

26 April 2024

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

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

Dear Commissioners

Re: National Water Reform 2024 Inquiry – Feedback on Interim Report

The Interim First Nations Water Working Group (FNWWG) is providing only abridged feedback on the *National Water Reform 2024 Inquiry Interim Report* due to the short timeframe available to compile a response. The FNWWG will provide more detailed comments to the Department of Climate Change, Energy, the Environment and Water's (DCCEEW) consultation seeking views on a future national water agreement.

The FNWWG reiterates positions and recommendations made in our initial response provided to the Productivity Commission's National Water Reform 2024 Inquiry (please refer to [Attachment 1](#) for the list of recommendations).¹ These recommendations are consistent with previous FNWWG publications².

The Interim Report identifies some of the shortcomings of the Intergovernmental Agreement on a National Water Initiative (NWI). It acknowledges the policy failings that have consistently led to poor outcomes for First Nations communities. The Productivity Commission advised in 2021 that a renewed NWI should 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. The Interim Report supports that advice, proposing a modernised goal referencing climate change and First Nations water interests and an overarching objective including reference to cultural outcomes to reflect aspirations of First Nations people.

The changing policy environment

The FNWWG advises that the NWI is too focussed on the Murray-Darling Basin, and should be the subject of an urgent reset that, among other things, should be designed to substantially increase the extent to which First Nations people are meaningfully involved in the governance of freshwater resources across Australia. A national Aboriginal and Torres Strait Islander water holder authority should be considered to focus exclusively on developing solutions that result in First Nations being able to access economic water allocation licenses in both fully allocated and unallocated freshwater catchments. In particular, this group should have a key focus on accessing water allocations for economic use in the context of activating the First Nations land estate.

The Productivity Commission's National Water Reform 2024 Inquiry is being conducted during a time of significant national policy change and is part of an extensive reform agenda that has wide-ranging impacts on First Nations communities.

¹ Available at Submission 48 here: <https://www.pc.gov.au/inquiries/current/water-reform-2024/submissions>

² Background Paper Mayiny-galang-ngadyang (Peoples' Water) National First Nations Water Roundtable Securing Water rights for First Nations' self determination <https://anufirstnations.com.au/wp-content/uploads/2023/06/Background-Paper-National-First-Nations-Water-Roundtable-16-17-May-2023.pdf> and Mayiny-galang-ngadyang (Peoples' Water), National First Nations' Water Roundtable 16-17 May 2023 'Securing water rights for First Nations peoples' self-determination' Outcomes Report <https://anufirstnations.com.au/wp-content/uploads/2023/08/National-First-Nations-Water-Roundtable-Outcomes-Report-20230808.pdf>

Despite ongoing dispossession, First Nations communities have consistently sought government commitment to a holistic approach to Caring for Country, respecting the interconnection between communities, land and water. To better enable First Nations participation in these types of reforms, there must be urgent clarity provided across policy areas and government departments. This is currently lacking.

This assertion is underlined by the Interim Report finding that too little progress has been made in critical policy areas including:

- Meaningful engagement with First Nations communities in decision about the future use and management of the nation's water resources; and
- Closing the Gap targets, consistent with the findings in the Closing the Gap report.

The Interim Report acknowledges that the social and political context for meaningful engagement with First Nations people on water reforms has changed rapidly from the 2021 review to now. The Commission has determined that the outcome of meaningful engagement can now only be considered as 'partially achieved' due to a lack of meaningful progress in this area, combined with the considerably higher standards expected by communities and that governments have committed themselves to meeting.

Governments must be more ambitious in undertaking engagement with First Nations communities. This is not a new or novel concept. The Productivity Commission's Review of the National Agreement on Closing the Gap characterises the progress in implementing Priority Reforms as weak and reflecting tweaks to, or actions overlaid onto, business as usual approaches.

Opportunities to strengthen First Nations water interests and Caring for Country

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. The FNWWG recognises the 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 the waters that their ancestors sustainably managed for 65,000 years.

The establishment of the Committee on Aboriginal and Torres Strait Islander Water Interests, and the injection of funding for the Murray–Darling Basin Aboriginal Water Entitlements Program are steps in the right direction, however there is much more work to be done to embed these structures and protect them from being undermined or eroded in the future.

The Interim Report recommends strengthening of First Nations water interests, however in our view it does not go far enough. Recommendations made by the FNWWG in the initial response have been addressed to some extent in the Interim Report, however reference to recommendations 4 and 5 (relating to building community capacity for participation in water governance, and in recognising and acknowledging water injustice respectively), seem to be missing.

The FNWWG recommended in initial feedback that, 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. Limited inclusion of First Nations in freshwater use planning and decision-making has been a major factor in the limited recognition so far achieved. This is an opportunity to strengthen First Nations freshwater rights, particularly with respect to rights to licensed allocations for economic purposes.

As a foundational matter 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.

The Interim Report notes that the retrospective nature of the Inquiry's terms of reference inherently limits the Productivity Commission's ability to inform recommendations relating to First Nations people's water rights.

In order to advance our advocacy, address water colonialism and obtain water justice for First Nations communities across Australia, the FNWWG will provide a further detailed submission to DCCEE's consultation on a future national water agreement.

Yours sincerely

Professor Peter Yu

Chair, Interim First Nations Water Working Group

Members of the Working Group involved in the drafting of this submission include:

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

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

Barry Hunter (Acting CEO, Northern Australia Indigenous Land and Sea Management Alliance)

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

Attachment 1 – Recommendations made in the submission from the Interim First Nations Water Working Group to the Productivity Commission Inquiry into National Water Reform 2024

Recommendations

Priority reforms

- 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)³ 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.

- 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.

³ 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)

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.