

# Indigenous Reference Group to the Ministerial Forum on Northern Development

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Monday, 18 September 2020

Australian Government - Productivity Commission  
National Water Reform Inquiry  
Lodgement online at [water.reform.2020@pc.gov.au](mailto:water.reform.2020@pc.gov.au)

Dear Commissioners

**Re: Submission to the Productivity Commission's National Water Reform Inquiry**

I refer to the abovementioned matter.

The Indigenous Reference Group (the 'IRG') is a formal advisory group to the Ministerial Forum on Northern Development (the 'Ministerial Forum')<sup>1</sup>. Established in August 2017, the IRG has, at the request of the Ministerial Forum, worked closely and intensively with relevant Commonwealth, Western Australian, Northern Territory and Queensland Government agencies, the not-for-profit and private sectors to develop a suite of policy initiatives that are designed to substantially enhance the engagement of Northern Australian Indigenous interests in the development of the Northern Australian economy, thus creating a pathway for Northern Australia to reach its full economic potential (the 'IRG Policy Recommendations').

Building entrepreneurial and business management capability in Indigenous organisations and businesses, and providing efficient access to the right sources of capital for that enterprise are key themes around which several of the IRG Policy Recommendations revolve.

The IRG believes it is important that water policies have a proactive focus on enabling Indigenous Australians to leverage commercial opportunities from water. The IRG suggests the Productivity Commission provides a specific opportunity for further discussion on Indigenous commercial interests in water to inform the inquiry. Ms. Anne-Marie Roberts in the National Indigenous Australians Agency is available to follow-up on this matter:

This submission outlines how the IRG recommends the National Water Reform can through a new policy and engagement lens, enable Indigenous people, traditional owners, and their corporations to develop Indigenous led collaborations that harness their knowledge, natural and cultural assets and recognises the unique collective contribution that Indigenous people make to Australia's water management and environmental outcomes.

On behalf of the IRG, I would like to thank you for the opportunity to make this submission.

Yours faithfully,

Peter Yu  
Chair  
Indigenous Reference Group

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<sup>1</sup> Further background on the IRG and Ministerial Forum is provided in the enclosed submission

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**INDIGENOUS REFERENCE GROUP TO THE MINISTERIAL FORUM ON  
NORTHERN DEVELOPMENT**

**National Water Reform – Productivity Commission Inquiry  
September 2020**

*Indigenous rights to water include commercial and customary rights.  
Too often, Indigenous rights are perceived narrowly, as rights to  
subsistence only.*

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# Indigenous Reference Group to the Ministerial Forum on Northern Development

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## 1. Background

The Indigenous Reference Group was appointed in August 2017, as one of two formal advisory groups. The IRG's purpose is to engage directly with, and provide policy advice to the Ministerial Forum, ensuring Indigenous perspectives are included in its deliberations, contributing to the achievement of tangible and sustainable benefits. In the first instance, the IRG has been tasked with advising on aspirations and barriers relating to developing the Indigenous business sector, growing the capability of Indigenous land owners to engage in development, and supporting Indigenous innovation.

The Ministerial Forum is chaired by the Commonwealth Government Minister for Northern Australia and comprised of the Commonwealth Government Minister for Indigenous Australians, and Ministers from the Western Australian, Northern Territory and Queensland Governments whose portfolio responsibilities intersect with the North's Development Agenda. Its purpose is to provide oversight and direction on the development of Australia's North in accordance with the Northern Australia Strategic Partnership (an agreement between the Northern Australian jurisdictions regarding the development of the North) and more recently, the Northern Australia Indigenous Economic Development Accord.

### Members of the Northern Australia Indigenous Reference Group

- **Mr Peter Yu (IRG Chair)**, Chief Executive Officer, Nyamba Buru Yawuru Ltd
- **Mr Lawford Benning**, Chair, MG Corporation
- **Dr Donna Odegaard, AM**, Chairperson, Aboriginal Broadcasting Australia
- **Mr Joe Morrison**, Managing Director, Six Seasons Pty Ltd
- **Mr Nigel Browne**, Chief Executive Officer, Larrakia Development Corporation
- **Cr. Vonda Malone**, Mayor, Torres Shire Council
- **Ms Fiona Jose**, Chief Executive Officer, Cape York Partnership
- **A.Prof. Colin Saltmere**, Managing Director, Indjalandji-Dhidhanu Aboriginal Corporation

The IRG is an expertise-based (rather than a representative based) committee comprised of Indigenous leaders across Northern Australia<sup>2</sup> that have broad expertise and significant experience in Indigenous business, community and government leadership in Northern Australia.

### 1.1. Focus of IRG

The IRG has maintained a disciplined focus with respect to its advice to the Ministerial Forum. The IRG has focused very specifically on addressing the sources of an evident market failure in the development of Northern Australia, being inadequate activation of the Northern Australian Indigenous economy (see Attachment 2). Indigenous Northern Australians comprise an average of 15 percent of the population of Northern Australia (compared to 2.5 percent in Southern Australia) with much larger Indigenous representation in the populations of northern Western Australia and Northern Territory (approximately 25 to 30 percent), and in populations outside of the main urban centres across Northern Australia (well in excess of 50 percent in many instances). As a result, Indigenous organisations are a key component of the government, industry and non-government-organisation institutional framework in Northern Australia.

Legally recognised Northern Australian Indigenous interests in the land and sea estate are more pronounced than they are in Southern Australia, with Indigenous interests owning or exercising some degree of control and property rights over more than 80 percent of the Northern Australian landmass, and considerable areas of sea country, including around 85 percent of the Northern Territory coastline. Very importantly, international conventions and increasingly the Australian judiciary are recognising that Indigenous interests extend beyond cultural rights and rights of occupancy, to rights over natural resources, intellectual property and a right to development. Trade with and investment from Asian interests are important drivers of the development of Northern Australia and Northern Australian Indigenous interests have a significant heritage with respect to

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<sup>2</sup> For the purposes of this Submission, 'Northern Australia' refers to that area of the Australian territory defined as 'Northern Australia' by the NAIF, with the term 'Southern Australia' referring to the remainder of the Australian territory.

particularly South East Asian trade, having conducted trade for centuries prior to European colonisation of the Region. In this environment, Indigenous businesses' products and services are becoming increasingly important components of the trade profiles of many nations.

In other words, the size of the Indigenous population, importance of Indigenous organisations and extent of Indigenous interests in land, water, sea, natural resources and other intangible assets in Northern Australia, means that Indigenous Northern Australians are paramount stakeholders in the Northern Australian economy. **Unless Indigenous interests in the Northern Australian economy are optimally activated, Northern Australia will at best never reach its social and economic potential and at worst, fail to develop socially and economically.**

Furthermore, the current state/territory – Commonwealth fiscal arrangements that pertain to Northern Australia are not delivering the required progress. Rather than accelerating economic self-determination, much of the current public investment in Northern Australian Indigenous affairs is entrenching disadvantage, with the lack of visibility as to specifically how state/territory – Commonwealth financial arrangements are being invested and the specific Indigenous economic development outcomes achieved from that investment only serving to exacerbate frustration with the current system. **Unless there is fundamental shift toward a genuine self-determination model, a significant section of the Northern Australian economy and society will remain (and likely become increasingly) dependent on financial support from government that is ultimately derived from a taxation base that is located primarily in the Nation's south.**

Indigenous enterprises in Northern Australia face both the same generic structural challenges as all business in Northern Australia, as well as unique structural challenges relating to the particular circumstances and history of Indigenous people and the state. The generic structural challenges faced by all Northern Australian business include small and sparse local markets, remoteness (including limited access during the wet season), poor infrastructure, harsh climate and a degree of political irrelevance that is derived from the electoral imbalance between Northern and Southern Australia. In addition to these structural challenges, Indigenous business in Northern Australia also faces challenges that are the result of two centuries of discriminatory dispossession, oppressive and punitive policy that has resulted in widespread background of intergenerational socio-economic disadvantage among Indigenous Northern Australians. This manifests itself in many ways, including generally lower levels of education and income, limited inter-generational wealth transfer, relatively limited capacity to engage in the workforce or to own, successfully operate and grow commercial enterprise and to access the necessary networks, resources and support services required to achieve these outcomes.

Further, while well-resourced social programs are obviously critical to improving the dire health and education status of many Northern Australian Indigenous communities, reliance on government funding itself can often create perverse incentives, which in turn discourage enterprise (including through competition by government organisations with Indigenous managed NGOs in service delivery) and perpetuate ongoing dependence on services delivered and funded by governments. Without concurrent economic development and pathways to economic self-determination, a significant number of Indigenous Northern Australians will remain welfare dependent and continue to live with the negative impacts of dependency and passivity. Until Indigenous people are able to achieve economic independence, this welfare dependency will remain a significant fiscal burden for the Northern Australian government jurisdictions.

This means that the market failure in the development of Northern Australia that is the result of the generic challenges targeted by the Commonwealth's Northern Australia Agenda are greatly exacerbated in the case of the Northern Australian Indigenous economy. Developing policy initiatives that target the source of this unique market failure in the Northern Australian Indigenous economy with a high degree of specificity is the primary focus of the IRG.

The IRG Policy Recommendations and related initiatives, and the objectives and principles that underpin those recommendations and initiatives emulate world-best-practice for frameworks designed to support and

accelerate regional Indigenous economic development. This is evidenced by the policy recommendations of a recent study on international best practice undertaken by the OECD<sup>3</sup> (see Attachment 3).

## 1.2. Consultation and IRG Recommendations

Since early 2018, the IRG has been working closely and intensively with senior officials in Commonwealth, Western Australian, Northern Territory and Queensland Government agencies, whose statutory and policy functions intersect with the Northern Australia Agenda and/or Indigenous economic development (refer to the table below for list of those consulted). This work has focused on establishing a policy framework designed to substantially enhance and accelerate the engagement of Northern Australian Indigenous interests in the development of the Northern Australian economy. The work commenced with a cross-jurisdictional policy assessment and development workshop in March 2018 which delivered 36 specific policy recommendations. The April 2018 Ministerial Forum endorsed 16 of those specific recommendations for implementation planning and referred the remaining 20 recommendations for further consideration.

Northern Australia Indigenous Reference Group Policy Development Consultation	The 16 recommendations can be broadly categorised as initiatives designed to:
<p><b>Commonwealth Agencies</b> – Prime Minister &amp; Cabinet; Austrade; Agriculture and Water; Indigenous Business Australia; Indigenous Land Corporation; Office of Northern Australia; CRC for Development of Northern Australia; Northern Australia Infrastructure Facility; CSRIO; and Geoscience Australia.</p> <p><b>Western Australian Government Agencies</b> – Premier &amp; Cabinet; Primary Industries and Regional Development; Jobs, Tourism, Science and Innovation; Water and Environmental Regulation; Training and Workforce Development; Communities WA; Planning, Land and Heritage; and Kimberly Development Commission.</p> <p><b>Northern Territory Government Agencies</b> – Chief Minister’s Office; Trade, Business &amp; Innovation; Health; Northern Territory Solicitor; Tourism NT; Local Government &amp; Communities; Environment &amp; Natural Resources; and Land Resource Management.</p> <p><b>Queensland Government Agencies</b> – Premier &amp; Cabinet; State Development; Treasury; Employment &amp; Training; Aboriginal and Torres Strait Islander Partnerships; Transport &amp; Main Roads; Environment &amp; Science; and Fire &amp; Emergency.</p>	<p>1. Create jobs and foster labour participation, entrepreneurship and business acumen among the Northern Australian Indigenous population;</p> <p>2. Develop knowledge management systems, decision support tools and commission research and development that is designed to improve the decision-making environment for Indigenous managers and business owners in Northern Australia;</p> <p>3. Develop infrastructure that supports Indigenous economic development in Northern Australia;</p> <p>4. Provide improved access to capital and international markets for Indigenous businesses in Northern Australia;</p> <p>5. Initiatives to activate the economic value of land, water, sea and cultural resource rights and interests of Northern Australian Indigenous people; and</p> <p>6. Give effect to institutional arrangements that work to activate, accelerate and optimise Indigenous economic development across Northern Australia</p>

## 1.3. Endorsement by the Ministerial Forum

The implementation plan was endorsed by the November 2018 Ministerial Forum, with six specific implementation actions currently underway. These specific initiatives include the development of a Northern Australian Indigenous Development Accord between the Commonwealth, Western Australian, Northern Territory and Queensland Governments, agreement on which was announced on 12<sup>th</sup> December 2019, as well as co-design work to scope pan-Northern Australian institutional arrangements (Northern Australia Indigenous Economic Development Body and Northern Australia Enterprise and Employment Hub network) to support the specific needs of the Northern Australian Indigenous economy, and the preparation of a Northern Australia Indigenous Commercial Research Roadmap.

<sup>3</sup> OECD (2019) *Linking Indigenous Communities with Regional Development*, OECD Publishing, Paris

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## 2. Introduction

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According to the United Nations, there are 370 million Indigenous peoples worldwide across 90 countries. While Indigenous peoples comprise approximately 5% of the world's population, they make up 15% of the world's extreme poor and 33% of the rural poor. They comprise the majority of the world's cultural and linguistic diversity and are stewards of the vast majority of the planet's biodiversity, the largest carbon stocks, intact freshwater systems and marine expanses. These special places have and continue to persist because of complex knowledge systems based on place-anchored guardianship and customary obligations.

The IRG's focus on Indigenous Northern Australia is based on the following:

- Currently, Indigenous people comprise 15 percent of the total population of Northern Australia, and substantially more of the population outside of the main regional centres of Cairns, Townsville and Darwin;
- 50 percent of the working age population of Northern Australia will be Indigenous by 2050;
- Indigenous interests have legal rights to around 80 percent of the Northern Australian terrestrial landmass and large areas of coastline and marine areas, including approximately 85 percent of the Northern Territory coastline; and
- As a result, Indigenous people and their institutions perform key functions in the future sustainability of Northern Australia.

Northern Australia holds some of the most biodiverse and unique landscapes in Australia. They are also home to Indigenous people that have lived within and managed these landscapes for at least 65,000 years. These include the world's most intact tropical savannas, extensive wetlands and sandstone plateau's of Arnhem land and the Kimberley with Kakadu, Uluru-Kata Tjuta, Purnululu, Wet Tropics and the Great Barrier Reef World heritage listed National Parks. The region has 65% of the nation's freshwater runoff from relatively intact rivers.

The enormous bio-cultural diversity of northern Australia, together with long Indigenous traditions represents globally unique opportunities to achieve sustainable development alongside the guardians of these collectively held lands and waters.

Yet, Indigenous peoples continue to suffer marginalization, extreme poverty and structural exclusion. Some are being dispossessed of their traditional lands and waters leaving ancient belief systems, cultures, languages and sustainable ways of life threatened with increasingly higher numbers facing extinction.

Typical orthodox western approaches deal with complex systems by breaking them into silo's and treating them separately, whilst Indigenous people continue to articulate the completeness, or wholeness, and the need to include all aspects of life.

The IRG believes this orthodox approach is one of the fundamental challenges facing the future sustainability of Australia's unique environment and resources, in particular the balance between development, sustainability and society.

The IRG is pleased to be able to submit to the Productivity Commission's review of the National Water Reform as being a critical policy area for Indigenous development and broader, public policy, to amplify and uplift the significant relationship between Indigenous people and water as well as to achieve sustainable development and prosperity.

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### 3. National water reform and Indigenous people

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The National Water Reform alongside the review of the EPBC Act, represents a timely suite of reforms that must connect with the legal status of Indigenous Australians and our nations efforts to achieve sustainable and equitable development. The submission presented here by the IRG is based around the Issues Paper, therefore it focuses on issues of principle and fundamentals of best practice and how it may interact with Indigenous people in northern Australia who have advocated over a long period of time, Indigenous water rights, and rights to an economic future (Figure 1&2).

*Indigenous people's rights to be free to practice and enjoy their own culture are recognised under the International Convention on Civil and Political Rights.<sup>4</sup>*

Prior to the introduction of the National Water Initiative (NWI), the Aboriginal and Torres Strait Islander Commission commissioned a series of papers on Indigenous water rights by the Lingiari Foundation. In 2004, ATSIC produced another publication on Aboriginal water and fishing rights, comparing the legal and policy approaches of Australia and Canada. The North Australian Indigenous Land & Sea Management Alliance (NAISMA) commenced research in 2004 and established Australia's first 'Indigenous Water Policy Group' in 2006, the 'Indigenous Community Water Facilitator's Network' in 2007 to engage Indigenous people in northern Australia's high-pressure catchments into statutory water planning frameworks. This was the first Indigenous led response to the national water reform (see below) in a post ATSIC environment and led to the establishment of a firm policy position relevant to northern Australia.

The NWI provided constrained recognition of Indigenous interests in water (refer Table 1 for objectives), although the recognition was limited to social, spiritual and customary interests, not, as many indigenous leaders have argued economic interests. In drafting the NWI, the Council of Australian Governments **did not** consult with Indigenous people and therefore did not consider the implications for Indigenous peoples of separating land and water titles and the potential to create systemic and adverse impacts to Indigenous people and the Australian environment.

*Land, water and people are inextricably connected, which means unity of land, water and Indigenous people<sup>5</sup>.*

This has led to a widespread perception that Indigenous interests in water exclude any economic dimension, yet native title expert Michael O'Donnell<sup>6</sup>, who in his review of 'Indigenous Rights in Water in Northern Australia' argues that commercial access is consistent with the NWI. He identifies that no attention is paid to clause 25(ix) of the NWI (2004), which requires that Indigenous needs be addressed. O'Donnell argues that this clause reflects the need to facilitate Indigenous access to water within the water entitlement framework, including for commercial purposes. This clause states that both water access entitlements and the planning framework are to address Indigenous needs that are inclusive of economic purposes and provides for a property right in water.

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<sup>4</sup> Lingiari Foundation 2002 *Offshore water rights discussion booklet*, Lingiari Foundation and ATSIC, Broome

<sup>5</sup><https://nailsma.org.au/resource-library/mary-river-statement>

<sup>6</sup> O'Donnell, M. (2011). NAISMA TRaCK Project 6.2 *Indigenous Rights in Water in Northern Australia*, Charles Darwin University, Darwin.



There have been Indigenous organisations (and nations) that have recognised the need to address Indigenous economic rights. Policy statements, such as the *North Australian Indigenous Water Policy Statement* (Figure 1.), the *Mary River Statement*<sup>7</sup> (Figure 2) and the *Murray and Lower Darling Rivers Indigenous Nations, Echuca Declaration*<sup>8</sup> all seek to advance water rights of a commercial nature, as do the outputs from the more recent National Cultural Flows Research Project<sup>9</sup>.

It is therefore important to understand the historical nature of this issue, as too often Indigenous calls for policy or legislative reform go unnoticed by successive governments.



Figure 1 & 2. Indigenous Water Policy Statement – Indigenous Water Policy Group

<sup>7</sup> <https://nailsma.org.au/resource-library/mary-river-statement>

<sup>8</sup> <https://www.mldrin.org.au/wp-content/uploads/2018/07/Echuca-Declaration-Final-PDF.pdf>

<sup>9</sup> <https://www.mldrin.org.au/what-we-do/cultural-flows/>



**Figure 3&4 Mary River Statement**

**The Mary River Statement**

"We, the delegates of the Mary River Water Forum, make this Statement to bring to the attention of the Australian Government the fundamental principle that water and Indigenous people are inextricably intertwined.

Indigenous people have rights, responsibilities and obligations in accordance with our customary laws, traditions, protocols and customs to protect, conserve and maintain the environment and ecosystems in their natural state as to ensure the sustainability of the whole environment.

Consideration by the Australian Government to separate land and water in future policy development for north Australia and establish a new regime for the allocation and use of water is of critical concern to us.

As Traditional Owners we have an inherent right to make decisions about cultural and natural resource management in north Australia.

In accordance with Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples, we must have a central role in the development, implementation and evaluation of policy and legislative or administrative measures that may affect us concerning water.

Any policies and legislation that are developed in water allocation and management in north Australia need to ensure that Indigenous rights are paramount.

We assert our rights in accordance with Article 26 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples confirming that:

- Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.
- Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
- States shall consult through their own representative institutions in order to obtain the free and informed consent of Indigenous peoples prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

States that provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Indigenous people have always been part of and are crucial to the maintenance of our ecosystems, and therefore need to ensure minimal impact from settlement and unsustainable development across north Australia.

We urge governments to ensure that sufficient resources are provided to enable the equitable participation of the Indigenous owners of north Australia in the development of policies, setting of allocations and management of regulatory schemes that may evolve.

We the Indigenous peoples of north Australia will work with the Government to establish what water settlement and allocation is required to satisfy our:

- spiritual and
- social and cultural,
- ecological and
- economic needs.

We support the North Australian Indigenous Land and Sea Management Alliance (NAISMA), the NAISMA Indigenous Water Policy Group, Indigenous representative bodies or individuals to proactively pursue positive outcomes in line with the Mary River Forum Statement."

**Recommendations**

1. That new ways to deal with governments need to be created, such as a new authoritative, statutory governance arrangement between governments and north Australian Traditional Owners to be established and supported. This could include the establishment of Regional Basin authorities in north Australia, or an Indigenous Water Commission.
2. That the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) be used as the benchmark for establishing and building a new legal and cultural framework for doing business between governments, enterprises and north Australian Indigenous people.
3. That membership and governance of NAISMA be expanded to include Prescribed Body Corporates with the intent of returning authority back to Traditional Owners living and working on country as part of building sustainable livelihoods.
4. That NAISMA, the Northern Australia Land and Water Taskforce and land councils facilitate a broader forum across north Australia, that would, among its tasks, establish a set of guiding principles for governments to support the Interim Working Group elected at this Forum, and their efforts to advocate for Indigenous people's rights to water.
5. That the uses of water as a northern Indigenous economic development opportunity through sustainable practices, be vigorously investigated; and that clearly defined culturally relevant geographical boundaries of north Australia be developed.
6. That all water policy and legislation is enacted in accordance with relevant Indigenous national and international laws and policies.
7. That a communication strategy be developed to ensure that Indigenous communities are able to actually participate and are fully informed on water policy issues and opportunities; and that the strategy includes requirements for institutional feedback to community for a two-way approach.
8. That the Native Title Act be amended to include water as a commercial use right to negotiate (other than just a customary use right), and this be included in other local, state, federal and international laws, codes and protocols.
9. That other interest groups be engaged to develop partnerships that promote understanding, recognition and a common goal in water use and management.
10. That the diversity, different needs and aspirations of urban, remote and all regional areas be considered in any consultations and decisions.

Figure 5&6. Mary River Statement cont'

### **Agreed objectives and outcomes of the NWI**

Implementation of the National Water Initiative (NWI) was anticipated to:

... 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 (paragraph 23)

There are ten specific objectives (paragraphs 23(i)-23(x)) underpinning this ambition.

The NWI also establishes agreed outcomes, actions and implementation timelines for eight key elements:

Water Access Entitlements and Planning Framework

Water Markets and Trading

Best Practice Water Pricing and Institutional Arrangements

Integrated Management of Water for Environmental and Other Public Benefit Outcomes

Water Resource Accounting

Urban Water Reform

Community Partnerships and Adjustment.

Knowledge and Capacity Building

NWI schedules also specify principles for regulatory approvals for water use, guidelines for water plans and planning processes, guidelines for water registries, and principles for trading rules.

*Source:* COAG (2004).

***Table 1. Objectives of the National Water Initiative***

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## 4. Context

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Water is central to Indigenous society, culture and livelihoods. Traditional relationships between Indigenous people and their country have always involved salt and freshwater (waters). However, the colonization of Australia brought many changes to Indigenous rights, access and use of waters including:

- Pollution;
- Overfishing;
- Dams modifying flows and passage ways for aquatic fauna;
- Mining;
- Over extraction; and
- Removal of Indigenous people from their country.

The future wellbeing of all Australians is tied to our collective ability to respect and maintain our water resources – this is an economic and social imperative. Equally important for Indigenous people is the capacity to both preserve and enjoy these resources and to practice and sustain the cultural obligations that are linked to the spirit of the country.

However, in recent times it has become obvious from work conducted by CSIRO on behalf of the IRG<sup>10</sup>, that urgent work around planning, policy, governance, research and recognition of the unique legal interests that Indigenous people hold must be reflected in legislation governing the water resources of the north.

Northern Australia has a large number of relatively intact river systems across the monsoonal tropical and sub-tropical north to the arid desert zones of central Australia. Groundwater is crucial for the provision of reliable access to water and for supporting ecosystems, communities and the customary and cultural practices for Indigenous communities. Water planning across Northern Australia operates in a context of:

- major governance and resourcing constraints;
- deficiencies in scientific knowledge of water resources;
- significant areas without water plans in some jurisdictions (especially Indigenous lands); and
- the inequitable allocation of available water.

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<sup>10</sup> Barber, M, Macintosh A, Waschka M, Robinson, C (2020). Indigenous Strategic Issues in Water Planning for Northern Australia. Paper prepared for the Indigenous Reference Group to the Ministerial Forum on Northern Development. 12 pages. CSIRO Brisbane



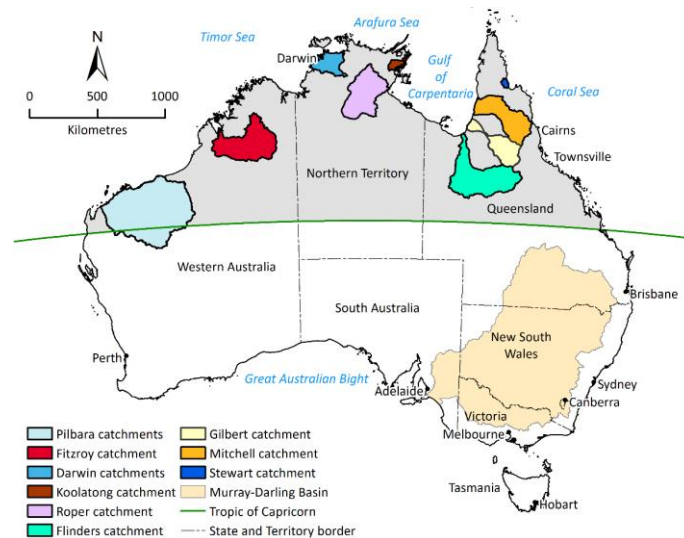


Figure 7. Major catchments in northern Australia<sup>11</sup>

As already mentioned, Indigenous people comprise a significant proportion of the population in Northern Australia and have legally recognized rights and interests in land in a large portion of the north. These conditions do not exist to the same degree in other key Australian contexts, notably the Murray Darling Basin.

It is evident through the work of the IRG that the needs of Indigenous communities to access and manage their country and resources has not been given appropriate attention by governments, economists, policy makers and decision makers relative to the attention and effort given to other sectors, industries and stakeholders. It is becoming clear that this situation of denial and neglect by successive governments creates social justice issues as well as a stain on the nation's ability to reconcile with Australia's first peoples. In addition, the economic pursuits of Indigenous people in northern Australia have to deal with both this historical neglect whilst finding sustainable futures that benefit their communities as well as the nation.

Further, the 2013 National Water Commission review found that there had been little increase in water allocated for Indigenous purposes. A further 2017 Productivity Commission inquiry found that Indigenous interests remained underrepresented, with water plans lacking detail on Indigenous cultural values, water objectives, and how those objectives could be realised.

Therefore, the IRG believes that the poor treatment of Indigenous rights and interests in Australian water policy and management practice is now well documented and requires urgent attention to secure Indigenous rights and ensure the integrity in the future management of the nation's precious water resources.

<sup>11</sup> Barber, M, Macintosh A, Waschka M, Robinson, C (2020). Indigenous Strategic Issues in Water Planning for Northern Australia. Paper prepared for the Indigenous Reference Group to the Ministerial Forum on Northern Development. 12 pages. CSIRO Brisbane

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## 5. Strategic Indigenous Issues

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The IRG commissioned research by Barber (2020) has found the following in each of the northern jurisdictions:

**Northern Territory** - water plans under the *Water Act 1992* (NT) utilize the following allocation rules for non-consumptive and consumptive uses (80:20 (Top End) and 95:5 (Arid Zone) and Indigenous cultural values can be addressed in non-consumptive and consumptive allocations in water plans. In 2017, after much policy and advocacy work by NAILSMA, and then the NLC, the *Northern Territory Strategic Aboriginal Water Reserves Policy* was adopted, establishing a framework for Strategic Aboriginal Water Reserves (SAWRs) to address Indigenous economic uses. In November 2019, the *Water Act 1992* was amended to identify SAWRs as a discrete beneficial use and to require Water Allocation Plans to include an 'Aboriginal water reserve' if any land in the water controlled district was eligible Aboriginal land. Currently, all six of the declared plans in the NT recognise the cultural significance of water for Indigenous people and include direct or indirect water allocations to protect Indigenous cultural values. Only the four most recent plans include SAWRs.

**Queensland** - water resources are managed through the *Water Act 2000* (Qld). The purpose of the Act is to provide a framework for the sustainable management of Queensland's water resources, including the planning, allocation and use of water. There are management principles outlined in the Act for achieving sustainable management, including recognition of the interests of Aboriginal and Torres Strait Islander people and their connection with water resources. The Act explicitly provides for Aboriginal and Torres Strait Islander people to take or interfere with water for traditional activities or cultural purposes without the need for an authorisation. Water planning is central to the *Water Act's* governance arrangements. Under the Act, there is a requirement (since October 2018) that all new or replacement water plans explicitly state desired 'cultural outcomes' separately from social, economic and environmental outcomes. In drafting a water plan, the Minister must consider the interests that an Indigenous party may have in the water resources for the plan area. All 12 water planning areas in northern Queensland include the objective of making water available to support the water-related cultural values of Indigenous people. Seven of these plans also seek to support the economic aspirations of Indigenous people by making water available to them for this purpose through Indigenous water reserves. The report provides a short case study on the Cape York water plan, highlighting a unique approach to reserving and allocating water to eligible Indigenous people, who can then make the decisions about how the water is used and by whom.

**Western Australia** - the primary water statute is the *Rights in Water and Irrigation Act 1914* (RiWI). The objectives of the Act are to provide for the sustainable use and development of water for current and future users, including for domestic, commercial, recreational, cultural and navigational purposes. Indigenous interests in water are not specifically mentioned in the RiWI Act, rather they can be incorporated as potential 'users' where 'use' includes development for commercial and cultural purposes. The only specific reference to Indigeneity in the RiWI Act is that local water resources management committees need to include people with knowledge of water needs and practices of local communities including Aboriginal communities. There is a requirement for an Indigenous person to be included on the Water Resources Council established by the *Water Agencies (Powers) Act 1984*, who under the RiWI Act must be given any proposed water plan for consideration, however this Water Resources Council is not currently in existence.

There is an established non-statutory process for developing water allocation plans in Western Australia set out in the document 'Water Allocation Planning in Western Australia: a guide to our processes' that identifies consultation with local Indigenous people in order to understand and address their water issues and needs. Consideration of Indigenous interests and Indigenous engagement vary considerably across water plans or water allocation plans. However, in many cases, the reference to Indigenous interests in northern water plans are high-level and procedurally focussed. Currently, no water allocation plan reserves water specifically for use by Indigenous people, although reserves have been discussed and/or included in other kinds of agreements. The

Western Australian Government's reform of existing water legislation through the drafting of a new *Water Resources Management Bill* enables further jurisdictional alignment with the principles of the NWI. Recently a new high-level State-wide Aboriginal Water and Environmental Advisory Group to the Department of Water and Environmental Regulation has been established to enable Indigenous engagement, input and advice on legislation and policy.

Across **Northern Australia**, current arrangements have shown limited effectiveness in promoting Indigenous water interests. All planning processes are shaped by, and must take account of, the wider planning context. In general, Indigenous people have far more knowledge of land tenure than water governance regimes, and Indigenous involvement in water planning is highly sensitive to the levels of resourcing and to the way those resources are used. A focus on improving structures, processes and resourcing for the development of Indigenous skills in water planning is a crucial basis for further progress. The synopsis above suggests that the effective representation of Indigenous interests in water planning processes across Northern Australia is driven by the institutional arrangements governing 4 main things.

- 1) The recognition of prior Indigenous ownership and control over water;
- 2) The procedures that are followed in the preparation of plans;
- 3) The substantive protections afforded to Indigenous cultural values and uses (both non-consumptive and consumptive); and
- 4) The quantity, quality and timing of water made available to support Indigenous commercial interests and the terms on which it is provided.

### **1) Recognising prior Indigenous systems of water law, governance and ownership**

Securing national public and governmental recognition of prior Indigenous ownership of the Australian continent and its resources remains an ongoing priority for Indigenous Australians. With respect to water law and governance, major Indigenous declarations have outlined Indigenous principles, norms and rules in an attempt to influence public attitudes and shape future water planning and policy engagement. Governments are increasingly guided by wider strategic commitments to reconciliation through initiatives such as Reconciliation Action Plans, and have become more open to formal acknowledgement and recognition of Indigenous laws, governance, and interests.

### **2) Involving Indigenous people in water policy reform and water governance**

Indigenous people have had limited participation in water policy reform and strategic water governance, with their roles largely limited to engagement and advisory processes. More substantial Indigenous involvement in government policy development concerning the management of freshwater resources would achieve improved water planning outcomes for Indigenous people. Recent developments, such as the review of the National Water Initiative and the drafting of new water resources legislation in Western Australia, provide an opportunity to enhance Indigenous levels of recognition and roles in strategic governance.

### **3) Enabling Indigenous representation, engagement, participation, and collaboration in water planning**

Indigenous involvement in existing water planning can encompass a spectrum of involvement that encompasses limited engagement, active participation, through to formal and extended collaboration. There are currently significant variations across time and jurisdictions in the structure, process and consistency of implementation of existing regimes. Enabling and resourcing greater opportunities for Indigenous representation across the spectrum of involvement is important, emphasising participation and collaboration. To be successful, improvements in representation and participation in water governance need to be complemented by a two-way process of translation that enables water planning to be influenced by Indigenous worldviews as well as Indigenous people engaging with the requirements of contemporary water planning.



#### **4) Protecting Indigenous cultural values**

The effective protection of the full array of Indigenous cultural values in water requires consistent and accurate terminology in water planning, consistent resourcing to address information needs, and ongoing improvement in water statutes.

#### **5) Supporting Indigenous commercial interests in water**

Indigenous access to water is crucial to protecting and advancing current and future Indigenous commercial interests. Key jurisdictional initiatives, such as the creation of Indigenous water reserves and entitlements, are to be encouraged and monitored for their effectiveness.

#### **6) Support Indigenous business to realise opportunities from water resources**

The creation of new water entitlements alone will not be sufficient to ensure the economic aspirations of Indigenous enterprises and communities. Government efforts to improve Indigenous access to water for commercial purposes must be accompanied by additional support to ensure Indigenous communities have the capacity to utilise the resource. This may include using the value of water resources to directly support Indigenous business capacity development.

#### **7) Incorporating Indigenous water values, rights and interests from other legislation and policy**

Key laws and policies in other domains will affect Indigenous water interests, including those related to cultural heritage protection, land-use planning (e.g. in relation to the construction of dams), environmental protection, water quality, and fisheries. Important matters may also be addressed through non-legislative mechanisms such as catchment management processes and agreements with water users; for example, mining companies. Addressing strategic water issues for Indigenous people requires 'whole of government' and 'whole of catchment' approaches.

#### **8) Improving knowledge to address Indigenous needs**

In general, there is less information about Northern Australia than about southern and eastern Australia. The improvement of this situation is an ongoing priority for those interested in the effective management and sustainable development of the north. Water is scarce in the dry season and desert areas, making permanent water sources of high value. Significant numbers of regional and remote Indigenous communities suffer from issues with domestic and community supply, further sensitising people to the value and importance of water. Indigenous influence over North Australian research strategy in general, and over water research in particular, will support better outcomes for Indigenous people and estates.

In **Summary**, addressing Indigenous interests in water remains a matter of considerable national significance. Whilst some progress has been made since the implementation of the National Water Initiative and particularly in the past decade on the general nature and extent of Indigenous water values, rights and interests in water in Northern Australia, there are enormous gaps in planning, legislative recognition, adoption of commercial allocations and protection of heritage as it relates to water. The IRG believes that Indigenous people are fundamental in the development of northern Australia and this extends to the need for significant water reform and supporting capacity development on the Indigenous estate.

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## 6. Recommendations

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The NWI is a national agreement, that was ill-informed in its design, poorly interpreted and implemented leaving Indigenous people in a position of disadvantage. This is inconsistent with some jurisdictional approaches to negotiate treaties and other forms of settlements with Indigenous peoples. It is imperative that Indigenous people have capacity and agency to engage with existing water planning structures and processes, but also to consider additional forms of actions that may be beyond existing jurisdictional agendas. To promote the water interests of Indigenous people in Northern Australia, the IRG requested research supporting a combination of principles, actions and draft recommendations suitable for further jurisdictional engagement. The following recommendations derive from that research and other research led by Indigenous people and agencies:

1. Governments commit to greater allocation of water entitlements to Indigenous people based on clear and agreed criteria that support Indigenous economic advancement and are subject to monitoring, evaluation, and revision.
2. Governments commit to actions to secure water for Indigenous commercial interests in fully and highly allocated systems, including through the buyback and reallocation of water entitlements
3. Governments adopt the United Nations Declaration on the Rights of Indigenous People<sup>12</sup> as a guide to engaging with Indigenous people in the design and implementation of a new National Water Initiative;
4. Governments commit to enabling formal acknowledgements and recognitions of prior Indigenous ownership and control of water in water legislation, policy, planning processes and/or documentation.
5. Governments commit to deepening Indigenous representation and participation from Northern Australia in current and future strategic water policy review and reform processes, particularly the NWI review that is currently underway.
6. Governments develop and consider strategies for increasing Indigenous representation in strategic-level water resource governance and control at multiple scales (cross-jurisdictional, jurisdictional, and sub-jurisdictional region/basin/catchment) across Northern Australia.
7. Governments commit to:
  - ongoing monitoring and evaluation of the effective implementation of existing structures for Indigenous representation in water planning;
  - creating new structures consistent with existing legislative and policy settings; and
  - investing to build Indigenous peoples' capacity for effective representation within such structures
8. Governments commit to the development of two-way translational, interactive and educational water planning resources, including a Best Practice Policy and Guide for Water Planners, that address the specific conditions and jurisdictions of Northern Australia.
9. Governments commit to partner with Indigenous people in the protection of cultural values through:
  - The development of clear and consistent conceptual approaches, classifications and terminology in water planning with respect to cultural values and outcomes across Northern Australia;
  - The sufficient and consistent resourcing of the cultural value and cultural outcome information needs for water planning; and
  - Ensuring water statutes in each jurisdiction place priority on the protection of Indigenous cultural values
10. Governments commit to 'whole of government approaches to supporting Indigenous businesses to realise opportunities from water resources on the Indigenous estate.
11. Governments commit to supporting comprehensive 'whole of jurisdiction reviews of water issues for Indigenous people beyond water planning, emphasising integrated government responses, alignment with NWI principles, and processes to address Indigenous needs and enable Indigenous benefits.
12. Governments commit to Indigenous-led and collaborative research on key issues for North Australian Indigenous water interests, including water policy reform options, cultural values, native title, water planning participation, barriers to Indigenous water utilisation, water resource development priorities, and options for realising value from the Indigenous estate.

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<sup>12</sup> [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)