

Productivity Commission Inquiry

National Water Reform 2024

Submission from the Interim First Nations Water Working Group

About the Interim First Nations Water Working Group

The Interim First Nations Water Working Group ('Working Group') is an informal coalition of prominent First Nations leaders and experts with substantial experience in water rights and interests of First Peoples. The Working Group was originally formed in December 2022 to support a roundtable of 24 First Nations leaders with the Minister for the Environment and Water, the Hon Tanya Plibersek MP. This roundtable involved a dialogue with the Minister on water buybacks but naturally moved to focus on the participation of First Nations peoples in water policy more broadly, including the refresh of the National Water Initiative (NWI). Members of the Working Group involved in the drafting of this submission include:

Prof Peter Yu (Chair; Vice President – First Nations Portfolio, ANU)

Jamie Lowe (CEO, National Native Title Council (NNTC))

Joe Morrison (Group CEO, Indigenous Land and Sea Corporation (ILSC))

Rene Woods (Associate Director of Indigenous Peoples and Local Communities (IPLC) Partnerships, The Nature Conservancy)

Dr Phil Duncan (Galambany Professorial Fellow, University of Canberra)

Barry Hunter (Carbon farming manager, Northern Australia Indigenous Land and Sea Management Alliance and now Acting CEO of NAILSMA)

Dr Guy Fitzhardinge (Director, North Australian Indigenous Land and Sea Management Alliance (NAILSMA))

For over a year, the Working Group has convened to deliberate on how First Nations communities can have a more equitable, substantive and enduring influence on Australian water reforms, water policy and water management. In May 2023, First Nations Portfolio at the Australian National University (ANU), the Indigenous Land and Sea Corporation (ILSC) and the National Native Title Council (NNTC) jointly hosted the National First Nations' Water Roundtable on the Country and Waterways of the Ngambri (Kamberri), Ngunnawal and Ngarigo peoples.

The National Roundtable brought together a diverse group of 80 people from various sectors with expertise on First Nations water rights, policy and governance. The Roundtable was framed around three facilitated workshops - *Where Are We Now; What Does 'Good' Look Like; How Do We Get There* - to give attention to current policy settings; gaps and issues as they relate to securing First Nations self-determination; and practical solutions and strategies to enable appropriate institutional and policy frameworks. There was a specific and deliberate focus on the NWI.

This submission represents a synthesis of the outcomes from the National Roundtable, including subsequent deliberations and consensus positions of the Working Group.

Executive Summary

Aboriginal and Torres Strait Islander peoples, the First Peoples of Australia, are the original owners and managers of Australia's lands and waters. Since time immemorial, water has provided the foundation for First Peoples' livelihoods, cultural identity and spiritual well-being. Across the diversity of the Australian continent, First Peoples have for generations undertaken and upheld complex responsibilities to water systems.

Against a well-documented history of dispossession, First Peoples have consistently defended a commitment to a holistic approach to caring for Country, one that respects the interconnection between communities, land and water. Strong foundations have been laid through many statements and declarations from Indigenous groups reflecting the diversity of First Peoples' rights and interests in water. These foundations point to the need to pay particular attention to ensuring First Peoples' consequential influence in water policy and management in ways that respect the diversity of Indigenous aspirations and the substantial differences in water and catchment management regimes across state and territory jurisdictions. Rarely has this geographic diversity and interconnectedness been reflected adequately and appropriately within Australian water management systems – its statutes, institutions, terminology and administration. This has served only to deny First Peoples a right to ancestor waters.

Aboriginal and Torres Strait Islander peoples own, control and manage less than 0.2 per cent of Australian surface water entitlements. This contrasts with Indigenous legal interests in more than 57% of land. The observable lack of meaningful participation and empowerment of First Peoples in current water regimes has significant impacts, limiting Indigenous economic development, undermining cultural obligations and contributing to broader environmental challenges.

Australia's national water reform agenda and renewal of the National Water Initiative must address the *unfinished business*. There is a critical need to develop decision making processes that accommodates and empowers First Peoples, recognises the primacy and full breadth of their interests, and provides for consequential influence over water and catchment decisions across the policy cycle at all levels of government. First Peoples' long history of integrated land and water management should be an integral part of the national water reform agenda. This must include consideration of a set of Aboriginal and Torres Strait Islander water values and principles to be reflected in the national water reform initiative and consistent with Australia's existing commitment to the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP). Having endorsed the UNDRIP, there is an expectation both internationally and domestically that Australia will actively involve First Peoples in decision-making over the management of waters and catchments.

The Working Group notes the findings of the previous Productivity Commission inquiries into the NWI as well as the particular Terms of Reference provided by Hon. Katy Gallagher for this inquiry. This submission of the Working Group responds in large part to recommendations the Productivity Commission has been asked to provide 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'*.

Australia is at a crossroads. Governments can continue with a largely undesirable status quo or, alternatively, take up an opportunity presented through a renewed National Water Initiative (NWI) to elevate and harness to the rights, interests, and cultural expertise of First Peoples in the management of and ownership of Australian water systems. The Working group acknowledges recent efforts of Australian governments, including the renewal of the National Water Initiative. These are important steps towards a more just and equitable future for First Peoples in water.

Current status of First Nations water rights and interests

Current water policy, planning and management regimes in Australia are characterised by conceptual, jurisdictional and spatial differences that pose challenges for First Nations' consequential involvement in water policy reform. The regulation and management of water in Australia is both technically complex and politically challenging. Settler water resource management regimes based on science, economics and engineering can make it difficult for water authorities to genuinely acknowledge and incorporate First Nations' knowledge and values into water policy, planning and management processes.¹ This needs to change. The joint media release by Ministers Plibersek and Burney on 28 April 2023 (*Delivering water ownership for First Nations*)² creates a new opportunity to review the National Water Initiative to ensure that First Peoples have a core, independent and enduring role in the governance of freshwater resources across Australia.

Aboriginal and Torres Strait Islander Peoples, the First Peoples of Australia, are the traditional owners and managers of Australia's lands and waters, have always maintained strong and vital relationships with their lands and waters since time immemorial, and share a sense of spiritual and cultural connections to, and custodial responsibilities for, water. First Peoples do not divide water into separate environmental, economic, cultural, social or spiritual components. The Productivity Commission in its 2021 review of the NWI, noted that land and the water – both above and below the ground – give life to First Peoples, their livelihoods, their cultural identity and their spiritual well-being, and that First Peoples have responsibilities to their lands, territories and waters, and in turn they sustain First Peoples.³

Australia has international obligations and commitments under a number of significant international instruments to recognise the rights of Australia's Indigenous peoples. In particular, the United Nations *Declaration on the Rights of Indigenous Peoples* which affirms the rights of Indigenous peoples to own, use and develop their traditional waters (namely Articles 25 and 32) and the rights to self-determination (Article 3) and of free, prior and informed consent (Articles 10, 19, 29 and 32). These are the minimum standards by which governments and industry should engage with First Peoples with regards to their land and waters, and which should be read alongside Australia's commitment to Sustainability Development Goal 6 (*Ensure availability and sustainable management of water and sanitation for all*), with the specific commitments to First Nations people living in remote communities. Further, the Working Group notes the findings of the recent Parliamentary Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs in the application of UNDRIP in Australia, particularly with respect to recommendations for greater consistency between the principles of UNDRIP and the development of government law and policy.

Despite millennia of water custodianship and international recognition of preexisting rights, First Peoples own and control less than 0.2 per cent of surface water entitlements in Australia. First Nations currently have legal rights or interests over half of the Australian continental land mass.⁴ In contrast, First Nations' water entitlement holdings are less than 0.2 per cent of all entitlements on issue.⁵ Even where First Nations have native title rights and interests or statutory traditional

¹ Point Advisory and Alluvium Consulting (2019) *Australian Freshwater Study – First Peoples' Water Rights Issues Paper*, Report prepared for The Ian Potter Foundation and The Myer Foundation, Melbourne.

² <https://minister.dcceew.gov.au/plibersek/media-releases/delivering-water-ownership-first-nations>

³ Productivity Commission (2021) *National Water Reform 2020*. Productivity Commission. Canberra.

⁴ Jacobsen, R., Howell, C., and Read, S. (2020) *Australia's Indigenous land and forest estate: Separate reporting of Indigenous ownership, management and other special rights*. Tech. rep. ABARES Research Report 20.15. Productivity Commission (2021) *National Water Reform 2020*. Productivity Commission. Canberra.

⁵ Hartwig, L.D., Jackson, S., Markham, F. and Osborne, N. (2022) 'Water colonialism and Indigenous water justice in south-eastern Australia'. *International Journal of Water Resources Development* 38.1, pp. 30–63.

ownership rights over land, their access to water entitlements and influence over water policy remain very limited.⁶

The statutory land rights schemes, where they have been enacted in several States and Territories have overlooked the issue of First Peoples' water rights and interests. Aboriginal People are entitled to use the land and are only entitled to use the water on the land for domestic and stock purposes without the need for a water use right. The beds and banks of watercourses and lakes may be included, but the land rights grants do not enable the recipients to use or harvest the water for any other purposes.⁷

The very limited recognition of water rights under the native title system is seen as an incomplete response to the exclusion of First Peoples from water law and policy frameworks. Native title determinations only 'serve to formalise the traditional water interests that have continued to be practiced by Indigenous Peoples despite colonisation, and which are not consistent with the allocation of water use rights to other users'.⁸ This characterisation of First Nations' water rights is evident in the National Water Initiative (NWI), clause 53 of which states:

'Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth *Native Title Act 1993* (Cth)'.⁹

Deep tensions remain between the native title and statutory land rights systems and water planning and governance systems. Cultural authority and governance systems are continually undermined by simplistic engagement geared towards satisfying minimum procedural requirements for token and minimalist forms of recognition, rather than genuine inclusion of First Nations' enduring rights, connections to and responsibilities for Country.

Furthermore, while water ownership and control are vitally important, acknowledging First Nations' rights and interests in water requires First Nations to also have greater influence in water policy, planning and decision-making. The unfinished business of Australia's national water reforms includes securing First Nations' interests in water and their consequential influence in water policy and management decision making, not just water allocations. Recognition of First Nations' values, rights and interests in water, for water should be an integral part of the national water reform agenda and the renewal of the National Water Initiative. The Working Group acknowledges the recent publication of the Committee of Aboriginal Water Interests that provides a detailed set of values, principles and actions to guide standards and protocols across national water reform.

The Working Group also notes that specific targets for water ownership and control in the *National Agreement on Closing the Gap* are yet to be finalised. However, the commercial and consumptive use of water by First Nations has important links to *Closing the Gap* targets in respect to economic development and employment opportunities to address persistent disadvantage. The Productivity Commission has recommended that where access to water entitlements supports economic development, water should be bought from the market by governments (where the consumptive pool is fully allocated), or Indigenous reserves should be created (where the consumptive pool has

⁶ Point Advisory and Alluvium Consulting (2019) *Australian Freshwater Study – First Peoples' Water Rights Issues Paper*, Report prepared for The Ian Potter Foundation and The Myer Foundation, Melbourne.

⁷ Macpherson, E. (2022) *Indigenous Water Rights in Law and Regulation. Lessons from Comparative Experience*. Cambridge Studies in Law and Society, Cambridge University Press, Melbourne.

⁸ Macpherson, E. (2022) *Indigenous Water Rights in Law and Regulation. Lessons from Comparative Experience*. Cambridge Studies in Law and Society, Cambridge University Press, Melbourne.

⁹ Australian Government (2004) *Intergovernmental Agreement on a National Water Initiative* Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory.

not been fully allocated) as has happened in the Northern Territory, Queensland and Western Australia.

Finally, climate change poses a significant and disproportionate burden on First Nations communities, their Country and cultural values. First Peoples across Australia are already observing changes to seasons, coastlines, waterways, flora and fauna that impact not only the health of Country, but also Indigenous knowledge systems and cultural economies. Extreme events such as heatwaves, cyclones, intense flooding and severe droughts have the effect of exacerbating existing pressures on freshwater resources and further entrenching First Peoples' socio-economic disadvantage – and are likely to become increasingly frequent into the future.¹⁰ A renewed NWI must take account for rapidly changing environments.

The next five years will see major water policy reform at national and state/territory levels. The opportunity to better recognise and accommodate First Nations water rights and interests should not be missed. Analysis undertaken by the Interim First Nations Water Working Group shows that only the Committee on Aboriginal Water Interests (CAWI), the Indigenous Land and Sea Corporation (ILSC) and the National Native Title Council (NNTC) have a core national mandate to represent First Nations water rights and interests in national water policy reform processes. Previously there were the National Water Commission and the First Peoples Water Engagement Council, and both of these have been abolished. CAWI was established in 2020 to advise the National Water Reform Committee (NWRC) and separately, the Australian Government Minister responsible for water, Commonwealth agencies, and the Murray-Darling Basin Ministers Council on Aboriginal and Torres Strait Islander Water interests.

The reform task is to reset the NWI to move beyond guidelines and protocols to more substantive outcomes. In the context of this inquiry by the Productivity Commission and the Australian Government's commitment to renewing the NWI, there is an opportunity to move beyond the platitudes to more meaningful engagement and substantive economic participation. The Commonwealth should lead a significant reset of the NWI that results in an improved coordination of water policy across all jurisdictions and with a specific and express focus on the meaningful incorporation of First Nations interests in the governance of the freshwater resource across the Nation.

First Nations interests need be better integrated into the NWI. First Nations have a key role to play in performing integral functions in water policy, usage and allocation decisions throughout the machinery of Commonwealth and jurisdictional governments that regulate freshwater resources in Australia. The review should also address frameworks for water allocations as part of Government-First Nations agreement making and reparations and the prospect of First Nations being primary custodians of particularly unallocated water resources. As stated earlier, First Nations peoples have a holistic view of land and waters that give life to First Peoples' livelihoods, cultural identify and spiritual wellbeing, and have responsibilities for their respective lands and waters.

If we are to see meaningful change in terms of water outcomes, then the NWI must at a minimum address the following factors:

- An assessment of First Nations demand for fully allocated resources.
- Resourcing the acquisition of economic water entitlements for First Nations through the market or creating new sources of freshwater that can be allocated to First Nations interests for commercial purposes.

¹⁰ Hartwig, L.D., Jackson, S., Markham, F. and Osborne, N. (2022) 'Water colonialism and Indigenous water justice in south-eastern Australia'. *International Journal of Water Resources Development* 38.1, pp. 30–63. Wensing, E. (2021a) 'Indigenous peoples' human rights, self-determination and local governance-Part 1' *Commonwealth Journal of Local Governance* 24, pp. 98–123.

- Assessment of First Nations demand for unallocated resources.
- Creating a comprehensive knowledge base of water resources as a basis for competent water allocation decisions.
- An assessment of potential economic volumes in unallocated resources.

The renewed NWI must also recognise that First Peoples’ rights and interests in water across the Australian continent are diverse and a ‘one-size-fits all’ policy response is inappropriate. New approaches to water planning and management decision-making will need to be devised that recognise different values systems, different cultural practices and beliefs, and are capable of accommodating place-specific governance arrangements, including ‘nation-based’ approaches in some jurisdictions

Recommendations

1. National water reform initiatives must highlight that First Peoples need a core, independent and enduring role in the governance of freshwater resources across Australia.

The Productivity Commission noted in its previous review of progress with implementing the NWI in 2021, that *‘The National Water Initiative (NWI) is a product of its time, with a focus on achieving cultural outcomes through engagement with Aboriginal and Torres Strait Islander people. Since 2004, Aboriginal and Torres Strait Islander people have articulated their aspirations for access to water for unconstrained use (that is, for both cultural and economic purposes).’*

First Nations have a significant role to play in water policy, planning, usage and management, and in allocation decisions throughout the machinery of Commonwealth and state and territory governments that regulate freshwater resources in Australia. The working group is of the opinion that there should be a reference group that sits independent of government and allows for ongoing and enduring advice from First Nations Peoples and experts on national scale.

2. National water reform initiatives must include, and be guided by, a nationally consistent set of principles and protocols for First Nations participation and decision-making.

The Working Group considers that the recently published Insights Paper by the Committee on Aboriginal and Torres Strait Islander Water Interests should be the starting point for the design of a nationally consistent set of principles for First Nations participation in water policy. The Insights Papers makes clear that these ‘guidelines and protocols’ are non-exhaustive and founded on the recognition of rights under the UNDRIP. We strongly encourage the Productivity Commission to reference a recent publication of the Committee on Aboriginal and Torres Strait Islander Water Interests (CAWI)¹¹ which outlines a set of Aboriginal and Torres Strait Islander water values, principles, and actions that the Committee identified for federal, state, and territory governments to consider when planning for, engaging in, and developing national water reform initiatives.

¹¹ CAWI (2023) Insights Paper - Pathway to enduring recognition of Aboriginal and Torres Strait Islander Peoples’ water interests in national water reform initiatives (available at dceew.gov.au/water/policy/first-nations/cawi)

3. National water reform initiatives must provide for a legitimate mechanism to enable the participation of First Nations communities in planning and decision-making arrangements.

First Nations peoples must have mechanisms to advocate for their water rights to be recognised and to participate in decisions affecting their water interests across all levels of government. This is consistent with the principles of UNDRIP, namely Articles 3 and 19, and will likely produce sector benefits through greater participation of key stakeholders.

Ultimately a matter for government, such a mechanism may take the form of a statutory body for the purposes of First Peoples water advocacy, research, water holdings and funding, to support community access and management of ancestral water entitlements. The Interim First Nations Water Working Group – that is independent of government – could be one such starting point.

4. National water reform initiatives must build First Nations community capacity and capability within the Australian water sector.

To participate in all levels of water governance, including to hold and manage water access entitlements for community benefit, a national water reform initiative must invest in building the capacity of First Nations communities to reasonably participate. This should include improving the capacity for ongoing monitoring and evaluation to measure benefits, place-based and evidence-based research to support their management of water and to self-determine and measure community benefits from their water governance, and measures to secure their own intellectual property as per First Nations data sovereignty principles.

5. National water reform initiatives must take account of the history of First Nations statements and declarations towards water equity and justice

The Productivity Commission Inquiry should acknowledge the history of advocacy amongst First Nations communities for greater ownership, control and protection of ancestral water systems. For generations, First Peoples have undertaken extensive work to articulate their collective and diverse rights and interests in water and make suggestions for policy reform, including:

- Boomanulla Statement (2002)
- Garma International Aboriginal Water Declaration (2008)
- Policy Statement on North Australian Indigenous Water Rights (2009)
- Mary River Statement (2009)
- Echuca Declaration (2010)
- First Peoples' Water Engagement Council Policy (FPWEC) Framework (2012) and the First Peoples' National Water Summit (2012)
- Fitzroy River Declaration (2017)
- National Cultural Flows Research Project (2018).

While many of the goals and recommendations of this earlier work by First Nations peoples on water rights and interests have not been achieved or actioned, much of this earlier work is as relevant today as it was then and lays a conceptual groundwork for increased First Nations influence in the national water reform agenda. We encourage the NWI to utilise those earlier recommendations, notably the work of the FPWEC and the First Peoples' National water Summit of 2012.