



Environmental  
Defenders Office

# **Submission on Productivity Commission Draft Report: National Water Reform 2020**

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## **About EDO**

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

***Successful environmental outcomes using the law.*** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

***Broad environmental expertise.*** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

***Independent and accessible services.*** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

**[www.edo.org.au](http://www.edo.org.au)**

### **Submitted to:**

Commissioner Jane Doolan  
Productivity Commission  
Sent via email only: [jane.doolan@pc.gov.au](mailto:jane.doolan@pc.gov.au)

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## Introduction

The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Productivity Commission's Draft Report on National Water Reform 2020 (**Draft Report**). EDO supports revision of the National Water Initiative (**NWI**) across a variety of areas, as set out in our August 2020 submission to the Productivity Commission on the National Water Reform Inquiry.<sup>1</sup> For the purposes of this submission, we are focussing on one particular area - Aboriginal water rights. EDO works with many Traditional Owners and Aboriginal organisations across Australia in relation to freshwater legal issues and broader relationships to water.

As noted in the Draft Report, progress towards NWI commitments relating to consultation with Traditional Owners about water planning and inclusion of 'social, spiritual and customary objectives' in water plans has been slow, and those objectives have not been achieved.<sup>2</sup>

In making our submission, we note that the EDO represents Traditional Owners right across Australia. Our clients have vastly different Country and waters, and they experience water laws in different ways across jurisdictions. Some of our clients operate within the market-system of the Murray-Darling Basin (**MDB**), while others have relationships to water in areas that have less rigid settler-state law-based regulation. Therefore, their perspectives and experiences are many and varied. As such, any revised version of the NWI needs to first, acknowledge the heterogeneous nature of Aboriginal perspectives and objectives regarding water, and second, seek to advance these various perspectives and objectives (as per the principle of self-determination).<sup>3</sup>

Overall, the EDO supports the recommendation of the Draft Report that there should be a new objective and element dedicated to Aboriginal interests in water in the 'renewed NWI'. EDO supports that the new element go beyond the original NWI commitments, in particular the emphasis on both cultural *and economic uses* of water by Aboriginal peoples and 'enhancing the influence'<sup>4</sup> and participation of Traditional Owners in water management processes that affect their Country and waters. EDO also supports the measuring of progress towards securing Aboriginal water interests by identifying a measure for water licences, water rights and water allocation plans.<sup>5</sup>

However, EDO submits that the recommendations of this Draft Report should go further than seeking to merely 'graft' Aboriginal values and rights onto inherently colonial legal and governance frameworks. Rather, there must be scope to – in appropriate

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<sup>1</sup> EDO, 'Submission to the Productivity Commission on the National Water Reform Inquiry' (21 August 2020) <<https://www.edo.org.au/wp-content/uploads/2020/08/EDO-Submission-to-PC-on-NWI-210820.pdf>>.

<sup>2</sup> Productivity Commission, Draft Report on National Water Reform 2020, p. 122.

<sup>3</sup> UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**), Arts 3 and 4.

<sup>4</sup> Productivity Commission, Draft Report on National Water Reform 2020 (Supporting Paper D), p. 14.

<sup>5</sup> *Ibid*, p. 10.

circumstances – acknowledge and develop legal and governance frameworks which directly reflect Aboriginal epistemology (ways of knowing) and ontology (ways of being). This includes support, resourcing and prioritisation of Indigenous-led and co-governance models of water resources.

Our submission is divided into the following five areas: 1) Indigenous-led and co-governance models; 2) Aboriginal water rights within market-based systems; 3) Water entitlements for economic use; 4) Indigenous rights and human rights; and 5) Cultural heritage, water and the need for law reform.

## 1. Indigenous-led and co-governance models

There are many Traditional Owners who are doing and proposing new ways of doing Indigenous-led collaborative water governance. One prominent example is the Martuwarra Fitzroy River Council (**Martuwarra Council**). We understand that their Chair, Dr Anne Poelina, attended the Access to Water Roundtable as part of the public consultation for this Draft Report and that the Martuwarra Council (in conjunction with the ANU Water Justice Hub) provided a written submission (which was referenced in the Part D supporting document to the Draft Report).<sup>6</sup>

The Martuwarra Council came together to first discuss their vision for the Martuwarra (Fitzroy River) in 2016.<sup>7</sup> In a 2019 article, Dr Poelina (et al) stated that: ‘We conceive of the MFRC as an opportunity to develop a model of ‘better-practice’ for water management for the West Kimberley: a locally designed collaborative solution that is based on cultural governance’.<sup>8</sup> In 2020, the Martuwarra Council produced their management plan: ‘A conservation and management plan for the National Heritage listed Fitzroy River Catchment Estate’ (**Management Plan**).<sup>9</sup> Two of the fifteen position statements in the Management Plan are of significant importance to achieving an Indigenous-led co-governance model of water allocation:

### Position Statement 6

The Martuwarra Council seeks formal recognition that the River’s variable flow regimes are an important feature of the cultural-natural heritage of the region. Therefore, any disturbance resulting from large scale irrigation extractions or other consumptive purposes is a threat to these nationally recognised heritage values and the Martuwarra’s right to flow as a living entity. All the water that makes up these flow regimes is already allocated to traditional and environmental uses and values,

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<sup>6</sup> Productivity Commission, Draft Report on National Water Reform 2020, pp. 203 and 206.

<sup>7</sup> Anne Poelina, Kathrine Taylor, Ian Perdrisat, ‘Martuwarra Fitzroy River Council: an Indigenous cultural approach to collaborative water governance’ (2019) 26(3) *Australasian Journal of Environmental Management* 236, p. 236.

<sup>8</sup> *Ibid*, p. 237.

<sup>9</sup> River of Life, M., Poelina, A., Alexandra, J., & Samnakay, N., ‘A conservation and management plan for the National Heritage listed Fitzroy River Catchment Estate (No. 1)’, Martuwarra Fitzroy River Council, Nulungu Research Institute (2020) <[HCMP-Cover-Page \(squarespace.com\)](#)> [Also see: <[Publications — MARTUWARRA FITZROY RIVER](#)>].

sustaining people and places, plant, animal and fish populations and customary harvestable production as well as community and spiritual connections.

#### Position Statement 7

The Martuwarra Council proposes to formalise a buffer zone that delineates a spatial boundary, which protects the River and its floodplains and identifies their high cultural and social-ecological significance. The rationale for the buffer is to ensure that management and any proposed development strengthens cultural or ecological values. There is also a need to ensure any development does not impact on the shared, custodianship, guardianship and authority responsibilities of Traditional Owners to protect the standing of the cultural and natural values of the *Barringtonia acutangula* (Majala/Madjulla Fresh Water Mangrove).<sup>10</sup>

A key part of the collaborative governance model proposed is the Martuwarra Council's advocacy of the establishment of a 'Martuwarra Fitzroy River catchment authority as a statutory body based on principles of co-governance and giving primacy to Indigenous knowledge, law and practice across the whole of the Martuwarra catchment including the King Sound'.<sup>11</sup>

The Martuwarra Council's approach goes well beyond 'securing' water interests/rights and invites a collaborative, whole-of-Country approach to relationships with the Martuwarra.

#### **Recommendation 1**

Any revised NWI must ensure that innovative organisations like the Martuwarra Council are supported, resourced and encouraged to develop their Indigenous-led collaborative governance models. It must also provide for the implementation of co-governance models of water management.

## **2. Aboriginal water rights within market-based systems**

Aboriginal water dispossession has been exacerbated by the water reform process, in particular the separation of land and water and the creation of water markets<sup>12</sup> (which in the southern MDB have been valued at approximately \$22 billion).<sup>13</sup> This has culminated in Aboriginal people in the NSW portion of the MDB owning a mere 0.2 percent of available surface water – despite comprising nearly 10 percent of the population.<sup>14</sup>

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<sup>10</sup> Ibid, p. 24.

<sup>11</sup> Ibid, p. 26.

<sup>12</sup> Lana D. Hartwig, Sue Jackson, Natalie Osborne, 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession' (2020) 99 *Land Use Policy* 104869.

<sup>13</sup> Aither, Water Markets Report, 2018-19 and 2019-20 Outlook <<https://www.aither.com.au/report>>.

<sup>14</sup> Lana D. Hartwig, Sue Jackson, Natalie Osborne, 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession' (2020) 99 *Land Use Policy* 104869.

At this juncture, it is important to note that Aboriginal people do not identify with this separation; it is culturally anathema. As noted by water expert and Kamilaroi man, Bradley Moggridge:

The connection which Aboriginal people have with the land is intrinsically linked to the water and sky as well. We see them as a connected system, it's only in the Western way that they have been separated and exploited.<sup>15</sup>

However, it is our understanding that some Aboriginal groups would like to be able to exercise their right to self-determination<sup>16</sup> by participating in water markets in the MDB. However, significant capital is required to purchase any meaningful quantity of water, which effectively excludes most Aboriginal people from doing so.<sup>17</sup> To that end, and consistently with certain recommendations in the Draft Report, we strongly support the provision of public funding to facilitate the reallocation of water to Aboriginal people (to be managed and used as they see fit). We further support the establishment and funding of an Aboriginal Water Holder or Holders in the MDB (with design of the governance, legal status and purpose to be led by Aboriginal people).

### **Recommendation 2**

Any revised NWI must explicitly support not only the reallocation of water rights to Aboriginal people in market-based systems, but require that public funding be made available for the same. Further, it must support the development and funding of Aboriginal designed and led 'water holders' that purchase water rights on the market and manage said water consistently with Aboriginal objectives.

### **3. Water entitlements for economic use**

EDO agrees that the NWI did not originally provide guidance on Aboriginal people's access to water for economic use and that this needs to be a focus of the renewed NWI. EDO also notes that the boundary between economic and cultural use is not clear-cut and that a holistic view needs to be taken. However, as noted in the Draft Report, it is important to separate out discussion and identification of economic uses to ensure that the legal framework is adequate to support this.

In this context, EDO notes that the Draft Report states that 'where governments determine that access to water is the best way to support economic development, that access should

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<sup>15</sup> University of Canberra, 'Water Dreaming sees UC scientist challenge Parliament' (22 March 2018) <[Water Dreaming sees UC scientist challenge Parliament - University of Canberra](#)>.

<sup>16</sup> UNDRIP, Arts 3 and 4.

<sup>17</sup> See, for example: The Australian Water Partnership, 'The effects of land and water separation on First Nations Peoples' (2 March 2017) <[The effects of land and water separation on First Nations Peoples | Australian Water Partnership](#)>.

be facilitated... within existing entitlement frameworks'.<sup>18</sup> We also note one of the examples given is Strategic Aboriginal Water Reserves in the NT.<sup>19</sup> A recent article by William Nikolakis (University of British Columbia) and Quentin Grafton (Australian National University) concluded that:

While the SAWR [Strategic Aboriginal Water Reserve] provides additional rights to water for First Peoples on their Country, it falls short of that advocated by Indigenous representative groups... Without additional NT government, or other support, the SAWR risks becoming a 'failed experiment' (anonymous personal communication, 2020). We contend that only through actively listening to Indigenous communities and providing adequate resources to govern Country (including surface and groundwater), in their own ways to meet their own needs, will the critical impediments towards water justice in Australia, and globally, be overcome.<sup>20</sup>

The EDO have not undertaken work specifically with Traditional Owners in the NT relating to Strategic Aboriginal Water Reserves. However, we use this article by Nikolakis and Grafton to emphasise that all frameworks developed for the 'securing' of Aboriginal economic interests in water must go through a process of consultation (based on principles of free, prior and informed consent) and, after that, must also be regularly evaluated to see if they are meeting the aspirations of Aboriginal people.

We further note that reference is made in the Draft Report to consideration of Strategic Aboriginal Water Reserves in WA. While there is reference to one specific reserve that was negotiated as part of an Indigenous Land Use Agreement (which would appear to have had consultation), we have had some feedback from Traditional Owner clients in other parts of WA that they have not been consulted about these reserves, that this form of legal framework was not their idea (or necessarily their preferred method) and that it seems the water reserve idea has just been adopted from the NT and 'plonked' into WA without either consultation or analysis. The Draft Report points out that 'transparency' in the process is important and the feedback from our clients would indicate that this is missing in WA.

In this context, for clarification, it is not acceptable to suddenly insert a Strategic Aboriginal Water Reserve into a discussion paper without any sense of the reasoning, background or analysis for such a model and then request consultation with Traditional Owners 'amongst' other stakeholders. It is important, when governments determine to use a new framework that they consult with Traditional Owners first, and specifically. As noted by the Draft Report, the 'chances of success will be maximised if programs providing water for economic purposes are co-designed with Traditional Owners using good policy design principles'.<sup>21</sup>

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<sup>18</sup> Productivity Commission, Draft Report on National Water Reform 2020, p. 119.

<sup>19</sup> Ibid, p. 118.

<sup>20</sup> William Nikolakis and R. Quentin Grafton, 'Law versus justice: the Strategic Aboriginal Water Reserve in the Northern Territory, Australia' (2021) *International Journal of Water Resources Development* (DOI: 10.1080/07900627.2021.1882406) [Published online: 24 Feb 2021].

<sup>21</sup> Productivity Commission, Draft Report on National Water Reform 2020 (Supporting Paper D), p. 27.

### **Recommendation 3**

Any revised version of the NWI must require that proposed legislative or policy responses to securing Aboriginal water entitlements for economic use go through a process of consultation (based on the principle of free, prior and informed consent) and, after that, must be regularly evaluated to analyse if they are meeting the aspirations of Aboriginal people.

## **4. Indigenous rights and human rights**

EDO notes that the Draft Report identifies that Articles 25 and 26 of the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)* are relevant to Indigenous peoples' rights to water. In the context of decision-making about water and implementation of new legislation or frameworks we also note Articles 18 and 19:

Art 18 Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Art 19 States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

EDO also notes the right to healthy drinking water which is a derivative of several established human rights.<sup>22</sup> In this Draft Report, drinking water is predominantly dealt with in a different chapter to Indigenous relationships to water ('Urban water services and remote communities'), but they are inextricably linked because both these issues are inherently based in Aboriginal water dispossession. In particular, we note that the Draft Report uses the poor quality drinking water in Walgett in NSW and the submission of the Dharriwaa Elders Group (**DEG**) and Walgett Aboriginal Medical Service.<sup>23</sup>

We have attached a copy of a relevant joint submission<sup>24</sup> responding to a call by the UN Special Rapporteur on Human Rights and the Environment for input to a report on "Too Dirty, Too Little, Too Much: The Global Water Crisis and Human Rights" at **Annex 1** to this submission. The first case study in this submission details DEG's experience of water scarcity and salinity in Walgett.

Any renewed NWI must explicitly acknowledge the links between human and Indigenous rights and water, as well as the need to ensure that these rights are enshrined in relevant

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<sup>22</sup> Notably: *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, Art 11 (the right to an adequate standard of living) and Art 12 (the right to the highest attainable standard of health); and *International Covenant on Civil and Political Rights (ICCPR)*, Art 6 (the right to life).

<sup>23</sup> Productivity Commission, Draft Report on National Water Reform 2020 (Supporting Paper G), p. 42.

<sup>24</sup> Co-authored by EDO, DEG and Murray Lower Darling Rivers Indigenous Nations (**MLDRIN**).



water laws. This is consistent with the UNDRIP, as well as with growing international recognition that the right to water is a derivative of established human rights articulated in binding treaties (including but not limited to the right to life).<sup>25</sup> It is also consistent with a significant body of ‘soft’ international law (such as resolutions by the United Nations General Assembly), as set out in **Annex 2** to this submission.

#### **Recommendation 4**

Any renewed NWI must explicitly acknowledge the links between human and Indigenous rights and water, as well as the need to ensure that these rights are enshrined in relevant water laws.

### **5. Cultural heritage, water and the need for reforms**

In the Draft Report there are only two<sup>26</sup> specific mentions of cultural heritage in the relevant supporting paper (Supporting Paper D: Securing Aboriginal and Torres Strait Islander people’s interests in water).<sup>27</sup> As noted in the introduction, EDO’s clients have many and varied experiences and perspectives, but one consistent theme is the relationship between protection of cultural heritage and water.

Our Aboriginal clients frequently indicate that it is not – as commonly assumed – discrete bits of a river system or wetland that are culturally significant; rather, the *entire system* and all of its component parts (river, floodplains, aquifers, ecological communities, species and so on) are inextricably linked to Aboriginal culture and identity. For example, the Yorta Yorta people have indicated to us that the entire Murray/Dungala River is considered a living being and part of their culture. As a consequence, the alteration of natural flow regimes (to meet irrigation demands in the summer) has disturbed natural breeding cycles and wetland inundation patterns. This has in turn caused harm to their Country, culture, identity and well-being. We further note Position Statement 1 of the Martuwarra Council’s Management Plan:

The conventional approaches to cultural heritage conservation need to be broadened so that waters’ place in First Law, sociality, sacredness, identity and life giving are better recognised. The Martuwarra Council seeks greater recognition of the centrality of Living Waters – which link material and spiritual connections - as being important to cultural and natural heritage in the region.<sup>28</sup>

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<sup>25</sup> ICCPR, Art 6. Relevantly, [General Comment 36](#) by the UN Human Rights Committee has expressly included access to water as part of the right to life (U.N. HRC, General Comment 36 on Article 6 (Right to Life), 6, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018)).

<sup>26</sup> Productivity Commission, Draft Report on National Water Reform 2020, p. 25.

<sup>27</sup> There are then some follow up references in Supporting Paper I: ‘Government investment in major water infrastructure’.

<sup>28</sup> River of Life, M., Poelina, A., Alexandra, J., & Samnakay, N., ‘A conservation and management plan for the National Heritage listed Fitzroy River Catchment Estate (No. 1)’, Martuwarra Fitzroy River Council, Nulungu

While heritage laws in several jurisdictions have required reform for a long time (particularly WA, NSW, Tasmania and the Commonwealth), the destruction of Juukan Gorge brought attention to the current reality, the need for urgent reform and highlighted the importance of analysing any references to heritage protection in all contexts.<sup>29</sup>

The Draft Report makes passing reference to the two relevant pieces of Commonwealth legislation, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) and the *Environment Protection Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**),<sup>30</sup> but the adequacy of these legal frameworks is not interrogated. The Interim Report of the Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia (**Juukan Gorge Inquiry**) (December 2020) stated that: ‘Evidence received by the Committee highlights the inadequacy of current Commonwealth protections under both the ATSIHP Act and the EPBC Act.’<sup>31</sup> The Independent Review of the EPBC Act (October 2020) by Professor Graeme Samuel AC also found that the current laws for heritage protection at a Commonwealth level were ‘unsatisfactory and out of step with community expectations’, and required urgent review.<sup>32</sup>

As water law and policy and water-related development (in its varied forms) are inherently linked to cultural heritage, we recommend that the Final Report’s findings and recommendations acknowledge the current inadequacy of cultural heritage legislation in several Australian jurisdictions and that this, in turn, needs to inform the way that Aboriginal relationships to water are recognised in water legislation.

We further note that the holistic conception of cultural heritage described above is not reflected in the current version of the NWI or relevant heritage, water or development laws at either level of government. We would argue that this must be addressed in any revised NWI. We again reference our joint submission (DEG, MLDRIN and EDO) attached (Annex 1) and draw attention to the second case study of MLDRIN’s experience of water infrastructure projects destroying Aboriginal cultural heritage. We also draw attention to EDO’s submission to the Juukan Gorge Inquiry<sup>33</sup> (which includes reference to the

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Research Institute (2020) <[HCMP-Cover-Page \(squarespace.com\)](#)> [Also see: <[Publications – MARTUWARRA FITZROY RIVER](#)>] p. 38.

<sup>29</sup> EDO, ‘Starting the important conversation about reforming our laws and values’ (21 August 2021) <[The Juukan Gorge Inquiry and First Nations cultural heritage - Environmental Defenders Office \(edo.org.au\)](#)>.

<sup>30</sup> Productivity Commission, Draft Report on National Water Reform 2020, pp. 5 and 25.

<sup>31</sup> Joint Standing Committee on Northern Australia, Never Again (December 2020) <[Never Again \(aph.gov.au\)](#)> p. 13.

<sup>32</sup> Graeme Samuel AC, The independent review of the Environment Protection and Biodiversity Conservation Act 1999 <[EPBC Act Review | Independent review of the EPBC Act \(environment.gov.au\)](#)> p. 57.

<sup>33</sup> EDO, ‘Starting the important conversation about reforming our laws and values’ (21 August 2021) <[The Juukan Gorge Inquiry and First Nations cultural heritage - Environmental Defenders Office \(edo.org.au\)](#)>.

Martuwarra Fitzroy River Council) and EDO's submission on the Draft Aboriginal Cultural Heritage Bill (WA).<sup>34</sup>

### **Recommendation 5**

We recommend that the Final Report's findings and recommendations acknowledge the current inadequacy of cultural heritage legislation in several Australian jurisdictions and that this, in turn, needs to inform the way that Aboriginal relationships to water are recognised in water legislation.

We further recommend that any renewed NWI explicitly acknowledge the links between Aboriginal cultural heritage (in the holistic sense) and water, and emphasise the need for state and Commonwealth cultural heritage, water and development laws to uphold the principle of free, prior and informed consent in relation to all development that affects Aboriginal cultural heritage linked to water.

### **Conclusion**

We again thank the Productivity Commission for the opportunity to provide these submissions on the Draft Report.

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<sup>34</sup> EDO, 'Submission on the draft Aboriginal Cultural Heritage Bill 2020 (WA)' (12 November 2020) <[Submission on the draft Aboriginal Cultural Heritage Bill 2020 \(WA\) - Environmental Defenders Office \(edo.org.au\)](#)>; and EDO, 'Once in a generation opportunity – WA Aboriginal Cultural Heritage Bill' (7 October 2020) <[Once in a generation opportunity – WA Aboriginal Cultural Heritage Bill - Environmental Defenders Office \(edo.org.au\)](#)>.