Submission to the Productivity Commission National Water Reform 2024: Interim Report

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Thank you for the opportunity to provide a response to the Productivity Commission's 2024 report on progress in reforming Australia's water resources sector. We are researchers with expertise in water governance and management and a special interest in Indigenous water rights in Australia. We have conducted water governance research in many Australian regions, including the Murray-Darling Basin (MDB), Victoria, Queensland, New South Wales, the Northern Territory and Western Australia. We have provided advice to the former National Water Commission, to previous reviews of the Productivity Commission, and to the Coalition of Peaks, Murray Lower Darling Rivers Indigenous Nations (MLDRIN), as well as many other representative Indigenous organisations.

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In putting this submission together, we draw on (a) the interests and concerns of Indigenous peoples shared during our research[1] (referred to below and at our institutional websites) and (b) findings and observations from research projects, most of which are published (see also the list below for select refences).

General comments

The needs of Indigenous communities to access and manage water have been a marginal consideration for policy makers, relative to the attention and effort given to (a) environmental restoration in regions such as the MDB, (b) structural adjustments and the continuation of irrigation production, and (c) developing northern Australian water resources. There are clear social justice implications of the denial and ongoing neglect of Indigenous water rights that are reflected in and perpetuated by the NWI of 2004. Australia has failed to come to terms with the legacy of 'aqua nullius' (the erroneous assumption that water belonged to no one when the British invaded), which continues to create both legitimacy and sustainability problems for water management (O'Donnell et al. 2023), as well as undermining the inherent and unceded rights of Indigenous Peoples (Marshall, 2017).

[1] No confidential information is included here.

In drafting the NWI, COAG did not properly consider the implications for Indigenous peoples of separating land and water titles or other changes, which in combination have entrenched and accelerated water dispossession (Hartwig et al. 2021; Hartwig et al. 2020). It is this glaring omission that calls into question the PC's view that the NWI has 'served Australia well as a foundation for water management' (PC 2024: 2). We reject the inference in that finding that the NWI needs to be refreshed to tackle *emerging* challenges; rather it needs to address the *historical and ongoing* injustice of settler colonial forms of water governance, as well as other important matters that could not have been foreseen twenty years ago.

The deplorable treatment of Indigenous rights and interests in Australian water policy and management practice is now well documented by Australian academics (see the published work of Marshall, Moggridge, Poelina, Langton, Jackson, O'Donnell, MacPherson, Godden, Hartwig, O'Bryan, Taylor, Weir; also work by practicing lawyers McAvoy, Ridge and O'Donnell). Over more than fifteen years now, several national government reviews have documented the lack of action taken to address adequately Indigenous rights and interests, including the Productivity Commission. Although these inquiries have noted some recent improvements in consultation, they conclude however that there has been no material change in the distribution of water rights since the NWI was agreed.

The situation is worse than recent evaluations suggest. Research from the Murray Darling Basin (Hartwig et al. 2020) shows that during the decade 2009-2018 Indigenous water holdings declined substantially, by 17% in NSW. An update carried out in 2023 highlights further loss in Indigenous water holdings (Jackson and Hartwig forthcoming). As of August 2023, Jackson and Hartwig estimated that Aboriginal water holdings in the NSW portion of the MDB have dropped to 11,651 ML/yr. While this long-term average annual yield estimate still constitutes 0.2% of available surface water holdings in the area, the total volume of water held by Aboriginal organisations in the NSW MDB **has now declined by at least 20.5% over the 14-year period from 2009 to 2023**. Most of this water was transferred from Aboriginal control when Aboriginal organisations (not Aboriginal Land Councils) could no longer operate under corporation laws and were wound up.

This research points to the vulnerability of statutory Indigenous water rights and the potential for adverse effects from water trading (see Hartwig et al. 2023). Not only have water reforms neglected Indigenous rights and interests; alongside other economic pressures on Indigenous community organisations, they have exacerbated inequities in water rights holdings. Unbundling of land and water titles has not improved outcomes for Indigenous peoples, at least in the NSW portion of the Basin where the data is available. Urgent action is therefore needed to **stem the further loss of valuable holdings**.

When COAG negotiated the NWI, it did not negotiate or consult with Indigenous peoples. There are now several Indigenous organisations advocating for their rights and interests and the Coalition of Peaks is working towards an inland water target under the Closing the Gap policy framework. As identified in the draft Report it is imperative that governments closely work with Indigenous representatives to identify the means of addressing the substantive issues pertaining to Indigenous water rights. Resources should be made available to assist Indigenous organisations and communities to prepare policy positions, options for law reform, and contribute fully developed ideas to the process of NWI review.

The *Closing the Gap* commitments represent welcome Commonwealth recognition of the need to improve water (and land) related outcomes for Indigenous peoples. However, we are

concerned by the delay in settling on a target and that work on Indigenous policy and water policy is operating to some extent in different policy silos and continues to be overseen by multiple Ministers at the federal and state levels. Water policy and Indigenous policy should be consistent and integrated with mutually reinforcing linkages between water legislation, environmental and heritage protection legislation and native title law. The National Cultural Flows Research Project law and policy paper provides detailed explanations of the relationships and outlines options for reform that will need closer examination (http://culturalflows.com.au/images/documents/Law%20and%20policy.pdf). This should be a priority for the Productivity Commission in collaboration with Indigenous representatives and organisations, as well as government departments.

In addition to proposing law reforms, Indigenous advocates and researchers have advanced a market-based reallocation mechanism as a means of addressing the disparity in water rights distributions between Indigenous and non-Indigenous people (see e.g. O'Donnell et al 2021). There appears to be public support for such a mechanism, assuming recent survey results are an indication. A survey of 2700 people in MDB jurisdictions in 2017 (response rate of c. 10%) found that 69.2% of respondents support the principle of reallocating a small amount of water from irrigators to Aboriginal people via the water market (Jackson et al. 2019). Respondents were willing to pay $21.78 in a one-off household levy (aggregate value, A$74.5 million). The results did not reveal strong preferences for how Aboriginal communities should use the allocated water (whether for consumptive or non-consumptive purposes). A more recent survey of 1,162 people found that 38% favoured recovering both environmental and cultural water beyond current goals for the MDB (Zuo and Wheeler 2024). The authors report that this was the most popular response to the question about water recovery and that reacquisition of water licences via the market (both through voluntary tender and compulsory acquisition) was the preferred overall strategy for water recovery.

Yet again, despite indications of public support, Australian governments and particularly the Commonwealth have done too little to reallocate water. The Victorian government, in 2022, explicitly ruled out funding a government water purchase program for Traditional Owners in northern Victoria (DELWP, 2022), despite knowing that this was the only meaningful option for significant water returns to Traditional Owners (O'Donnell et al 2021). The Commonwealth has committed $40M since 2018, and although this was increased to $100M in 2023, none of the funding has been spent. Work by MLDRIN shows that the increase in water prices from 2018 to 2023 means that the original funding of $40M would in 2023 only buy 2/3 of the water it would have purchased in 2018 (Rigney et al 2023). These delays not only cost Indigenous peoples time (in which they could be using water rights for their own benefit) but also continue to cost them water: as prices rise, more and more funding will be needed.

The general point about lack of action is one that needs to be tackled with greater force than is conveyed in the Interim Report, particularly when it is a consistent conclusion of most reviews and inquiries. For example, on page 2, in observing good progress in water reform across the jurisdictions, the Productivity Commission says:

> Although jurisdictions have developed various action plans and strategies to include First Nations people in water planning and decision-making processes, actual outcomes still need to be achieved.

This finding has featured consistently in reports by the Productivity Commission. In our view, it is no longer adequate to continue to note the lack of outcomes. Future directions should target

measurable outcomes rather than the proposed focus which recommends 'limit[ing] prescriptive actions, instead setting out principles for best practice, and fit-for-purpose policy approaches to achieving outcomes' (page 27).

This submission comments more specifically on the following areas:

1. Recognising the inherent water rights of Indigenous peoples
2. Realising greater benefit from current water holdings
3. Strategic Indigenous (Aboriginal) Water Reserves in Northern Australia
4. Correcting weaknesses in NWI implementation
    a. Weak provisions and systems of monitoring and reporting
    b. Improving water management to protect customary uses of water
5. Non-compliance with the NWI in the Northern Territory

1. Recognising the inherent water rights of Indigenous peoples

The report lists several key points, including one which encapsulates how the Commission has framed the rights and interests of First Nations peoples:

> *A renewed NWI should include both an objective and a new element, recognising First Nations people's reverence and cultural responsibility for water and the continued involvement and participation of First Nations people in water management (2024:2).*

This recommendation for a renewed NWI falls short of recognising Indigenous *rights* to water, as does the text on page 10. Many First Nations groups in Australia have utilised the provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to support their claims for greater recognition and protection of their water rights.[2] Accordingly and given Australia's endorsement of the UNDRIP (and that future reviews of the *Water Act 2007* will need to consider UNDRIP), any progress on water policy reform and Indigenous water rights should be benchmarked against the UNDRIP.

It is likely that the narrow frame adopted by the Productivity Commission stems from the narrow interpretation (or misinterpretation) of the NWI Indigenous access provisions. It is common to most government reports, so we will return to the Agreement to offer an alternative view.

There is a perception that Indigenous interests in water exclude any economic dimension, yet native title lawyer Michael O'Donnell (2011) argues that commercial access is consistent with the NWI. Little attention has been paid to clause 25(ix) of the NWI (2004), which requires that Indigenous needs be addressed. O'Donnell contends that this clause is to be interpreted as facilitating 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:

[2] See, eg, Northern Australia Indigenous Land and Sea Management Alliance, 'A Policy Statement on North Australian Indigenous Water Rights' (November 2009); Federation of Victorian Traditional Owner Corporations, 'Victorian Traditional Owner Water Policy Statement 2014' (November 2014); North Australian Indigenous Experts Water Futures Forum, 'Mary River Statement' (6 August 2009); First Peoples' Water Engagement Council, 'Policy Framework' (March 2012).

> *25. The Parties agree that, once initiated, their water access entitlements and planning frameworks will:*
> *...*
> *(ix) recognise indigenous needs in relation to water access and management;*

Michael O'Donnell (2011) refers to the definition of water access entitlement in paragraph 25 of the NWI as 'a perpetual or ongoing entitlement to exclusive access to a share of water from a specified consumptive pool as defined in the relevant water plan'. He further contends that paragraph 25 is not qualified by 'any requirement for the finalisation of native title claims, nor land ownership by Aboriginal groups, nor is it limited to the recognition of Indigenous cultural values only' (2011 p. 185).

O'Donnell (2013: 91) further explains key terms:

> A 'water access entitlement' is one of the key components of the *NWI.* It is the basic legal instrument or property right that provides for rights to access and use water, especially for commercial purposes. It is defined as 'a perpetual or ongoing entitlement to exclusive access to a share of water from a specified consumptive pool as defined in the relevant water plan.' It can be traded, subdivided, amalgamated, mortgaged, is legally enforceable, is registrable and only subject to cancellation when conditions of the entitlement are breached.

'Water for consumptive use' is, by definition, for commercial and domestic water supply purposes. O'Donnell (2011; 2013) concludes that this clause of the NWI, therefore, allows for the grant of water access entitlements to meet Indigenous needs, including for commercial purposes. This is significant as it means that Indigenous interests should not only be included within the planning frameworks but also that Indigenous needs in relation to the commercial use of water should be recognised and allocated. O'Donnell states:

> In my opinion, there is no ambiguity in relation to this given that the consumptive pool (as defined) is the water allocated in a water plan "or private benefit consumptive purposes" (2011 p. 185).

Indigenous organisations recognise the urgent need for commercial opportunities. Policy statements, such as the *Murray and Lower Darling Rivers Indigenous Nations Echuca Declaration* (2007), the *Mary River Statement* (2009) and the *North Australian Indigenous Water Policy Statement* (2009) all seek to advance water rights of a commercial nature, as do the outputs from the more recent National Cultural Flows Research Project and the *Cultural Water for Cultural Economies* project (O'Donnell et al 2021).

In addition, the Australian Law Reform Commission (2015) recognized that native title represents a vehicle for advancing this aspect of the water policy agenda. It handed down a report on reform to the *Native Title Act 1993* (Cth) in which it recommends changes that could see economic benefit accrue native title holders from the use of natural resources, including water. This and other sources, particularly the National Cultural Flows Research Project (http://culturalflows.com.au/images/documents/Law%20and%20policy.pdf), should be reviewed carefully for promising directions.

Recommendation: That revision of the NWI unambiguously commit governments to urgently improve Indigenous access to water for commercial purposes. Further, that the Productivity Commission investigate a comprehensive approach to enable sustained beneficial use from Indigenous organisations and people holding more water rights (including access to land, capital, capacity etc.).

The draft Report treats commercial access as an option for improving the economic standing of Indigenous peoples, one that should be dependent on the agreement of governments. The draft report acknowledges that Indigenous access to water remains low (page 15), but fails to reflect that this is the result of explicit decisions made by state and federal governments (such as the decision in NSW to create new floodplain harvesting licences but not to increase access to these new entitlements for First Nations; or the decision of the Victorian government in 2021 when it created an additional 2GL of water savings as part of the Connections Project and gifted it to irrigators in the Goulburn Murray Irrigation District).

Even where there is progress, Indigenous peoples face many hurdles. In Victoria, the state has issued four section 51 water licences to Traditional Owner organisations since 2021, although these collectively still do not bring the total volume above 0.2% of water rights in Victoria. Further, each of these applications required sustained and persistent advocacy from the Traditional Owner organisations for over a year in every case (sometimes significantly longer), even though these were comparatively simple water licence applications. In the Northern Territory, despite the creation of the Strategic Aboriginal Water Reserve in 2019, and the availability of water in this reserve in several water allocation plan areas, the required regulations that Indigenous organisations would need to follow to access the water have still not been issued (see section below).

The renewal advice 3.2 (page 24) indicates that although cultural outcomes can include economic outcomes, the objective is to 'optimise economic, environmental, social and Aboriginal and Torres Strait Islander people's cultural outcomes through best practice management of Australia's water resources'. This objective utterly fails to recognize the inherent rights of Indigenous Peoples to water and provides no meaningful incentive for governments to allocate water access entitlements to Indigenous Peoples.

As noted above, the cost of further delays in addressing the decline in Indigenous water holdings needs to be considered. The foregone opportunities for Indigenous people to benefit from changes to the water economy had they been in possession of a greater share of the country's water assets are unknown. This lack of information markedly contrasts with the attention given by other reviews (Productivity Commission 2017; Sefton Independent Assessment of the Social and Economic Conditions of the Basin) to documenting the benefits of water reform for other sectors of Australian society.

Recommendation: Any government response to the inequitable allocation of water will need to go beyond current financial commitments, for instance the Australian Government's A$100 million commitment to purchase water for Indigenous people for economic and cultural purposes equates to less than 0.2% of the southern MDB's water entitlement trade (in 2022-23 terms). The longer Governments delay acting the more it is likely to cost, assuming that the market value of water continues to appreciate.

2. Realising greater benefits from existing water holdings

The Report raises the need for adequate support arrangements to improve economic outcomes for Indigenous communities. We commend to the Commission a recently published paper on water trading by 13 Aboriginal organisations in NSW which reinforces the urgent need for such consideration (Hartwig et al. 2023). The 13 organisations interviewed hold at least 22 water entitlements with water trading potential to inland water sources. Nine of the thirteen organisations had engaged in short-term or temporary water trading during the study period (2004–05 to 2017–18). This saw the organisations retain ownership of the enduring right to access water; only the seasonal water available for immediate use was sold.

Hartwig et al. (2023) found that the organisations generally achieved market prices that were consistent with their respective regional markets. There was no evidence that Aboriginal organisations purchased water (allocations or entitlements), and none traded water as part of an asset portfolio management strategy, as employed by large agri-corporates or financial investors. The value of the financial gain to Aboriginal organisations from this water trading cannot be overstated. Revenue has helped organisations to remain in operation and, in some cases, to achieve other important social, economic and/or community outcomes. Interviewees reported that their water trade revenue was easy to access. Advantageously, it had no externally imposed restrictions on how it was spent and no onerous reporting requirements typical of other income sources, like grant funding. Water trades thus afford a degree of flexibility and financial independence.

The authors also show that Aboriginal water traders face many limits to realising enduring and substantial benefits from their water ownership. The limits give rise to what they have termed a 'water trading trap' where most Aboriginal organisations and communities find themselves in a situation where they are effectively 'stuck' in a cycle of temporarily selling their water, rather than directly using it to build wealth or pursue other outcomes.

The water trading trap demonstrates that saleable water rights are a necessary but not sufficient condition of self-determination in water management. In the absence of financial resources and high value production opportunities, knowledge, technology, and infrastructure, the benefits from water trading may be limited to a quick injection of cash. The existence of this trap points to the need to analyse the effects of water trading from within the settler-colonial and neoliberal economic context that currently constrains the efforts of Aboriginal organisations and their constituents to exercise self-determination.

One of the contributing factors to the water trading trap is the fees and charges associated with water access entitlements. In 2022, the Victorian government committed to ensuring that Traditional Owner organisations would not pay fees and charges except where the water was used for a purely commercial purpose (and even then, the policy proposed a long time frame before Traditional Owners would pay 100% of the fees, see DELWP 2022). This straightforward policy fix should be a key outcome for a renewed NWI.

Current knowledge of Indigenous water holdings

There is an urgent need to improve the evidence base, particularly to understand better the status of Indigenous ownership and to track, as well as report, changes over time. Successive reforms cannot continue to ignore the historical processes of exclusion that are explained fully in Hartwig et al. (2020; 2023) and elsewhere, or the recent and alarming declines in NSW (Jackson and Hartwig forthcoming). The research from NSW found no Aboriginal organizations had secured any new water entitlements over the study period (by way of purchase on the open water market or by any other method). As noted above, in Victoria water licences have been allocated to Traditional Owners in the southern part of the state:

- In March 2021, Gunaikurnai Land and Waters Aboriginal Corporation received a 2 GL water licence in the Mitchell River. This process formally began at a workshop held as part of the *Cultural Water for Cultural Economies* project in February 2020.[3]
- In September 2022, Gunditj Mirring Traditional Owner Aboriginal Corporation received a 2.5 GL water licence in the Fitzroy River catchment in south-western Victoria.[4] This process was also initiated at a separate workshop as part of the *Cultural Water for Cultural Economies* project in February 2020.
- In October 2023, Gunaikurnai Land and Waters Aboriginal Corporation received two further licences (500 ML surface water licence in the Tambo River, and 200 ML groundwater licence in the Buchan Munji aquifer system). Negotiations for these licences commenced shortly after *Water is Life* was launched in September 2022.[5]

Although this represents an increase in Victoria, it is still a tiny fraction of the total volume of water rights.

More generally, governments do not appear to be aware of the trend in declining water ownership, let alone consciously working to alter it. To our knowledge, the factors that render Aboriginal people vulnerable to further losses in water holdings have not received any systematic consideration across any jurisdiction (except in Victoria), nor has a robust baseline been established to monitor changes over time. An attempt at such a baseline was released in 2022, but independent peer review has shown that this baseline was not conducted in a rigorous or repeatable manner (O'Donnell, Jackson and Hartwig 2023, report for Coalition of Peaks, unpublished).

Recommendation: That the Productivity Commission supports the work of DCCEEW and the Coalition of Peaks, as well as the states and territories, to undertake a detailed national assessment of the water entitlements held by Indigenous people and their community organisations and provide an analysis of the enablers and barriers to increased Indigenous access. Greater effort should be made by NWI parties to understand how Indigenous organisations currently interact with the water market, and to devise programs and policies that will realise long-term benefits both for current and future Indigenous water holders.

3. Strategic Indigenous Reserves in Northern Australia

Water regulation processes in southern Australia offer Indigenous peoples a low base from which to raise water rights standards in the north. Thus, Indigenous water advocates have looked for new models of Indigenous rights recognition. Although environmental and socio-cultural impacts are clearly a major concern for Indigenous communities (see Poelina et al.

[3] Troy McDonald and Erin O'Donnell, 'Victoria Just Gave 2 Billion Litres of Water Back to Indigenous People. Here's What That Means for the Rest of Australia', *The Conversation* (https://theconversation.com/victoria-just-gave-2-billion-litres-of-water-back-to-indigenous-people-heres-what-that-means-for-the-rest-of-australia-150674, online, 30 November 2020) <https://theconversation.com/victoria-just-gave-2-billion-litres-of-water-back-to-indigenous-people-heres-what-that-means-for-the-rest-of-australia-150674>.

[4] Kyra Gillespie, 'Gunditjmara Traditional Owners Handed Unallocated Water from Fitzroy River System', *ABC News Online* (online, 2022) <https://www.abc.net.au/news/2022-10-09/gunditjmara-given-unallocated-water-from-fitzroy-river-system/101506836>.

[5] William Howard, 'Water Rights Returned to Gippsland Traditional Owners in Landmark Victorian Government Deal', *ABC News Online* (online, 2023) <https://www.abc.net.au/news/2023-10-12/traditional-owners-given-more-water-in-landmark-announcement/102963860>.

2019, for example), considerable attention has been given to policy options to improve and ensure Indigenous access to water for commercial purposes. Indigenous leaders look to the experience of southern Australia where water rights are inequitably distributed, and water use is now capped (Jackson and Altman 2009). They are aware of the risk of excluding northern Indigenous communities from current water allocations, especially those groups who are in the process of claiming land and/or may not have developed plans to use water commercially. Reserving water is therefore seen as a critical means of advancing current and future Indigenous business enterprises that require an entitlement (O'Donnell 2011; 2013). Additionally, reserving water provides a means of accessing potential revenue streams derived from trading water to non-Indigenous enterprises, should water trading commence. The former National Water Commission stressed the need for a water reserve in 2012 (NWC 2012).

Water reserves to meet the social and economic aspirations of Indigenous communities have now been set aside in several water plans in Queensland and the Northern Territory. Officials in Western Australia are considering adopting this policy innovation and have included the concept in their settlement agreement with Yamatji Traditional Owners. In Queensland and the Northern Territory, some Indigenous groups stand to gain from the reservation of water but that northern governments have tied water access to land ownership without addressing the effects of historical acts of appropriation of Indigenous land (Godden et al 2020).

In some places where Reserves are being instituted (e.g. Katherine, NT, and Cape York, Queensland), Indigenous peoples are unable to access these water Reserves due to competition from existing commercial water users. For instance, water has not been reserved in two Cape York catchments because of significant pre-existing allocations. One of these catchments contains the region's most productive agricultural soils, some of which are found on large areas of previously cleared Aboriginal freehold land held by an Aboriginal corporation with aspirations to use the land for high value irrigated horticulture. According to the Cape York Land Council 'this Aboriginal land cannot be used for its best possible use, and Aboriginal economic development aspirations will be thwarted as long as water is not available.'

In 2019, the Strategic Aboriginal Water Reserve (SAWR) was created via amendment to the *Water Act 1992* (NT), enabling water to be set aside for future use by Indigenous people to support economic development. The SAWR reinforces the link between eligibility to access water and exclusive possession of land, ensuring that entitlement to land (under the laws of the settler-colonial state) remains pivotal to Indigenous peoples' access to water (Jackson et al. 2023). To come into being, the SAWR requires the existence of at least 1 hectare of 'eligible land' (s4B) within a water allocation plan (WAP) area (s22C). The eligibility criteria affects both land to which the SAWR applies (and whether the SAWR exists at all), as well as the Indigenous organisations that are eligible to access the SAWR. It is important to note that land under a non-exclusive possession native title determination is not considered to be eligible land. The definition means that a large area of the Northern Territory will be ineligible for access to a Reserve, because the majority of its native title determinations are non-exclusive determinations over pastoral leases.

The SAWR volumes operate on a stepped scale, so that 'in an area with more than 0% but less than 10% of eligible land, 10% of the consumptive pool will be reserved for Aboriginal use. If there is between 10% and 30% of eligible Aboriginal land in the plan area, then the reserve will correspond with the actual percentage. The reserve is capped at 30% in an area containing greater than 30% of eligible Aboriginal land' (Godden et al., 2020, page 676). For example, in the Roper/Mataranka region, traditional owners are in possession of approximately 70% of the land base of the WAP, yet the SAWR will be capped at 30%. Even exclusive possession of

land above the land base cut off is insufficient to gain access to an equivalent share of water rights and the economic development this could support (Jackson et al 2023).

Use of water available from the SAWR relies on an additional step to allocate a water licence, a decision made by the Water Controller. Section 71BA (1) states that '[t]he Controller must not grant a water extraction licence in relation to an Aboriginal water reserve unless the Aboriginal persons of a class prescribed by regulation have given consent'. As of April 2024, these regulations do not exist, meaning that consent is currently not legally possible.

Further, although water licences are also still linked to land, it is envisaged that in the NT (as is already occurring in WA, see Taylor et al 2023), the primary use of the SAWR will be to facilitate the leasing of water to non-Indigenous organisations. Leasing would potentially provide an income stream to the eligible Indigenous organisation(s), but in doing so, each lease would entrench the separation of land and water, as water would be used by others, on other land.

There is also no guarantee that water will be available for use under the SAWR. Even if Traditional Owners are willing to accept water licences issued from the SAWR (for their own use or to lease to others), the SAWR only exists within WAP areas, and only four of the current eight WAPs have non-zero allocations of water available in the SAWR. The policy requires the SAWR to be allocated in accordance with the eligible land, but where the water is already over-allocated, there is no process for returning water to the SAWR. As a result, some plans, such as the Ti-Tree WAP, have indicated a 22% volume for the SAWR based on the environmentally sustainable yield, but there is no water available for use at all.

Table 1: SAWR allocations in declared Water Allocation Plans (WAPs) (adapted from Jackson et al 2023)

Water allocation plan	Strategic Aboriginal water reserve
Mataranka 2024 (draft)	18% notional allocation 7% actual allocation (water available) *There is a significant risk that extracting additional water from the aquifer could lead to a reversal of flow in the Roper River (Currell et al 2024)* *Plan proposes that unused water entitlements might be reallocated to the Reserve*
Georgina Wiso 2023	10% (actual allocation) *Environmental and cultural values not specified and may require future reductions in sustainable diversion limit*
Ti-Tree 2020	22% notional allocation 0% actual allocation
Katherine (Tindall Aquifer) 2019	10% notional allocation 0% actual allocation
Oolloo Dolostone Aquifer 2019	20% notional allocation 10% actual allocation (zero in northern groundwater management zone)
Western Davenport Ranges 2018 (under review)	24% actual allocation
Alice Springs 2016	No SAWR (plan predates 2019 law reform)
Berry Springs 2016	No SAWR (plan predates 2019 law reform)

Although the SAWR can potentially secure limited guarantees that Aboriginal interests in water are not entirely disregarded by over-allocation (as has occurred in southern Australia), the SAWR ultimately operates to constrain those interests to a commoditised form of water which is most likely to be made available for utilisation by non-Aboriginal people, and the wider benefit may not flow to all land holders of eligible land. Although some of the water plans in the NT protect the Reserve from under-utilization, some Aboriginal organizations are fearful that if they do not use it, they may lose it should competition intensify (O'Donnell et al 2022).

Another shortcoming of the SAWR model is that it does not empower Aboriginal people to have a stronger role in water management (Jackson et al 2023). Some of the newer WAPs (such as Georgina Wiso) are entering into force well in advance of having all the evidence on environmental and cultural values that the sustainable diversion limit is intended to protect (see section on NT below).

Recommendation: That the Productivity Commission carefully examine the Reserve policies and water law of Queensland and the Northern Territory to identify ways that Indigenous peoples' needs will be met in areas where there is strong competition for water. Furthermore, that consideration be given to ensuring benefits from water use extend beyond only those communities able to prove exclusive possession native title and support for making commercial use of water.

4. Correcting weaknesses in NWI implementation

Weak provisions and systems of monitoring and reporting

The clauses of the NWI relating to Indigenous rights and interests are discretionary (Tan and Jackson 2012). Low rates of access and ongoing weaknesses in water planning processes (see Hartwig et al. 2018; Moggridge et al. 2019) are likely to in some part be attributable to the absence of mandatory objectives, standards and targets. Although the Interim report includes an objective to 'better specify' cultural and environmental outcomes (page 29), this language needs to be focused more explicitly on water access entitlements as well as other outcomes that may be achieved through water planning. Instead of merely committing to 'improve engagement', (page 29) the NWI should establish a framework that enables Indigenous self-determination, which will include genuine partnerships and power transfers to Indigenous organisations. A comprehensive and robust policy framework is needed to take Australian water management beyond token commitments to markedly improve consultation and engagement as well as material outcomes.

For a few years following the introduction of the NWI, governments were obliged to report on implementation and the National Water Commission fulfilled the role of making such information transparent. Basic information on implementation is lacking. States do not appear to be monitoring Indigenous access or the effects of consultation processes (noting however that some improvements have been made in Victoria, for example). The absence of benchmarking exercises to track changes over time is indicative of the low priority given to the Indigenous related provisions of the NWI and urgently needs redress.

Recommendation: That in revising the NWI, Indigenous representatives and all governments agree to clear, measurable and well-informed objectives in water plans, tangible actions in support of the achievement of those objectives, and monitoring and reporting arrangements that promote accountability and foster learning about what does (and does not) work.

Improving water management to protect customary uses of water

Water laws been shown to be deficient in protecting customary uses across many jurisdictions, especially the planning processes they regulate (see Hartwig et al. 2018; Ayre and Mackenzie 2013). There are however many legal rules that currently impose conditions and obligations on 'actors' whose conduct affects Indigenous interests in water resources and landscapes.

Water rights therefore need to be supported and reinforced by other laws (environmental protection, native title and heritage, for example). Jackson and Langton (2012) point to the removal of the right to negotiate over water resource developments from the *Native Title Act 1993*, as a weakness of current arrangements.

Recommendation: That the Productivity Commission consider closely the options advanced by the National Cultural Flows Research Project for amendments to State, Territory and Commonwealth legislation to strengthen rights for access and use of water for customary and cultural activities for First Nations, especially in conjunction with cultural heritage legislation and settlement and/or agreement models.

5. Non-compliance with the NWI in the Northern Territory

We support the finding of the Interim Report that water planning in the Northern Territory is not consistent with the NWI. As shown in O'Donnell et al. (2022), the Northern Territory has not yet reached compliance with the NWI on multiple grounds (Hart, O'Donnell and Horne 2020; Productivity Commission 2017; Productivity Commission 2021). The NT legal framework has failed to ensure safe and secure drinking water for Indigenous communities in the Territory (Howey and Grealy 2021). Water access entitlements remain in the form of time-limited licences that are linked to land on which the water will be used, and water trading is limited to areas within water allocation plan (WAP) areas, which also serve as the tool for sustainable water planning.

The status of WAPs as statutory water plans is also concerning. In a recent ruling of the NT Supreme Court[6], the court held that the Minister (or the Water Controller) is not required to 'comply with' the content of the WAP. This ruling effectively means that the WAPs are non-binding planning documents which can be ignored when issuing water licences, rendering them ineffective at providing sustainable water management. This has contributed to the issue of the largest single water licence in NT history, the 40GL Singleton Agribusiness water licence.

In 2021, only 28% of water licences occur in WAP areas (Productivity Commission 2021). There are now 8 WAPs, but a single WAP can take an extremely long time. For example, the Howard River WAP has been in development since 2010 (Jackson, Tan, and Nolan 2012), although concerns about environmental impacts of water management practices in the region have been publicly aired since 1998 (Cook et al. 1998; Straton, et al. 2008; Jackson, Tan, and Nolan 2012). Similarly, the recently issued Mataranka WAP was in preparation for 13 years (Jackson and Barber 2013), and all 22 groundwater licences in that system have been issued while the plan has been under development. The licenced amount in that case is sufficient to warrant a cap on new entitlements in the northern zone. More recent WAPs, such as Georgina Wiso, have also been issued well in advance of the necessary work to provide a rigorous

[6] *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as Delegate of the Minister for Environment & Anor and Arid Lands Environment Centre Inc v Minister for Environment & Anor* [2024] NTSC 4

evidence base for sustainable water management. In the case of the Georgina Wiso WAP, work on identifying environmental and cultural values that are dependent on groundwater ecosystems will only take place after the WAP has come into effect.

We recommend a recently published paper (Currell et al. 2024) on the many weaknesses of the NT's groundwater management, particularly in relation to the region facing increasing demand for water from fracking and irrigation, the Beetaloo. The paper, titled *Risks in the current groundwater regulation approach in the Beetaloo region, Northern Territory, Australia,* finds that the current rules governing the administration of groundwater licencing are poorly suited to protect ecological, Indigenous socio-cultural and other water use values. Currell et al. (2024) conclude that the Georgina Wise Water Allocation Plan fails to comply with national water policy, in that no substantive steps have been taken to understand Indigenous cultural and ecological values sustained by groundwater prior to setting an Estimated Sustainable Yield.

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