



**NORTHERN
LAND COUNCIL**

Submission to the Productivity Commission

on

National Water Reform 2024

February 2024

Introduction

Thank you for the opportunity to provide feedback to this Inquiry. Please also see attached the Northern Land Council (NLC) submission to the Productivity Commission on National Water Reform 2020. Our previous recommendations for the refreshed National Water Initiative (NWI) are still current and highly relevant to both this inquiry and the process of renewed national water reform.

The NLC notes the concurrent process whereby the Department of Climate Change, Energy, the Environment and Water are working with States and Territories through the National Water Reform Committee, its technical sub-committees and the Committee on Aboriginal and Torres Strait Islander Water Interests in developing a new national water agreement. The NLC expects that this submission will contribute to the concurrent process.

Almost 80 per cent of Aboriginal people in the Northern Territory live in remote or very remote areas – the same areas where major development projects are most likely to have substantial impacts. Due to the close relationship between Aboriginal values, identity, culture and the broad concept of ‘country’, negative impacts and damage to country are readily noticed and strongly felt in the Aboriginal community.

The substantial rights and interests of Aboriginal people in the Northern Territory, and the disproportionate risks they face, underpin the NLC’s recommendations for a renewed national water reform agenda, which include a prominent role for securing Aboriginal people’s interests in water.

This submission focuses on the key elements of the NWI of relevance to Aboriginal people in the NT, including where their rights and interests are directly affected.

Progress in jurisdictional adoption of NWI principles, objectives and key outcomes

The NLC continues to advocate for jurisdictional progression in the Northern Territory in water reform with regards to the priorities of Aboriginal people. The priorities of the NLC’s constituents, identified by our Council Members include:

- Meaningful engagement on water planning and management decisions that directly impact their rights, interests, values and aspirations.
- The ability to undertake cultural obligations to protect Country, especially when water extraction activities threaten their values.
- The provision of water specifically for Aboriginal economic development, a critical component of self-determination in the NT.
- The provision of safe and secure potable water supply in all remote communities.

In relation to these priorities, the NLC welcomes the NT Government’s recognition in its *Territory Water Plan* (2023) that reforms are required to meet the principles, objectives and outcomes of the NWI. The plan includes commitments to introduce safe drinking water legislation, engage with remote communities on drinking water quality and security, establish an Aboriginal Water Advisory Committee, partner with Land Councils to build the Government’s understanding of Aboriginal cultural values of water, and replace the *Water Act 1992* (NT) (Water Act) by 2026. The NLC looks forward to working with the NT Government on progressing these reforms.

In May 2023 the NT Government announced the appointment of a new Controller of Water Resources, to support the integrity of decision-making through the separation of assessment and monitoring functions from decision-making functions as required under the NWI (pt. 74). Separating the Controller role from where it previously sat within the remit of the responsible Department of Environment, Parks and Water Security’s Chief Executive Officer is a welcome step. However, the Controller of Water Resources model ensures the decision-making is still retained by a single person meaning decision making is not necessarily holistic or

encompassing of a broad range of views. The NLC's recommendation continues to be the establishment of an independent water commission that includes Aboriginal representation.

Issues in jurisdictional adoption of NWI principles, objectives and key outcomes

Notwithstanding the commitments made in the Territory Water Plan, the NLC continues to have substantial concerns regarding the slow pace of water reform in the NT. Critically, in the NLC's view; the NT has regressed in several key areas since the 2020 Inquiry. The NLC's 2020 submission (attached) should be considered as part of this submission. Additional input follows;

Water planning

The ongoing low number of statutory water plans (NWI, pt. 36) remains a significant concern to the NLC. The volume of water licensed for extraction in the NT within areas covered by water allocation plans (WAPs) remains the lowest of all jurisdictions. Only one WAP has been declared in the NT since 2020: the Georgina Wiso WAP.

The NLC is highly concerned by the approach the NT Government took with this plan, and proposes to take with future plans. This involved separating the WAP into three parts, only one of which is a statutory document. The technical and water source information that informed the WAP's development, risk assessment and implementation plan, including monitoring, have all been removed from the statutory WAP. This undermines the confidence of stakeholders, including Traditional Owners, that the water resource will be managed in accordance with the WAP. It appears to the NLC that the NT Government has adopted this model to limit legal challenges.

Further, where statutory protections are in place, they are woefully inadequate, as illustrated by the recent Supreme Court decision in relation to the Singleton water licence (31/01/2024)¹. A request to set aside the NT Government decision to grant a licence for Singleton Station was dismissed on a number of grounds, including that the relevant Minister must consider – but is not obliged to comply with – a WAP in decision making. The Plaintiffs had argued for compliance with environmental and cultural values as set out in the Western Davenport WAP. This outcome sets a dangerous precedent that calls into question the statutory basis of WAPs if their utility is merely at the Minister's discretion. This decision highlights that environmental and cultural outcomes are at risk in the NT: with no requirement to comply with the terms of a WAP, there is no explicit provision of 'a statutory basis for environmental and other public benefit outcomes in surface and ground water systems to protect water sources and their dependent ecosystems' (NWI pt. 25(ii)).

Similarly, WAPs are only provided for the Controller 'for consideration' rather than 'direction' in making water licensing and management decisions. In practice this mean the Controller can make a decision that adheres to a WAP, or one that is in conflict with it.

The NT legislative regime is inconsistent with the requirement for statutory recognition of environmental and public benefit outcomes in a WAP (NWI, pt. 35).

Aboriginal access and representation in water planning processes

The lack of jurisdictional commitment of the NTG in relation to Aboriginal access and inclusion is illustrated by the Georgina Wiso WAP, declared in November 2023, the largest water allocation plan in the NT. The WAP was developed in the absence of a stakeholder Water Advisory Committee, and without consultation with local Aboriginal people. As a result, there has been no opportunity for Aboriginal people to have meaningful

¹ [NTSC-4-Bar2402-Mpwerempwer-Aboriginal-Corporation-RNTBC-v-Minister-for-Territory-Families-Urban-Housing-as-Delegate-of-the-Minister-for-Environment-and-Ors-31-Jan.pdf](#)

involvement in decision making or to have their needs and rights represented, including consideration of cultural values.

Where there is engagement on a WAP, the NLC expects this to be meaningful, documented accurately and with a genuine commitment to Aboriginal voices contributing to decisions and outcomes. In late 2023, the three Traditional Owner members of the Mataranka Water Advisory Committee resigned from that committee, amid concerns their views were not being taken into consideration in the preparation of the plan. This means that since the National Water Reform 2020 Inquiry, Aboriginal representation on water advisory committees in the NT has further declined.

Under the NWI, all jurisdictions have agreed that water access entitlements and planning frameworks should recognise the needs of Aboriginal people in relation to water access and management (NWI pt. 52(ii)). Amongst other commitments in the *Territory Water Plan*, the NT Government has committed to Aboriginal representation in water planning processes. Despite this rhetoric, the NLC continues to be disappointed with the ongoing and current lack of involvement and meaningful engagement of Aboriginal people in water planning.

Water Advisory Committees are the only formal mechanism employed by the NT Government for community and stakeholder input into water allocation planning processes and implementation. NT legislation does not specify a requirement that Aboriginal people must be part of Water Advisory Committees. Enshrining a requirement for Aboriginal people's involvement in water advisory remains a crucial element of a refreshed water reform agenda.

Interception

Under the Water Act, taking surface water or interfering with a waterway requires a licence or permit, unless for an exempt activity. The NT Government will shortly release its *Surface Water Take - Wet Season Flows Policy* and associated *Interference with a Waterway Guideline*, which relate to taking water during the wet season for storage and use during the dry season. Based on the draft, the NLC is concerned the policy and guideline will not provide adequate protection of Aboriginal rights and interests, as follows:

- The policy will provide for surface water licences and interference with a waterway permits to be issued outside of areas with declared water plans. The draft policy stated cultural water requirements would be maintained, but it is unclear how this could be done in the absence of a water plan developed with input from Aboriginal people.
- The policy will not include mechanisms to ensure sacred site and cultural heritage protection. The Department has confirmed that the current requirement for an Aboriginal Areas Protection Authority sacred site clearance to be provided as part of a permit to interfere with a waterway application has been removed.
- The NLC is not confident in the data and modelling proposed for use in implementing the policy, and is concerned insufficient information on monitoring and compliance will be included in the policy and guideline.

Urban Water Reform

The NT Government has committed to developing a Safe Drinking Water Act. While the NLC welcomes the proposed legislation, which intends to guarantee a degree of safe (healthy) drinking water, the NT Government is yet to guarantee the supply of drinking water to all Territorians. The *Territory Water Plan* (Priority 14) discusses economic regulatory reform for water supply and sewerage services; however, the *Water Supply and Sewerage Services Act 2000* (NT) currently only regulates Power and Water Corporation as the sole licensee, and only in gazetted town centres. As 73 remote communities in the Northern Territory are

not gazetted towns there remain a vacuum in legislative assurance for secure drinking water for Aboriginal people living in remote communities.

Achieving better outcomes in the NWI

To achieve better outcomes for all Northern Territorians, and with particular reference to the rights, interests and aspirations of Aboriginal people, the NLC reiterates that the NWI will be improved by:

- Recognition of Aboriginal people and a commitment to meeting their rights, interests and aspirations
- Strengthening the governance arrangements of a future water reform, to ensure that governments are accountable to constituents and that real outcomes are achieved.
- Facilitating improved compliance with NWI water reform through agreed jurisdictional plans with measurable goals and an independent assessment of progress.
- Ensuring that water planning includes community and stakeholder engagement, and is done in a meaningful, collaborative and effective way.
- Increasing protection of environmental water in unregulated systems such as the NT.
- Strengthening requirements that recognise Aboriginal people's rights and interests in water, and the ability for Aboriginal people to be part of decision-making processes that directly affect them.
- Ensure that Aboriginal people are able to actualise water allocations in the water planning and allocation process to the full extent of their rights for economic development.
- Ensure that water safety and security are enshrined in legislation to improve water security in remote Aboriginal communities, and that water supply improvements are priorities for funding.
- Ensure that all engagement activities with Aboriginal people are undertaken in accordance with principles of free, prior and informed consent, as per national and international requirements.

Findings and recommendations related to NWI renewal - 2020 Commission Report

The NLC commends the proposed NWI renewal reform advice outlined in the *National Water Reform 2020 Productivity Commission Inquiry Report* (2021). The findings and proposed changes align with concerns and recommendations in the NLC's 2020 submission, current issues outlined by the NLC and our recommendations for better outcomes documented in this submission. We particularly welcome the following;

- Modernisation to reference adaptation to a changing climate and to recognise the water interests of Aboriginal and Torres Strait Islander people.
- Modernisation to reflect both water resource management and water service provision with objectives that optimise Aboriginal and Torres Strait Islander people's cultural outcomes through best practice water resource management
- Extending statutory provisions for the environment to recognise a need for integration with natural resource management and the potential to achieve cultural and social benefits
- Enabling strengthened and enduring standing and influence for Aboriginal and Torres Strait Islander people in water planning and natural resource management processes
- The proposed expansion of water service provision to include drinking water quality; integrated management of water supply, wastewater and stormwater services; and processes to ensure that investments in major infrastructure clearly contribute to community wellbeing
- The comprehensive application of the six overarching principles and the retention of the eight original elements of the NWI plus the two new elements; one reflecting the interests of Aboriginal and Torres Strait Islander people in water resource management and the other with principles for efficient investments in major water infrastructure

The NLC looks forward to ongoing participation in the process to develop a new national water agreement.

If you have any questions regarding this submission please contact Diane Brodie, Policy Team Leader,

About the NLC

The NLC was established in 1973. Following the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Land Rights Act), the NLC became an independent statutory authority responsible for assisting Aboriginal people in the northern region of the Northern Territory to acquire and manage their traditional lands, waters and seas.

The Land Rights Act combines concepts of traditional Aboriginal law and Australian property law and sets out the functions and responsibilities of the land councils. Under the Land Rights Act, the key functions of land councils include expressing the wishes and protecting the interests of Traditional Owners² throughout the land council's region.

The NLC is also a native title representative body under the *Native Title Act 1993* (Cth) (Native Title Act) and has functions to represent native title holders, including in consultations and negotiations relating to Indigenous land use agreements, future acts, rights of access and other matters relating to native title. In this capacity, the NLC also represents the Aboriginal people of the Tiwi Islands and Groote Eylandt.

Aboriginal people make up more than 30 per cent of the Northern Territory population and have freehold title rights to around 50 per cent of the Northern Territory via the Land Rights Act, with most of the remaining land mass and some sea country subject to native title rights and interests. Access to the natural resources of these areas, and their free, safe and assured use, is one of the basic rights and expectations articulated through both the Land Rights and Native Title Acts. Any impact on the natural environment that threatens access to or use of resources has cultural implications for the Aboriginal people that rely on these resources.

² For the purposes of this submission, the term Traditional Owner includes traditional Aboriginal owners (as defined in the *Aboriginal Land Rights (Northern Territory) Act 1976*, native title holders (as defined in the *Native Title Act 1993*) and those with a traditional interest in the lands and waters that make up the NLC's region.