

# **Submission to the Productivity Commission Review of National Water Reform**

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Thank you for the opportunity to provide a response to the Productivity Commission's review of national water reform. I am a geographer with a special interest in Indigenous water management and governance in Australia. I have conducted water governance research in many Australian regions, including the Murray-Darling Basin, Queensland, the Northern Territory and Western Australia. I have provided advice to the former National Water Commission and to previous reviews of the Productivity Commission. I currently serve as a member of the MDBA's ACSEES (the MDB Authority's Advisory Committee on Social, Economic and Ecological Sciences) and the Lake Eyre Basin Ministerial Scientific Advisory Committee.

In putting this submission together, I draw on (a) the interests and concerns of Indigenous peoples shared during my research (referred to below and at my [institutional website](#)) and (b) findings and observations from research projects, most of which are published (see reference list below).

## **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 vitality of irrigation communities, and (c) developing northern Australian water resources. There are clear social justice implications of the denial and ongoing neglect of Indigenous water rights. Moreover, unless adequately and promptly addressed, there is a risk that inaction will undermine the achievements of the land rights era of reforms (Hartwig and Jackson 2020). In drafting the NWI, COAG did not properly consider the implications for Indigenous peoples of separating land and water titles and these urgently need serious and close attention to avoid or ameliorate adverse impacts.

The poor 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, MacPherson, Godden, Hartwig, O'Bryan, Taylor, Weir; also work by practicing lawyers McAvoy, Ridge and O'Donnell). Over more than a decade, a number of 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. In a 2017 submission to the Productivity Commission, Jackson and Hartwig were critical of the slow speed of reform in this area, saying

*Year after year, reviews and reports have recognised lack of progress in this area, noting that water plans are failing to achieve indigenous objectives. In the NWC report of 2011 (p. 46), for example, 'most jurisdictions have improved consultations with Indigenous communities in water planning and management, but have generally failed to incorporate effective strategies for achieving Indigenous social, spiritual and customary objectives in water plans'.*

The situation is worse than recent evaluations suggest. New research from the Murray Darling Basin (Hartwig et al. 2020) shows that during the past decade Indigenous water holdings have

declined substantially, by almost 20% in NSW. That research points to the vulnerability of Indigenous water holdings and the potential for adverse effects from water trading. It now appears that not only have water reforms neglected Indigenous rights and interests; alongside other economic pressures on Indigenous community organisations, they have also exacerbated inequities in water rights holdings. Unbundling of land and water titles has not improved outcomes for Indigenous peoples in the NSW portion of the Basin where action is needed to stem the further loss of valuable holdings.

When COAG negotiated the NWI, it did not negotiate or consult with Indigenous peoples. This current review provides an opportunity to work with First Nations representatives to identify the means of addressing the substantive issues pertaining to Indigenous water rights. Consideration should be given to establishing a mechanism to ensure strong participation from Indigenous representative groups in contributing to the Closing the Gap targets relating to inland waters and in renegotiating the NWI, including the re-establishment of the First Peoples Water Engagement Council. Resources should be made available to assist First Nations to prepare policy positions, options for law reform, and contribute fully developed ideas to the process of NWI review. The Indigenous Water Policy Group of the North Australia Land and Sea Management Alliance represents a case of collaborative water policy-making (Jackson and Altman 2009; Jackson and Crabtree 2014) that could serve as a model, as does the National Cultural Flows Research Project (<http://culturalflows.com.au/>).

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

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. There appears to be public support for such a mechanism, assuming recent survey results are an indication. A recent 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).

Lastly, a national approach to reform will need to achieve three objectives relating to nested scales of governance. First, to design reforms that enable Indigenous peoples to control and manage water at a local scale that aligns with customary territories. Second, to recognise in Indigenous organisations the desire and capacity to organise and govern at the catchment or basin scale (e.g. MLDRIN, NBAN and Martuwarra (Fitzroy River) Council). There is much to learn from the efforts of these alliances, their values, visions, knowledge and responsibilities to water and river health (see for example, Poelina 2019). Third, to reflect on the marked differences in the conditions that shape water access between the north and south of the country

(see Tan and Jackson 2013; Jackson and Langton 2012; O'Donnell 2013). A publication submitted in July to the journal *Environmental Law and Planning Journal* (Godden et al. in review) provides an update on Indigenous water rights across three regions (northern Australia; the MDB; and metropolitan Melbourne where there have been some advances in recognition of Traditional Owners in managing the Yarra River). This paper can be made available to the Commission.

This submission comments more specifically on the following areas:

1. Increasing the economic benefits from Indigenous access to water
  - a. Narrow interpretations of the NWI provisions
  - b. Current knowledge of Indigenous water holdings
  - c. Strategic Indigenous (Aboriginal) Water Reserves in Northern Australia
2. Correcting weaknesses in NWI implementation
  - a. Weak provisions and systems of monitoring and reporting
  - b. Improving water management to protect customary uses of water
  - c. Capacity building for collaborative water management

## **1. Increasing the economic benefits from Indigenous access to water**

### Narrow interpretations of the NWI provisions

It is clear from numerous reviews, including one by the Productivity Commission, that the Indigenous access provisions of the NWI have been narrowly interpreted, even misinterpreted. 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:

*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;*

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* (2008), 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.

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 the NWI be revised to 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 holding more water rights (including access to land, capital, capacity etc.).

Consideration needs to be given to the cost of further delays in addressing the decline in Indigenous water holdings. 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 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\$40 million commitment to purchase water for Indigenous people for economic and cultural purposes equates to just 0.2% of the MDB’s water market (in 2015-16 terms). The longer Governments delay taking action the more it is likely to cost, assuming that the market value of water continue to appreciate.

## 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) and elsewhere, or the recent and alarming declines in NSW. In the NSW portion of the Basin, where Aboriginal people constitute nearly 10% of the total population, their organizations hold only 0.2 % of the available surface water (Hartwig et al. 2020). Hartwig et al. (2020) also show that Aboriginal water holdings in NSW have declined by 17.2% over the past decade. This same research found no Aboriginal organizations had secured any new water entitlements over the same time (by way of purchase on the open water market or by any other method). Governments do not appear to be aware of this trend, let alone consciously working to alter it. To my knowledge, the factors that render Aboriginal people vulnerable to further losses in water holdings have not received any systematic consideration across any jurisdiction, nor has there been a concerted effort to establish baselines or monitor changes over time (beyond the intention of the MDB to commission the research referred to next).

Recent Griffith University research applying to the entire Murray Darling Basin (MDB) (Hartwig and Jackson 2020) confirms very low rates of water access in that region:

- At least 30 Aboriginal entities hold at least 12.774 GL/year under 64 entitlements. Aboriginal water holdings constitute 0.17% of the relevant Basin States (excluding Victoria<sup>1</sup>) or 0.12% of the equivalent take Baseline Diversion Limit (BDL) of the whole Basin (including Victoria). The largest volume of water held by Aboriginal entities in the MDB is located in the NSW portion (93.9%). No Aboriginal water holdings were identified in Queensland or the Australian Capital Territory (ACT).
- Aboriginal water holdings in the MDB are valued at approximately \$18.6 million in 2015-16 water market terms. These holdings constitute just 0.11% of the MDB's \$16.5 billion water market (in 2015-16 terms).
- There is a clear disparity between the north and the south of the Basin with Aboriginal entities in the north, where the Aboriginal population is greater, holding fewer less valuable licences.
- Aboriginal entities hold disproportionately more water under unregulated entitlements not only across the whole Basin, but particularly in the Northern Basin. This can be a less reliable means of accessing water.
- The majority (87.3%) of LTDLE Aboriginal-held water under regulated entitlements is of lower priority. In other words, the vast majority of Aboriginal organisations receive little benefit from the comparatively greater reliability and certainty of access of these licenses. Further, much of the water that can be accessed through the more reliable entitlements can only be used for domestic and stock purposes.

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<sup>1</sup> Victoria data could not be sourced in the required format.

*Recommendation: That the Productivity Commission commit to undertaking 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. Studies by Hartwig et al. (2020) and Hartwig and Jackson (2020) provide a starting point and could inform a national assessment that should be tracked over time to monitor progress against NWI implementation, as well as the proposed Closing the Gap targets. 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.*

### 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. 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 a number of water plans in Queensland and the Northern Territory. Officials in Western Australia are considering adopting this policy innovation. Godden et al. discuss the developments in Queensland and the Northern Territory in detail in a paper under review and from which the following points are drawn. That paper indicates that 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.

Information available to date suggests that 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 the agriculturally productive region of Katherine (NT), because the groundwater in the system is currently over-allocated, there is 'no water available to grant licences using water from the Strategic Aboriginal Water Reserve' (SAWR). For this reason,

the Water Plan<sup>2</sup> establishes an allocation tied to the SAWR that it refers to as a ‘notional allocation.’

The narrow definition of ‘eligible Aboriginal land’ in the *Water Further Amendment Act (NT)* will also preclude Aboriginal water use from substantial tracts of land where the interests of the pastoral sector have been prioritized. It is important to note that land under a non-exclusive possession native title determination is not considered to be eligible land. The definition will mean 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. A further constraint on the benefit to be obtained from Reserves stems from the relative lack of access that Indigenous groups have to capital and infrastructure, and that these policies do not extend to providing such support. 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.

*Recommendation: That the Productivity Commission examine carefully 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.*

## **2. 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. 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 renegotiating 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

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<sup>2</sup> Tindal Aquifer Water Allocation Plan.

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.*

### Capacity building for collaborative water management

The need for water planning to better address cultural differences and enhance collaboration (across scientific, planning, Indigenous and other communities), as well as include social and cultural values has been recognized for over a decade. Recommendations relating to knowledge and capacity made at the first workshop of Indigenous interests in water planning in Adelaide in February 2009 may be of value to the Commission (see Jackson, Tan and Altman 2009). Growth in capacity for Indigenous participation in water planning has been a noticeable feature of the Australian natural resource management sector since that time (see 2019 special issue of the *Australasian Journal of Environmental Management*). The efforts of the National Water Commission to build a community of practice amongst water planners were promising; however, were not sustained once the Commission was disbanded. Anecdotal reports from water planners, CMAs, and water authorities, suggest that they have few resources to put to research and engagement tasks such as workshops, meetings, technical reports, guidelines, etc.

*Recommendation: That the Productivity Commission consider specific recommendations to support First Nations, States and Territories and Commonwealth water agencies to improve their capacities to collaboratively manage water.*



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