



**New South Wales  
Aboriginal Land Council**  
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National Water Reform 2020  
Productivity Commission  
Locked Bag 2, Collins Street East  
MELBOURNE VICTORIA 8003

Via email: [water.reform.2020@pc.gov.au](mailto:water.reform.2020@pc.gov.au)

To the Productivity Commission,

**RE: National Water Reform 2020 - Productivity Commission Draft Report – February 2021**

Please find enclosed the NSW Aboriginal Land Council's (NSWALC) response to the National Water Reform 2020 - Productivity Commission Draft Report.

NSWALC and the network of 120 Local Aboriginal Land Councils (LALCs) represent over 23,000 Aboriginal people in NSW. We are a democratically elected voice of Aboriginal peoples, and we strive for a future in which the Aboriginal peoples of NSW can live their lives to their full potential.

Should you require further information, please contact the NSWALC Strategy and Policy Unit at your convenience.

Sincerely,

**James Christian PSM**  
Chief Executive Officer  
NSW Aboriginal Land Council

Date: 20 April 2021

**ALWAYS WAS ALWAYS WILL BE ABORIGINAL LAND**

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**NSW Aboriginal Land Council Submission  
National Water Reform 2020  
Productivity Commission *Draft* Report  
February 2021**

### Introduction

The NSW Aboriginal Land Council (**NSWALC**) is the peak Aboriginal representative body in NSW. Securing the return of land and waters to Aboriginal people is at the heart of our future. As Aboriginal people, our lands and waters are central to our being, and are essential to the spiritual, social, cultural and economic survival of our communities. NSWALC, and the network of 120 Local Aboriginal Land Councils (**LALCs**) across NSW, work to improve, protect and foster the best interests of all Aboriginal peoples in NSW.

NSWALC, LALCs and Aboriginal people have long called for improved water management practices, involvement of Aboriginal people in water governance and decision-making, increased access to and ownership of water for Aboriginal people for cultural and economic purposes, and improved accountability, transparency and compliance.

Maintaining spiritual and cultural relationships with land, water and Country are intertwined for Aboriginal people. The right to economically develop natural resources, consistent with cultural obligations, is also of significant importance.

### Comment

The Productivity Commissions Draft Report (the Report); states that “Jurisdictions have made good progress against the reform agenda”.

NSWALC raises concerns with this statement. While most jurisdictions (except Western Australia and the Northern Territory) have enacted legislation to create secure, National Water Initiative (**NWI**) consistent water access entitlements for consumptive uses, they have failed to deliver on outcomes for Aboriginal people.

The Report acknowledges, that engagement with Aboriginal people could be improved:

*“all jurisdictions have sought to improve the scale and quality of their engagement with communities and Aboriginal and Torres Strait Islander people. That said, concerns have been expressed about the adequacy and effectiveness of some engagement efforts”*

Engagement with Aboriginal people is critical; however, this engagement must include real tangible outcomes for Aboriginal peoples. To date the reform agenda has not focussed sufficiently on meaningful recognition of Aboriginal rights to water.

In NSW, the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**) is facilitating the return of lands to Aboriginal peoples in NSW. However, mechanisms to support our ownership of, and decision making in relation to water, are not similarly recognised. Our ownership of water is miniscule and has been going backwards. For example, while Aboriginal people in the Murray Darling Basin constitute nearly 10% of the total population, Aboriginal organisations hold only 0.2 % of the available surface water<sup>1</sup> in the Basin and 0.1% across the state. Aboriginal water holdings between 2009 and 2018 indicate a new wave of dispossession. Almost one fifth of Aboriginal water holdings by volume were lost during this time.<sup>2</sup>

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<sup>1</sup> Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession Lana D. Hartwig, Sue Jackson, Natalie Osborne 2020

<sup>2</sup> Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession Lana D. Hartwig, Sue Jackson, Natalie Osborne 2020

It's important to note that NSWALC is committed to working with the NSW Government, partners and Aboriginal communities to empower and advance water rights for all Aboriginal people.

## 9 Securing Aboriginal and Torres Strait Islander people's interests in water

The Productivity Commission<sup>3</sup> has highlighted the lack of progress by governments to date in delivering water outcomes to Aboriginal people. They have signalled the need for governments to work with First Nations peoples to secure Aboriginal and Torres Strait Islander people's interests in water.

The National Agreement on Closing the Gap Agreement provides an important framework for governments to work in partnership to ensure Aboriginal people maintain distinctive cultural, spiritual, physical and economic relationships with water, and advance Aboriginal people's rights and interests in water.

NSWALC is disappointed that the Draft Reports' Key Points discuss what government *should* or *could* do in relation to "Securing Aboriginal and Torres Strait Islander people's interests in water". The Productivity Commission must make clear and strong statements regarding what needs to change for Aboriginal people to see real outcomes.

The Draft Report also indicates that since 2004 Aboriginal people have *articulated their aspirations*, but it appears that very little water has been secured by Aboriginal people, and as discussed earlier, in NSW it has gone backwards. At a time when refreshed Closing the Gap targets for water are being negotiated, the Commonwealth Government is considering back-peddling on a "\$40 million commitment to buy back water from irrigators for First Nations groups" by spending some of the funds on non-water assets<sup>4</sup>. This does not provide any optimism in achieving any tangible outcomes for the Closing the Gap inland water target or for the NWI.

To "modernise" the NWI, the Commission recommends updating the goal to include reference to climate change and the importance of water in the lives of Aboriginal and Torres Strait Islander people. NSWALC recommends that this wording is strengthened to include the governments commitments under the National Closing the Gap Agreement and International human rights agreements:

"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."

### **Recommendation 1:**

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."

### 9.1 Understanding of Traditional Owners' aspirations has evolved since the NWI was drafted

NSWALC strongly supports Aboriginal ownership of, and access to, water for cultural and economic purposes. We seek strengthened commitments to recognise and provide for Aboriginal people's rights

<sup>3</sup> <https://www.pc.gov.au/inquiries/current/water-reform-2020/draft/water-reform-2020-draft.pdf>

<sup>4</sup> <https://www.smh.com.au/politics/federal/breach-of-faith-money-meant-for-indigenous-water-rights-could-go-elsewhere-20210326-p57ecv.html>

and interests in water sharing plans and related instruments. This includes increased water access entitlements and more secure and reliable water allocations for Aboriginal people and Aboriginal Land Councils.

In line with previous recommendations by the Australian Human Rights Commission<sup>5</sup>, we have sought assurances from the NSW Government for example to give higher priority to ensuring that the rights, values and interests of Aboriginal peoples are explicitly included and provided for in all water plans and instruments. This will support the NSW Government to achieve its commitments under the National Agreement on Closing the Gap.

We note that in November 2020, the Victorian Government allocated 2 billion litres of water to Aboriginal people and invested \$5 million to support Aboriginal people's economic interests.<sup>6</sup> The Productivity Commission should promote and explore more ambitious mechanisms and commitments with other governments.

## 9.2 A new policy element developed through co-design

While NSWALC supports the establishment of the Committee on Aboriginal Water Interests (Advice 9.1) the power imbalance between government parties and Aboriginal representatives makes it difficult for genuine partnership to occur. Too often Aboriginal representatives are made to comply with government's predetermined timelines and agendas. For meaningful reform to occur governments must be prepared to take the lead from Aboriginal representatives on Aboriginal water rights, rather than pre-determining the process. As a result, while we support the advice for a new co-design element (although it should be strengthened to partnership), the limitations of the current governance arrangements in facilitating co-design must also be acknowledged.

To support co-design governments should commit to:

- a robust engagement process with Aboriginal people
- legislative reforms to enable Aboriginal rights, interests and ownership of water
- revising existing, and developing new, water policy and planning approaches to strengthen Aboriginal decision making in water management
- securing sustainable funding and resourcing
- building the organisational capacity of First Nations and Aboriginal communities to enable self-determination and sustained participation in projects relevant to water interests.

We seek guarantees that decisions regarding funding and resourcing will not detriment any existing positive initiatives.

### **Recommendation 2:**

To support co-design elements, governments need to commit to:

- a robust engagement process with Aboriginal people
- legislative reforms to enable Aboriginal rights, interests and ownership of water
- revising existing, and developing new, water policy and planning approaches to strengthen Aboriginal decision making in water management
- securing sustainable funding and resourcing
- building the organisational capacity of First Nations and Aboriginal communities to enable self-determination and sustained participation in projects relevant to water interests.

<sup>5</sup> Page 209 [https://humanrights.gov.au/sites/default/files/content/social\\_justice/nt\\_report/ntreport08/pdf/chap6.pdf](https://humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntreport08/pdf/chap6.pdf)

<sup>6</sup> <https://www.premier.vic.gov.au/water-traditional-owners-victorian-first>

### 9.3 Achieving cultural outcomes through enhancing the influence of Traditional Owners in water management

Aboriginal people's rights and interests in water is not limited to cultural values and should not be compartmentalised or separated out into only one element of water management. Aboriginal worldviews and cultural obligations to care for Country do not separate land, water and other natural resources.

Aboriginal people's rights and interests must be recognised more comprehensively in water planning and should extend to major infrastructure such as dams and weirs. There needs to be process for recording the views and concerns of Aboriginal people upstream and downstream of such proposals, consistent with the Akwé: Kon guidelines.<sup>7</sup> To facilitate this, governments should ensure that water resource plans and water sharing plans include measurable targets for Indigenous water interests (economic, social and cultural) and that an assessment of the impact on Aboriginal interests is conducted prior to plan approval.

#### **Recommendation 3:**

Aboriginal peoples must have the opportunity to care for Country (land and waters) holistically and have real decision-making power in relation to water planning and management, including major infrastructure such as dams and weirs.

### 9.4 Enabling access to water for economic use

All governments have committed to increasing Aboriginal water rights through a specific target in the National Agreement on Closing the Gap and the refreshed NWI should specifically include measures to support the achievement of this target, including increasing the volume of water access entitlements allocated under state and territory water rights regimes to Aboriginal and Torres Strait Islander corporations.

The Closing the Gap National Agreement includes four priority reforms which aim to change the way in which governments work with Aboriginal people, these are:

1. Shared decision making
2. Building the Aboriginal community sector
3. Transforming mainstream institutions
4. Data sharing<sup>8</sup>

Central to the premise of shared decision making is supporting Aboriginal people's self-determination and respecting lived experiences.

Consequently, the statement that '**where State and Territory Governments have decided** (emphasis added) that providing access to water is an effective way to support the economic development of Aboriginal and Torres Strait Islander communities' contradicts Aboriginal self-determination.

Allowing governments to continue to make decisions for Aboriginal people is disempowering. 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 achieve this, as identified in the National Agreement on Closing the Gap.

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<sup>7</sup> <https://www.cbd.int/traditional/guidelines.shtml>

<sup>8</sup> [https://www.closingthegap.gov.au/sites/default/files/2021-03/national-agreement-ctg-mar-21\\_0.pdf](https://www.closingthegap.gov.au/sites/default/files/2021-03/national-agreement-ctg-mar-21_0.pdf)

**Recommendation 4:**

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 their right to self-determination under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).