarely been recognised in water laws.

Law sets out obligations and responsibilities that are binding. Policies set out programs and principles that can lead to positive outcomes for First Nations, but may not be enforceable.

So law and policy have different useful tasks, but implementing cultural flows using law gives important advantages to First Nations.

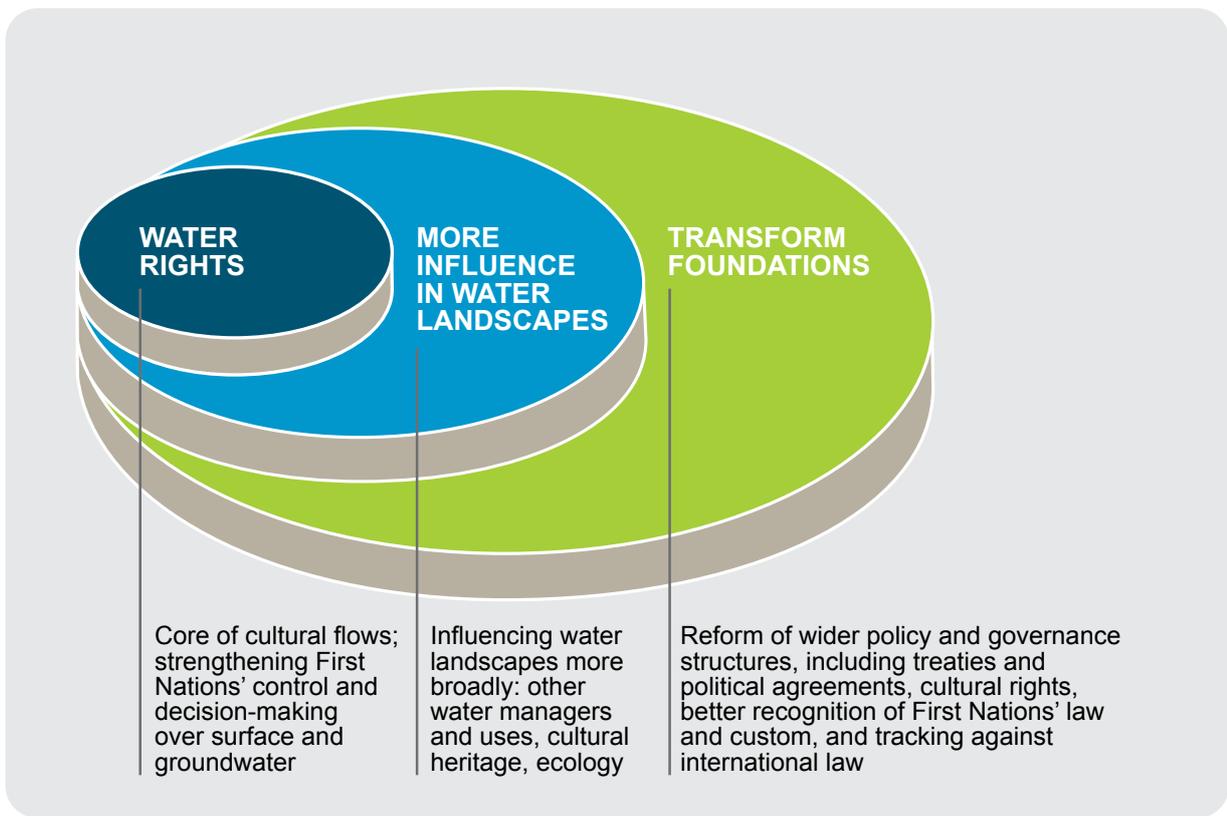
Three legal and policy approaches to cultural flows:

Implementing cultural flows in law and policy requires three approaches:

APPROACH 1
WATER RIGHTS FOR FIRST NATIONS

APPROACH 2
LAWS TO INCREASE FIRST NATIONS’
INFLUENCE OVER WATER LANDSCAPES

APPROACH 3
EFFECTIVE INCLUSION OF FIRST
NATIONS IN WATER GOVERNANCE



APPROACH 1

WATER RIGHTS FOR FIRST NATIONS

Water rights are the core of the legal and policy measures for cultural flows. These rights are centred on water laws, and they may have different names in the laws in the states and territories. In water laws in the Murray-Darling Basin they are often called water entitlements or water shares. Water rights give First Nations more capacity to control their water, to fulfil responsibilities to Country, and to participate in water resources partnerships. They can give First Nations a 'seat at the table' with other water rights owners and more influence in water management generally. This approach links with strengthening water values in native title laws and in land rights laws.

APPROACH 2

LAWS TO INCREASE FIRST NATIONS' INFLUENCE OVER WATER LANDSCAPES

This approach is about strengthening First Nations' influence over the whole water landscape. It goes beyond controlling the water itself. It is about improving the laws that deal with the wider water landscape and that impact on water and water rights. For example, water pollution laws need to work alongside First Nations' water rights to make sure that the water that First Nations control is clean and healthy. These laws, such as cultural heritage law, environmental laws, and land use planning laws, also provide other opportunities for delivering cultural flows objectives.

APPROACH 3

EFFECTIVE INCLUSION OF FIRST NATIONS IN WATER GOVERNANCE

Principles and practices in the broader legal system shape water management across Australia. Management of water and landscapes also occurs within a wider framework of water governance. This framework includes water authorities, water markets and planning, assessment processes, and power dynamics. Governance reform will need to be part of an overall cultural flows program to advance First Nations' voices and interests in decision-making about water. This approach includes measures from the wider legal and policy system, such as treaty, constitutional law, agreements and partnerships, as well as the principles of international law (like human rights). There are also many new and innovative water law and policy tools that can improve governance. These include giving legal rights to rivers and recognising First Nations' laws and customs in that process.

These three approaches were developed by reviewing a broad range of law and policy options and refining them using criteria and feedback from First Nations representatives and others. More detail can be found at www.culturalflows.com.au

One pathway, different starting points and strategies

The three approaches to law and policy for cultural flows support each other. None of them is optional. Each approach is necessary to build a strong cultural flows pathway. No one cultural flows 'recipe' will suit all First Nations. Individual Nation groups can adapt and use the law and policy measures of the three linked approaches in different ways. Each Nation will need to decide:

- Where to start on the reform pathway (for example, start by seeking a water right, or start by pursuing a treaty); and
- What combination of long-term and short-term strategies will suit them best.

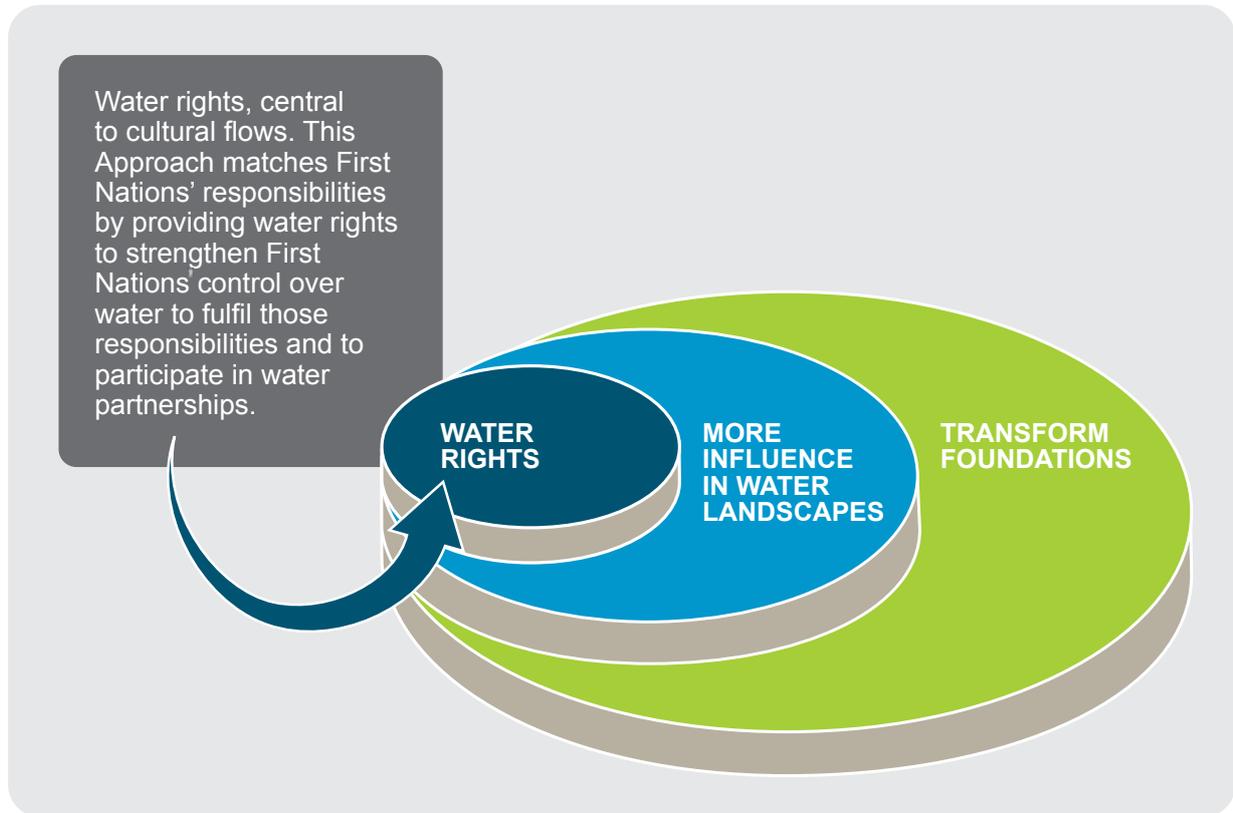
It is important for each Nation to make sure that its pathway to cultural flows:

- Is flexible enough to support that Nation's traditional responsibilities for water on-Country, and the objectives for cultural flows that each Nation wants for the future; and
- Suits the water systems for their Country, for example
 - surface water, groundwater, or both; and
 - whether the water is 'regulated' (with large on-stream dams) or unregulated (no large on-stream dams).



APPROACH 1

First Nations water rights - central to cultural flows



WHY ARE WATER RIGHTS IMPORTANT TO CULTURAL FLOWS?

Approach 1 takes the Echuca Declaration as its starting point. It supports **sustainable and legally effective water rights**. The models reflect human rights values of equality while expressing First Nations' special relationships with traditional land and waters.

The four types of water rights examined in approach 1 match the major areas of settler law that manage water in Australia (See Table). The four types of water rights also cover the main legal tools and measures that are used in Australian water legislation, including; water shares/entitlements, water law rules, and water plans, as well as native title laws and land rights laws.

Water laws divide water up into shares of a water resource that are distributed among many people and organisations. The legal rights allow people and organisations to own, use and access water. A cultural flows water right would form part of the water law or land rights distribution system. The water that relates to the right might be a storage dam holding water or it could be a river or a ground water spring, or it could be an entire river catchment.

Although, a First Nations' water right would be a share in the entire water resource, it can still be used for a range of First Nations' purposes. The water share, for example, could be used by First Nations to top up water in a waterhole on Country in a period of drought so that fish and birds don't die, or it could be used to support cultural activities that pass on traditional knowledge or it could build economic opportunities for the First Nations.

Element	Definition	Examples
A. Water right or share (take and use approval) in water laws	The legal right (ownership) to a defined share of an available water source.	Water licence (NSW); water share (Vic)
B. Water rights in native title and in statutory land rights.	Legal recognition of First Nations' interests in land and water.	<i>Native Title; Native Title Act 1993</i> <i>Aboriginal Land Rights (NT) Act 1976</i>
C. Cultural reserves and statutory reserves	The setting aside (or grant) of water of adequate quantity and quality for cultural flows purposes. This could be an allocation within an existing reserve.	<i>Cape York Peninsula Heritage Act 2007 (Qld)</i>
D. Cultural water 'holder'	An organisation or legal entity with responsibilities for holding and/or managing water for cultural flows. The water holdings could be water entitlements and/or reserves.	No current examples - adapt Environmental Water Holders. International - Chilean Indigenous Water Fund

RELEVANT LAWS AND MODELS

In Approach 1 we examine how law and policy can best give effect to water rights controlled by First Nations, strengthen the water values in native title and land rights as well as put in place larger-scale cultural water reserves and cultural water holders. We give representative examples in each of the four categories of water rights.

We refer to water legislation in all Australian states and territories, Water Act (2007) (C'th); Water Policy (National Water Commission), case law interpreting water legislation; common law water doctrines; common law legal rights and property concepts; native title laws - primarily Native Title Act 1993 and Traditional Owner Settlement Act 2010 (Vic); land rights legislation; Commonwealth Environmental Water Holder; Victorian Environmental Water Holder.

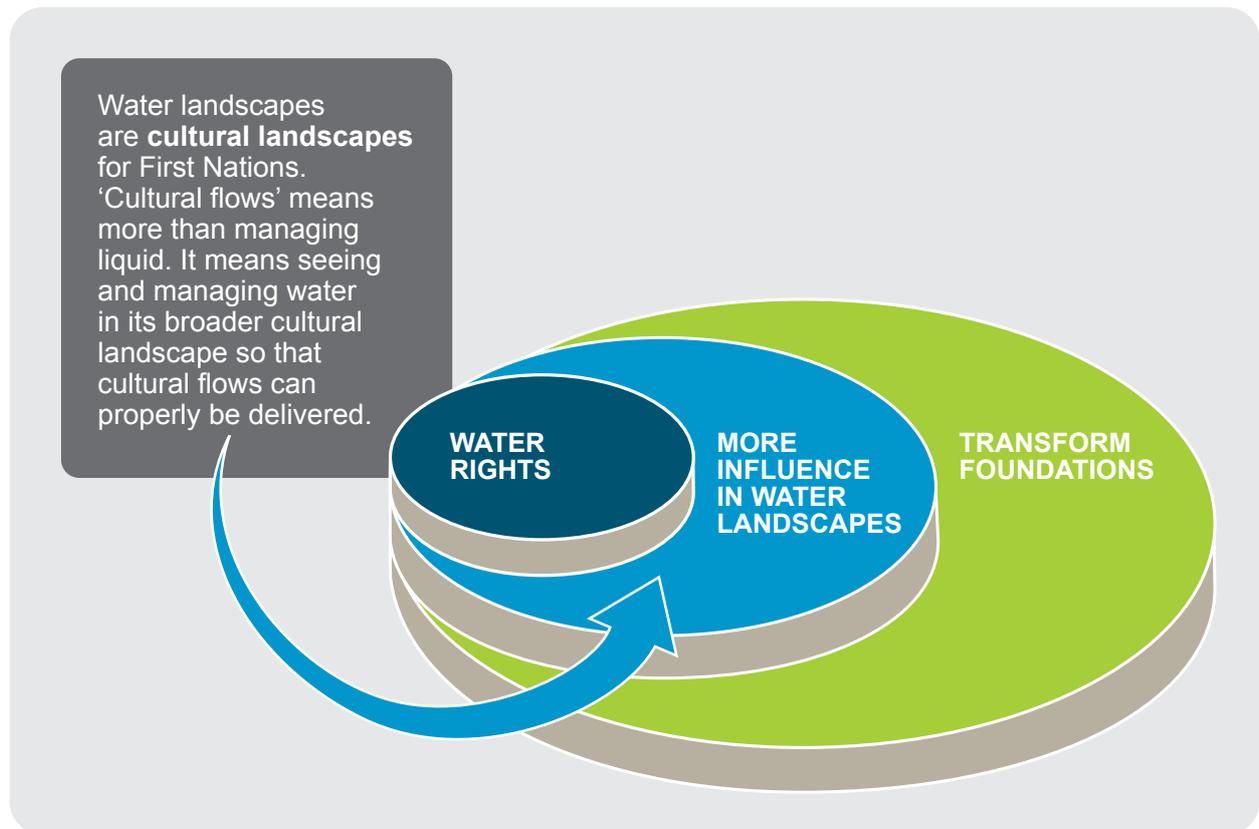
PATHWAYS TO IMPLEMENTATION

Some First Nations groups already hold water rights and are actively applying traditional ecological knowledge in managing water on Country. For such groups, a [comprehensive water rights model](#), such as co-management of a catchment level water share, cultural reserves or a cultural water holder can form an immediate part of the pathway. For other groups, it may be important to build capacity via on Country water rights models that can progressively build to broader cultural flows objectives over time.

Funding measures and institutional changes are necessary to support the adoption and implementation of water rights and culturally -relevant governance models to manage First Nations' water rights.



Approach 2 Increasing First Nations' influence in water landscapes



WHY IS INCREASING INFLUENCE IN THE WATER LANDSCAPE IMPORTANT TO CULTURAL FLOWS?

Although water rights are the core of cultural flows, many laws affect water rights and water landscapes. Those wider laws deal with animals and plants, water quality, water flows, soil and catchments, and cultural heritage.

As well as controlling water, **First Nations need more influence in water landscapes to help make sure that cultural water rights can do their job properly.** Water rights will not deliver First Nations' outcomes if the water is dirty and makes fish sick, or the right wetland plants have all gone, or if cultural knowledge (intangible cultural heritage) isn't protected and respected.

Laws in other areas could also fund or help actions that complement water rights in other ways. **Reforming laws that affect water rights and water landscapes** is necessary to deliver cultural flows effectively.

Law also gives First Nations ways to [influence how water or land is used by others in the water landscape to help deliver cultural flows outcomes](#). This might include influencing when and how a water authority releases water from a dam, or where a mine builds fencing on riverbanks or around springs, or making sure that no one can pump water from a billabong at a particular time of year.

Relevant laws: Cultural heritage laws, environmental and land use laws, water planning and licensing laws, and other laws about consultation, traditional knowledge, and statutory and common law agreements.

EXISTING LAW AND POLICY EXAMPLES:

- Water quality objectives that respond to cultural needs, like **New Zealand's National Policy Statement for Freshwater Management**. This Statement sets out how local councils need to set water quality standards. Standards seek to prevent important ceremony sites from being polluted, and to make sure that important freshwater species are safe to harvest and eat, and knowledge about how to prepare, store and cook them can be transferred to the next generation.
- Water extraction and other licensing rules that protect culturally significant springs, like **New South Wales' Aquifer Interference Policy** or rules in **New South Wales Water Sharing Plans**. These can be used to ban new bores being drilled close to these springs to protect them from drying up.
- Rules that can protect cultural knowledge about water sites and management, like Victoria's **intangible cultural heritage protections** under the *Aboriginal Heritage Act 2006*. These rules enable First Nations to register their water management knowledge about a special site. This could lead to agreements and funding to protect, conserve and develop that knowledge.
- Partnerships with private entities about managing water landscapes, like the Mimal Land Management Aboriginal Corporation's *Mimal Healthy Country Plan 2017-2027*, with NGO Bush Heritage Australia. Partnerships can jointly develop water monitoring plans and do work on Country (like fencing off springs from livestock or doing youth engagement activities).

As this approach deals with many laws, there are many other possibilities.

The full law and policy report available at www.culturalflows.com.au describes some others.

PATHWAYS TO IMPLEMENTATION

This approach deals with many different laws. This means that a Nation group will need to deal with many different government agencies that have responsibility for these laws (like cultural heritage agencies, environmental protection agencies and catchment management agencies).

Adding up reforms to several laws and policies will strengthen this part of the cultural flows pathway, for example:

- (1) Changing water quality standards in environmental protection laws to recognise cultural needs

PLUS

Changing dam operations rules and water sharing rules to reflect the new standards.

LEADS TO stronger standards that have wider effect. For example, the new standards would need to be considered by a dam operator in releasing water from a dam; a decision-maker considering an application for a new licence to take water; and a decision-maker considering an application for a licence to put waste into a river.

- (2) Partnering with a land manager to do surveys of water-related cultural heritage on Country and plan protection measures like fencing to keep feral animals out

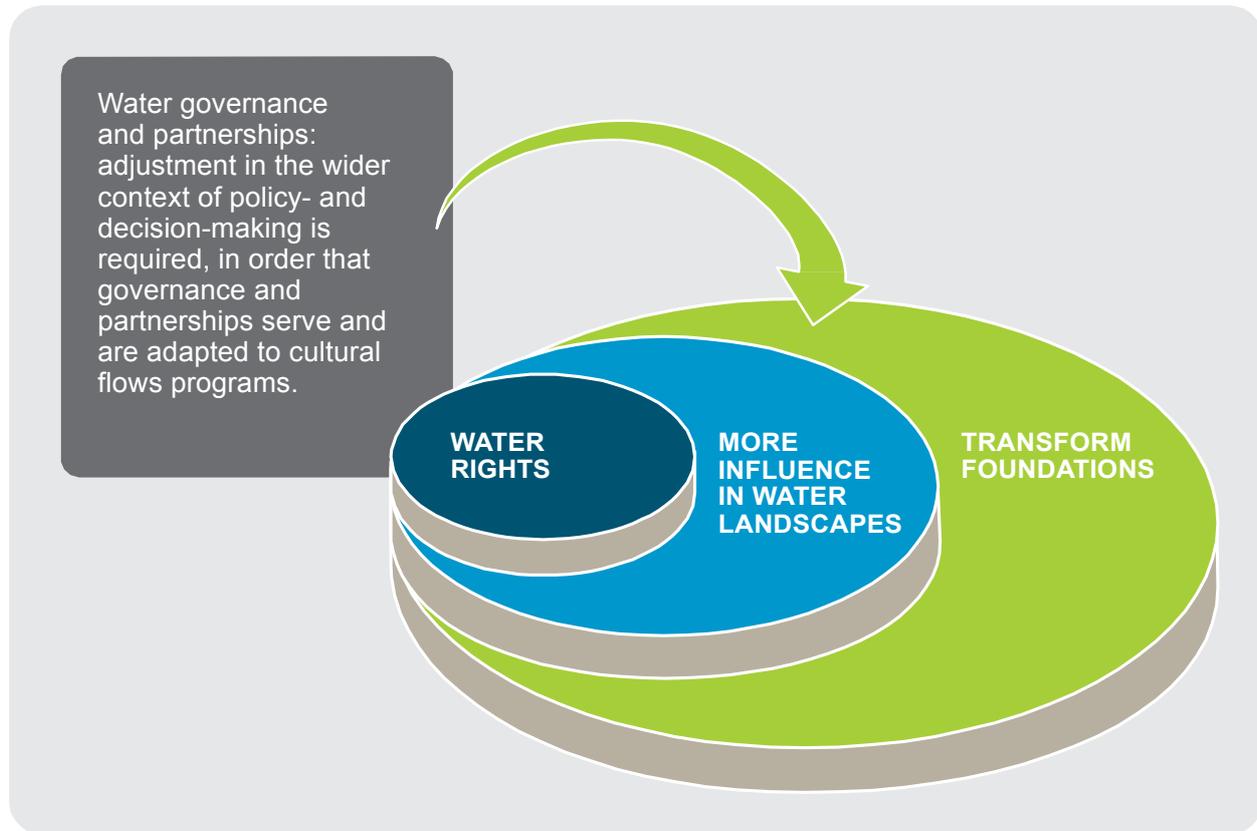
PLUS

registering tangible and intangible cultural heritage about those sites under cultural heritage laws.

LEADS TO stronger protections for sites than using a partnership by itself (including protections from third parties who might go onto the land). It might also open up government funding for cultural heritage work or could be used as a basis for advocating for a First Nations water right to control water at the site.

APPROACH 3

Transform foundations



WHY DO WE NEED TO TRANSFORM FOUNDATIONS OF WATER GOVERNANCE AND PARTNERSHIPS?

A cultural flows pathway depends on water rights and related laws, such as cultural heritage and environmental laws, as well as **other laws and organisations that bring together the people that are involved in 'governing' water.** The current organisation does not provide a strong foundation for First Nations' rights, interests, perspectives or participation in water management. While there have been recent improvements, we need to further develop water law governance to better reflect cultural flows priorities.

Effectively delivering cultural flows needs **new supporting foundations**—a shifted governance and political framework that puts First Nations at the centre of water management in Australia. This may mean creating new organisations such as 'cultural water holders'. 'Big picture' reforms include re-setting water management structures and guiding principles, especially through **partnerships based on treaty processes or political agreements.**

Partnership and reform can create 'hybrid' governance. These partnership models include ones that jointly adopt settler and First Nations rules and practices for significant places in order to manage rivers or wetlands, while other models recognise water as a living entity (personhood) and give it the same legal rights as a person.

Underpinning safeguards can also be built through law and policy reform. These include stronger First Nations' rights provisions and progressive Australian implementation of international commitments. The UN Declaration of the Rights of Indigenous Peoples through principles such as free, prior and informed consent sets a baseline for action.

Supporting reforms include:

- increasing the role of First Nations in making decisions about operating dams;
- protecting cultural knowledge; and
- using assessment tools to both protect and advance First Nations' relationships to water.

Relevant laws: constitutional law, international law, human rights law, water legislation, contract law.

EXISTING LAW AND POLICY EXAMPLES:

- Agreement-making between government and Nation groups, such as **the Noongar Agreement, the Ngarrindjeri Agreement, or the Canadian MacKenzie River Basin Water Management Agreements;**
- First Nations rights measures, such as the right to maintain and strengthen distinctive relationships with traditionally owned or occupied and used lands and waters, which is **incorporated into human rights legislation and adapted from the UN Declaration of the Rights of Indigenous Peoples (UNDRIP);**
- Establishment of hybrid governance arrangements over river systems, such as that based on the **Whanganui River Settlement and subsequent legislation in New Zealand;**
- Cultural assessment tools as a means for strengthening and protecting cultural knowledge through models such as **Aboriginal Waterway Assessments** and the **Akwe:Kon Principles developed under the Biodiversity Convention.**

PATHWAYS TO BROADER ADOPTION

This approach deals with legal and non-legal ways of governing, administering and framing cultural flows and works in conjunction with Approaches 1 and 2.

An important aspect is negotiating and concluding settlements about water through treaties or other forms of political agreement.

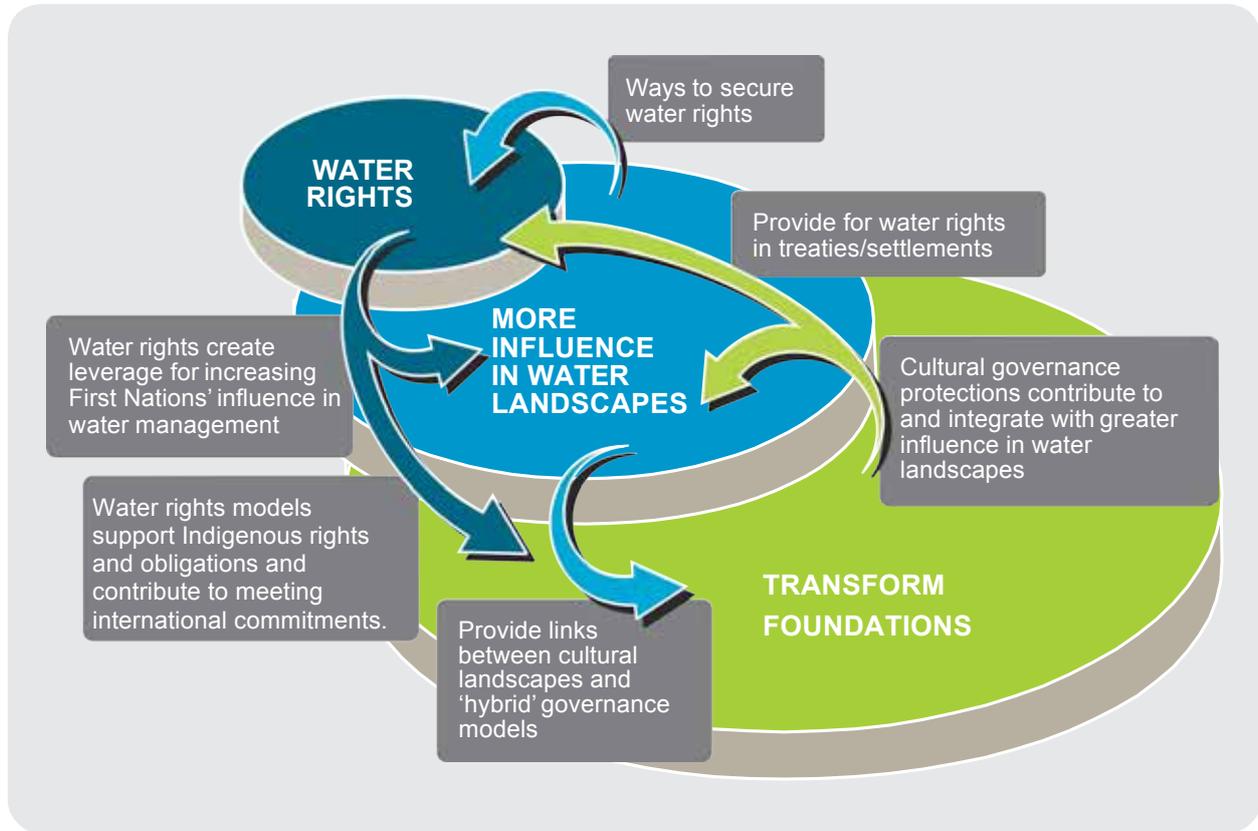
International instruments, like UNDRIP, are a powerful way in which key principles of First Nations' relationships with water can inform Australian law and practice and assist Australia to meet international commitments. First Nations' rights in water can take inspiration from instruments like UNDRIP and what is happening in other countries to translate those into Australian laws (including contracts and agreements).

New legal mechanisms can establish governance arrangements that prioritise First Nations' laws, customs and concepts. For example, law can attach legal protections to places of significance to First Nations (eg rivers). This will require legislative reform, although agreement-making can play a major role in leading to such outcomes.

Other legal and practical tools will be important to delivering cultural flows, such as cultural assessment methods and protections for cultural knowledge that can occur in contracts or regulations that set out how these measures are used and by whom.



Pathways to achieving cultural flows



This diagram shows the pathways to achieving cultural flows. It emphasises that different Nation groups and governments may approach the implementation of cultural flows from multiple entry points. It highlights how the three

different approaches support and reinforce each other. The three approaches, working together, will be necessary for successfully implementing cultural flows. The ten principles set out below apply to all three approaches.

10 PRINCIPLES FOR IMPLEMENTATION

1. All three approaches are necessary to any cultural flows program
2. Partnerships and agreements are a central strategy to implement cultural flows
3. Water governance should recognise and protect cultural knowledge about water
4. Governments must clearly and demonstrably account for First Nations' diverse values, objectives and capacities relating to water
5. Sustainable, ongoing resourcing is critical to implementing cultural flows measures in the long term
6. Cultural flows in water management support First Nations and benefit non-Indigenous society
7. All elements of reform should enhance independence of First Nations in water decision-making
8. First Nations should have active and informed involvement in all aspects of water management and operations, including monitoring and review
9. Government must have clear lines of responsibility for implementing and achieving cultural outcomes in an efficient and timely manner
10. Implementation must be scoped broadly but still have regard to context and individual First Nations' priorities, and take into account First Nations' organisational structures.

Travelling the pathway to just and enduring cultural flows

A cultural flows pathway has many steps along the way. Some of those steps relate to work 'on the ground' dealing with cultural values, ecology and hydrology.

Those steps are not the end of the pathway. Strong laws and policies are needed to deliver and protect cultural flows into the future.

Building that strength in a just and enduring way requires:

- water rights;
- more influence over water landscapes; and
- new, supporting foundations for water governance— placing First Nations at the heart of water management in Australia.



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

Echuca Declaration, 2010

