8 May 2026

Productivity Commission Inquiry: National Water Reform 2026

Environmental and Natural Resources Law Research Unit
Adelaide Law School | College of Business and Law
Adelaide University
North Tce
ADELAIDE S.A. 5005

Dear Ms Giri

Submission in relation to National Water Reform 2026 Inquiry

Thank you for this opportunity to provide a submission in relation to the National Water Reform 2026 Inquiry. We make this submission as members of the Environmental and Natural Resources Law Research Unit (ENREL) at the Adelaide Law School, Adelaide University.

The Environmental and Natural Resources Law Research Unit brings together a diverse range of scholars working on issues of law and policy relating to the environment, land use planning, heritage protection, human rights, sustainability, climate change, and energy and natural resources. The Unit is actively engaged in research and advocacy on cutting-edge issues for the effective and equitable management of natural resources and environments in Australia.

We set out our written submission and recommendations in the pages that follow.

Yours sincerely

Assoc Prof Alex Wawryk, Co-Director, ENREL, Adelaide Law School, Adelaide University,

Dr Bruno Arpi, Co-Director, ENREL, Adelaide Law School, Adelaide University,

Authors

This submission was written by Dr David Adamson (School of Economics); and Dr Mark Giancaspro, Professor Jennifer McKay AM, Bradley Distinguished Professor Irene Watson, and Mr Michael Croft (Adelaide Law School); with contributions by Assoc Prof Alex Wawryk, Dr Kylie Covark and Mr Nate Camatta, on behalf of the members of ENREL.

Members of ENREL

Academic staff and external members	**HDR candidates**
Assoc Prof Alex Wawryk (Co-director)	Ms Marie Beillevert
Dr Bruno Arpi (Co-director)	Ms Frankie Bray
Prof Paul Babie	Ms Binota Britya
Adjunct Senior Lecturer Dr Kerryn Brent	Mr Nate Camatta
Prof Peter Burdon	Mr Michael Croft
Adjunct Senior Lecturer Margaret Castles	Ms Ashleigh Keneally
Dr Kylie Covark	Ms Emma Lush
Dr Ayla do Vale Alves	Mr Hamish McNamara
Mr Michael Doherty	Ms Rachel Neef
Adjunct Prof Robert Fowler	Ms Madeleine Perrett
Dr Mark Giancaspro	Mr Chongxu Shan
Adjunct Prof Bryan Jenkins	Mr Karl Vatzlavik
Ms Taylor Jobling	
Dr So Yeon Kim	
Adjunct Senior Lecturer Mr Paul Leadbeter	
Assoc Prof Sulette Lombard	
Assoc Prof Phillipa McCormack	
Prof Jennifer McKay	
Dr Juliette McIntyre	
Mr Finn McIntyre	
Assoc Prof Beth Nosworthy	
Emerita Prof Rosemary Owens	
Dr Kellie Toole	
Assoc Prof Sylvia Villios	
Prof Irene Watson	
Dr Kirrakee Watson	
Dr Claire Williams	

The Environmental and Natural Resources Law Research Unit (ENREL) recommends as follows:

Recommendation 1: Water law and governance in Australia be reformed to embed the right of Aboriginal and Torres Strait Islander peoples to self-determination.

Recommendation 2: the Committee on Aboriginal and Torres Strait Islander Water Interests should consult nationally, including with Commonwealth, state and territory governments, relevant sectors and stakeholders and Aboriginal and Torres Strait Islander peoples.

Recommendation 3: Water law and governance in Australia be reformed to embed Aboriginal knowledges.

Recommendation 4: the statutory exception for free take in the water management statutes across the Basin states be decoupled from the exercise of Native Title rights and instead apply to any use associated with traditional activities or cultural purposes.

Recommendation 5: Australia should recognise and implement the right to a clean and healthy environment, and the specific human right to water, in domestic law.

Recommendation 6: The Australian Government should coordinate efforts with the Basin states to improve the transparency and efficiency of enforcement actions relating to water theft.

Recommendation 7: The Australian Government and the Basin states should contemplate uniformalisation of their water management statutes in relation to enforcement powers and penalties.

Recommendation 8: The Australian Government should contemplate the creation of a Joint Water Theft Council to work in conjunction with the Inspector General of Water Compliance to develop consistent principles and approaches for addressing water theft.

Recommendation 9: All Australian jurisdictions should add a duty to cooperate to their relevant water statutes, to foster dialogue and consideration of impacts of decisions between and within states.

Recommendation 10: The minimum international law standards in the *UN Declaration on the Rights of Indigenous Peoples*, which identify a number of rights recognition approaches, should be considered when developing future water service provisions models. These approaches should apply to water service provision models across Australia, including regional and remote areas.

Information Request Part B – Secure, resilient and sustainable services

Overall Questions

- **How well do current arrangements support safe, secure and culturally appropriate water services for Aboriginal and Torres Strait Islander communities?**
- **Are there specific reforms to water service arrangements that would materially improve outcomes?**

First Peoples' sovereign rights to benefit from the resources of their territories is currently excluded from considerations of economic benefits for Aboriginal Peoples. First Peoples are generally excluded from the economy and are historically and contemporaneously excluded from non-Aboriginal commercial processes. Australian laws provide very little recognition of First Peoples' unceded sovereign rights in relation to our lands and natural resources, and this includes rights and relationships to water (Watson, 2018).

It is understood that the Committee on Aboriginal and Torres Strait Islander Water Interests provides guidance on developing the NWA to the National Water Committee and the Water Ministerial Council to elevate Aboriginal and Torres Strait Islander water interests and values: Committee on Aboriginal and Torres Strait Islander Water Interests - DCCEEW

However, there is little information available regarding the consultative and engagement mechanisms and whether the National Water Reform process is in alignment with Aboriginal People's international law right to self-determination. Of particular note is the lack of information regarding Australia's responsibility to recognise and apply the minimum standards in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in regard to self-determination and the inherent sovereign rights of First Peoples to care for country.

The publicly stated intention of the Committee on Aboriginal and Torres Strait Islander Water Interests is to provide guidance to the National Water Committee on developing the NWA and to the Water Ministerial Council on the elevation of Aboriginal and Torres Strait Islander water interests and values. The Aboriginal members of the Committee on Aboriginal and Torres Strait Islander Water Interests were chosen for their expertise on water management, knowledge of the Aboriginal cultural context of water, and ability to engage with First Peoples, but their inclusion in the structure appears tokenistic and as a model is unlikely to be able to fully engage with First Peoples and their knowledge systems, from within First Peoples' self-determining sovereign frameworks.

Aboriginal sovereignty as the basis for Aboriginal governance is not recognised and the right to self-determination is not upheld within current Australian water management laws. The structure which is currently in place is simply to advise, and does not embed the capacity of First Peoples to fully engage in an Aboriginal way of doing engagement and act as self-determining.

This National Water Reform process appears to enable participation, but participants retain only consultative roles rather than decision making power. For example, First Peoples are treated as 'stakeholders' alongside other water-rights holders, rather than as owners or custodians of water, with inherent sovereign rights to govern and manage.

We should also move away from western science biases. Environmental practice in this country mostly prioritises 'scientific values' as primary reasons for protection. Aboriginal knowledge is mostly treated as 'supplementary' or 'cultural data' rather than a valid, stand-alone evidence base for managing the environment. As a result, a protection approach is often drawn and based on evidential data – to the exclusion of the complex and deep cultural mapping in such instruments as Songlines and other Aboriginal knowledges (Watson 2025).

Recommendation 1: Water law and governance in Australia be reformed to embed the right of Aboriginal and Torres Strait Islander peoples to self-determination.

Recommendation 2: **the Committee on Aboriginal and Torres Strait Islander Water Interests should consult nationally, including with Commonwealth, state and territory governments, relevant sectors and stakeholders and Aboriginal and Torres Strait Islander peoples.**

Recommendation 3: **Water law and governance in Australia be reformed to embed Aboriginal knowledges.**

In addition to shifting away from western science biases, the statutory exception for free take in the water management statutes across the Basin states should be reconsidered.

The water licensing regime that operates throughout the Basin states and territories is complex. Categories and conditions of licence vary significantly between jurisdictions: see Croft and Giancaspro (2026). However, a common requirement is that, subject to some exceptions, any use or extraction in prescribed areas be licensed and, in many cases, that take is metred. The various water management statutes in each Basin state generally permit free take where this occurs in the exercise of native title rights: see, e.g. *Water Management Act 2000* (NSW), s 55; *Landscape South Australia Act 2019* (SA), ss 100, 221.

In Queensland, the relevant exception provision is slightly broader in that it is not tied to Native Title rights per se. Rather, s 95(1) of the *Water Act 2000* (Qld) provides: 'An Aboriginal party or Torres Strait Islander party may, in the area of the State for which the person is an Aboriginal or Torres Strait Islander party, take or interfere with water for

traditional activities or cultural purposes'. This free take exception is framed by reference to cultural identity and connection to Country, rather than the formal recognition or exercise of Native Title rights, and therefore extends to a wider class of persons and circumstances. In that respect, it constitutes a more expansive and practically accessible entitlement, decoupled from the evidentiary and doctrinal constraints associated with Native Title, and better accommodates the lived realities of traditional water use by Aboriginal and Torres Strait Islander peoples.

Recommendation 4: the statutory exception for free take in the water management statutes across the Basin states be decoupled from the exercise of Native Title rights and instead apply to any use associated with traditional activities or cultural purposes.

Theme 2: Governance, accountability and coordination

Roles, Responsibilities and accountability

- **How clearly defined are the differing roles of governments, regulators and service providers? How well are these roles communicated to customers and the general public?**

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. 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: see McKay 2005; Keremane and McKay 2012.

- **Are there areas of overlapping or fragmented responsibilities, and if so, what consequences arise?**

Australian federalism is 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* (Cth) and targeted programs, has produced overlapping responsibilities rather than integrated governance. 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 et al 2010).

Socio-legal analyses undertaken by McKay 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. These failures embed structural inequality

by transferring governance risk onto communities with limited political and financial capacity (McKay 2005; McKay 2011).

- **How well do existing accountability mechanisms (such as economic regulation, performance reporting, ministerial oversight or board governance) drive measurable performance improvement?**

Empirical research on water utilities has revealed 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 2005; McKay et al 2010).

- **How well do these existing accountability mechanisms engender broader community and customer trust in water services decision-making?**

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

- **What reforms would strengthen governments' accountability and improve outcomes?**

1. *The right to a clean, healthy and sustainable environment*

Professor McKay's recent research situates water governance within the emerging international recognition of the human right to a clean, healthy and sustainable environment. Recognition of this right—confirmed by United Nations resolutions and international human rights law—provides a normative foundation for water governance reform in Australia. 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.

Consistent with UN General Assembly Resolution 76/300, water governance reform must integrate environmental protection, public health, and human rights. 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 in a potential national Human Rights Act.

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. Equitable outcomes require differentiated governance solutions that reflect cultural, geographic, and socioeconomic realities rather than uniform regulatory models (McKay 2005). Strengthening Indigenous water governance is essential for justice, rebuilding institutional trust, and achieving long-term water and environmental sustainability (McKay 2011; Keremane et al 2014).

Recommendation 5: Australia should recognise and implement the right to a clean and healthy environment, and the specific human right to water, in domestic law.

2. Addressing water theft

Loch et al (2020) have developed a conceptual framework for understanding water theft and invited its empirical testing. The framework emphasises that inadequate recognition of the value of water, and of the consequences of illegal take for those who cannot access it, contribute to systemic failures across governance, legal, and institutional arrangements. These deficiencies, coupled with a low probability of detection and comparatively limited penalties, incentivise opportunistic and deliberate water theft by both individuals and corporations. This framework provided the analytical foundation for subsequent studies, including those examining Australian legal contexts.

Flawed legal frameworks, inadequate regulatory oversight, and anaemic enforcement efforts inhibit effective transboundary water management (Loch et al 2024). Effective deterrence mechanisms rely upon a strong culture of compliance, however the distinct disharmony between statutory water management regimes and enforcement efforts throughout the Basin states preclude the cultivation of such a culture.

Restructuring the broader regulatory framework governing water and adapting the tested and successful National Cabinet model to facilitate joint governance of the Murray-Darling Basin will lead to greater governmental accountability and also improve enforcement and management outcomes (Croft et al, forthcoming 2026). The authors further suggest the establishment of a Joint Water Theft Council (JWTC) to create a consistent set of principles for judicial determination of cases, as well as a common graduated sanction framework for water theft offences. The JWTC would cooperate with the Inspector General of Water Compliance to co-develop and implement JWTC initiatives.

An analysis of various water theft offences and institutional responses designed to detect and prosecute it throughout the Basin states determined that the New South Wales model is the most robust (Croft and Giancaspro, forthcoming 2026). Incorporating an independent and well-funded Natural Resources Access Regulator (NRAR), a specialist Land and Environmental Court (LEC) and a transparent prosecution strategy, New South Wales leads the way in preventing and addressing instances of water theft.

Harmonization of water laws and governance has not occurred, and enforcement powers and penalties in water management statutes should be made uniform (McKay, 2005).

3. Duty to cooperate

In the absence of uniform or harmonised laws and governance across the relevant Australian jurisdictions, McKay and others advocate imposing a duty to cooperate onto all Ministers and officials in the water supply businesses, including public and private sector actors, to foster dialogue and the consideration of impacts of decisions between and within States (Cook et al 2022). This duty mimics those found in international law (McKay 2019). A duty to co-operate will foster uniformity and accountability in governance, thereby furthering community and customer trust in decision-making.

Recommendation 6: The Australian Government should coordinate efforts with the Basin states to improve the transparency and efficiency of enforcement actions relating to water theft.

Recommendation 7: The Australian Government and the Basin states should contemplate uniformalisation of their water management statutes in relation to enforcement powers and penalties.

Recommendation 8: The Australian Government should establish a Joint Water Theft Council to work in conjunction with the Inspector General of Water Compliance to develop consistent principles and approaches for addressing water theft.

Recommendation 9: All Australian jurisdictions should add a duty to cooperate to their relevant water statutes, to foster dialogue and consideration of impacts of decisions between and within States.

- **Are there formal partnership arrangements in place between Aboriginal and Torres Strait Islander people and governments to support joint decision-making? How could these partnerships be strengthened?**

The right of self-determination should become and remain core to developing Aboriginal governance models. Evidence of the effectiveness of Aboriginal governance models is across pre-colonial history, in the pristine environment which they maintained and which sustained hundreds of diverse First Peoples/Nations.

Theme 3: Regional, remote and equity considerations

Alternative models for service provision

- **What examples are there of (alternative) service provision models that would support self-determination for Aboriginal and Torres Strait Islander communities and drive improved outcomes in regional and remote areas?**

The minimum international law standards regarding the rights of First Peoples - as referred to above and in UNDRIP - identify a number of rights recognition approaches which must be considered when developing future water service provisions models for regional and remote areas. We note that these future models should be applied across the continent and not limited by colonial geographical constructs of 'regional and remote'.

The standards provide for recovering Aboriginal models and knowledges which would make a positive contribution to the current and future climate-change challenges. In particular, there are articles of UNDRIP which should assist in the design and development of models for service provision and they include: articles on the right to self-determination; articles on retaining connection to country and proscribing forcible removal; articles on the recovery and maintenance of Aboriginal knowledges, culture and law; articles on free, prior and informed consent to be obtained in all negotiations with First Peoples; and numerous others which are core to respecting and centring Aboriginal values and principles in building for the future.

Recommendation 10: The minimum international law standards in the *UN Declaration on the Rights of Indigenous Peoples*, which identify a number of rights recognition approaches, should be considered when developing future water service provisions models. These approaches should apply to water service provision models across Australia, including regional and remote areas.

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