



ABN 94 806 492 396  
PO Box 2747  
Broome WA 6725

E: [ceo@martuwarra.org](mailto:ceo@martuwarra.org)

Productivity Commission  
GPO Box 1428  
Canberra City ACT 2601 Australia

Per: online submission

## **National Water Reform 2024**

### **Please Note.**

**This submission represents the views of the Martuwarra Fitzroy River Council. Anne Poelina is the Chair of the Council. She is also currently an Associate Commissioner at the Productivity Commission on the inquiry into National Water Reform. Anne was not involved in discussions about, or drafting of, this submission.**

Dear Commissioners

### **Submission to the Productivity Commission Inquiry on the 2004 Intergovernmental Agreement on a National Water Initiative**

Please find herewith, the submissions of the Martuwarra Fitzroy River Council to the Productivity Commissions Inquiry. We will be happy to address any queries you may have about the submissions, either in person or in writing.

### **The Martuwarra Fitzroy River Council**

The Martuwarra Fitzroy River Council is an Indigenous led organisation, guided by a diverse representation of senior elders with cultural authority, knowledge holders on the front line, defending against the destruction of cultural heritage, ecological damage, poverty and climate change.

The Martuwarra (Fitzroy River) is an iconic, heritage listed and unregulated river system of global significance. The environmental and cultural values are recognised in both the Western Australian Aboriginal Cultural, and National Heritage, Listings.

Our vision is to ensure Martuwarra, a living ancestor and a global treasure, retains a right to live and flow. We consider Martuwarra to be communal property, an 'asset in the commons' that belongs to all of us. The River must be protected for the benefit of all present and future generations.

### **The Productivity Commission's tasks**

The Productivity Commission was tasked with providing recommendations:

1. on actions that the parties to the [Intergovernmental Agreement on a National Water Initiative (NWI)] might take to better achieve the objectives and outcomes of the NWI;
2. to support all Australian governments in efforts to progress national water reform in light of current priorities, including water security and the involvement of First Nations communities in water management;
3. on how the Australian Government can better utilise the [*Water Act 2007* (Cth), Water Act]] as a framework for guiding national water reform policy.

### **The focus of these submissions**

The focus of these submissions is primarily on the requirement to consider the involvement of First Nations communities in water management, with particular reference to the Fitzroy River Catchment in the north of Western Australia. However, of course the issues that are relevant for the Fitzroy River Catchment occur within a context, making consideration of other issues necessary.

The commission indicated that, due to time constraints, they were unable to address item 3 in the Interim report. Clearly, consideration to the place of the Water Act in water management is important and it is essential that there be an opportunity to comment on an interim report, at a later date.

### **Recommendations**

#### **Comment on the guiding principles of the 'National Water Reform 2024' inquiry**

1. that the Productivity Commission promotes the principle that Indigenous rights in water resources and environmental outcomes are assessed in all forums, on an equal footing to commercial proposals, as an integral principle in the new NWI.
2. that the Productivity Commission supports inclusion in the new NWI, of the framework to ensure that the equal footing given to Indigenous rights in water resources and environmental outcomes is effectively implemented.

## **Indigenous water access rights**

3. That the Productivity Commission supports definitive provisions that acknowledge that entitlement to water resources inheres in Indigenous communities, arising out of their prior, long-term occupation of their country.
4. That the productivity commission supports provisions that are unqualified, do not depend on political processes to be effected and do not require enactment of legislative provisions before they arise.
5. That the Productivity Commission support the position that the inherent right to water entitlements carries with it the concomitant right to participate in decisions on water resource management for the waters of relevant Indigenous communities, for both surface and groundwater resources.
6. That the Productivity Commission refrain from proposing the use of ILUA's as a substitute for, or adjunct to, formal recognition of the existence of inherent Indigenous water rights.
7. That the Productivity Commission supports the right of Indigenous Communities to deal autonomously with their water access entitlements and to apply them as they see fit, except in so far as they choose to consult and/or cooperate with other interested parties.
8. That the Productivity Commission supports recognition that requiring Indigenous communities to address social justice and environmental issues, in conjunction with managing water access entitlements, is inappropriate and each must be addressed separately and on their own terms.

## **Economic considerations – unconstrained mining activity**

9. In order to better protect Australia's water resources, that the Productivity Commission supports the retention of oversight of proposals that attract the 'water trigger', within the Commonwealth jurisdiction and further, that the Productivity Commission supports strengthening of the water trigger so that there are :  
  
clear, ambitious and legally enforceable outcomes for water ... supported by a deep structural reform of the water trigger and the powers of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC).<sup>1</sup>
10. That the productivity Commission supports inclusion in the new NWI, the requirement that equal weight be given to assessing the impacts associated with

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<sup>1</sup> Currell, above n. 24, p. 1.

climate change and the impacts associated with the solutions proposed to mitigate climate change, in particular solutions that require increased mining.

11. That the Productivity Commission supports a recommendation that the water trigger in the EPBC Act be expanded to include assessment of any mining development that will have a significant impact on water resources.

### **Economic considerations – water markets**

12. That the Productivity Commission promotes recognition of the fact that privatisation of water resources has the potential to increase inequality in Australia, particularly for Indigenous communities who are already seriously compromised.
13. That the Productivity Commission supports the introduction of effective measures to reduce the potential for privatisation of water resources to increase inequality in Australia, particularly for Indigenous communities.
14. That the Productivity Commission supports the commitment to provide water access entitlements that address not just physical and cultural needs, but also economic needs that allow Indigenous communities to engage in commercial activities as determined by the community concerned.

### **Compliance and enforcement**

15. That the productivity Commission support full exploration of the relationship between private interests and the new provisions directed to affording Indigenous communities water access entitlements, to avoid conflict and to ensure that Indigenous water access entitlements are not, and cannot be, subsumed by private interests.
16. That the productivity commission support the right of Indigenous communities to participate in the development of the new provisions, and supports the provision of resources, including financial resources to facilitate their participation.

### **Submissions**

#### **Comment on the guiding principles of the ‘National Water Reform 2024’ inquiry**

‘If you always do what you’ve always done,  
you always get what you’ve always gotten.’<sup>2</sup>

In undertaking their review, the Productivity Commission is required to consider “the objectives provided for in clause 23 of the NWI”. Clause 23 provides:

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<sup>2</sup> Attributed to Jessie Potter by ‘The Milwaukee Sentinel’ of Milwaukee, Wisconsin in 1981. The phrase has been attributed to Henry Ford but there is no evidence to support this. (Quote Investigator, (2016, 25 April), retrieved 21 April 2024 from the Quote investigator website: <https://quoteinvestigator.com/2016/04/25/get/>)

Full implementation of this Agreement will result in a nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that *optimises economic, social and environmental outcomes* (emphasis added).

A market-based system is:

a system organized so that companies, prices, and production are controlled naturally by the supply of and demand for goods and services, *rather than by a government* (emphasis added)<sup>3</sup>

A regulatory system is:

a system that makes sure that a person, business, or institution is conforming to laws and procedures designed to create and promote fair practice<sup>4</sup>

A planning system is a subset of a regulatory system so is not specifically addressed here.

The primary objective of the 'neoliberal' market-based system that has prevailed in Australia since the early 1970's, has been to reduce as far as possible, restrictions on the operation of markets. Joseph Stiglitz<sup>5</sup> defines neoliberalism as:

the idea that free and unfettered markets are efficient, stable and maximise societal welfare and individual freedom.<sup>6</sup>

He considers that this view of the world is demonstrably wrong and: 'should have been thrown into the dustbin of history', stating:

capitalism, at least in the neoliberal version, creates people who put values and ethics on the back burner ... (but) As discredited as neoliberalism might be, it won't fade until we create an alternative model for how the economy might work.<sup>7</sup>

He cites Treasurer Jim Chalmers' essay, 'Capitalism after the crises'<sup>8</sup> with qualified approval, stating:

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<sup>3</sup> Online Cambridge Dictionary: retrieved 21 April 2024 from the Cambridge Dictionary website: <https://dictionary.cambridge.org/dictionary/english/market-based>

<sup>4</sup> Online World Law Dictionary: retrieved 21 April 2024 from the World Law Dictionary website: <https://dictionary.translegal.com/en/clearing-system/noun>

<sup>5</sup> An American economist and professor at Columbia University, the co-chair of the High-Level Expert Group on the Measurement of Economic Performance and Social Progress at the OECD, and the chief economist of the Roosevelt Institute, he was awarded the Nobel Memorial Prize in Economic Sciences in 2001.

<sup>6</sup> Stiglitz, J. E., (2023, February 23), 'Australia and the post-neoliberal order', *The Monthly*, Schwartz Media, Collingwood, Victoria.

<sup>7</sup> Stiglitz, above n. 5.

<sup>8</sup> Chalmers, J. (2023, February 23), 'Capitalism after the crisis', *The Monthly*, Schwartz Media, Collingwood, Victoria.

Chalmers emphasises a values-driven capitalism, but I would go further: we need a market economy that not only reflects values but encourages and develops these values from the outset. GDP, markets and market prices do not reflect and incorporate much that is important.<sup>9</sup>

The 2004 NWI's provision for market-based water resource management is not necessarily consistent with protecting Indigenous water rights and the environment. The inherent demands of a market-based system regularly require challenging of the legitimate protective measures intended to maintain the integrity of Indigenous water rights and the environment. Where systems are in conflict it usually means that neither system is effective, and that one system is given priority over others.

Implementation of the NWI has been relatively successful in establishing water markets for a limited number of water reservoirs (Note: the argument here is that the market-based system was more or less successfully introduced. It is most emphatically not that a market-based system gives the best outcome for water resources). The NWI has been considerably less successful at achieving satisfactory environmental outcomes and has not really addressed Indigenous rights in water resources. Commercial ventures have been prioritised by government institutions assessing proposals for water use, at least in part, because of the perceived economic benefits that will accrue to the relevant state and Australia. As stated by Commissioner Brett Walker, powerful interests have applied substantial pressure to wind back provisions for environmental protection.

As a result of the fallout from the Guide in 2010 and 2011, the MDBA, and perhaps those advising it, came under pressure to reduce the proposed recovery amount, which could be achieved if they were to adopt a triple bottom line approach to the construction of the Water Act.<sup>10</sup>

Some commercial interests have bypassed the system altogether with no or minimal consequences.<sup>11</sup>

The perception that a market-based system promotes the best outcomes, made it almost inevitable that the part of the NWI that would be more fully implemented was water markets. The dramatic failures of market-based systems since the introduction of the NWI, in particular, the failure to effectively navigate the global financial crises and the crises resulting from the covid pandemic, has undermined this perception. Its primacy is being challenged even in such stringently market focused institutions as the IMF. Two recent papers illustrate this more questioning approach:

1. In his paper, 'Rethinking economics', Angus Deaton,<sup>12</sup> acknowledges that he has changed his mind on the primacy of markets. He wrote:

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<sup>9</sup> Stiglitz, above n. 5.

<sup>10</sup> Commissioner Bret Walker SC, (2019), *Murray-Darling Basin Royal Commission Report*, Murray Darling Basin Royal Commission, South Australia, p. 197.

<sup>11</sup> Australian Broadcasting Commission, (2017, July 24), *Pumped*, retrieved 21 April 2024 from the ABC website: <https://www.abc.net.au/news/2017-07-24/pumped/8727826>.

<sup>12</sup> The Dwight D. Eisenhower Professor of Economics and International Affairs, Emeritus, at the Princeton School of Public and International Affairs at Princeton University. He is the 2015 recipient of the Nobel Memorial Prize in Economic Sciences.

Our emphasis on the virtues of free, competitive markets and exogenous technical change can distract us from the importance of power in setting prices and wages, in choosing the direction of technical change, and in influencing politics to change the rules of the game. Without an analysis of power, it is hard to understand inequality or much else in modern capitalism.<sup>13</sup>

He went on to say:

Efficiency is important, but we valorize it over other ends. ... when efficiency comes with upward redistribution - frequently though not inevitably - our recommendations become little more than a license for plunder ... social justice became subservient to markets and a concern with distribution was overruled by attention to the average, often nonsensically described as the “national interest.”<sup>14</sup>

2. In her paper ‘A New Compass for Economics’ Kate Raworth<sup>15</sup> wrote:

... when post-war economic thought adopted growth as its de facto goal, GDP became the economist’s compass: it depicted progress as an exponential curve, measured with the single metric of monetary value in pursuit of endless increase, ... The impact of wealthy countries continuing to prioritize GDP growth over tackling inequality and protecting the living world is now all too clear. This century, we need a far more ambitious and holistic goal: human flourishing on a thriving, living planet ... (that) prioritizes the essential needs and rights of every person ... (recognizing) that the health of all life depends upon protecting Earth’s life-supporting systems ...<sup>16</sup>

The context within which the Productivity Commission’s enquiry has been framed risks perpetuating a system which continues to be dysfunctional for the environment and Aboriginal communities and promotes the inadequacies of the current market-based system. As a preliminary measure, Indigenous water rights and the environment must be explicitly given at least the same standing in water resource management decisions, as commercial interests. The United States Bureau of Land Management has recently amended its regulations so that the Public Lands Rule:

will guide balanced management of America's public lands now and for the future ... (and) help safeguard (their health) for current and future generations by ensuring that we:

- protect clean water and wildlife habitat;
- restore lands and waters that need it, and

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<sup>13</sup> Deaton, A., (2024, March), ‘Rethinking Economics’, *Finance and Development*, International Monetary Fund, Washington, p. 20.

<sup>14</sup> Deaton above n. 9.

<sup>15</sup> The author of the book ‘Doughnut Economics: Seven Ways to Think Like a 21<sup>st</sup> Century Economist’, she teaches at Oxford University’s Environmental Change Institute.

<sup>16</sup> Raworth, K. (2024, March), ‘A New Compass for Economics’, *Finance and Development*, International Monetary Fund, Washington, p. 12.

- make informed management decisions based on science, data and *Indigenous knowledge (emphasis added)*.

The change is intended to recognize:

conservation as an essential component of public lands management, *on equal footing with other multiple uses of these lands (emphasis added)*<sup>17</sup>

In their Final Report to Government the productivity Commission has a real opportunity to support meaningful reform that will provide real benefits to Aboriginal Australians and the environment because of:

- the current governments recognition that market-based systems have clear limitations, as expressed by Commissioner Chalmers; and
- the changing international approach to more equitably balancing the demands of a market economy and Indigenous water rights and environmental protection.

### **Recommendation 1**

That the Productivity Commission promotes the principle that Indigenous rights in water resources and environmental outcomes are assessed in all forums, on an equal footing to commercial proposals, as an integral principle in the new NWI.

### **Recommendation 2**

That the Productivity Commission supports inclusion in the new NWI, of the framework to ensure that the equal footing given to Indigenous rights in water resources and environmental outcomes is effectively implemented.

### **Indigenous water access rights**

It must be acknowledged that water resource management sits within a highly complex matrix of laws, policies and cultural practices. As water reservoirs come close to and pass full allocation of available resources, the need for effective legislative regimes, based on the best available science, that incorporate the capacity for full and equitable consideration of all competing claims, becomes increasingly urgent. The Western Australian government has apparently shelved developing of water resource plans, including for the Fitzroy River catchment, until 2025, but does not intend to delay issuing of water licences. Deferring the implementation of water resource plans deprives Indigenous communities and the environment of even the minimal protections afforded by the NWI.

On 21 December 2023, the Western Australian government announced that it was scrapping its water reform agenda, preferring to take:

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<sup>17</sup> Bureau of Land Management, (2024, April 18), Public Lands Rule, retrieved 21 April 2024 from the Bureau of Land Management website: <https://www.blm.gov/public-lands-rule>.

a more practical approach to water resource management (remaining) committed to supporting economic growth and jobs by improving processes for environmental approvals and reducing green tape (with priority being) given to supporting timely processing of licence applications and investigations and helping the broader community to preserve our precious water resources.<sup>18</sup>

This announcement was despite the release on 23 October 2023 of:

key policy positions that will form the basis for the Fitzroy water allocation plan, as part of its ongoing commitment to protecting the Fitzroy River while supporting economic development.<sup>19</sup>

The only reason given for this complete reversal of position was that it resulted from feedback from water users and stakeholders.<sup>20</sup> The result is that the W.A. government has resiled from its commitments pursuant to the NWI.

Had the Western Australian government complied with the terms of the 2004 NWI, pursuant to clause 52, Indigenous communities would have had a right:

- to a water resource entitlement, although it may have been restricted to use for ‘indigenous and cultural purposes’;
- to be represented in water planning forums ‘whenever possible’; and
- to the implementation of strategies for meeting their social, spiritual and customary objectives ‘wherever they can be developed’.

These entitlements are heavily qualified and the terms on which access is given is governed by the decisions of others. However, they acknowledge the existence of Indigenous water rights.

Further provisions, referable to the definition of ‘environmental and other public benefit outcomes’, ‘may’ apply to ‘indigenous and cultural values’. Whether or not they do apply is more a political decision than a legal decision because of the terms in which the definition is framed. The definition provides that what is included in ‘environmental and other public benefit outcomes’ are defined during the water planning process and set out in individual plans, and ‘may’ include ‘indigenous and cultural values’.

What needs to be acknowledged, is that, in Western Australia, Indigenous communities have not even achieved the meagre standards established by the NWI because of the failure of the Western Australian government to implement its commitments. The decision to continue to issue water licences as determined by the Department of Water

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<sup>18</sup> Minister McGurk, retrieved 22 April 2024 from the W.A. website: <https://www.wa.gov.au/government/media-statements/Cook-Labor-Government/Water-priorities-reset-to-focus-on-practical-measures-20231221>.

<sup>19</sup> Ministers McGurk, Jarvis and Whitby, retrieved 22 April 2024 from the W.A. Government website: <https://www.wa.gov.au/government/media-statements/Cook-Labor-Government/Fitzroy-River-Water-Planning-reaches-significant-milestone-20231023>.

<sup>20</sup> McGurk above n. 17.

and Environmental Regulation, explicitly excludes Indigenous communities from participating in water resource management planning and decisions.

### **Recommendation 3**

That the Productivity Commission supports definitive provisions that acknowledge that entitlement to water resources inheres in Indigenous communities, arising out of their prior, long-term occupation of their country.

### **Recommendation 4**

That the productivity commission supports provisions that are unqualified, do not depend on political processes to be effected and do not require enactment of legislative provisions before they arise.

### **Recommendation 5**

That the Productivity Commission support the position that the inherent right to water entitlements carries with it the concomitant right to participate in decisions on water resource management for the waters of relevant indigenous communities, both surface and groundwater resources.

The Productivity Commission points to ILUA's as a possible route to achieving water resource rights, citing the 'Yamatji Nation Indigenous Land Use Agreement' as an example. Unfortunately, only an extract of the Agreement is available on the National Native Title Tribunal website, so it is not possible to evaluate it on its own terms. What is apparent is that at best ILUA's will create a very piecemeal approach to creating Indigenous water rights. It also risks excluding traditional custodians of particular water resources because traditional custodians are not necessarily the same persons as those who hold native title. While, pursuant to section 24BD(3) of the *Native Title Act 1993* (Cth), 'any ... person or persons may be parties' to an ILUA, the coverage of the ILUA is confined to matters set out in section 24BB, which are solely concerned with native title issues. This heavily constrains its application to water resource management and does not create any inherent entitlement to water resources. At best it is a very poor mechanism for acknowledging and protecting Indigenous water rights.

### **Recommendation 6**

That the Productivity Commission refrain from proposing the use of ILUA's as a substitute for, or adjunct to, formal recognition of the existence of inherent Indigenous water rights.

The Productivity Commission discusses access to water entitlements to achieve cultural objectives in part 2.3. We welcome recognition of the importance of water to achieve cultural objectives but reject the idea that Aboriginal people are confined to applying their water entitlements to achieve their cultural objectives. While acknowledging that an outcome of providing Indigenous communities with water access entitlements, may be to improve social outcomes, we also reject the idea, suggested by the Productivity Commission in their discussion of the 'National Agreement on Closing the Gap', that

Indigenous water access entitlements should be used to overcome social disadvantage. Additionally, we reject the idea that the aspirations of Aboriginal people and for the environment are necessarily the same. Each of these issues is critically important to Aboriginal people and each certainly needs to be addressed. However, the allocation of water access entitlements is a separate issue and how any entitlement is used must be left to the communities concerned.

A concerning feature of the NWI is that where water entitlements are afforded to Aboriginal people they are 'managed' by outside entities, for example in clause 35(iii). Clause 35 provides:

Water that is provided by the States and Territories to meet agreed environmental and *other public benefit outcomes* as defined within relevant water plans:

- iii) if held as a water access entitlement, may be made available to be traded (where physically possible) on the temporary market, when not required to meet the environmental and *other public benefit outcomes* sought and provided such trading is not in conflict with those outcomes. (emphasis added)

Clause 79(i)(e) makes 'environmental water managers' responsible for trading activity. To be able to fully realise the benefits of their water entitlements, Indigenous communities must be considered capable of managing those entitlements as they see fit. The other issues referred to above, that have been conflated with Indigenous access entitlements, must be dealt with separately on their own terms.

### **Recommendation 7**

That the Productivity Commission supports the right of Indigenous Communities to deal autonomously with their water access entitlements and to apply them as they see fit, except in so far as they choose to consult and/or cooperate with other interested parties.

### **Recommendation 8**

That the Productivity Commission supports recognition that requiring Indigenous communities to address social justice and environmental issues, in conjunction with managing water access entitlements, is inappropriate and each must be addressed separately and on their own terms.

### **Economic considerations – unconstrained mining activity**

The Productivity Commission has focussed considerable attention on the impact climate change will have on water security but has not addressed an equally important issue for water security. That issue is the impact that purported solutions to climate change are having and will continue to have. Whether there are enough essential minerals to support the transition to alternative energy sources and to maintain the necessary infrastructure indefinitely, is still the subject of vigorous debate. It is an important issue

because supplying the required resources depends on a substantial increase in exploration and mining, the extent of which is as yet unknown. As a consequence of the perceived urgency to solve climate change, governments are ramping up exploration and mining approvals without giving due consideration to the consequences. Mining requires access to substantial quantities of water and has social and environmental impacts that, unless effectively managed, could have far more serious consequences than climate change.

We can survive in a hotter climate. Compare the environment that northern Europeans survive in with the environment that Australians survive in. Even though we are living in a hotter climate we survive equally well, possibly better than they do. Research conducted by the Breakthrough Institute estimated that:

about 5.1 million excess deaths per year are associated with non-optimal temperatures. Of those, 4.6 million are associated with colder than optimum temperatures, and 0.5 million are associated with hotter than optimum temperatures.<sup>21</sup>

This is not to minimise the problems associated with climate change, only to point out that there is an argument for developing a more nuanced approach to solving them because we cannot survive without adequate, potable water. Without a considered approach to assessing mining proposals and their potential impact on water resources, the risk of long term or permanent damage to water reservoirs is high.

The cost of cleaning up the mess caused by poorly assessed mining proposals, can far outweigh any benefit to Australia and to the community affected by the mining activity. An example of the high costs of poorly regulated mining projects is currently being dealt with in British Columbia, on the lands of the Tlingit and Tahltan peoples. They regard the Taku River as sacred but, despite this, a copper, lead, zinc and gold mine was established on the Tulsequah River in 1951. The mine is located about 10 km upstream from the Tulsequah's intersection with the Taku River. It only operated for about six years. Even so, over the intervening years heavy metals have been leaching into the Taku river, causing health and environmental problems for the resident communities and resulting in an estimated cost to the taxpayer of 72 million Canadian dollars, or approximately 81 million Australian dollars.<sup>22</sup> This estimate only accounts for clean-up costs and does not include health costs to the communities affected by the pollutants. This is a historical example involving a mine in another country and it might be argued that Australia does it better and/or better now. However, the problems associated with the Cadia gold mine in NSW, make this a dangerous assumption.<sup>23</sup>

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<sup>21</sup> Brown, P. (2022, December 1), *Human Deaths from Hot and Cold Temperatures and Implications for Climate Change*, retrieved 23 April 2024 from the Breakthrough Institute website: <https://thebreakthrough.org/issues/energy/human-deaths-from-hot-and-cold-temperatures-and-implications-for-climate-change>.

<sup>22</sup> Fionda, F., Jones, J. and Wang, C., (2024, February 22), 'B.C.'s multimillion-dollar mining problem', *The Globe and Mail*, retrieved 23 April 2024 from the Globe and Mail website: <https://www.theglobeandmail.com/business/article-british-columbia-mining-cleanup-costs-investigation/>

<sup>23</sup> NSW EPA, (2024, 12 March), Cadia Gold Mine, retrieved 23 April 2024 from the NSW EPA website: <https://www.epa.nsw.gov.au/working-together/community-engagement/updates-on-issues/cadia-gold-mine>

The Fitzroy River Catchment is subject to a very large number of mining proposals including a proposal to undertake fracking activity by Bennett Resources Pty Ltd, a wholly owned subsidiary of Black Mountain Energy. Bennett Resources has recently lodged an application for a water licence for 102,800 kL of water. This application only relates to exploration activities. It is assumed that, in the event that the exploration activities are successful, much larger quantities of water will be required. The EPBC Act was amended in December to require proposals to extract unconventional gas to be assessed for their impact on water resources (the expanded 'water trigger'). There are problems with the operation of the 'water trigger', as pointed out by Professor Currell<sup>24</sup> and Janice Baird in their report 'Reform of the EPBC Act Water Trigger'. They concluded:

there is compelling evidence that Australia's water resources and the species that depend upon them for survival are not adequately protected by the current regulatory framework. The structure and operation of the water trigger do not achieve the fundamental objects of the EPBC Act, which include the protection of the environment and the conservation of biodiversity and ecological integrity ... the lack of clear, strong and legally enforceable environmental outcomes for water will fail to ensure that the health, diversity and productivity of water resources are maintained by the present generation for the benefit of future generations.<sup>25</sup>

As matters now stand, Bennett Resources must submit their proposal to the scrutiny of the Commonwealth environment minister. Inadequate as the process is, it has the potential to become worse. In a report in the Guardian, Lisa Cox notes that the terms of the current EPBC Act prevent the Commonwealth from delegating its decision-making powers under the water trigger, to state and territory governments. A draft of new provisions, presented to environment and business groups, appears to remove this guarantee. If the provision is removed states and territories could be accredited to undertake the assessment.<sup>26</sup>

Ms Cox quoted Georgina Woods from Lock the Gate, who commented in the following terms:

It is not in the national interest to allow state and territory governments free rein to put precious water resources at risk from coal mining and unconventional gas. We're talking about the lifeblood of the continent and decisions with centuries-long consequences.

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<sup>24</sup> Professor Currell is a Professor (Environmental Engineering) and Professor at the Australian Rivers Institute, at Griffith University. Janice Baird is a Principal at Earth & Every, a multidisciplinary public interest environmental advocacy practice.

<sup>25</sup> Currell, M. and Baird, J., (n.d.), *Reform of the EPBC Act Water Trigger*, retrieved 23 April 2024 from the Lock the Gate website: [https://assets.nationbuilder.com/lockthegate/pages/8572/attachments/original/1707199707/Water\\_Trigger\\_Report\\_2024.pdf?1707199707](https://assets.nationbuilder.com/lockthegate/pages/8572/attachments/original/1707199707/Water_Trigger_Report_2024.pdf?1707199707), p. 26.

<sup>26</sup> Cox, L. (2024, 02 April), *Labor's proposed changes to water trigger laws could have 'centuries-long consequences'*, *environment groups say*, retrieved 23 April 2024 from the Guardian website: <https://www.theguardian.com/australia-news/2024/apr/02/labor-water-trigger-laws-environment-impact-coal-seam-gas>

## **Recommendation 9**

In order to better protect Australia's water resources, the Productivity Commission supports the retention of oversight of proposals that attract the 'water trigger', within the Commonwealth jurisdiction and further, that the Productivity Commission supports strengthening of the water trigger so that there are :

clear, ambitious and legally enforceable outcomes for water ... supported by a deep structural reform of the water trigger and the powers of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC).<sup>27</sup>

## **Recommendation 10**

That the productivity Commission supports inclusion in the new NWI, the requirement that equal weight be given to assessing the impacts associated with climate change and the impacts associated with the solutions proposed to mitigate climate change, in particular solutions that require increased mining.

## **Recommendation 11**

That the Productivity Commission supports a recommendation that the water trigger in the EPBC Act be expanded to include assessment of any mining development that will have a significant impact on water resources.

## **Economic considerations – water markets**

Devolving water resource management to market forces was a key objective of the NWI, ostensibly on the basis that it would lead to greater efficiency in the allocation of water resources. The name given to this market-based approach to allocation of resources is neoliberalism. Louis Menard<sup>28</sup>, writing in the New Yorker describes neoliberalism as an ideology that:

thinks the state should play a smaller role in managing the economy and meeting public needs, ... (opposes) obstacles to the free exchange of goods and labor ... (letting) the market find solutions.<sup>29</sup>

Neoliberal philosophy assumes that:

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<sup>27</sup> Currell, above n. 24, p. 1.

<sup>28</sup> Louis Menand is the Lee Simpkins Family Professor of Arts and Sciences and the Anne T. and Robert M. Bass Professor of English at Harvard University. He contributed to The New Yorker from 1991 and became a staff writer in 2001. His book "The Metaphysical Club" was awarded the 2002 Pulitzer Prize for history and the Francis Parkman Prize from the Society of American Historians. His book "The Free World: Art and Thought in the Cold War", published in 2021 was named a notable book of the year by the New York Times Book Review. In 2016, he was awarded the National Humanities Medal by President Barack Obama.

<sup>29</sup> Menand, L. (2023, July 17), *The Rise and Fall of Neoliberalism*, retrieved 23 April 2024 from the New Yorker website: <https://www.newyorker.com/magazine/2023/07/24/the-rise-and-fall-of-neoliberalism>.

freeing markets increases productivity and competition (and lowers) prices, and that markets regulate themselves more efficiently than administrators can.<sup>30</sup>

Markets require a form of private ownership of the goods and services exchanged in the market-place. In the NWI the goods traded in the water markets are 'water access entitlements', defined as:

a perpetual or ongoing entitlement to exclusive access to a share of water from a specified consumptive pool ...

Clause 31 prescribes the features of water access entitlements. Ownership is not associated with ownership of land and is recorded in publicly accessible, reliable water registers. An entitlement specifies the essential characteristics of the water product being traded. They are exclusive, that is, the owner can exclude others from the benefit of the entitlement. They can be traded; given; bequeathed or leased; subdivided or amalgamated; and mortgaged. The terms of the entitlement are enforceable and can be enforced. To all intents and purposes water entitlements are real property, similar in character to land.

What is clear from clause 31 is that something that was once owned by government on behalf of all Australians, was transferred into private ownership once water markets were established. Water access entitlements have become a private asset. In his book 'Capital in the 21<sup>st</sup> century', Thomas Piketty<sup>31</sup> provides an exhaustive analysis of the relationship between capital and income over three centuries, using France, Britain and the USA as case studies. His thesis is that historically, the returns to capital are greater than the returns to income. This allows those who accumulate capital, by whatever means, to increase their wealth at a faster rate, on average, than those who rely on income, exacerbating inequality over time. In Piketty's words:

The principle destabilising force has to do with the fact that the private rate of return on capital,  $r$ , can be significantly higher for long periods of time, than the rate of growth of income and output,  $g$  ... This inequality expresses a fundamental logical contradiction. The entrepreneur inevitably tends to become a rentier, more and more dominant over those who own nothing but their labour. Once constituted capital reproduces itself faster than output increases.<sup>32</sup>

Of course, those on higher incomes have more opportunities to acquire capital, allowing them to accelerate wealth accumulation. When water was owned by governments the only reason to hold water entitlements was to use the water in productive enterprise. Once entitlements became private assets, this imperative changed. The objective for investors is to accumulate wealth by buying something

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<sup>30</sup> Menard, above n. 28.

<sup>31</sup> Thomas Piketty is Professor of Economics and Economic History at École des Hautes Études en Sciences Sociales (School of Advanced Studies in the Social Sciences) and at the Paris School of Economics. He is also co-director of the World Inequality Lab and the World Inequality Database, and one of initiators of the Manifesto for the democratization of Europe. He is the author of several books including *Capital in the 21st century* (2014), *Capital and ideology* (2020) and *A Brief History of Equality* (2022).

<sup>32</sup> Piketty, T., (2017), *Capital in the 21<sup>st</sup> Century*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, translated by A. Goldhammer, p. 746.

relatively cheaply and selling it at a higher price. When water access entitlements were converted to private assets those who held them immediately increased their wealth by the value of the entitlement they held. Those who were income poor and who often lacked sufficient knowledge to appreciate the value of what they had and/or how to benefit from it, sold their entitlements to investors. As at 2019, 14% of water trades were by persons (individuals or corporations), who do not own land.

Successful investors can afford to hold assets until they can lease or sell them for a profitable return, thereby further increasing their wealth. They may, but do not have to, use their entitlement for socially advantageous activities, for example, they can apply the water entitlement to productive agriculture (either themselves or by leasing it to an agricultural enterprise) but equally, they can apply it to maintaining verdant gardens and luxury swimming pools, it is their choice.

The Productivity Commission's interim report expressed the firmly held neoliberal belief that:

consistent trading rules allow water to be moved to its highest value use

There are two things that are glossed over by this catchphrase. The first is why consistent trading rules necessarily return that outcome. One of the clearly identified failings of free markets is that for most people they have incomplete knowledge. Trading in a water market requires specialised knowledge making it more accessible to those who do so regularly compared to those who do so intermittently. Investors are far more likely to operate regularly compared to farmers, for example, or to have 'people' who do it for them. The same rules apply to both types of operators, but incomplete knowledge makes water markets far less accessible for water users compared to investors.

The second thing that is glossed over is 'value' to whom. Governments measure value based on how much money a product brings into the economy. However, they neglect both social and economic costs associated with the replacement of one enterprise with another, for example, in the Murray Darling Basin production of almonds:

is now the largest crop grown in the lower Murray, with more than 45,000 hectares planted (but) almonds are also the most water-intensive (crop).<sup>33</sup>

Almonds replaced crops such as grapes, oranges and olives, which are far less water intensive but return a smaller profit. The water demand of almonds is a boon for investors because the value of the crop means almond producers can afford to pay higher prices for their water. In times of water scarcity, they have to pay higher prices to survive. This means that other products, such as grapes, oranges and olives, can be priced out of the market, forcing farmers to leave their farms or replace their crops with more almonds. The products that farmers are no longer producing must be imported, imposing a cost on the Australian economy, not the least because of a reduction in food

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<sup>33</sup> Kennedy, E. and Mackintosh, A., (2024, 9 February), Water-intensive almonds now the largest crop grown in the lower Murray amid call for moratorium, retrieved 24 April 2024 from the ABC website: <https://www.abc.net.au/news/rural/2024-02-04/almond-industry-expanding-in-australia-high-water-usage/103388210>

security. In the event of a serious drought, almost inevitable in Australia, those almond producers who cannot afford the price for very scarce water are also forced off their farms. Those who can afford the high price created by low availability pay for their water, and again, investors gain a substantial benefit. The simplistic analysis that equates dollars earned to 'highest value' ignores a host of other factors that contribute to the value of a crop.

For historical reasons Indigenous communities did not benefit from holding water entitlements so were locked out of water markets at their inception.<sup>34</sup> Unless they are investors, their knowledge of how water markets operate is unlikely to be any better than the average farmer. Therefore, protecting the waters for which they are traditionally responsible is not going to be effected through water markets. The conversion of water entitlements to private assets prevents indigenous communities from being proactive in determining how their traditional waters are utilised. Indeed, their waters can be used against their interests if others hold water access entitlements for the particular reservoir.

The privatisation of water resources has the potential to increase inequality because it provides another avenue for wealth accumulation. It also has the potential to lock Indigenous communities out of participation in decisions for their traditional waters.

### **Recommendation 12**

That the Productivity Commission promotes recognition of the fact that privatisation of water resources has the potential to increase inequality in Australia, particularly for Indigenous communities who are already seriously compromised.

### **Recommendation 13**

That the Productivity Commission supports the introduction of effective measures to reduce the potential for privatisation of water resources to increase inequality in Australia, particularly for Indigenous communities.

### **Recommendation 14**

That the Productivity Commission supports the commitment to provide water access entitlements that address not just physical and cultural needs, but also economic needs, that allow Indigenous communities to engage in commercial activities as determined by the community concerned.

## **Compliance and enforcement**

The Productivity Commission has limited their exploration of compliance and enforcement to how well measures have been implemented. They recommended that the new NWI:

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<sup>34</sup> Hartwig, L. D., Jackson, S. and Osborne, N., 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession', *Land Use Policy* 99 (2020) 104869.

include both an objective and a new element dedicated to First Nations people's access to water and the involvement and participation of First Nations people in water management.

Indigenous communities will need some measure of assurance that their rights will be respected and, when they are not, that compliance will be enforced. There is also a risk that the rights of private interests will inadvertently conflict with the rights of Indigenous communities unless great care is taken to clearly delineate the respective rights. If the inclusion of water access entitlements for Indigenous communities is to be effective, the relationship between Indigenous rights and the rights of private owners, and how they are navigated and enforced, must be fully explored. This topic is too complex to be addressed here but, in the process of developing the objective and identifying the rights to be accorded to Indigenous communities, it must be fully explored so that Indigenous inherent rights to their water resources are protected and conflicts do not arise.

### **Recommendation 15**

The productivity Commission support full exploration of the relationship between private interests and the new provisions, directed to affording Indigenous communities water access entitlements, to avoid conflict and to ensure that Indigenous water access entitlements are not, and cannot be, subsumed by private interests.

### **Recommendation 16**

That the productivity commission support the right of Indigenous communities to participate in the development of the new provisions, and supports the provision of resources, including financial resources to facilitate their participation.

Mr Glenn Woods  
CEO Martuwarra Fitzroy River Council