

17 October 2017

**Submission to the Productivity Commission *National Water Reform* public inquiry, Draft report released 15 September 2017.**

Thank you for the opportunity to provide a response to the *National Water Reform* Draft Report.

We are researchers with a special interest in Aboriginal water management and governance in Australia. Recently, our research has focused on Aboriginal access to water and engagement in water planning processes across the Murray-Darling Basin. Throughout this year, we have worked with several Aboriginal communities and organisations throughout New South Wales (NSW) and Victoria, including Barkandji Traditional Owners, whose native title rights were recognised over large parts of Western NSW in June 2015.<sup>1</sup> In putting this submission together, we draw on (a) the interests and concerns of Aboriginal peoples shared with us during our work and (b) findings and observations from our current research, some of which is published and referenced below.

This submission makes comment on four areas:

1. Indigenous access to water
2. Monitoring
3. Incorporation of Indigenous cultural objectives in water plans
4. Native title and planning processes in NSW.

**1. Indigenous access to water**

We support the Productivity Commission in identifying the aspirations and needs of Indigenous people as a priority issue (page 11), as ‘unfinished business’. However, we consider that the way in which Indigenous concerns are framed, particularly at this early point in the draft report, is inadequate. Increased engagement of Indigenous people in water planning is a welcome recommendation, but it is an insufficient requirement if Australia is to address the legacy of inequitable distribution in water rights. Over the past decade or more, growth in capacity for Indigenous participation in water planning has been a noticeable feature of the Australian natural resource management sector. It is indeed encouraging to see so many Indigenous organisations, natural resource management (NRM) groups, water planners, environmental agencies collaborating in water planning processes, waterways assessments etc. What does not appear to have changed significantly during the last 20 years, however, is the volume of water that Indigenous people are able to direct to uses and purposes of their choices, either environmental or commercial.

---

<sup>1</sup> *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* (NSD6084/1998)

We argue that a stronger commitment to improving Indigenous access is warranted in the Productivity Commission's final report. Progress towards National Water Initiative (NWI) goals relating to Indigenous access has been very slow, as noted previously by the National Water Commission (NWC), numerous Indigenous water alliances, and academics. 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*

We argue, as does O'Donnell (2013) and others, that little attention has been paid to clause 25(ix) of the NWI (2004), which requires that Indigenous needs be addressed. 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', and further, 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). 'Water for consumptive use' is, by definition, for commercial and domestic water supply purposes. O'Donnell 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" (p. 185).

This interpretation of the NWI conflicts with that of the Productivity Commission on page 89 of its draft report that water for commercial purposes 'is separate from the provision of water for cultural purposes and is not addressed in the NWI'.

Recognition that Indigenous rights to water should include commercial rights is found in other sources. According to O'Donnell (2013), in addition to the NWI, advocacy by Indigenous organisations recognises the need for commercial opportunities. The former includes 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). In a 2012 position statement released by the NWC, a link was made between water entitlements, economic development and national Indigenous policy:

*that the [a]llocation of water entitlements to Indigenous Australians to facilitate economic development should be explicitly considered as a strategy for contributing to the Australian Government's Closing the Gap agenda (as cited in O'Donnell 2013, p. 85).*

More recently, the Australian Law Reform Commission (2015) has 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. We recommend this and other sources to the Commission when finalizing this report.

The foregone opportunities for Aboriginal 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 in the draft report to documenting the benefits of water reform for other sectors of Australian society. We therefore recommend that the 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 Altman and Arthur (2009) and Jackson and Langton (2012) provide a starting point and could inform a national assessment that should be tracked over time to monitor progress against NWI implementation.

The Commission acknowledges the need for an evidence-based approach to the incorporation of cultural values on page 14:

*There is more work to do in all jurisdictions to achieve clear, measureable and well-informed Indigenous cultural 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.*

We strongly urge a similar approach to the pursuit of Indigenous economic objectives.

## **2. Monitoring**

Further to the point above, we recommend that attention should be given to the development of rigorous performance evaluation and monitoring of all provisions relating to Indigenous peoples' rights and interests. The monitoring provisions (cl. 104) of the NWI provides sufficient basis for action, yet we are not aware of the existence of nationally consistent performance indicators to evaluate implementation of Indigenous access or participation outcomes.

The Commission recognises the need for monitoring and evaluation but fails to recommend specific mechanisms by which this should be achieved, or to recommend a responsible agency.

We draw the Commission's attention to the recommendations of the first workshop on Indigenous water planning in 2009 (sponsored by the NWC):

NWI objectives and tasks need to be monitored and evaluated:

8.1 Nationally consistent indicators should be developed to monitor the performance of water plan objectives relating to Indigenous access and participation in management.

8.2 All jurisdictions should be required to report against these indicators and all water plans should be evaluated against measurable targets (e.g. every water plan will include a specific allocation for Indigenous social, cultural and customary needs).

8.3 Jurisdictional Implementation Plans and annual work plans should include a specific target for engagement with Indigenous people in water planning process and establish key performance indicators relating to measurable targets (e.g. every community reference group will include at least two Indigenous representatives) (see Jackson, Tan and Altman 2009).

### **3. Incorporation of Indigenous cultural objectives in water plans**

The section on water planning and Indigenous values acknowledges progress. Against some noted achievements, this section of the report acknowledges some of the 'technical' difficulties, however it could give more attention to instances where Indigenous water objectives have been determined, see for the methods and results outlined in:

- Mooney, C., & Tan, P.-L., 2012. *South Australia's River Murray: social and cultural values in water planning*, Journal of Hydrology 474: 29-37.
- Jackson, S., Pollino, C., Maclean, K., Bark, R. and B. Moggridge. 2015. *Meeting Indigenous peoples' objectives in environmental flow assessments: Case studies from an Australian multi-jurisdictional water sharing initiative*, Journal of Hydrology 522: 141-151.

We have witnessed strong interest in the NRM sector in advancing Aboriginal water management and urge the Commission to consider more specific and detailed recommendations that will gain traction in government and the community, for example, resources for a community of practice of water planners, Aboriginal organisations, Catchment Management Authorities (CMAs), environmental water managers, etc., with funding for workshops, meetings, technical reports, guidelines, etc. 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 in finalising this report (see Jackson, Tan and Altman 2009).

We also add that while several constraints and barriers are noted, a key limiting factor is financial. Water planners, CMAs, Indigenous organisations have few resources to put to the research and engagement tasks. More consideration should be given to ways of resourcing this effort.

Negligible comment is made about regressive steps evident in recent years. A balanced review, needs to identify and reflect upon any steps backwards, as well as providing encouragement. We provide examples from NSW below, and argue for closer examination of these issues not

only in NSW, but on a state-by-state basis, so as better to illuminate the progress both towards *and* away from the requirements of the NWI that relates to Indigenous water access and engagement in water planning.

The Draft Report recognises that at the time of the NWC's 2014 assessment, 'New South Wales was considered to be relatively more advanced' due to (a) the availability of Indigenous specific licences, and (b) the work undertaken by the Aboriginal Water Initiative (p. 89). Indeed, the progressive nature of NSW with respect to Aboriginal water matters has been cautiously highlighted by others in the past as well (see Tan and Jackson 2013). The Commission's Draft Report has not commented, however, on any progress or change in NSW since 2014. This is even though the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) brought some of these issues to the attention of the Productivity Commission via their submission (Submission 60).

#### **A. New South Wales Office of Water's Aboriginal Water Initiative (AWI)**

The draft report highlights the significance of the Aboriginal Water Initiative (AWI) of the NSW Office of Water, and its database of Aboriginal water values from prior to 2014. However, no comment is made about the progress of the AWI since 2014, including, specifically that this Unit was dismantled in late 2016.<sup>2</sup> Taylor, Moggridge and Poelina's (2017) comment that, 'the dismantling of AWI has slashed investment in progressing Aboriginal water in NSW' (p. 140). The absence of comment by the Productivity Commission about the withdrawal of the AWI and what the NSW Government is offering in its place to progress towards these relevant NWI commitments is of concern.

We further note a comment made by the Productivity Commission on AWI's database:

*initiatives such as the Aboriginal Water Initiative database in New South Wales ... demonstrate that meaningful progress can be made where there is sufficient will and commitment by governments (p. 91).*

We understand that this database was established to hold information about culturally sensitive water dependent sites collected by AWI team members from Traditional Owners throughout NSW, so that these sites may be protected in water planning processes. Protocols were set up to protect the shared culturally sensitive information, including intellectual property agreements ensuring ownership of the knowledge is always with the knowledge provider, and making the database login protected so that only Aboriginal staff could access it. With the dismantling of the Aboriginal Water Initiative, however, we are aware of some concerns about the security of this data.

The removal of this Unit and the associated uncertainty of this database calls into question the government commitment lauded by the Productivity Commission.

#### **B. New South Wales Indigenous Specific Water Licences**

The second, albeit brief, point we wish to raise here relates to the NSW Indigenous specific water licences. These licences, which include the Cultural Access Licence and the Aboriginal

---

<sup>2</sup> MLDRIN's concern about the Aboriginal Water Initiative and NSW water planning processes were included on page 313, Appendix B of the Draft Report, but no comment is made directly from the Commission except that the issue 'may warrant further consideration by relevant State and Federal Governments'.

Community Development Licence, were recognised by the previous NWC's review (2014) and as mentioned above, were grounds for judging NSW to be 'relatively more advanced' (Productivity Commission 2017, p. 89) compared with other jurisdictions. At a similar time, however, Tan and Jackson (2013) noted that whether these licences and other measures 'go some way towards addressing Indigenous peoples' desire to enjoy economic and environmental benefits associated with water remains to be seen' (p. 146), and we argue this is still the case.

While the Productivity Commission's Draft Report mentions these licences, no comment about their progress since 2014 is offered, nor comment made about their uptake and/or Indigenous outcomes being achieved (or otherwise). A more in-depth examination of these licences is required in order to comment on their effectiveness in helping to achieve the Indigenous water access NWI principle, as they have been positioned to potentially do in past assessments and by the NSW State Government. Given these licences have been in place for some time now with little critical reflection, the final report presents an excellent opportunity for review.

Based on our research experiences, we understand that very few of these Indigenous specific licences have been applied for and granted (see also Jackson and Langton 2012). It is important to understand why this is so. Possible explanations include low and wavering support from agencies to support Indigenous people accessing these licences, low rates of land and infrastructure ownership to access and use the water, concerns surrounding the restrictions applied to these licences, and resistance of the NSW State Government to adjust or address these identified issues<sup>3</sup>. We argue that greater attention to these matters is required. While the introduction of these licences may have been interpreted initially as a step towards progress – in comparison to other jurisdictions – their effectiveness in achieving proclaimed outcomes deserves further examination.

#### **4. Native title and water planning processes in NSW**

Based on our recent experience in the NSW setting, we respond to the following request from the Commission:

*The Commission's preliminary analysis has not identified specific examples of water planning processes that do not adequately accommodate native title rights to access water resources, where they are found to exist. However, we encourage interested stakeholders to comment on jurisdictions' progress — or lack thereof — against the native title provisions of the NWI ahead of the final report. (p. 98)*

Below we comment on the lack of progress in NSW with respect to NWI native title provisions, drawing particularly on the experiences of the Barkandji Traditional Owners and native title holders. We argue that their experience is of broader relevance to other native title holders and claimants both in NSW and other States and Territories and that the issue requires greater consideration by the Productivity Commission in this inquiry.

---

<sup>3</sup> An exception here relates to licences fees associated with these licences that were identified as a barrier (Jackson and Langton 2012). The AWI and Office of Water sought a fee waiver for these Indigenous specific licences, which granted by the NSW Treasury in 2014 (NWC 2014, p. 23).

## A. Background

As Macpherson (2017) identifies, there are two ways water may be recognised through Australia's native title processes:

*One of these ways is section 211 of the Native Title Act, which allows native titleholders limited rights to access water in exercise or enjoyment of their native title rights and interests without a water licence or permit. However, section 211 expressly excludes the use of water for commercial purposes. The other way is as part of a determination of native title rights and interests by a court under section 225 of the Act. (p. 1139)*

Moreover, O'Donnell (2013) notes that 'where native title can be proven to exist, it generally includes rights to take and use water for domestic, social and cultural purposes, but not for commercial purposes'. While such water uses may not amount to significant volumes of water, these native title rights to water still must be accounted for through the due water planning processes in each application's jurisdiction. With hundreds of native title determinations on record throughout Australia, we suggest the Commission reconsider its statement that '[t]o date, successful native title claims to inland waters are relative rare' (p. 312). We further suggest that the Commission request the latest information from the National Native Title Tribunal on the number of claims to define water as part of native title.

Under the *Water Management Act 2000* (NSW), water allocated to satisfy native title rights (that is for non-commercial purposes) are considered 'basic landholder rights' and so are afforded the same priority as domestic and stock rights of riparian land owners or occupiers (s 55). This notionally positions native title water rights in the highest category of rights in that their requirements are to be met first, prior to any other consumptive uses (Tan and Jackson 2013; Duff 2017). Duff notes though, that 'this outcome is a consequence of the water legislation interacting with the native title holders' rights in relation to the *land* — it does not depend on them having any particular native title rights in relation to water' (p. 19, emphasis in original). Basic landholder rights – including domestic and stock rights and native title rights – do not require a water access licence to take and use water in exercising their native title rights (s 55, WMA). Of note, section 211 of the NTA already allows for licence exemptions for native title holders (as stated above), so in that regard this specific native title allowance in NSW is not anything significant (Duff 2017).

In NSW, Water Sharing Plans (WSPs) are the governance mechanisms that include the rules for sharing and allocating water between different uses within river and groundwater systems. To ensure 'basic landholder rights' are met first, Water Sharing Plans specify these requirements, and in some acts, quantify them in volumetric terms. As an example, the WSP for the *Clarence Unregulated and Alluvial Water Sources 2016* specifies native title water right entitlements for the Yaegl People, the Bandjalang People, and the Githabul People, without volumetric limits (s 20). A second example, where native title rights have been accounted for volumetrically, is the *Greater Metropolitan Region Unregulated River Water Sources 2011* (s 21), which states that:

*The water requirements of persons entitled to native title rights within these water sources are estimated to be 26.6 megalitres per year (hereafter ML/year) in the Kangaroo River Management Zone in the Shoalhaven River Water Source.*

A review of Water Sharing Plans in NSW undertaken in 2013 revealed that all except two WSPs had zero allocations for native title rights, which could be interpreted to mean 'any priority for

indigenous access is illusory’ (Tan and Jackson 2013, p. 136). Certainly, some native title determinations have been handed down since 2013, and it would be reasonable to expect that where native title determinations are handed down, Water Sharing Plans would recognise the existence of their native title rights (to both waters *and* lands) and include measures to protect them. But the experiences of the Barkandji Traditional Owners in western NSW indicate that this is not always the case.

## **B. Barkandji native title determination and water**

For the Barkandji Traditional Owners, the Darling River is extremely significant. They know the River as *Barka* (or *Baaka*), with their name meaning, ‘people of the *Barka*’ or ‘people of the River’. In his article recently published in the Guardian, Barkandji Elder William ‘Badger’ Bates (2017) emphasises the importance of the *Barka* not only to him, but the Barkandji people:

*How can I teach culture when they’re taking our beloved Barka away? There’s nothing to teach if there’s no river. The river is everything. It’s my life, my culture. You take the water away from us; we’ve got nothing.*

The centrality of *Barka* to the Barkandji people is also captured in a statement recently released by the native title holders (as cited by MLDRIN 2017):

*The Darling River is our life blood, it is our mother, just like the land. We, the Barkandji People, feel that when you take the water from the River, we have nothing. We are the *baaka wipajas* (the Darling River Black People), we have to protect the *Ngatji* (Rainbow Serpent), who is the creator of the land and the rivers.*

Notably, this statement was made in response to the July 2017 ABC Four-Corners episode alleging significant water theft in the Barwon-Darling catchment, an issue some Barkandji peoples had long been concerned about. The Barkandji traditional owners recognise the river system is not only important to them, but also users throughout western NSW.

The significance of the *Barka* to the Barkandji people is reflected in their successful native title consent determination handed down by the Federal Court on 16 June 2015. The nature and extent of their determined native title rights includes specific water-related rights and interests. Explicitly, Barkandji native title holders have had the right to take and use water recognised:

*for personal, domestic and communal purposes (including cultural purposes and for watering native animals, cattle and other stock, and watering gardens not exceeding 2 hectares), but not extending to a right to control the use and flow of the water in any rivers or lakes which flow through or past or are situated within the land of two or more occupiers.<sup>4</sup>*

Here, ‘cultural purposes’ is defined to mean the purposes of performing activities of a cultural nature that ‘involve the use of insubstantial quantities of water’ such as ‘cleansing ceremonies’; ‘the preparation of food or bush medicines’; and ‘activities involving the teaching of native title holders about traditional laws, customs and practices’ to list just a few. In addition to these specific water use rights, other recognised native title rights and interests also indirectly relate to water.

---

<sup>4</sup>*Barkandji Traditional Owners #8 v Attorney-General of New South Wales* (NSD6084/1998)



The Barkandji's native title determination also recognised a number of 'non-exclusive areas', which are lands and waters in which their recognised native title rights and interests can be enjoyed alongside other existing rights and interests. Such non-exclusive areas include 'the beds, banks, subsoils and waters of any naturally occurring water body, provided that the underlying land has not been the subject of (i) a previous exclusive possession act; or (ii) extinguishment at common law.' In line with this definition and the claim area, the Barkandji's native title determination stipulates a 400km stretch of the Darling River, north of its junction with the Great Darling Anabranch.<sup>5</sup>

Within NSW, the Darling River is managed in two discrete parts. Upstream above the regulated Menindee Lakes Scheme is considered the Barwon-Darling Unregulated River Water Source. This water source is managed through the *WSP for the Barwon-Darling Unregulated and Alluvial Water Sources 2012* ('Barwon-Darling WSP' hereafter). The remainder of the Darling River runs from the Menindee Lakes Scheme to its junction with the Murray River near the Victorian border, and is formally called the Lower Darling Regulated River Water Source, or more commonly is known as the Lower Darling. This downstream portion is managed by the *WSP for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2016* ('NSW Murray and Lower Darling WSP' hereafter).

The Barkandji native title claim area including the determined non-exclusive portion of the Darling River traverses both these WSP areas. Therefore, it would be expected that both WSPs, in accordance with the NSW *Water Management Act 2004* and the native title provisions of the NWI, should take account of and accommodate the Barkandji's native title rights and interests. However, over two years have now passed since the Barkandji's native title claim was handed down, yet at the time of writing both WSPs state:

*At the commencement of this Plan, there are no native title rights in these water sources. Therefore the water requirements for native title rights are 0 ML/year (s 20 of Barwon-Darling WSP and s 19 of NSW Murray and Lower Darling WSP).*

The Barwon-Darling WSP commenced on 4 October 2012, a little over two and a half years prior to the handing down of the Barkandji's native title determination on 16 June 2015. Yet, all WSPs specifically include allowances so that they:

*may be amended following the granting of a native title claim pursuant to the provisions of the Native Title Act 1993 (Cth) to give effect to an entitlement granted under that claim (s 84(3) of Barwon-Darling WSP)*

Even though the Barwon-Darling WSP was introduced prior to the native title determination, there is a mechanism in place for the Plan to be amended. Therefore, the current WSP is inaccurate and is arguably inconsistent with the NWI. The NSW Murray and Lower Darling WSP on the other hand, commenced on 1 July 2016, more than an entire year after the Barkandji's native title consent determination was handed down. Therefore, the statement '[a]t the commencement of [the NSW Murray and Lower Darling WSP], there are no native title rights in these water sources' is inaccurate.

---

<sup>5</sup> Due to an overlap with an existing native title claim at the time of application, other Barkandji river country was not able to be included in the claim. See 'claim area' definition in case notes.

### C. Attempts to have Barkandji native title water rights considered

The Barkandji native title holders have made several attempts to have their native title rights recognised in these WSPs. NTSCORP, the native title services body for NSW and ACT and legal representatives of the Barkandji native title holders, first brought this inconsistency to the attention of the NSW State Government on 13 July 2016 via email, once the plan had commenced. The issue was raised by NTSCORP as part of the NSW Parliament General Purpose Standing Committee's *Inquiry into the augmentation of water supply for rural and regional New South Wales*. This included a formal submission dated 14 August 2016<sup>6</sup>, and giving evidence at the Broken Hill public hearing on 26 October 2016<sup>7</sup>. No formal feedback or advice from the NSW State Government has been received in response to these requests.

In addition to these formal and direct requests to the NSW State Government, the Barkandji peoples have held several protests in recent years specifically focused around water justice and the conditions of the Barka (the Darling River). The first was in May 2016, which saw a group of about 30 water campaigners from western NSW travel to Canberra to lobby politicians for change to the water management practices of the Darling River (Wainwright and Gooch 2016). The second was a weekend-long protest in Wilcannia, held a month later in June 2016. In this protest, Barkandji and other Indigenous peoples showed their frustrations and anger about the management and over-extraction of the river upstream through intermittently blocking vehicle access on the Wilcannia Bridge – which crosses the Darling River and is a key route for through traffic on the Barrier Highway – with the assistance of police and council workers. It was hoped this protest would help raise awareness about the cultural importance of the River (Wainwright 2016).

We have also made our own inquiries with the NSW State Government on this matter. Our original inquiry was submitted to the Department of Primary Industries on 21 November 2016, to which we received a response on 28 February 2017, which suggested that the Barkandji's native title determination 'excluded the waterways and therefore they [the Barkandji native title rights] are not reflected in the WSP'. As the Barkandji native title determination does in fact include waterways including approximately 400km of the Darling River (as detailed earlier), this statement from the NSW State Government would appear to be incorrect. Clarification on this response was sought on 31 July 2017, and as of 17 October 2017, we are waiting for a response.

From interviews with former NSW State Government employees as part of our ongoing research, we have sought to learn how native title rights to water are protected or accommodated into WSPs. While very few people could help with our inquiries, what we have learned, is that it appears to be an ad hoc, process dependent on NSW State Government employees to first know of the existence of the native title claim, and then subsequent determination, and to then notify the appropriate water planner. There is little transparency in the process making monitoring and review or appeal of government decisions difficult.

We are concerned that if the Barkandji experience remains unexamined, there may be implications for others including current and future native title holders and claimants in NSW and in other jurisdictions. Most recently in NSW, the Western Bundjalung People's successful

---

<sup>6</sup> <https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/56268/084%20NTSCORP.pdf>

<sup>7</sup> <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryEventTranscript/Transcript/9868/Transcript%20-%2026%20October%202016%20-%20Corrected.pdf>

native title determination includes a native title right to take and use water for personal, domestic, communal and cultural purposes.<sup>8</sup> To meet the objectives of the NWI, recognised native title rights such as those of the Barkandji peoples and now Western Bundjalung People's, and also the 'possible existence' of native title rights, must be better accounted for in NSW water planning processes and allocation mechanisms (ie. WSPs).

We urge the Productivity Commission to further explore these issues in NSW, and include recommendations for improvement, in its final report.

Again, thank you for the opportunity to comment on the Productivity Commission's Draft Report from the *National Water Reform* inquiry. We would be happy to provide further comment if required.

Yours faithfully,

Ms Lana Hartwig & Associate Professor Sue Jackson

---

<sup>8</sup> *Western Bundjalung People v Attorney General of New South Wales* (NSD2300/2011).

## References

- Australian Law Reform Commission. (2015). *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126). Commonwealth of Australia, Sydney.
- Bates, W. (2017, July 26). When they take the water from a Barkandji person, they take our blood. *The Guardian*. Retrieved from <<https://www.theguardian.com/commentisfree/2017/jul/26/when-they-take-the-water-from-a-barkandji-person-they-take-our-blood>>
- Duff, N. (2017). *Fluid mechanics: The practical use of native title for freshwater outcomes. AIATSIS Research Report*. Australian Institute of Aboriginal and Torres Strait Islander Studies. Retrieved from: <[https://aiatsis.gov.au/sites/default/files/products/research\\_report/fluid\\_mechanics\\_0.pdf](https://aiatsis.gov.au/sites/default/files/products/research_report/fluid_mechanics_0.pdf)>
- Jackson, S., and Langton, M. (2012). Trends in the recognition of Indigenous water needs in Australian water reform: The limitations of 'cultural' entitlements in achieving water equity. *The Journal of Water Law*, 22(2-3), 109-123.
- Jackson, S., Tan, P.-L., and Altman, J. (2009). *Indigenous fresh water planning forum: Proceedings, outcomes and recommendations*. NWC, Canberra.
- Macpherson, E. (2017). Beyond Recognition: Lessons from Chile for Allocating Indigenous Water Rights in Australia. *University of New South Wales Law Journal*, 40(3), 1130-1169.
- Murray Lower Darling Rivers Indigenous Nations [MLDRIN]. (2017, July 26). 'This is important: Barkandji people speak up for their river.' [Twitter post]. Retrieved from <https://twitter.com/MLDRIN/status/890342342447714305>
- National Water Commission [NWC]. (2011). *The National Water Initiative—securing Australia's water future: 2011 assessment*. NWC, Canberra.
- NWC. (2014). *A review of Indigenous involvement in water planning, 2013*, NWC, Canberra.
- O'Donnell, M. (2011). NAILSMA TRaCK Project 6.2 *Indigenous Rights in Water in Northern Australia*. Charles Darwin University, Darwin.
- O'Donnell, M. (2013). The National Water Initiative, native title rights to water and the emergent recognition of Indigenous specific commercial rights to water in Northern Australia. *The Australasian Journal of Natural Resources Law and Policy*, 16(1), 83-100.
- Productivity Commission. (2017). *National Water Reform, Draft Report*. Productivity Commission, Canberra.
- Tan, P.-L., and Jackson, S. (2013). Impossible dreaming – does Australia's water law and policy fulfil Indigenous aspirations? *Environmental and Planning Law Journal*, 30, 132-149.
- Taylor, K.S., Moggridge, B.J., and Poelina, A. (2017). Australian Indigenous Water Policy and the impacts of the ever-changing political cycle. *Australasian Journal of Water Resources*, 20(2), 132-147.

Wainwright, S., and Gooch, D. (2016, May 2). Far west NSW campaigners staying at Canberra tent embassy to demand better water management. *ABC Broken Hill*. Retrieved from <<http://www.abc.net.au/news/2016-05-02/far-west-nsw-campaigners-canberra-over-water/7376288>>

Wainwright, S. (2016, June 20). Indigenous protesters march to show their anger over the drying up of the Darling River. *ABC Broken Hill*. Retrieved from <<http://www.abc.net.au/news/2016-06-20/indigenous-protesters-protest-over-state-of-darling-river/7526718>>