



**NORTHERN  
LAND COUNCIL**

**Submission to the Productivity Commission  
on**

**NATIONAL WATER REFORM 2020**

**March 2021**

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## 2. About the Northern Land Council

The Northern Land Council (NLC) was established in 1973 and following the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA), the NLC became an independent statutory authority responsible for assisting Aboriginal people in the northern region of the Northern Territory (NT) to acquire and manage their traditional lands and waters. The ALRA combines concepts of traditional Aboriginal law and Australian property law and sets out the functions and responsibilities of the Land Councils as follows:

- Identify relevant Traditional Aboriginal Owners and affected people.
- Ascertain and express the wishes and opinions of Aboriginal people about the management of, and legislation in relation to, their land and waters.
- Consult with traditional Aboriginal owners and other Aboriginal people affected by proposals.
- Negotiate on behalf of traditional Aboriginal owners with parties interested in using Aboriginal land or land the subject of a land claim.
- Assist Aboriginal people carry out commercial activities.
- Obtain Traditional Owners' informed consent, as a group.
- Assist in the protection of sacred sites.
- Direct an Aboriginal Land Trust to enter into any agreement or take any action concerning Aboriginal land.

In 1994 the NLC became a Native Title Representative Body under the *Native Title Act 1993* (Cth) (NTA), whose role and functions are set out under Part 11, Division 3 of the NTA.

The NLC represents more than 36,000 Aboriginal people and assists its constituents by providing services in output areas including land, sea and water management, land acquisition, community development, Aboriginal land trust administration, native title services, advocacy, information and policy advice. Relevant to this submission is a responsibility to protect the rights and interests of Traditional Owners and other Aboriginal people with interests over the area of the NLC region – more than 210,000 square kilometres of land and over 85% of the coastline.

The NLC's vision is for a Territory in which the rights and responsibilities of every Traditional Owner are recognised and in which Aboriginal people benefit economically, socially and culturally from the secure possession of their lands, freshwater, seas and intellectual property. The NLC's mission is to assist Aboriginal people in the northern region of the NT to acquire and manage their traditional lands and seas, through strong leadership, advocacy, industry engagement and management.

This submission is based on the NLC's functions and its long history and experience working with Aboriginal people in the NT.

Within this submission the NLC refers to Aboriginal people who are traditional Aboriginal owners in the NT as defined under the Aboriginal Land Rights Act. Reference to the term Traditional Owner is used as a term which includes traditional Aboriginal owners (as defined in the Land Rights Act), native title holders (as defined in the Native Title Act) and those with a traditional interest in the lands and waters encompassing the NLC's region.

The NLC would like to suggest through this review that the use of Indigenous does not specifically recognise the First Nation peoples of this country who are distinctly Aboriginal and or Torres Strait Islander Peoples. However, the Northern Land Council will use the language consistent with the Productivity Commission, particularly when referring to the use of the word Indigenous.

### 3. Introduction

The NLC welcomes this opportunity to provide comments on the Productivity Commission (**Commission**) report on the National Water Reform program (**water reform**).

Water is incredibly important to the NLC and its constituents. In 2009 the Mary River Statement was developed by a group of Aboriginal water experts from northern Australia,<sup>1</sup> this Statement is still relevant. Delegates of the forum identified a number of principles and recommendations through the Mary River Statement, including:

- Land, water and people being inextricably connected.
- Aboriginal people have cultural and kinship responsibilities and obligations under customary law to look after water.
- Aboriginal people have responsibility for maintaining water places, the environment and ecosystem in their natural state so as to ensure their sustainability for the whole environment.
- New way to deal with governments need to be created – regional basin authorities or an Indigenous Water Commission.
- That all water policy and legislation is enacted in accordance with relevant Aboriginal national and international laws and policies.

There are a number of high priority water management interests for the NLC and its constituents however, over the last 17 years since the original National Water Initiative (**NWI**) was agreed in 2004, there remain some significant barriers to implementing the NWI as intended in the NT.

One of the Commission's review findings has been that national governance arrangements established for the NWI were significantly eroded over recent years and that strengthened governance architecture is required (draft finding 4.1).

While the NLC supports this finding and the draft recommendation, we note that the success of an NWI to which individual States and Territories are parties should not have to rely on national governance arrangements to ensure principles are acted upon. Every State and Territory government should take responsibility for its commitments under national agreements and deliver accordingly.

The NLC understands the need to refresh the water reform program across all states and territories, however we are concerned that if the Commission does not explore the underlying reasons why priorities under the 2004 NWI are still not being met, any future reform agenda may encounter the same slow progress or non-compliance.

The NLC recognises the comments made by the Commission in setting expectations for a renewed NWI:

'The prospective renewal of the NWI will act to reaffirm collective jurisdictional commitment to water reform. It will provide contemporised outcomes and objectives that jurisdictions will be assessed against going forward.'<sup>2</sup>

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<sup>1</sup> The Mary River Statement is available at <https://nailsma.org.au/uploads/resources/mary-river-statement.pdf>

<sup>2</sup> Source: Assessment of National Water Initiative implementation progress (2017-2020)

The NLC sees this as a great opportunity, and would encourage the Commission to consider the specifics of the NT and address the issues impeding the NT from achieving the intention of the original NWI as part of any renewal.

In the NT over recent years, we have seen the continued erosion of the ability for community and stakeholders to be involved in water management decisions made by government which affect their rights and interests.

There has been a history of water allocation plans not being declared by the Government of the day, only to have redo the process under a new political regime. There has also been a stalling of water planning processes over the last 18 months. Meanwhile, the majority of water extraction licences are being issued in the absence of water planning processes and the important functions planning processes provide.

The provision of water for Aboriginal economic development through Aboriginal Water Reserves (**AWR**), while a great initiative in theory, has not been realised on the ground – in the majority of cases where the AWR should be available, the water resources have been fully or overallocated and there is no water available. Further, the required legislation to enable issuing of water extraction licences to eligible Aboriginal rights holders is still not fully in place, despite the primary legislation being passed by the NT Legislative Assembly in October 2019.

This submission will not provide an analysis of the Commission's complete set of reports in their entirety, but will instead focus on the key elements that are of particular relevance to Aboriginal people in the NT, and where their rights, interests and aspirations are directly affected.

The submission provides commentary on the *Productivity Commission Draft Report – Assessment of National Water Initiative implementation progress (2017-2020)* (**Assessment Report**), identifying areas that are of particular concern to the NLC and its constituents (Part A).

Part B provides feedback on the *National Water Reform 2020 Productivity Commission Draft Report Findings, recommendations and renewal advice* (**Advice Report**).

The NLC would welcome the opportunity to discuss this submission in greater detail with the Commission.



## 4. Part A: Productivity Commission Draft Report – Assessment of National Water Initiative implementation progress (2017-2020)

The Assessment Report provides an assessment of jurisdictions' progress since 2017 toward achieving the outcomes and objectives of the NWI.

The slow progress that has been made in some areas of the 2004 NWI, and the current approach of the NT Government to water resource management, is continuing to adversely impact Aboriginal people in the NT. The following priorities are consistently raised by Aboriginal people, but are yet to be realised:

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

These are fundamental components that should have been resolved in the past 17 years of the NWI. The NLC is calling for the Commission to provide clear accountability and binding commitment from governments to meet the existing commitments of the NWI that remain outstanding, as part of any NWI water reform refresh. Until these core commitments are met, it will be difficult to build and progress further reforms.

**Recommendation 1:** That existing NWI commitments be included in any water reform refresh, with clear accountability for their achievement.

### I. Water access entitlements and planning

#### Water planning (assessment report section 1.2)

Paragraph 36 of the 2004 NWI states:

‘Recognising that settling the trade-offs between competing outcomes for water systems will involve judgements informed by best available science, socio-economic analysis and community input, statutory water plans will be prepared for surface water and groundwater management units in which entitlements are issued... Water planning is an important mechanism to assist governments and the community to determine water management and allocation decisions to meet productive, environmental and social objectives.’

As stated in the Implementation Progress Report, ‘under the NWI, parties agreed to prepare statutory water plans for surface water and groundwater management systems in which entitlements are issued.’ Pg. 19.

In the NT, water planning is undertaken in accordance with S22B of the *Water Act 1993* (NT) (**Water Act**). The Department of Environment, Parks and Water Security (**DEPWS**) develops water allocation plans (**WAP**) for endorsement by the Minister for Environment.

One of the functions of a WAP under the Water Act is to ensure ‘...water is allocated within the estimated sustainable yield to beneficial uses’. Under S90 of the Water Act, WAPs are to be considered by the NT Controller of Water Resources (**Controller**) in making water licensing and management decisions, along with a range of other factors that must be considered, including ‘other factors the Controller considers should be taken into account...’

Table 1.2 of the Assessment Report shows the proportion of water licensed for extraction that is within a WAP area. Only 28% of the volume of water licensed for extraction in the NT is within areas covered by WAPs. This is the lowest of all jurisdictions and NLC is concerned that 72% of water extraction occurs in areas where stakeholders have not been involved in trade-off discussions to determine allocation decisions required to meet productive, environmental and social objectives. In these cases, there is a lack of transparency as to the scientific basis of the decision, the NLC has seen little evidence of socio-economic analysis, and there is unlikely to have been any community input or consultation. This includes consultation with Aboriginal people who may have rights and interests under the ALRA or NTA.

For example, from an analysis of information contained on the NT Government water licensing portal<sup>3</sup>, it appears that all 11 water extraction licences with individual volumes of greater than 7,000ML per year are either from water resources not covered by planning processes, or were licensed prior to the declaration of a WAP. These include:

- A 15,400ML per year licence (licence J21) taking water from the Jinduckin Formation, which does not have a WAP declared or under development.
- A 10,000ML per year licence (TLAM1002) taking water from the Tindall Limestone Aquifer (Mataranka) and issued in December 2020. There has been a water planning process underway for this resource for over a decade, however the Controller’s decision statement did not consider water planning information in issuing the water extraction licence.
- A 13,896ML per year licence (licence O34) taking water from the Ooloo Dolostone Aquifer that was issued in May 2016. The Ooloo Dolostone water allocation plan was declared in November 2019.
- Surface water extraction licence number 8111000 for 100,000ML per year and 811019 for 50,000ML per year from Forsyth Creek; and 815002 – 22,500ML per year from Blackmore River. Neither of these systems have water allocation plans in place or planning processes underway.

The absence of water planning underpinning water extraction licence decisions is of particular concern to the NLC on behalf of its constituents. Water allocation plans include identification of the water requirements to sustain key environmental and cultural assets, a determination of the estimated sustainable yield, and determination of the Aboriginal Water

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<sup>3</sup> Copies of all water extraction licence decisions are available through the NT Water Licensing Portal: [Water Licensing Portal - Department of Environment and Natural Resources](#)

Reserve (amongst other functions)<sup>4</sup>. The absence of planning means these key functions are not being considered prior to extraction occurring.

In addition, there is no opportunity for Traditional Owners to have meaningful involvement in decision making, as may be an option through the WAP development process. There is currently no ability for government to consider the protection of cultural values outside of plan areas, and therefore in the majority of water extraction licensing decisions, including all major extractions to date cultural values have not been considered.

It is paramount that effective WAPs are developed, declared and used to underpin water extraction licensing decisions. The NLC seeks further consideration of this issue by the Commission, given the poor performance of successive NT Governments in developing WAPs to guide sustainable water resource management decisions.

In order for any future water reform to be effective, the underlying barriers to the NT Government undertaking water planning processes in a timely manner, and using WAPs to inform licensing and management activities, need to be addressed. The NLC would welcome the Commission's consideration of addressing these barriers to ensure the intent of the NWI is achieved.

**Recommendation 2:** That the Commission consider and make recommendations to address the underlying barriers to the NT Government's development of water plans and ensure that water licensing decisions are being made in accordance with water plans which meet the requirement of the 2004 NWI.

**Recommendation 3:** That the Commission emphasises the urgent need for jurisdictions to rely, in the absence of thorough water plans, on: expert consideration of the best available science; direct consultation with Traditional Owners in relation to applications; and the precautionary principle where a water resource is poorly modelled to date.

**Water for environmental and other public benefit outcomes (assessment report section 1.3)**

**Addressing overallocated and overused systems (assessment report section 1.4)**

Under the NWI, 'water for environmental and other public benefit outcomes' is intended to:

- Have statutory recognition
- Be afforded the same level of security as consumptive uses
- Be tradeable on the temporary market (where held as an entitlement).<sup>5</sup>

The Assessment Report states: 'Under the NWI, parties agreed to provide a better balance in water resource use in systems that had been overallocated' and 'realising the objectives of the NWI requires returning all overallocated and/or overused systems to environmentally sustainable levels of extraction.' Pg. 32.

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<sup>4</sup> Source: 'About water allocation planning' - <https://depws.nt.gov.au/water/water-management/water-allocation-plans/about-water-allocation-planning>

<sup>5</sup> Source: Productivity Commission Draft Report – Assessment of National Water Initiative implementation progress (2017-2020)

In the NT, water for environmental and other public benefit outcomes is provided statutory recognition only in instances where there is a WAP declared by the Minister.

Under the Water Act (NT), WAPs are only provided for the Controller 'for consideration' rather than direction in making water licensing and management decisions. In practice this has meant that even when a WAP has been declared, water for environmental and other public benefit outcomes is not afforded the same level of security as consumptive uses.

The following provides two recent examples of licensing decisions made by the Controller that do not meet the NT's NWI commitments. Unfortunately, recent experience demonstrates that the NT is not taking steps to return systems to environmentally sustainable levels of extraction, but rather continues to facilitate extraction from over-allocated water resources.

#### **Example 1: Howard Groundwater System**

The Howard Groundwater system, in the Darwin Rural area, does not have a WAP guiding its management. There has never been a WAP in place and the Howard Water Advisory Committee, whose role was to provide advice and recommendations on the development of a WAP, was disbanded on 30 June 2019, after nine years of operation<sup>6</sup>.

On 8 February 2021, the Controller issued a water extraction licence for agricultural extraction from the Howard groundwater system<sup>7</sup>. As part of the decision statement, the Controller identified the volume of water available for consumptive uses as 20% of annual average recharge in accordance with the framework used in the NT when there is no WAP in place, equating to 7,400ML per year<sup>8</sup>.

The current total use of water in the system is documented in the licence decision as 18,626ML per year (comprising 14,972ML of licensed extraction and 3,654ML of domestic use exempt from licensing). This is 50% of the annual average recharge – well above the consumptive water availability of 20% of recharge, and overallocated by 11,226ML per year.

Despite the Controller's decision statement identifying the clear over-allocation of the resource, the Controller still issued a new water extraction licence for 235ML per year, taking the total extraction to 51% of the annual average recharge and further overallocating the resource.

As well as the risks borne by the environment and other users from this decision<sup>9</sup>, the overallocation of the resource has significant implications for the future availability of water in the AWR, a legislated requirement of WAPs and right of Aboriginal landholders, made available upon declaration of a WAP and only available in instances where there is sufficient water remaining in the consumptive pool.

The decision statement made by the Controller states:

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<sup>6</sup> The Howard Water Advisory Committee Terms of Reference are available at:

[https://depws.nt.gov.au/\\_data/assets/pdf\\_file/0009/387450/HWAC-Terms-of-Reference-Dec-2016.pdf](https://depws.nt.gov.au/_data/assets/pdf_file/0009/387450/HWAC-Terms-of-Reference-Dec-2016.pdf)

<sup>7</sup> NT Water Licensing Portal: [Water Licensing Portal - Department of Environment and Natural Resources](#)

<sup>8</sup> The decision statement is available at [Water Licensing Portal - Department of Environment and Natural Resources](#).

<sup>9</sup> A NT Government study in 2006 states that 'baseflows would be adversely affected by intensive drawdown.' In Howard Springs [https://denr.nt.gov.au/\\_data/assets/pdf\\_file/0007/254608/darwinaquifersprings2006.pdf](https://denr.nt.gov.au/_data/assets/pdf_file/0007/254608/darwinaquifersprings2006.pdf)

‘As the volume of water allocated for consumptive uses in this System already exceed the contingent levels recommended in the Framework, there is insufficient water available to satisfy a SAWR [Aboriginal Water Reserve] should a WAP be declared for the System. As a result, I consider that granting the Licence will have negligible additional impact on the provision of a future SAWR and will instead provide for a holistic management of the resource in the future.’ Pg. 6.

In July 2020 the NT Government released the Recovery of Unused Licensed Water Entitlements Policy (**unused water policy**), which specifies the objective of recovering unused licensed entitlements in the NT is to<sup>10</sup>:

- ‘ensure that licensed entitlements are fully utilised for the benefit of the licence holder, the community and the Territory, and
- reduce speculation in licensed entitlements, requiring licence holders to demonstrate a genuine need to retain a maximum licensed entitlement in future periods.

The objective of this policy is to provide clear information about when the Controller will commence the process for recovery of unused licensed entitlements.’ Pg. 5.

This unused water policy does not address the requirements of the 2004 NWI to return systems to environmentally sustainable levels of extraction, but rather focuses on ensuring that all extraction licences are fully utilised.

The NT Government is setting a disturbing precedent by the Controller being comfortable to continue overallocating resources, despite 17 years of being a signatory to the NWI. Such an approach puts water for economic development even further out of reach for Aboriginal people and is clearly against the intent of the NWI.

It is disappointing that the NT Government is yet to develop a process for returning systems to environmentally sustainable levels of extraction, or a policy to ensure water extraction licensing decisions do not overallocate water resources. It is concerning that Aboriginal people must wait for WAPs to be developed in order to get access to water for economic development through the AWR, while these water resource systems continue to be overallocated in the absence of water planning processes.

The Howard Groundwater System example highlights one of the reasons why the NLC and its constituents have concerns about trusting the NT Government and the Controller to adequately manage the precious water resources of the NT for the benefit of all.

#### **Example 2: Mataranka Water Allocation Planning**

The Mataranka Water Advisory Committee (**Mataranka Committee**) in its current form was re-established in 2017, after previously being in operation from 2009 to 2012. The Mataranka Committee provides advice and recommendations to the department on the development of a water allocation plan for the Tindall Limestone Aquifer, Mataranka. There are four members of the Mataranka Committee who are Aboriginal and represent the rights and interests of Aboriginal people in part of the WAP area.

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<sup>10</sup> The policy is available at [Recovery of unused licensed water entitlements policy](#)

There is yet to be a WAP declared for this resource. Despite this, water extraction licences from the Mataranka Tindall Aquifer groundwater system within the draft plan boundary currently sit at 8% of the total water licensed in the NT.

At the May 2019 meeting of the Mataranka Committee, the NT Government presented information indicating they considered up to 20% recharge to be an acceptable level of take from the resource, equating to 28,200ML per year<sup>11</sup>. According to information from the NT Water Licensing Portal, water licences for the Mataranka resources with issue dates prior to May 2019 had a combined volume of 9,452ML per year.

Based on information from the NT Water Licensing Portal, there are seven water extraction licences with issue dates after May 2019. The total additional volume licensed for extraction by the Controller between May 2019 and December 2020 was 32,316ML per year, taking the total volume of water licensed from the resource to 41,768ML per year.

Based on this information, the water resource could now be considered overallocated by a volume of 13,568ML per year.

However, under the two most recent licence decisions (TLAM10001 – 3,392ML per year and TLAM10002 – 10,000ML per year), the Controller has significantly increased the volume of water considered available for consumptive uses, by allowing a portion of the aquifer to have permissible drawdown of storage volume by up to 80% over 100 years – this would equate to 12,320,000ML per year if fully utilised<sup>12</sup>.

These decisions have been made in the absence of any consultation with the Mataranka Committee, who have not had a government facilitated meeting since October 2019.

This change in approach undermines the government water planning processes. It also highlights the ability of the Controller to make significant changes to water management arrangements without effective engagement with community and stakeholders, including Aboriginal people who are undeniably impacted by water licensing decisions.

The decisions made by the Controller in relation to these two licence applications have been questioned by the NLC, with review requests submitted to the Minister for Environment in December 2020 and January 2021. At the time of writing, the Minister had advised that the applications had been referred to the Water Resources Review Panel under S30(3)(b) of the Water Act (NT). The NLC is happy to share copies of the requests if they are of interest to the Commission.

#### **Indigenous access (assessment report section 1.6)**

Under the NWI, all jurisdictions agreed that water access entitlements and planning frameworks would recognise the needs of Aboriginal people in relation to water access and management. Amongst other commitments, the NT Government committed to having Aboriginal representation in water planning processes; and providing for the possible existence of native title rights to water in planning processes.

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<sup>11</sup> Minutes from the meeting are available at [Tindall Mataranka-Daly Waters Water Advisory Committee meetings - Department of Environment, Parks and Water Security](#)

<sup>12</sup> The licence decision statement associated with TLAM1002 is available at [Water Licensing Portal - Department of Environment and Natural Resources](#)

The NLC is disappointed with the lack of progress by the NT Government in complying with the Indigenous access component of the 2004 NWI.

### **Indigenous representation in water planning processes**

Under S23 of the Water Act (NT), the Minister may establish and appoint members to a water advisory committee for the NT, part of the NT or a WAP area.

Water advisory committees are the only formal mechanism employed by the NT Government for community and stakeholder input into water allocation planning processes and the implementation of plans, and consist of ‘such members as the Minister thinks fit and the members shall hold office at the Minister’s pleasure.’ (S23(2)). The Act does not provide for any specific composition requirements, and does not specify that Aboriginal people must be part of water advisory committees – an area the NLC believes can be substantially improved.

As at 1 March 2021, there was one water advisory committee in operation in the NT – the Mataranka Committee. The last time the Committee met was 24 October 2019<sup>13</sup>.

The Mataranka Committee has 12 members, four of whom are Aboriginal and have been appointed to represent Aboriginal interests in part of the WAP area. Aboriginal land (including non-exclusive native title possession) represents approximately 80% of the Mataranka WAP area<sup>14</sup>.

The four Aboriginal members are the only Aboriginal people currently represented in any water planning processes across the whole of the NT, which represents a substantial decline over recent years.

At the time of the 2017 National Water Reform final report, there were seven water advisory committees in place in the NT - Western Davenport, Mataranka, Katherine, Ti Tree, Ooloo, Alice Springs and Howard. Over the last three years, six of those committees were dissolved. A new Alice Springs Plan Review Water Advisory Committee was established in October 2020 and expired on 1 March 2021<sup>15</sup>.

The NLC highlights this as it appears to contradict the information provided in the Assessment Report:

‘Since 2017, the Northern Territory Government has established water advisory committees which contribute to the development of water allocation plans and include Aboriginal participants.’ Pg. 38.

Based on information available through the water advisory committee minutes online, in 2017 there were a total of 80 people appointed to water advisory committees. As at 1 March 2021 there are 12<sup>16</sup>.

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<sup>13</sup> Minutes from the meeting are available at [Tindall Mataranka-Daly Waters Water Advisory Committee meetings - Department of Environment, Parks and Water Security](#)

<sup>14</sup> Source: Mataranka WAC meeting minutes 21-22 May 2019 [Microsoft Word - FINAL DRAFT Minutes TMDWWAC 9 May 2019.docx \(nt.gov.au\)](#), combined with NRMMaps analysis.

<sup>15</sup> The Alice Springs Plan Review Water Advisory Committee Terms of Reference is available at [Alice Springs Plan Review Water Advisory Committee - Department of Environment, Parks and Water Security](#).

<sup>16</sup> Information about water advisory committees are available at <https://depws.nt.gov.au/boards-and-committees/water-advisory-committees>



As there are no other formal mechanisms for the NT Government to involve community and stakeholders in water allocation planning, the substantial diminishing of water advisory committees since 2017 is of concern to the NLC.

The NLC has sought information from the NT Government about the criteria for commencing new or revised water allocation plans. To date there has been no response from government.

While the majority of the Committees were disbanded on the declaration of WAPs, the NLC has sought that Committees be continued or re-appointed to oversee the implementation of WAPs. Section 23(1B) of the Water Act provides for Committees to 'advise the Controller on the effectiveness of the water allocation plan in maximising economic and social benefits within ecological constraints.' It is disappointing that there are now six declared WAPs in the NT, but no Committees overseeing their implementation.

**Recommendation 4:** That before embarking on a new or revised water reform agenda, the Commission explore the reasons that the NT has not met the requirements of the 2004 NWI in relation to: providing secure water to meet environmental and other public benefit outcomes; addressing overallocated and overused systems; and recognising the need of Aboriginal and Torres Strait Islander people in relation to water access and management.

#### Accounting for native title rights

##### *Strategic Aboriginal Water Reserve Policy and Aboriginal Water Reserve Legislation*

The Assessment Report highlights:

'The NWI requires signatories to take account of native title rights, and to account for water allocated to native title holders. Native title rights to access water for personal, domestic, social and cultural purposes are commonly recognised in native title determinations (Robison et al. 2017). The right to use water for commercial purposes has not, to date, been expressly recognised in native title legislation (Macpherson 2017).'

Pg. 40.

The example provided in the Assessment Report for the NT relates to the Strategic Aboriginal Water Reserve (**AWR**) Policy. The NLC applauds the NT Government for the establishment of this policy and the subsequent 2020 legislative amendment requiring AWRs to be included in relevant WAPs. This represents a significant step towards listening to the aspirations and views of First Nation people and the recognition of Aboriginal water rights. However, there are some major concerns associated with the eligibility criteria, given the NT Government's intent to support Aboriginal economic development.<sup>17</sup>

The criteria for eligible land under the AWR legislation provides for

- i. Aboriginal land scheduled under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act)
- ii. Aboriginal land (Northern Territory enhanced freehold)
- iii. Exclusive Possession Native Title Determination Areas.

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<sup>17</sup> A copy of the AWR policy framework is available at [https://denr.nt.gov.au/\\_data/assets/pdf\\_file/0011/457553/SWRC-Policy-Framework\\_A4\\_V1.pdf](https://denr.nt.gov.au/_data/assets/pdf_file/0011/457553/SWRC-Policy-Framework_A4_V1.pdf)



The NLC has been disappointed that one of its key recommendations throughout the development of the AWR was not adopted through the legislative amendment – that is, that eligibility should be broadened to encompass Aboriginal people and communities who have neither land rights nor exclusive native title. There is negligible land held under exclusive native title in the NT, with the majority of land determined as native title being pastoral leases.

The NLC urges the Commission to review the NLC's and CLC's submissions to the NT Parliament Economic Scrutiny Committee in relation to the eligibility criteria for the AWR<sup>18</sup> and consider whether it meets the NWI requirement to account for native title rights.

#### *Native Title Act Future Acts*

As highlighted under Part A, the majority of water extraction licensing decisions in the NT are made outside of water planning processes. As such, the ability of the NLC and its constituents to influence decision making to reflect the rights of Aboriginal people under NTA and ALRA is largely limited to providing comments on licensing applications and decisions.

Water extraction licensing decisions are 'Future Acts' to which S24(HA) of the NTA applies. The NTA states that an act 'affects' native title if it extinguishes native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise (S227).

As such, the NLC provides the following information to the Commission to demonstrate the NLC's requirements that must be met in order to operate within the NTA:

- Before a licence decision is made, the Controller should provide each of the NLC and any registered applicant to a native title claim or prescribed body corporate (which holds native title on determined by the Federal Court) with a notice of the proposed act which meets the requirements of *Native Title (Notices) Determination 2011 (No. 1)* (S24HA(7)(a))
- By way of notices, the Controller must give the NLC and any native title party a reasonable opportunity to comment on the proposed grant (including comment about whether they oppose or support the grant on certain conditions) (S24HA(7)(b))
- If the licence is issued, it impairs but does not extinguish native title (S24HA(4))
- If the licence is issued, the native title holders are entitled to compensation, which will be payable by the Northern Territory (S24HA(5)).

Non-compliance with these provisions denies Aboriginal people the ability to realise their basic rights under the Commonwealth statute. Failure to give notice in accordance with the NTA withholds from them any reasonable opportunity to know in advance about significant water extraction activities that are planned for their country.

The NTA is clear that water extraction permits or licences are Future Acts giving rise to the right to compensation for impacts on native title. Judicial guidance or negotiated precedents

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<sup>18</sup> Submissions to the Economic Scrutiny Committee are available at:  
[https://parliament.nt.gov.au/\\_data/assets/pdf\\_file/0006/729717/Submission-8-Northern-Land-Council.pdf](https://parliament.nt.gov.au/_data/assets/pdf_file/0006/729717/Submission-8-Northern-Land-Council.pdf);  
and [https://parliament.nt.gov.au/\\_data/assets/pdf\\_file/0009/729711/Submission-2-Central-Land-Council.pdf](https://parliament.nt.gov.au/_data/assets/pdf_file/0009/729711/Submission-2-Central-Land-Council.pdf)

as to the value of compensation are yet to be determined, but compensation for which states and territories will be liable will be somewhat proportionate to the loss suffered. Degradation of sacred sites and cultural landscapes through the over-allocation of water will foreseeably impact upon native title causing compensable cultural loss.

The NLC is continuing to seek the NT Government adhere to the provisions of the NTA as part of water extraction licence decisions.

The Future Acts provision of the NTA and the rights it provides are significant, and the NLC urges the Commission to consider Future Acts as part of the advice.

**Recommendation 5:** That the Commission include reference to the Future Acts provisions of the Native Title Act as part of the advice to government.

## II. Urban water reform

### Urban water service quality (assessment report section 6.1)

The Assessment Report identifies that drinking water quality remains a significant issue in some remote communities. This is certainly the case for many remote Aboriginal communities and homelands across the NT.

The Assessment Report notes that 'States and Territories have all endorsed the ADWG [Australian Drinking Water Guidelines], and most implement them through regulatory arrangements.'

The reporting provided in table 6.3 of the Assessment Report – 'Water quality outcomes for the NT' highlights the following:

'Remote communities: Health related (radiological and microbiological and chemical) parameters were met in 65 of 72 remote communities. There was aesthetic non-compliance against ADWG. The required number of samples were not collected in 21 remote communities.' Pg. 168.

Power and Water Corporation NT (**PWC**) undertakes reporting on water quality in remote communities they service, and include a breakdown of each community and their drinking water quality in comparison to health guidelines.<sup>19</sup>

Of the 72 remote communities serviced in the NT by PWC or its subsidiary, the reporting indicates that 61 of them had water quality that did not meet one or more health guideline parameter in 2017-18<sup>20</sup>. The most commonly exceeded guideline parameter was hardness (as calcium carbonate - CaCO<sub>3</sub>), where 41 communities exceeded 200mg/L - the guideline level included in PWC's water quality report. For example, the drinking water at Ngukurr

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<sup>19</sup> The 2018 water quality report is available at [https://www.powerwater.com.au/\\_data/assets/pdf\\_file/0026/26774/2018-Power-and-Water-Drinking-Water-Quality-Report.pdf](https://www.powerwater.com.au/_data/assets/pdf_file/0026/26774/2018-Power-and-Water-Drinking-Water-Quality-Report.pdf).

<sup>20</sup> Tables 20 to 27 of the appendices of the 2018 Power and Water Report show the results of the health, aesthetic and other parameters for all remote communities ([https://www.powerwater.com.au/\\_data/assets/pdf\\_file/0026/26774/2018-Power-and-Water-Drinking-Water-Quality-Report.pdf](https://www.powerwater.com.au/_data/assets/pdf_file/0026/26774/2018-Power-and-Water-Drinking-Water-Quality-Report.pdf))

community had a recorded calcium carbonate concentration of 692mg/L and Jilkminggan had a concentration of 608mg/L<sup>21</sup>.

In 2017-18 there were also three remote communities with uranium levels in their water supply exceeding the health guideline parameter of 0.017mg/L – Willowra (0.024mg/L), Wilora (0.023mg/L) and Laramba (0.046mg/L)<sup>22</sup>.

This information is in conflict to the information included in the Assessment Report (table 6.3) that implies there are only seven remote communities that are not meeting health related parameters.

**Recommendation 6:** That the Commission re-examine the information used to inform the water quality outcomes for the NT in the Assessment Report to ensure it provides an appropriate reflection of the latest monitoring results from NT remote communities.

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<sup>21</sup> *ibid*

<sup>22</sup> *ibid*. A news report from 2018 regarding the uranium levels in these communities is available at [Uranium in remote communities' water puts 'people's lives at risk' | Indigenous Australians | The Guardian](#)

## 5. Part B: Productivity Commission Draft Report – Findings, recommendations and renewal advice

The following section provides NLC's comments on the National Water Reform 2020 Productivity Commission Draft Report *Findings, recommendations and renewal advice (Advice Report)*. It builds on the responses provided in Part A, and focuses on areas where the NLC sees that greatest change is required.

### I. NWI renewal: a refreshed intent (advice report section 3)

The NLC welcomes the inclusion of a dedicated objective and renew element in relation to Aboriginal peoples' involvement in water management.

The Productivity Commission Draft Report National Water Reform 2020 (**Water Reform 2020 Report**) recognises Indigenous rights to water by highlighting that Australia has adopted the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**). The Water Reform 2020 Report highlights that Articles 25 and 26 of the UNDRIP state that Indigenous peoples have rights to water that they have traditionally owned, including the right to own, use and develop those resources.<sup>23</sup>

Further, the Water Reform 2020 Report refers to the National Agreement on Closing the Gap (**CtG**) which, amongst other aims, commits to strengthened and established formal partnerships and shared decision-making.

While the Commission notes these overarching requirements in the Water Reform 2020 Report, they are not adequately translated into the draft goal or priorities under the Advice Report. The NLC sees this as a significant oversight that needs to be rectified.

As it currently stands, the information provided by the Commission within the Advice Report (NWI renewal advice 3.1: a modernised goal) is as follows:

'The overarching goal of the National Water Initiative remains sound but should be modernised through reference to adaptation to climate change and recognition of the importance of water in the lives of Aboriginal and Torres Strait Islander people. Suggested wording follows:

The Parties commit to this renewed National Water Initiative in recognition of the continuing national imperative to increase the productivity and efficiency of Australia's water use, to service the changing needs of rural, urban and remote communities and to ensure the health of river and groundwater systems and their surrounding landscapes whilst adapting to a changing climate. In continuing to implement this agreement, the Parties also acknowledge the importance of water to the lives of Aboriginal and Torres Strait Islander people.' Pg. 1.

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<sup>23</sup> UNDRIP 2007 in <https://www.pc.gov.au/inquiries/current/water-reform-2020/draft/water-reform-2020-draft.pdf>

**Recommendation 7:** That the Commission update the renewal advice 3.1: a modernised goal to include the following: ‘In continuing to implement this agreement, the Parties also acknowledge the importance of water to the lives of Aboriginal and Torres Strait Islander people, and commit to meeting the rights, interests and aspirations of Aboriginal and Torres Strait Islander people in accordance with government policy and international agreements.’

The NLC suggests that the wording of the proposed agreement needs to be strengthened in order to adequately reflect the findings of the Water Reform 2020 Report (including government commitment under the UNDRIP and the CtG Agreement).

The findings of the Water Reform 2020 Report and the Assessment Report are also not adequately reflected under the NWI renewal advice 3.2: modernised overarching objectives documented in the Advice Report. The draft objective states:

‘...optimise economic, environmental, social and cultural outcomes through best-practice management of Australia’s water resources. In the process, this will provide certainty for investment, water users and the environment...’ Pg. 1.

**Recommendation 8:** That the Commission include an objective in the renewed NWI that is specifically related to the rights, interests and aspirations of Aboriginal and Torres Strait Islander people in order to adequately reflect the outcomes from the Water Reform 2020 Report and the Assessment report.

The NLC is supportive of the references to adaptation to climate change made by the Commission and recognition that provisions need to be made to better account for climate change.

Climate change is of great concern to the NLC and its constituents. It is recognised that vulnerable Territorians, particularly Aboriginal people living in remote areas will be disproportionately impacted by climate change.<sup>24</sup> Impacts affecting health and well-being, livelihoods, changes to Country and traditional food sources, and the outcomes of extreme weather events (such as salt-water intrusion, storm surges and erosion) are all areas that are being felt by Aboriginal people as a consequence of climate change.<sup>25</sup>

The draft NWI renewal advice 3.3: modernised objectives (A2) states that:

‘...transparent, statutory-based water planning that...includes clear triggers and processes for reviewing the balance between water for the environmental and consumptive use, such as in response to the effects of climate change.’ Pg. 2.

The NLC suggests that the triggers and process for rebalancing should also include consideration of cultural outcomes along with environmental and consumptive uses.

**Recommendation 9:** That the Commission broaden its draft renewal advice to consider the impacts of climate change that will be felt by Aboriginal people and that processes for rebalancing environmental and consumptive uses also consider cultural outcomes.

<sup>24</sup> Source: Northern Territory Climate Change Response: Toward 2050 available at [https://depws.nt.gov.au/data/assets/pdf\\_file/0005/904775/northern-territory-climate-change-response-towards-2050.pdf](https://depws.nt.gov.au/data/assets/pdf_file/0005/904775/northern-territory-climate-change-response-towards-2050.pdf)

<sup>25</sup> A Foreground article from 2019 provides a number examples of climate change impacts in the NT. Available at <https://www.foreground.com.au/culture/not-passive-victims-indigenous-australians-respond-to-climate-change/>

The NLC is encouraged to see that the provision of safe and secure drinking water is a recommended focus of a renewed NWI in the Advice Report under Advice 3.3: modernised objectives (B1) - 'access to safe and reliable drinking water, including in remote communities'. As discussed in Part A, this is a key issue for the NLC and our constituents, and an area that requires significant improvement.

## **II. Building in good governance for a renewed NWI (advice report section 4)**

### **Governance arrangements for a renewed NWI (draft renewal advice 4.1)**

The Advice Report Draft Recommendation 4.1 states:

'Water ministers should come together periodically to oversee development of a renewed NWI, and to receive, consider and act upon advice that comes out of any periodic review of the new agreement.' Pg. 5.

The NLC does not believe this recommendation to be strong enough to avoid the issues and failings of the past. Periodic reviews of the 2004 NWI were undertaken, and progress reports compiled. It is not clear how Draft Recommendation 4.1 will result in improved outcomes for those affected by inadequate water resource management decisions, and how any future water reform programs will be improved as compared to the arrangements under the 2004 NWI.

The NLC provides the following for the Commission to consider in finalising its advice to government under Draft NWI Renewal Advice 4.1: Governance Arrangements for a Renewed NWI:

1. '...oversee development of a renewed National Water Initiative, and to receive, consider and act upon advice that comes out of any periodic review of the new agreement...' Pg. 5.

This requires clarification about what 'consider and act upon' means in practice. There needs to be certainty that findings from the reviews result in improvements throughout the life of a new agreement. For example, the Commission may consider a recommendation that specifies the need to place a moratorium on processes which are found not to support the objectives and commitments of the NWI, and with all relevant stakeholders and community input, implement reforms as a government priority.

2. '...clearly link desired outcomes to objectives and limit prescriptive actions, instead setting out principles for best practice ...' Pg. 5.

The NLC cautions against limiting prescriptive actions. As has been seen in the NT over recent years, principles have not been adhered to in processes and outcomes. To ensure transparency and accountability, it is paramount that there is clarity in what will and will not be done under a national agreement, and a certain level of prescription is now required to avoid the further exclusion of Aboriginal Territorians.

3. '...commit to preparing three-year rolling work programs setting out how they aim to achieve the outcomes set out in the renewed agreement ...' Pg. 5.

The NLC welcomes the development of work programs, and seeks to ensure that governments are required to make the programs publically available in a timely fashion.

Ideally these work programs would also include the involvement of community and stakeholders in their development, and be independently reviewed to ensure the work programs meet the objectives of a renewed agreement. Further, the NLC recommends the inclusion of a risk mitigation strategy associated with the implications of not adhering to the work program.

4. ‘...the National Water Reform Committee should provide on-going collective oversight of the agreement, initiating policy advice and guidance...’ Pg. 5.

The NLC sees this as an important mechanism, and would urge the Commission to include a requirement for independent membership of the Committee, including ensuring that Aboriginal and Torres Strait Islander voices are effectively represented.

**Recommendation 10:** That the Draft Recommendation be strengthened to ensure that governments are accountable to their constituents, that commitments are met, and that outcomes are ultimately achieved.

### III. Water entitlements and planning (advice report section 6)

#### Water planning (draft renewal advice 6.2)

The NLC supports the Commission’s advice provided in the water planning component of the Advice Report. This is an area of great interest to the NLC and its constituents and, as highlighted in Part A, is an area that requires substantial improvement in the NT given there is only one water advisory committee currently in operation.

However, there are a number of components of the Water Planning Draft Renewal Advice (6.2) that the NLC would like to see refined:

1. ‘...State and Territory Governments should ensure that water planning provisions are maintained and enhanced.’ Pg. 7.

The NLC agrees that improvements (enhancements) are still required. As per the comments in Part A, the NLC is concerned that a number of original commitments made by the NT Government have not been achieved, or have diminished over time. Delivery of the original NWI commitments should not be compromised by a renewed NWI that replaces the 2004 NWI in its entirety.

2. ‘...better specify measurable and well-informed cultural and environmental outcomes and improve engagement with Traditional Owners.’ Pg. 7.

The NLC supports this view of the Commission, but suggests amending the wording to ‘improve engagement with Aboriginal and Torres Strait Islander people’ to ensure inclusivity.

The NLC urges the Commission to consider activities that have worked in the past, and to recommend that these be reinstated. For example, in 2005 the Daly River Aboriginal Reference Group was established as a 22-person committee responsible for determining and documenting their own aspirations for land and water use, economic development and cultural heritage protection.<sup>26</sup> The group is no longer in place.

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<sup>26</sup> Further information about the Daly River ARG is available from <http://www.nespnorthern.edu.au/wp-content/uploads/2016/04/3.1-Indigenous-engagement-and-participation.pdf>

3. ‘...include principles for independent review of water plans... NWI could set out principles for reviews to promote their need to be robust and fit for purpose, focused on achieving net benefits and to involve community participation.’ Pg. 7.

The NLC welcomes this suggestion, but seeks that the Commission expand the proposal for an independent review of water plans to include review of implementation activities and adherence to plans in making water extraction licensing and management decisions.

The NLC supports the suggestion to include community participation in the review, and seeks a specific principle that Aboriginal people have the opportunity to be involved.

In the NLC’s view, rather than incorporate a principle of independent review, that a renewed agreement commits to enacting independent review processes in legislation. The NT Water Act currently provides for the establishment and operation of various panels including the Water Resources Review Panel and the Drillers Qualification Advisory Committee. The NLC seeks a similar legislated group to be established to provide an independent review function under a renewed NWI.

**Recommendation 11:** That the Water Planning Draft Renewal Advice (6.2) be revised to ensure the existing commitments from the 2004 NWI are delivered upon and that independent review processes of water plans, their implementation and use in water extraction licensing and management decisions be legislated.

#### IV. Environmental management (advice report section 8)

##### Best-practice environmental objectives and outcomes (draft renewal advice 8.1)

The NLC is heartened to see the emphasis on best-practice environmental objectives, and seeks that this is implemented. This is an area that requires particular focus in the NT, given water planning, licensing and management decisions frequently rely on environmental information that is out-of-date and is not reflective of current best practice.

For example, the 2019 Ooloo WAP uses outcomes from a workshop which was held in 2004 to set the sustainable level of extraction from the water resource<sup>27</sup>.

For water licensing and management decisions made in the absence of a water allocation plan, the NT Water Allocation Planning Framework (**WAPF**)<sup>28</sup> is used to underpin decisions. This is also used when there is a lack of relevant technical and scientific information to guide water management decisions (e.g. whether to apply annual announced allocations). This framework was developed in 2000 and has not been updated since<sup>29</sup>.

In 2018 the NT Government released the NT Water Regulatory Reform Directions Paper,<sup>30</sup> which highlighted a number of issues with the WAPF that could be considered in a review of

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<sup>27</sup> The report, Revision of Recommendations of Erskine et al. (2003) Based on Daly Region Water Allocation Workshop, Darwin, 5 May 2004 is available at [https://depws.nt.gov.au/\\_data/assets/pdf\\_file/0008/396494/Erskine\\_Report\\_Environmental-Water-Requirements-of-the-Daly-River\\_Revision-of-Recommendations.pdf](https://depws.nt.gov.au/_data/assets/pdf_file/0008/396494/Erskine_Report_Environmental-Water-Requirements-of-the-Daly-River_Revision-of-Recommendations.pdf).

<sup>28</sup> The NT WAPF is available at [https://depws.nt.gov.au/\\_data/assets/pdf\\_file/0011/476669/nt-water-allocation-planning-framework.pdf](https://depws.nt.gov.au/_data/assets/pdf_file/0011/476669/nt-water-allocation-planning-framework.pdf)

<sup>29</sup> *ibid*

<sup>30</sup> The Water Reform Directions Paper is available at <https://haveyoursay.nt.gov.au/waterreform>



the policy. These included its application to resources considered under arid zone provisions, which under the WAPF may be drawn down by up to 80% over 100 years.

In 2018 the NT Government also accepted all recommendations of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (**Inquiry**). The Inquiry expressed significant concern about any proposed application of arid zone contingent allocations to water extraction licensing decisions in the Beetaloo Sub-basin, which lies within the arid zone, highlighting that:<sup>31</sup>

‘If this rule was applied to an onshore shale gas industry, or any other extractive use in the region, this would again essentially permit ‘mining’ of the groundwater resource, and would be ecologically unsustainable...’ Pg. 137.

It is concerning that the NT Government is relying on information that is at least 17 to 21 years old to underpin water planning and management activities across the NT. This is being done in full knowledge that the information needs to be updated.

**Recommendation 12:** That the Commission a) include further criteria relating to its interpretation of ‘best-practice’ environmental objectives and outcomes, and b) provide clear guidance to jurisdictions that regular updates to information underpinning decisions must occur.

The NLC supports the Commission’s advice regarding collaborative processes with stakeholders and community:

‘Environmental objectives and agreed environmental outcomes should then: be set through a collaborative, stakeholder and community process that considers the relative community value of outcomes...’ Pg. 10.

This advice highlights the need to have the right people, at the right time, in the right place, asking the right questions. The opportunity for affected community members to actively and effectively participate in these processes is paramount.

In the NT, Aboriginal people are key stakeholders, especially in areas outside of the main urban centres where a majority of water management decisions are made. It is critical that culturally appropriate engagement is undertaken.

**Recommendation 13:** That the Commission include advice requiring governments to ensure that any stakeholder and community engagement process is undertaken in accordance with best-practice engagement principles, and ensure that all affected people have the opportunity to be meaningfully engaged in the process.

### Waterway oversight (draft renewal advice 8.3)

NLC supports the renewal advice regarding waterway oversight:

‘State and Territory Governments should establish a formal institutional oversight responsibility for wetland and waterway management that provides an interface between the management of waterways and environmental water.’

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<sup>31</sup> The HFI Final Report is available at <https://frackinginquiry.nt.gov.au/>

Integrated waterway and catchment management has occurred very successfully in parts of the NT in the past but has been disbanded in recent years. It is an approach that the NLC's constituents see as valuable to reinstate. The NLC suggests that this process should include independent oversight in order to foster participation and gain support from community and stakeholders.

For example, the Daly River Management Advisory Committee (**DRMAC**) was established in 2006 to advise the NT Government on ways of achieving the highest standards of management of lands and other resources (including water) used for both production and conservation in the Daly River region. DRMAC was an independent community committee with a mandate to bring a diversity of skills, perspectives and opinions to bear on land use, conservation and sustainable use of resources.<sup>32</sup> DRMAC was disbanded by NT Government in 2013 and has not been replaced.<sup>33</sup>

**Recommendation 14:** The NLC supports draft renewal advice 8.3 and recommends that the function be performed by panels of experts, land and water users and community members, specifically including Aboriginal members. This group should be independent from, but resourced by governments.

**Objectives and priority setting for held water (draft renewal advice 8.5)  
Independent managers and auditing (draft renewal advice 8.10)**

The Commission provides a significant amount of consideration for held environmental water, and is prescriptive of the objectives to be achieved from environmental water holders and environmental watering activities.

In the NT, there is no held environmental water, and planned environmental water is water that should be retained in the system, by determining volumes and protecting these prior to any water being licensed for extraction. As compared to held environmental water, the only consideration given to planned environmental water is provided under the *Draft NWI Renewal Advice 8.12: Commitment to adaptive management*.

As has been seen in water systems across the NT in recent years, it is too easy to over-allocate resources, diminishing the amount of water that is retained in systems to meet basic environmental and cultural needs. This was explored in Part A of this submission.

Given the Controller is responsible for issuing consumptive water extraction licences in the NT, and there is no independence in environmental water decision-making, it is paramount that the NWI provides a similar level of prescription to the decision-making and reporting of planned environmental water as it does to held environmental water. This is particularly important in instances where there is no environmental water holder and the only provision of environmental water is as planned water.

The NLC supports the renewal advice regarding independent managers and auditing:

‘Where governments own significant held environmental water... they should ensure that decisions on the use of this water are made by independent bodies at arm’s

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<sup>32</sup> Further information about the DRMAC is available from [https://cmsexternal.nt.gov.au/\\_data/assets/pdf\\_file/0020/254540/DRMAC-strategic-plan-2012-15-Revised.pdf](https://cmsexternal.nt.gov.au/_data/assets/pdf_file/0020/254540/DRMAC-strategic-plan-2012-15-Revised.pdf)

<sup>33</sup> An interview with the Chair of the DRMAC is available at <https://www.abc.net.au/news/rural/2013-07-31/top-end-valley/4856026>

length from government. Governments with held environmental water entitlements should provide for independent auditing...’ Pg. 14.

However, it is disappointing that the Commission considers this requirement as only being applicable to held environmental water. The fact that all environmental water provision in the NT is considered planned environmental does not diminish the important function that it provides for the environment and other public benefit outcomes in water resource systems. It should therefore be afforded the same level of transparency and accountability by governments.

**Recommendation 15:** That objectives and priority setting requirements be provided for planned environmental water in addition to held environmental water, focusing on protection of the planned environmental water and ensuring it is provided with an equal level of security as consumptive water, as per the 2004 NWI requirements.

**Recommendation 16:** That the same level of independence, oversight and auditing be required for planned environmental water in jurisdictions such as the NT as is provided to held environmental water.

## **V. Securing Aboriginal and Torres Strait Islander people’s interests in water (advice report section 9)**

### **Draft finding 9.1**

The NLC welcomes the inclusion of a dedicated objective and new element in a renewed NWI relevant to Aboriginal and Torres Strait Islander people’s interests, and the recognition by the Commission that slow progress has been made against commitments in the 2004 NWI:

‘Much more needs to be done to include Traditional Owners’ interests in water in jurisdictional planning and the management of water. Slow progress against commitments made in the 2004 National Water Initiative, coupled with the contemporary context including the National Agreement on Closing the Gap and wide support for action, warrants inclusion of both a dedicated objective and new element in a renewed National Water Initiative.’ Pg. 15.

It is encouraging that the Commission has identified the need for a Committee on Aboriginal Water Interests. How committee members are appointed, and whether there are members who represent Aboriginal Territorians, are considerations of interest to the NLC.

The Water Reform 2020 Report provides a summary of the National Cultural Flows Research Project. It also references the Echuca Declaration, made in 2007. The existence of these – and other documents that call for Aboriginal rights and interests to be more effectively reflected in water management activities across Australia – highlights there has been a desire and willingness of Aboriginal people to participate for a long time.

In order to improve outcomes in this space there is a need to understand the barriers to achieving meaningful outcomes that have been in place to date, and ensure that these are addressed by Commonwealth, state and territory governments.

The Mary River Statement (2009) demonstrates the seriousness of Aboriginal people's contribution and desire to be included in water policy decision-making<sup>34</sup>. In the NT, Aboriginal people are willing and able to participate and represent their rights, interests and aspirations. The barriers to this exist within government, where decision-making is taken away from the people who are affected through the erosion of meaningful engagement processes (e.g. contracting the number of water advisory groups – discussed in Part A Indigenous Access, and abolishing DRMAC – discussed in Part B Environmental Management).

#### **Improving cultural outcomes using existing frameworks (draft renewal advice 9.2)**

The Commission provides the following advice in relation to developing a new NWI element for improving cultural outcomes:

- ‘...cultural objectives are explicitly identified and provided for in water plans and progress in achieving those objectives is regularly monitored and reported publicly
- environmental water holders seek to deliver cultural outcomes whenever consistent with their ecological obligations
- natural resource managers incorporate cultural objectives into river and wetland plans and work with Traditional Owners in on ground management programs to achieve them
- Traditional Owner engagement in water planning, environmental water management and natural resource management is of high quality and fostered through the development of long term relationships (Draft NWI renewal advice 6.2, 8.3 and 8.9).’ Pg. 15.

The NLC provides the following suggestions to the Commission for refining the renewal advice 9.2: improving cultural outcomes using existing frameworks:

- Reorder such that the statement relating to ‘Traditional Owner engagement in water planning, environmental water management and natural resource management...’ is first. This would reflect that relationships and effective, respectful and meaningful engagement are critical to the success of any activity relating to Aboriginal people. This should not be understated.
- All government activities must meet the principles of free, prior and informed consent in accordance with the UNDRIP. This should be explicitly included in this section.
- Consider and include a requirement for the renewed NWI to account for the protection of Traditional Ecological Knowledge, and ensure that cultural information is afforded a level of protection that is determined by each knowledge holder.<sup>35</sup> This is specifically the case in relation to any public reporting and must be considered in relation to identifying cultural objectives in water plans.
- Ensure governments commit to on-going engagement with Aboriginal people, and that Aboriginal people have an effective voice in decisions that affect their rights, interests and aspirations.

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<sup>34</sup> Source: Mary River Statement, available at <https://nailsma.org.au/uploads/resources/mary-river-statement.pdf>

<sup>35</sup> The NLC notes that IP Australia is currently undertaking consultation associated with Indigenous Knowledge (<https://www.ipaustralia.gov.au/about-us/news-and-community/news/indigenous-knowledge-consultations-now-open>). Any development in this space should be reflected in a renewed NWI.

- Include a requirement that Aboriginal people are provided appropriate support (e.g. remuneration, training and development, translation services etc.) as part of any engagement activities relating to water planning and management, and that this must be provided by government, in consultation with representative bodies such as Land Councils (or other representative organisations).

**Recommendation 17:** That the Commission refine the renewal advice 9.2: improving cultural outcomes using existing frameworks in accordance with NLC’s suggestions.

### Improving access for economic development (draft renewal advice 9.3)

In accordance with the findings in the Water Reform 2020 Report that a new element for the NWI should be developed through a co-design process with Aboriginal and Torres Strait Islander people, the NLC suggests the following revisions to the renewal advice associated with improving access for economic development.

The statement that ‘where State and Territory Governments have decided [our emphasis] that providing access to water is an effective way to support the economic development of Aboriginal and Torres Strait Islander communities...’ suggests the opposite of Aboriginal self-determination in relation to their social, cultural and economic needs.

By empowering governments to continue deciding whether providing access to water is a way of supporting economic development for Aboriginal people, this further disempowers those same people to have a meaningful say in activities that affect them.

Should Aboriginal communities determine that access to water is an effective way to support their own economic development, it is the responsibility for state and territory governments to work with Aboriginal people to meet these requirements.

**Recommendation 18:** That draft renewal advice 9.3 be replaced by advice that puts the determination of means and mechanisms required to achieve Aboriginal economic development solely into the hands of Aboriginal and Torres Strait Islander people, in accordance with the right to self-determination, and that this advice be developed with relevant Aboriginal representative bodies.

## VI. Urban water services (advice report section 11)

### Ensuring access to a basic level of service (draft renewal advice 11.6)

The NLC welcomes the recognition that all Australians, including Aboriginal people who live in remote communities and homelands, should be able to access safe and reliable drinking water.

As highlighted in Part A of this submission, there is a long way to go in the NT, as a large proportion of our remote communities have drinking water that is sub-standard. The NLC recognises that the funding required to meet a basic level of safe and reliable drinking water in the NT is substantial, however this is a right that should be afforded all Australians.

## VII. Monitoring and reporting on regional and remote service quality (draft renewal advice 11.8)

It is encouraging that the advice from the Commission for a renewed NWI would consider monitoring and reporting on water quality and service outcomes in remote Aboriginal communities.

The NLC supports this advice, however recommends the inclusion of the need for individual communities to be actively involved in determining their required level of service and hence requirements for water service provision.

This will be fundamental to ensuring that monitoring and reporting on service quality meets the needs of the customers.

**Recommendation 19:** That reporting and monitoring of service quality associated with individual remote community water supply includes collaboration with the communities affected to determine the required level of service and therefore ensure the monitoring and reporting requirements meets the needs of the customer.

## VIII. Government investment in major water infrastructure (advice report section 13)

### Draft Recommendation and Information request 13.1

The Commission seeks advice about how a refreshed NWI could ensure that major water infrastructure investments most effectively promote the aspirations of Traditional Owners and protect Aboriginal and Torres Strait Islander people's heritage and cultural values. The Commission questions whether the principle guiding new investment should be amended to ensure that planning processes for developments are 'culturally responsive'.

In principle the NLC supports the inclusion of a principle for planning processes to be culturally responsive in addition to developments being environmentally sustainable and economically viable. However, the NLC seeks additional information from the Commission about what is meant by this term. At a minimum, any major water infrastructure project should avoid harm to sacred sites and culturally important places, however the NLC would support the Commission going beyond this minimum level as part of its advice.

The Commission recommends that the National Water Grid Authority (**NWGA**) should broaden its Investment Policy Framework to allow funding for all projects where government involvement may be warranted, including supporting access to essential town water supplies (draft recommendation 13.1).

The NWGA's remit includes supporting regional prosperity.<sup>36</sup> The NLC sees remote Aboriginal communities as being a critical component to achieving regional prosperity, and no community can prosper without basic services including safe and secure water. This should be a focus of a government agency such as the NWGA.

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<sup>36</sup> Refer to The National Water Grid: Investing in Australia's water future, available at <https://www.nationalwatergrid.gov.au/sites/default/files/documents/the-national-water-grid-investing-in-australias-water-future.pdf>

**Recommendation 20:** That the NWI refresh promote the requirement to undertake activities that go beyond the minimum level of cultural site protection, and recognise that to promote the aspirations of Aboriginal people, effective and meaningful engagement must occur early and often.

**Recommendation 21:** That the Commission's draft recommendation 13.1 be broadened to include supporting access to safe and secure potable water for remote Aboriginal communities.

## **IX. Community engagement (advice report section 14)**

As highlighted in Part A of this submission, community engagement arrangements associated with water planning, licensing and management in the NT need to be significantly improved. The NLC supports the approach the Commission has implemented in developing a more prescriptive community engagement framework, and ensuring that 'Australian governments should recommit to best practice, cost-effective engagement with their communities on all water matters.' Pg. 25.

However, the NLC is concerned that the NT Government may use the 'cost-effective' component of the advice to avoid undertaking engagement activities in accordance with best-practice arrangements. It is paramount that the Commission seeks to ensure that budgets are not easily re-prioritised away from community engagement.

The following statement by the Commission may only be considered 'aspirational' in the NT, as it reflects a number of areas that need to be significantly improved upon:

'The characteristics of inclusiveness, timeliness, partnership, respect, access to information, transparency, responsiveness and continuous improvement represent a best practice foundation for guidance on effective community engagement and information provision practice in water resource management and water service provision.' Pg. 25.

The NLC is committed to doing whatever is in its power to improve outcomes for Aboriginal people in the NT, and will continue to advocate for best-practice engagement activities. The NLC seeks the support of the Commission in advancing this, and welcomes the opportunity to work with Commonwealth and Territory Governments in ensuring Aboriginal people are meaningfully engaged in water planning, licensing and management activities that affect them.

**Recommendation 22:** As part of the community engagement advice, that the Commission include a requirement for governments to undertake all water planning, licensing and management activities in accordance with free, prior and informed consent requirements as per the UNDRIP.

**Recommendation 23:** That the Commission recommends that relevant legislation to mandate meaningful community engagement as part of government water planning and management functions.