

23 February 2024

Commissioner Joanne Chong
Associate Commissioner Anne Poelina
Productivity Commission, National Water Reform 2024 Inquiry

Via email: water.reform.2024@pc.gov.au

Dear Commissioners

Re: Submission to the National Water Reform 2024 Inquiry

Thank you for the opportunity to provide a submission on behalf of the Indigenous Land and Sea Corporation (ILSC), and we appreciate the extension of time that was granted to us.

The Commission has called for submissions from organisations that have an interest in national water reform policy.

The ILSC collaborated with the Australian National University and the National Native Title Council to convene a First Nations Water Roundtable in May 2023. This Roundtable was in recognition of an urgent need to bring together First Nations peoples' perspectives from across the country to examine and discuss First Nations Water rights in Australia identified through the extensive consultations undertaken by the ILSC in the preparation of its National Indigenous Land and Sea Strategy 2023-28 (NILSS). The Roundtable resulted in a public communique and a series of 13 recommendations. These recommendations are fully endorsed by the ILSC.¹

As has been the case for a number of decades, Indigenous people attending the Roundtable called for urgent action to secure recognition and protection of First Nations water rights through Treaties, legislation and other policy means and for the Australian Government to be held to account on its commitments. The Roundtable noted key challenges such as the lack of First Nations peoples' involvement in water governance, fragmented legislative requirements across jurisdictions, rural and remote communities lacking access to safe and secure water supply, and the lack of institutional change across all levels of government to ensure Australia adheres to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) but more importantly, basic principles of Human Rights and provision of services to its citizens. The recently released Review of the National Agreement on Closing the Gap² has also been critical of

¹ ANU, ILSC & NNTC, Outcomes Report on the National First Nations Water Roundtable, 16-17 May 2023, Canberra, the Australian National University <https://anufirstnations.com.au/mayiny-galang-ngadyang-peoples-water-national-first-nations-water-roundtable-2/>

² Productivity Commission 2024, *Review of the National Agreement on Closing the Gap*, Study report, volume 1, Canberra. <https://www.pc.gov.au/inquiries/completed/closing-the-gap-review/report>

governments' ability to implement structural changes required to meet targets and improve Indigenous peoples' lives. The latest report is a reminder of the lack of progress against setting specific targets for water ownership in the National Agreement.

The National First Nations' Water Roundtable also established an Interim National First Nations Water Working Group to progress thinking and action under First Nation leadership at a national level. The ILSC has reviewed the Working Group's submission to this inquiry and fully support both its evidence base and policy and activity recommendations.

Through insight gained in our recent engagement with First Nations Australians and Corporations in the development of our National Indigenous Land and Sea Strategy, the ILSC is confident of broad national support for the urgent adoption of a consolidated and strategic First Nations-led approach to the care and management of freshwater Country.³

1. The Indigenous Land and Sea Corporation

The ILSC is a corporate Commonwealth entity under the *Public Governance, Performance and Accountability Act 2013* (Cth), first commencing as the Indigenous Land Corporation on 1 June 1995. It was established by the *Aboriginal and Torres Strait Islander Act 2005* (Cth) in response to the Mabo judgement (1992) and as such complements the *Native Title Act 1993* (Cth) in recognition of common law native title rights to land.

The ILSC acts as a strategic funder and facilitator, supporting First Nations people to access, use, and Care for Country on their own terms to achieve their aspirations; supports First Nations people to leverage, and continue to grow, their assets and rights to land and water, extend beyond grant-making and enable First Nations groups to take advantage of opportunities that optimise the use and Care of Country now and into the future; and improve our service to First Nations people and continue our efforts to return power and control to First Nations communities by divesting our operating businesses and landholdings.

2. Current State

Despite almost two decades since the establishment of the NWI, significant water injustices prevail and in many circumstances have now become embedded into failed policy settings for First Nations people. Only between 0.1 and 0.2 per cent of the total volume of freshwater allocation across Australia is held by First Nations interests. Most of this freshwater allocation comes in the form of cultural flows, which legally prohibits use for economic purposes, hampering the self-determination of communities. Lack of water rights deprives First Nations people of opportunities to have a relationship with Country, to Care for Country, to generate wealth, to exercise self-determination and to be able to sustain and pass on cultural practices for future generations.

The separation of water and land titles has created barriers and an artificial view of the importance of environmental management and economic development with the last two decades shifting the focus away from transparent and equitable access to development for short term gains. This is most easily articulated in parts of the Murray Darling and Northern Australia where Indigenous land ownership, nor the need for healthy potable water and equitable development consider the long term needs of the Indigenous community.

The ILSC supports First Nations leaders who have articulated that the lack of recognition and access to water entitlements exacerbate widening the gap of First Nations disadvantage, leading to poor environmental outcomes as highlighted in the 2021 State of the Environment Report, and contributing to

³ To see copies of the Indigenous Land and Sea Corporation's *National Indigenous Land and Sea Strategy 2023-28* and *Community Consultation Report*, please see the ILSC website: <https://www.ilsc.gov.au/nilss-2/>

inefficient use and management of Australia's natural resources at an unsustainable level for future generations.⁴ The recognition of First Nations peoples' rights and interests in water management, ownership and governance is critical to effective National water reforms and should be embedded at all levels.

The ILSC welcomes the Australian Government's commitment to boosting funding for the Aboriginal Water Entitlement Program (AWEP) from \$40M to \$100M including mandatory reporting to demonstrate how environmental water holders have considered First Nations values, uses and ensured involvement in environmental water decisions. The ILSC also acknowledges the important work undertaken by the First Nations Water Branch in the Department of Climate Change, Energy, Environment and Water with Traditional Owners from across the Murray Darling Basin to engage on the design and implementation of the AWEP.

The ILSC welcomes reforms underway to achieve these goals, however meaningful First Nations representation within institutions and governance structures is required to ensure outcomes equitably benefit First Nations people and communities without interference from other interested parties. A truth telling process may be required to acknowledge the dispossession of water rights and its detrimental effect for our country.

3. Direction for National Water Reforms

As noted above, the ILSC endorses and recommends to the Committee, the submission to this inquiry prepared by the Interim National First Nations Water Working Group established following the First Nations Water Roundtable in May 2023.

Specifically, the ILSC notes that the Working Group recommends the following as key priorities:

- The NWI should provide a clear and transparent nationally consistent framework for the involvement of First Nations peoples in water planning, management of decision-making, and reforms, consistent with principles embedded in the UNDRIP.
- The NWI should provide mechanisms which facilitate First Nations' participation in matters affecting their water rights and interests, consistent with principles embedded in the UNDRIP.

First Nations institutions must be resourced to effectively participate in water planning, market engagement and to manage water access entitlements for wider community benefit. As recommended by the First Nations Water Working Group, this could be through the form of an Indigenous Economic Water Fund. Resources are also required to engage in government processes, undertake research to support decision-making, and to facilitate community water governance.

The ILSC also suggests that the reform of the NWI be harmonised with other Australian Government reviews, such as the ongoing reforms arising from the review of the EPBC Act, including reforms which impact on First Nations heritage. These reforms will have significant impacts on First Nations peoples' environmental, spiritual and cultural values, as well as economic and social outcomes.

The ILSC urges the Commission to consider recommendations in the Committee on Aboriginal and Torres Strait Islander Water Interests (CAWI) Insights Paper in determining the direction for National Water Reforms. CAWI was identified in the Commission's 2020 inquiry as a body that could operate as a mechanism to support the economic development of First Nations communities. CAWI has released a set

⁴ p 109, ANU, ILSC & NNTC, *Outcomes Report on the National First Nations Water Roundtable*, 16-17 May 2023, Canberra, the Australian National University <https://anufirstnations.com.au/mayiny-galang-ngadyang-peoples-water-national-first-nations-water-roundtable-2/>

of water values, principles, and actions that the Committee encourages federal, state, and territory governments to consider when planning for, engaging in, and developing national water reform initiatives.⁵

The ILSC strongly supports the work of CAWI as it deeply aligns with the ILSC's own mandate and strategic agenda. The ILSC and Committee are platforms for gathering and amplifying the aspirations of First Nations peoples regarding water reforms.

To strengthen these reforms, governments must undertake necessary law reform to implement changes identified in the recommendations above, to be consistent with the UNDRIP, Native Title, and to address the significant gap in water access equity and justice between First Nations communities and other water users.

4. Freshwater rights reforms and the ILSC

The ILSC was previously known as the Indigenous Land Corporation and became the ILSC in 2019 when our remit was expanded to include salt and freshwater interests. In order to develop the NILSS, in 2022 the ILSC completed a national consultation to listen to the priorities and aspirations for Country of First Nations Australians and to understand the role they want the ILSC to play. One of the outcomes of this consultation was strong feedback that while there has been significant progress in relation to land similar access to water and water rights was lacking. There is a strong desire amongst first nations people to increase their access to, ownership and control of freshwater and sea Country. Indigenous people (particularly groups across the Murray-Darling Basin region) want this to be a focus of the ILSC.

The Aboriginal and Torres Strait Islander Land and Sea Future Fund (ATSILSFF) is the ILSC's primary source of funding and it remains the only national fund to support an ever increasing demand for acquisition and management support independent from government. External program funding and co-investment for specific projects is sometimes utilised, however the ATSILSFF represents the only real means of increasing available funds to the ILSC. The addition of water-based rights and interests to the ILSC's remit through legislation change in 2019 has also added additional demand on the ILSC's limited resources.

The ILSC has contributed more than \$3.5 million in grant funds to support the Dja Dja Wurrung Clans Aboriginal Corporation to purchase their own land back to set up what could be the largest yabby farm in the southern hemisphere. Of that \$3.5 million, \$750,000 was allocated for the acquisition of water rights for approximately 260 megalitres from the Goulbourn water system in Victoria. This project demonstrates the ILSC's ability to partner in bringing lands and waters back together through the return of water rights to Dja Dja Wurrung People. The ILSC also holds seven water licences for properties across areas in NSW and WA mostly for agricultural uses and irrigation.

The ILSC has a strategic focus on increasing First Nations peoples' access to, ownership and control of freshwater and sea Country. Country represents the lands, waterways, seas, and skies to which Indigenous people are connected. First Nations peoples do not consider land and water to be separate, but mutually dependent. The ILSC will be undertaking further engagement and research to develop a revised sector strategy for freshwater under the National Indigenous Land and Sea Strategy. It will be led by First Nations interests and knowledge and will support the ILSC to make strategic and transformative investment in the freshwater sector over the next five years, to 2028.

To support self-determination, First Nations people want the ILSC to be a facilitator, collaborator, advocate, influencer, enabler, broker, and interpreter. It is of urgent importance to build First Nations institutional

⁵ p 9, Australian Government 2023, 'Insights Paper Pathway to enduring recognition of Aboriginal and Torres Strait Islander Peoples' water interests in national water reform initiatives', *Committee on Aboriginal and Torres Strait Islander Water Interests*, December 2023 <https://www.dcceew.gov.au/water/policy/first-nations/cawi>

capacity in water rights and interests, and that the National Water Reforms support First Nations peoples' mechanisms to engage in advocacy across regional and national forums.

The issuing of freshwater entitlements and licensing for economic activities for First Nations people will move closer to meeting the Closing the Gap Outcome 15 that 'People maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters', with the details of an additional Target 15c relating to inland waters still being determined nationally. The ILSC has an explicit role in the delivery of Water Justice and is a contributor towards elements of Closing the Gap Priority Reforms 1 to 4 which focus on ways of doing business. The ILSC's National Indigenous Land and Sea Strategy sets out how elements of the strategy such as self-determination, partnership and sector leadership align with Closing the Gap.⁶

5. Concluding comments

The ILSC supports National Water Reforms that contribute towards the realisation of outcomes that further First Nations Communities' ability to Care for Country, remove barriers to self-determination, and provide autonomy of choice in how they work in partnership to advance their freshwater interests including the ability to engage in economic development and financial empowerment.

And as has been the case with Land Rights and Native Title, Indigenous people have proven to be appreciative of the need to equitably share in natural resources. The need for a paradigm change to manage our nations resources is upon us now.

Should you or your department require any further information or detail on the proposals raised in this submission please contact my office directly via Rebecca Hayden, General Manager Policy, Strategy and Performance.

Yours sincerely

Joe Morrison
Group Chief Executive Officer

⁶ p 35, Indigenous Land and Sea Corporation, *National Indigenous Land and Sea Strategy 2023-28*, <https://www.ilsc.gov.au/nilss-2/>