Professor Jennifer McKayAM submission to National Water Reform 2026

Productivity Commission - National Water Reform 2026

National Water Initiative (NWI) Assessment – Part A

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Framing comment: the human right to a clean, healthy and sustainable environment

Recent international developments recognising the human right to a clean, healthy and sustainable environment reinforce the importance of effective water governance. While Australia has not fully incorporated this right into domestic law, it provides a normative framework that aligns closely with the objectives of the NWI: sustainable resource use, intergenerational equity, environmental protection and social wellbeing.

My research has long emphasised that water reform cannot be treated solely as an economic or technical exercise. Access to safe water, protection of aquatic ecosystems, and resilience to climate impacts are foundational to human health, dignity and community stability. Viewed through a human rights lens, ongoing shortcomings in water governance — particularly where environmental decline or inequitable access persists — represent not only policy failure, but risks to fundamental human and community interests.

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1. Progress since the 2024 NWI assessment

Actions taken in response to the 2024 findings and reform priorities

Since the Productivity Commission's 2024 NWI assessment, jurisdictions have taken partial and incremental actions in response to identified priorities. This pattern is consistent with findings in my research on Australian water governance: reforms that can be framed as administrative improvements tend to progress, while structural reforms that constrain discretion or address distributional impacts lag behind.

Actions observed include:

- Updates to water planning documents to acknowledge climate change and extreme events;
- Continued emphasis on infrastructure-based responses framed as resilience building;

- Expanded mechanisms for Aboriginal engagement, including cultural water strategies;
- Incremental improvements in water data and reporting systems.

While these actions contribute to some NWI objectives, they stop short of embedding enforceable protections for ecological condition and community water security, which are central to the human right to a clean, healthy environment.

Where progress has occurred

Progress has been most apparent in:

1. Recognition of climate-water risk
   Jurisdictions increasingly acknowledge the implications of climate change for water availability. This aligns with my research advocating adaptive governance. However, recognition has not consistently translated into enforceable safeguards for ecosystems and downstream communities.
2. First Nations engagement
   Increased attention to Aboriginal water values reflects growing recognition that environmental health and cultural wellbeing are intrinsically linked. This aligns with both human rights principles and long-standing critiques in my work regarding exclusion of Indigenous peoples from water decision-making.
3. Technical and scientific capability
   Investment in modelling, monitoring and research (including through One Basin CRC) continues to improve understanding of system risks. As my research makes clear, however, knowledge without governance reform does not secure rights or outcomes.

Where progress has been limited, slower than expected, or reversed

Progress remains limited in areas most critical to safeguarding environmental and community wellbeing:

- Environmental protection and outcomes
  In some systems, ecological condition continues to decline despite nominal compliance with plans. From a human rights perspective, this undermines the right to a healthy environment and associated rights to health and livelihoods.
- Limits on discretion
  Emergency powers and ad hoc political interventions remain common during droughts and floods. My research consistently identifies excessive discretion as

a central governance failure, particularly where it weakens environmental limits and disproportionately affects vulnerable communities.

- Accountability and enforcement
  Weak compliance undermines confidence that water laws protect ecosystems and users equitably, eroding trust in institutions responsible for safeguarding shared environmental goods.

Policy, legislative, regulatory, funding and governance influences

Positive influences

- Commonwealth funding that supports resilience, data and research;
- Increasing alignment between environmental protection objectives and broader sustainability discourse;
- Growth in recognition of Indigenous environmental stewardship.

Negative influences

- Fragmented governance with limited enforceable national standards;
- Legislative frameworks prioritising flexibility over environmental security;
- Continued preference for infrastructure investment over institutional strengthening.

From a human rights perspective, these weaknesses matter because environmental protection depends on stable, enforceable governance rather than discretionary goodwill.

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2. Barriers and emerging risks

Key barriers affecting progress toward NWI outcomes

Key barriers identified in my research and One Basin CRC work include:

- Fragmented accountability, making it unclear who is responsible when environmental harm occurs;
- Discretion-heavy legal frameworks that allow temporary responses to become de facto long-term policy;
- Insufficient integration of First Nations rights, despite their internationally recognised role in environmental protection;

- Limited institutional capacity to enforce environmental limits and protect shared resources.

These barriers directly affect Australia's ability to realise the substance of the human right to a clean, healthy environment in practice.

Emerging risks over the next three years

Emerging risks include:

- Climate-driven shocks leading to frequent suspension of planning rules;
- Cumulative environmental degradation, with long-term consequences for human health and regional communities;
- Erosion of trust in water institutions, particularly where impacts fall unevenly on First Nations and rural communities;
- Rising conflict between economic use and environmental protection, intensifying social and legal tension.

Delaying reform increases the risk that water governance failures translate into broader human and environmental harms.

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3. Forward reform priorities (next three years)

From my perspective, informed by water law scholarship, One Basin CRC research, and a human-rights-aware governance framework, three priorities stand out:

1. Embed environmental protection and climate adaptation as enforceable legal obligations

Water plans must ensure ecological sustainability and community water security as core, non-negotiable objectives, consistent with the right to a clean, healthy environment.

2. Strengthen governance, accountability and limits on discretion

Reforms should:

- Constrain discretionary overrides of environmental limits;
- Strengthen independent regulation and enforcement;
- Establish clearer national consistency benchmarks.

This reflects a central conclusion of my research: environmental and community outcomes depend on institutional design, not just policy intent.

3. Systemically recognise First Nations water rights and stewardship

Meaningful progress requires legal and institutional arrangements that support First Nations access to water, shared decision-making, and protection of country — outcomes consistent with both NWI commitments and international human rights norms.

Concluding observation

The recognition of a human right to a clean, healthy and sustainable environment reinforces a long-standing conclusion of Australian water governance research: sound water management is inseparable from social justice, ecological integrity and intergenerational equity. Australia's challenge under the NWI is no longer one of knowledge or technical capacity, but of governance choices. Addressing these choices over the next three years is essential if water reform is to protect both people and the environment in an increasingly climate-stressed future.

Overall Questions - Part B Secure, resilient and sustainable services- note this refers to past empirical research by McKay

Which element of current water service arrangements governance arrangements that are creating material risks, inefficiencies or misalignments?

McKay's Core Diagnostic: The "Messy Mosaic"

In her 2019 TEDx talk, McKay characterised Australia's overlapping environmental laws as a "messy mosaic" and called for them to be reformed into "jigsaw laws" — coherent, interlocking instruments that fit together rather than collide. This metaphor captures the central finding running through her decades of research: that jurisdictional fragmentation in Australian water law is not merely an administrative inconvenience but a structural impediment to sustainable and efficient water management.

McKay traces this fragmentation to its historical roots, identifying five epochs of Australian water regulation. Colonial laws from 1788 to 1901 were, in her analysis, "highly introspective to the particular colony," focused on development without care for sustainable management or environmental protection. The federal structure established at federation in 1901 entrenched that fragmentation, leaving water management substantially within State legislative power.

The Scale of the Problem: 14 Legal Forms Across 333 Businesses

One of McKay's most striking empirical contributions is the sheer scale of institutional multiplicity she documented. Her research established that there are 333 water supply businesses in Australia operating under 14 different types of legal forms spread across several State Acts. This finding — drawn from her comprehensive survey of CEOs of Australia's largest water utilities — gives concrete measure to what might otherwise seem an abstract governance problem.

Interviewing 183 CEOs of the largest water suppliers, McKay found they were broadly committed to implementing Ecologically Sustainable Development (ESD) and regarded it as part of their social licence, but were searching for clarity on the meaning of Australia's definition of ESD. The results indicated a pessimistic outlook on their ability to achieve ESD, linked to a lack of community cohesion and lack of coordination between government agencies.

This is a direct compliance cost: regulated entities understand their obligations in principle but cannot give them effect because the regulatory landscape across jurisdictions does not cohere.

Coordination Failures Under the COAG Reforms

McKay was a lead researcher in the independent assessment of jurisdictional performance under the COAG water reforms, producing an Independent Assessment of Jurisdictional Reports on the Environmental Achievements of the COAG Water Reforms, which evaluated how each state translated Commonwealth-driven reform commitments into practice. Her findings revealed persistent coordination gaps even where a common national framework nominally applied.

The 1994 COAG reforms were Commonwealth-driven but States were allowed to adopt them in their own ways. In interviews with 183 CEOs conducted in 2005, most reported putting significant effort into achieving ESD principles, but they were not convinced that well-established intergovernmental processes existed to ensure coordination of policies. They also did not think policy-making was transparent.

This points to a specific category of compliance cost that McKay's research illuminates: the burden of navigating not just different rules, but different institutional cultures and policy environments across jurisdictions.

Water Allocation Plans and the "Introspective" Approach

In her 2011 paper in the Hydrological Sciences Journal, McKay examined conflicts arising from the Regional Water Allocation Plan (RWAP) system introduced after 2004. She found that jurisdictional insularity was a root cause of conflict and inefficiency. The paper identified conflicts between users, between the environment and users, and conflicts related to community consultation processes, the science

used to reduce allocations, and how water reductions were administered. McKay proposed that a duty to cooperate be added to State laws, requiring persons working on water plans to work collaboratively within their region and with those in adjacent water plan regions. Such a duty would, in her analysis, help overcome the fragmentation and introspective approach of the early regional water allocation plans.

Writing in Basin Futures, McKay observed that the pre-existing introspective State law regimes had been weakly cooperative and primarily promoted economic and social development, without adequate regard for cross-border or ecological outcomes. The Water Act 2007 and the NWI reforms punctuated and changed those cultures, but did not eliminate them.

The Duty to Cooperate as a Law Reform Proposal

A recurring thread across McKay's career is her advocacy for a duty to cooperate as the structural solution to jurisdictional fragmentation. In her TEDx talk, she argued that the mosaic of laws should be replaced by instruments that respect existing political power arrangements but superimpose a duty to cooperate — a duty that already exists in contract law and international water law — to enable upstream and downstream water users to work together.

This proposal draws on her comparative work at the international level. McKay noted that the 1997 Convention on transboundary aquifers includes an obligation on states to cooperate on the basis of sovereign equality, sustainable development, and good faith, and suggested that Australia's Water Act should incorporate this concept. Applying this principle at the domestic inter-jurisdictional level, in her view, would reduce duplication, eliminate planning conflicts between adjacent regions, and lower compliance costs for those who must navigate multiple regulatory systems.

Water Quality: A Forgotten Area of Fragmentation

McKay's research extended beyond allocation to water quality, where she identified a distinct compliance gap flowing from jurisdictional inconsistency. In 2000, she examined Australia's fragmented water quality regulations and advocated for mandatory, enforceable standards to ensure safe drinking water across all states — beyond the existing voluntary guidelines and limited urban licensing schemes. The absence of nationally binding quality standards creates uneven protection for communities and uneven compliance burdens for operators depending on where they are located.

Assessment

McKay's body of work, spanning more than 180 publications and four decades of empirical and doctrinal research, consistently supports the conclusion that jurisdictional differences in Australian water law generate real and substantial costs. These include:

the burden placed on water utilities operating under incompatible legal forms; the coordination failures that prevent ESD from being achieved even when regulated entities intend to comply;

the conflicts generated by adjacent water allocation plans that treat their boundaries as hard barriers; and

the absence of harmonised quality standards.

My proposed remedy — a legislated duty (in State water laws) to cooperate superimposed on existing state frameworks . This has been viewed as the most analytically developed reform option in the Australian water law literature for addressing these inefficiencies without dismantling the federal structure.

The duty to cooperate.

The duty to cooperate in international water law is a core legal obligation requiring states sharing transboundary watercourses to work together through information-sharing, consultation, negotiation, and joint management to ensure equitable and sustainable use of shared waters.

Duty to cooperate as a core but under-utilised governance principle

An important but under-developed dimension of Australian water governance relevant to the NWI is the duty to cooperate embedded in both the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) and Australia's obligations under the Ramsar Convention on Wetlands of International Importance.

My research has consistently emphasised that Australian water governance suffers not from a lack of institutions, but from weak coordination, fragmented responsibility and limited legal obligations to act collectively across jurisdictions. The duty to cooperate is therefore a critical, yet insufficiently operationalised, mechanism for delivering NWI outcomes.

EPBC Act: cooperation and intergovernmental responsibility

The EPBC Act is explicitly premised on cooperative environmental governance, recognising that environmental protection — including the protection of water-dependent ecosystems — requires coordination between the Commonwealth, states and territories.

Key features relevant to NWI implementation include:

- Objects promoting cooperation between governments to protect matters of national environmental significance (MNES);
- Reliance on bilateral and intergovernmental arrangements for assessment and approval processes;

- Protection of Ramsar wetlands as MNES, directly linking Commonwealth environmental responsibilities to water allocation, planning and management decisions made primarily at state level.

However, as my research has identified, cooperation under the EPBC Act has largely been treated as a procedural or negotiated commitment, rather than a substantive duty that constrains decision-making. This has significant implications where state-based water plans or discretionary interventions impact Ramsar wetlands or other nationally significant water-dependent ecosystems.

From an NWI perspective, this weak operationalisation of cooperation allows misalignment between water planning, environmental protection and climate adaptation, undermining both environmental outcomes and community confidence.

Ramsar Convention: international obligation to cooperate

Australia's obligations under the Ramsar Convention further reinforce the importance of cooperation in water governance. Key duties include:

- Maintaining the ecological character of listed wetlands;
- Promoting the wise use of wetlands across the landscape, not only within Ramsar boundaries;
- Cooperating in the management of shared water systems, including river basins affecting Ramsar sites.

These obligations are particularly relevant in the Murray–Darling Basin and other regulated systems where upstream water allocation and operational decisions have direct impacts on Ramsar wetlands downstream.

My research has long argued that Ramsar obligations require integration into water allocation and planning frameworks, not treatment as an external or secondary environmental consideration. Failure to do so weakens Australia's capacity to meet both international commitments and domestic NWI objectives.

Link to the human right to a clean, healthy and sustainable environment.

I am firmly of the view, that Australia need to have a national human rights act or alternatively, States without one, NSW,NT,SA,WA and Tasmania could assent to an act which would be based on the model law in the ACT. The ACT law recently included the human right to a clean healthy environment.

The Human Right to a Clean, Healthy Environment and Australian Water Law

The International Framework

The global context has shifted significantly in recent years. In July 2022, the United Nations General Assembly adopted a historic resolution declaring that the right to a clean, healthy and sustainable environment is a fundamental human right. The UN Special Rapporteur on Human Rights and the Environment has defined the right to include clean air; a safe climate; access to safe drinking water and sanitation; healthy biodiversity and ecosystems; toxic-free environments; and healthy and sustainably produced food.

Australia's Domestic Gap

Despite supporting the 2022 UN resolution, Australia has been conspicuously slow to translate it into law. Australia remains one of only 15 countries without the right to a healthy environment enshrined in federal laws or constitution. More than 150 legal frameworks around the world have integrated the right. Australia is the only liberal democracy in the world without a law protecting all human rights.

This gap has direct consequences for water. The human right to water has been recognised as a legally binding human right impliedly recognised under the International Covenant on Social, Economic and Cultural Rights. As a party to the Covenant, Australia has an obligation under international law to domestically implement the human right to water. Owing to the absence of federal legislative protection of social, economic and cultural rights in Australia, the human right to water is inadequately recognised under Australian law.

The ACT Breakthrough (2024)

In August 2024, the ACT Parliament passed legislation enshrining the right to a healthy environment, making the ACT the only Australian jurisdiction to have done so. The Commonwealth Joint Parliamentary Committee on Human Rights has recommended that the right to a healthy environment be enshrined in federal law as part of a national Human Rights Act.

The right has been recognised to include a right to clean air, a safe climate, access to safe water and to healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.

Recognition means the right must be considered as part of government decision-making, and hence gives people a legal avenue to challenge public authorities for failing to properly consider or act consistently with the right. This would give courts the power to declare laws incompatible with the right. All new legislation would have to include accompanying detail addressing impacts on the right — so if the ACT government tried to push through laws resulting in more water pollution, it would have to formally justify those impacts.

The Water Act 2007 and Its Limitations

The Water Act 2007 is Australia's primary national water instrument, but it has significant human rights gaps. Insofar as the Water Act purports to implement relevant international agreements, those agreements are all environmental treaties such as the Convention on Biological Diversity, the Framework Convention on Climate Change, and the Ramsar Convention. There is no reference in the Water Act to human rights treaties.

Australia's water management history is testament to the prioritisation of economic uses of water over water sustainability, resulting in the over-allocation of water entitlements in the Murray-Darling Basin. Scholars and advocacy groups have argued that framing water protection through a human rights lens would reweight these priorities — if environmental considerations are conceptualised as rights, governments may be obligated to give more weight to them in decision-making, and individuals could sue governments for failing to ensure that third parties adequately protect, respect and fulfil their right to clean, affordable and accessible water.

Climate Litigation and the Missing Right

The absence of the right has constrained environmental litigation. Climate activists have been forced to use other rights — such as the right to life — to ground climate change arguments, or to turn to areas of law such as tort. In a high-profile federal court case, the court found the Australian government did not owe a duty of care to Australian children to protect them from climate change. If the right to a healthy environment had been available, the outcome could have been very different.

Indigenous Peoples and Water Rights

The intersection of the right to a healthy environment with Indigenous water rights is particularly acute. The concept of aqua nullius — water that belongs to no other — raises questions that align with discourse on Indigenous land rights and are generally ignored in broader discussions on property rights in water.

The work of the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) reflects the understanding that water is more than an economic and environmental resource. Rivers and other waterways are cultural holding spaces for First Nations people. MLDRIN defined Cultural Flows as a way of translating Indigenous people's water rights, needs and aspirations into the language of modern water management, stating that First Nations have the right to own and manage water on Country to support self-determination.

Yet legal recognition has lagged. Although the Native Title Act 1993 includes water rights as part of native title rights, only rights to use water for domestic and personal purposes have been recognised by the courts, and the Act does not provide for a right to negotiate over water. Compliance with international law should evolve consistently with Indigenous rights and views in the Australian context, given that

successful implementation of the right to a healthy environment also depends on being responsive to people in vulnerable situations.

The Reform Agenda

The Australian Panel of Experts in Environmental Law has recommended legislating a substantive right to a safe, clean and healthy environment, coupled with procedural environmental rights including the right to information, public participation and access to justice in environmental matters, as a core element of improving environmental laws in Australia.

The most effective and comprehensive means of implementing the human right to water in Australia would be through the introduction of a federal Human Rights Act which recognises the right to life, the right to water, and the right to a healthy environment.

The duty to cooperate under the EPBC Act and Ramsar Convention alignment to the human right to a clean, healthy and sustainable environment

The duty to cooperate under the EPBC Act and Ramsar Convention is closely aligned with the **human right to a clean, healthy and sustainable environment**. Effective cooperation between governments is essential to:

- Prevent environmental degradation that affects human health and livelihoods;
- Protect vulnerable communities reliant on healthy aquatic ecosystems;
- Ensure equitable and transparent decision-making across jurisdictions.

From a rights-aware governance perspective, persistent fragmentation and discretionary override of water rules represent not only policy weaknesses, but failures to adequately safeguard environmental conditions essential to human wellbeing.

First step the duty to cooperate -Implications for NWI reform and assessment

The Productivity Commission's assessment of NWI progress would benefit from explicitly considering **whether cooperation obligations are being meaningfully implemented**, rather than merely acknowledged.

Key questions include:

- Are EPBC Act cooperation mechanisms actually constraining water planning and allocation decisions?

- Are Ramsar obligations embedded into operational water rules, not just plan objectives?
- Are intergovernmental processes sufficiently transparent and accountable when environmental limits are under pressure?

My research and One Basin CRC findings indicate that without **clearer legal expectations around cooperation**, NWI implementation will continue to rely on goodwill rather than enforceable governance.

Reform implications (linked to forward priorities)

Strengthening the duty to cooperate over the next three years would materially improve NWI outcomes by:

1. **Embedding cooperation as a substantive obligation**, not merely a procedural aim, particularly where water decisions affect Ramsar wetlands or other MNES.
2. **Clarifying the interaction between water planning frameworks and EPBC Act responsibilities**, reducing regulatory gaps and conflict.
3. **Supporting environmental protection as a shared responsibility**, consistent with the human right to a clean, healthy and sustainable environment and intergenerational equity.

Concluding observation

Incorporating the duty to cooperate more explicitly into water governance is not a new reform agenda. It reflects commitments already made under the EPBC Act, the Ramsar Convention and the NWI itself. My research demonstrates that **the failure lies in implementation, not intent**. Strengthening cooperative obligations offers a practical pathway to address fragmentation, protect nationally significant wetlands, and improve alignment between water reform and environmental and human rights outcomes.

THEME 2 Governance, accountability and coordination

References to work of Professor Jennifer McKay AM

1. Clearly Defined Roles of Governments, Regulators and Service Providers

Professor Jennifer McKay's research demonstrates that although Australia has formally separated water policy, regulation, and service delivery following COAG (1994) and the National Water Initiative (2004), these distinctions remain poorly

understood outside government and industry. McKay emphasises that clarity between governments, regulators, and service providers exists primarily at an institutional level, not at the community or customer level. In remote and Indigenous communities, this lack of clarity is magnified, as service delivery is often mediated through local councils, regional corporations, or Commonwealth-funded programs, further obscuring accountability pathways (McKay 2009; McKay 2011).

2. Responsibilities Across Levels of Government, Including Remote Communities

McKay identifies Australian federalism as a structural contributor to accountability confusion in water governance. Constitutional allocation of water responsibilities to the states, combined with expanded Commonwealth intervention through the Water Act 2007 and targeted programs, has produced overlapping responsibilities rather than integrated governance. Her research shows that remote and discrete communities are disproportionately affected, as water infrastructure provision, water quality regulation, and public health oversight are split across agencies without a single accountable authority (McKay & Marsden 2009; McKay 2010).

3. Fragmented Responsibilities and Disproportionate Impacts

McKay's socio-legal analyses demonstrate that fragmented governance does not enhance protection but instead creates regulatory gaps. In remote Aboriginal communities, this has contributed to water supply failures, delayed maintenance, and uncertainty over responsibility for remediation. McKay argues that these failures embed structural inequality by transferring governance risk onto communities with limited political and financial capacity (McKay 2005; McKay 2011).

4. Accountability Mechanisms and Performance Improvement

McKay's empirical research on water utilities reveals that existing accountability mechanisms focus on procedural compliance and economic efficiency rather than outcomes that matter to remote and Indigenous communities. Performance frameworks rarely capture service reliability, cultural safety, or environmental stewardship, limiting their capacity to drive genuine improvement where it is most needed (McKay 2009; McKay 2010).

5. Trust, Legitimacy and Participation

McKay consistently finds that trust in water governance is weakest where communities experience decision-making as distant, technical, and unresponsive. Indigenous and remote communities are often consulted late and without decision-making power. McKay concludes that trust arises from transparency, shared authority, and visible incorporation of community knowledge into decisions (McKay 2011; McKay 2014).

6. The Human Right to a Clean, Healthy and Sustainable Environment

Professor McKay's more recent research situates water governance within the emerging international recognition of the human right to a clean, healthy and sustainable environment. She argues that recognition of this right—confirmed by United Nations resolutions and international human rights law—provides a normative foundation for water governance reform in Australia. McKay contends that embedding this right in domestic law would strengthen accountability by reframing water services, water quality, and ecosystem protection as rights-based obligations rather than discretionary policy choices. This rights-based framework is particularly significant for remote and Indigenous communities, where environmental degradation and service failure have profound health, cultural, and intergenerational consequences

7. Implications for Accountability and Reform

Consistent with Resolution 76/300, McKay emphasises that water governance reform must integrate environmental protection, public health, and human rights. She argues that recognising the right to a clean, healthy and sustainable environment—alongside the human right to water—would support clearer accountability pathways, strengthen regulatory oversight, and improve trust in decision making, particularly in jurisdictions considering Human Rights Acts or rights based legislative reform or indeed in a potential national Human Rights Act.

8. Reforms to Strengthen Accountability in Remote and Indigenous Contexts

Drawing on McKay's reform work, governments should adopt place-based accountability frameworks with clearly designated lead agencies, integrate ecologically sustainable development into economic regulation, and recognise both the human right to water and the right to a clean, healthy and sustainable environment in domestic law. McKay emphasises that equitable outcomes require differentiated governance solutions that reflect cultural, geographic, and socioeconomic realities rather than uniform regulatory models (McKay 2009).S trengthening Indigenous water governance, according to McKay, is essential for justice, rebuilding institutional trust, and achieving long-term water and environmental sustainability (McKay 2011; McKay 2014).

1. McKay, J. (2005). Issues for CEOs of Water Utilities with the Implementation of Australian Water Laws. Journal of Contemporary Water Research & Education.

2. McKay, J. & Marsden, S. (2009). Australia: The Problem of Sustainability in Water. In The Evolution of the Law and Politics of Water. Springer.

3. McKay, J. (2009). Water Governance Regimes in Australia. Water Policy.

4. McKay, J. (2010). Picturing Freshwater Justice in Rural Australia. CRC Irrigation Futures.

5. McKay, J. (2011). Indigenous Water Rights and Regulatory Reform in Australia. Water Policy.

6. McKay, J. (2014). Trust, Transparency and Participation in Water Governance. Journal of Environmental Law.

7. United Nations General Assembly, The Human Right to a Clean, Healthy and Sustainable Environment, GA Res 76/300, UN Doc A/RES/76/300 (28 July 2022).

Theme 3 Alternative models for service provision

As a large nation with relatively few people widely dispersed, we cannot unpick the existing federal structure. We can however, make it work in a more coherent manner

My view as stated above is that these two steps will make a huge difference

1 Insert a *duty to cooperate* into all state laws for water and the environment generally.

2 A dream outcome would then be to insert into State human rights acts a provision, adopted from the ACT of the human right to a clean healthy environment .

3 A national human rights act bearing these two provisions.

THEME 4 National consistency and intergovernmental coordination

Do differences between jurisdictions create compliance costs or inefficiencies, and if so, how?

Professor McKay highlights that fragmented jurisdictional governance—what she terms “monstrously tangled” freshwater law—leads to administrative complexity, inefficiencies, and duplication of regulatory frameworks across states. Her interviews with 183 water utility CEOs revealed issues like difficulty in meeting varying environmental and pricing regulations, lack of trust in differing state frameworks, and compliance burdens from misaligned laws. [link.springer.com] [researchgate.net], [unisouthaf...ademia.edu]

In which areas would national consistency deliver net benefits?

- **Water resource management**: McKay argues that applying a single Water Act across Australia, with harmonised corporate forms and governance structures, could reduce duplication and increase clarity. [link.springer.com] However, this is not possible. Hence the suggestion to incorporate a Duty to cooperate into water and environmental laws at State level.

- **Inter-state river basins (e.g., Murray–Darling Basin)**: Federal oversight helps resolve state-level conflicts over shared resources, overcoming "competing interests" that have prevailed for over a century. [link.springer.com] . The recent amendments to EPBC act go some of the way, but need buttressing of a duty to cooperate as mentioned above.
- **Environmental and development standards**: Consistent obligations (e.g. Environmental Sustainable Development goals) would reduce burden on businesses operating across borders and improve investor confidence. [researchgate.net], [link.springer.com] This could be achieved via the duty to cooperate and eventually by the human right to a clean healthy environment. The second would allow review by courts and judicial oversight.

Where is jurisdictional flexibility most important, and why?

- **Local environmental contexts**: McKay notes that region-specific ecological, social and cultural factors (e.g. Indigenous rights, community needs) require adaptability. [link.springer.com], [fulbrighte...etwork.com]
- **Cultural sensitivities in river systems**: In her TEDx talk, McKay supports embedding a "duty to cooperate" across jurisdictions while still allowing localized regulation sensitive to upstream/downstream needs. [ted.com], [youtube.com]

How should the benefits of flexibility for individual jurisdictions be balanced against nation-wide consistency?

McKay proposes a hybrid model:

1. **Maintain core national standards and duties** (e.g., duty to cooperate, water allocations, environmental protections).
2. **Allow local implementation** reflecting community values, cultural practices, ecological variations, and innovative regulatory tools. [ted.com], [link.springer.com]
3. **Empower courts or tribunals** to interpret the duty to cooperate, providing oversight while respecting local conditions. [ted.com]

This balances binding nationwide objectives with tailored regional responses.

How could intergovernmental coordination/collaboration be strengthened without increasing regulatory complexity?

McKay advocates for structural coordination mechanisms that streamline rather than multiply layers:

- **Statutory "duty to cooperate"**: Embedding a legal obligation across jurisdictions fosters collaboration, enforced by existing judicial forums. [ted.com], [youtube.com]
- **Unified governance structures**: Harmonising corporate forms of water bodies and standardising reporting under a national framework eliminates redundant processes. [link.springer.com]
- **Enhanced epistemic communities & NGOs**: Involving expert networks and civil society ensures cohesive policy, sharing best practices across jurisdictions. [link.springer.com]
- **Federal catchment-based coordination**: Using basin-scale oversight (as in China's innovation of river chiefs) to integrate fragmented systems under national strategy. [link.springer.com]

Summary of McKay's Insights

- **Compliance costs** stem from legislative fragmentation and duplicative regulatory burdens across states.
- **National consistency** offers significant efficiency gains in shared-resource management and core environmental protections.
- **Jurisdictional flexibility** is critical for local adaptation, cultural fit, and ecological specificity.
- **A balanced approach** combines binding national duties with local implementation modalities.
- **Effective coordination** can be achieved through statutory duties, governance harmonisation, expert communities, and basin-scale oversight—without adding regulatory layers.

McKay's work underscores that rather than enforcing uniform laws, **strategically designed national frameworks—coupled with local flexibility and a legally enforceable duty to cooperate—can deliver both efficiency and justice** across jurisdictions.