



Environmental  
Defenders Office

**Submission to the Productivity Commission National  
Water Reform 2024 - Call for submissions**

**21 February 2024**

## 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.

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### Submitted to:

National Water Reform 2024

Productivity Commission

Attention: Commissioner Joanne Chong and Associate Commissioner Anne Poelina

By email: [water.reform.2024@pc.gov.au](mailto:water.reform.2024@pc.gov.au)

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## **Acknowledgement of Country**

*EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.*

*EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.*

*First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.*

## **A note on language**

*EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction. In making our submission, we note that EDO represents First Nations peoples across Australia. Our clients have vastly different Country and waters, and they experience water laws in different ways across jurisdictions.*

*Out of respect for First Nations self-determination, EDO has provided high-level recommendations for western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.*

*We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations. We acknowledge that not all First Nations people will identify with that term and that they may instead identify using other terms or with their immediate community or language group.*

*First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.*

## Contents

Introduction .....	5
1. Jurisdictional progress towards implementing the NWI .....	6
Introduction .....	6
Overview – Northern Territory .....	8
Overview – Western Australia .....	9
a. Water allocation planning .....	10
Overview .....	10
Northern Territory .....	11
Western Australia.....	17
b. First Nations water access, management and ownership.....	21
Overview .....	21
Northern Territory .....	23
Western Australia.....	24
c. Community involvement/consultation.....	25
Overview .....	25
Northern Territory .....	26
Western Australia.....	27
2. The Productivity Commission’s 2020 recommendations and advice for renewal of NWI.....	30
a. First Nations water access, management and ownership.....	31
b. Incorporating climate change and extreme weather events into water planning.....	31
c. Access to safe and secure drinking water .....	34
Northern Territory .....	35
Western Australia.....	36
d. Transparency/access to information .....	37
3. Summary of recommendations .....	39
Appendix A: Recommendations from EDO’s 2020 and 2021 Submissions to the Productivity Commission Inquiry on National Water Reform .....	42
2020 Submission .....	42
2021 Submission .....	44
Appendix B: Evaluation of the Badu Advisory Report: Review of the NT’s implementation of the National Water Initiative in relation to water planning .....	46

## Introduction

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide a submission to the inquiry into the reform progress of Australian governments towards achieving the objectives and outcomes of the 2004 *Intergovernmental Agreement on a National Water Initiative (NWI)*.

Water is vital for life. It plays a critical role in the health of our communities, economy, and ecosystems. Australia is the driest inhabited continent on Earth,<sup>1</sup> and our limited water resources are in demand from competing interests including agriculture, extractive industry, urban and domestic water needs, the needs of the environment (e.g. to maintain and improve ecosystem function) and customary needs (e.g. cultural flows to maintain and improve spiritual, cultural, environmental, social and economic health and wellbeing for First Nations). These challenges will become more difficult as the population grows and climate change impacts increase.

The management of water resources in Australia is an increasingly complex issue. The environment, First Nations communities, the broader community and industry all rely on access to finite water resources. Demand for water is increasing as industry expands while future supply is subject to the risks and uncertainties of climate change. Meanwhile, the disparity between access to safe drinking water in urban centers and regional communities is a persistent issue requiring urgent attention.

The NWI is the key intergovernmental agreement underpinning water reform and regulation in Australia. The Federal Government and all Australian States and Territories have signed on to the agreement. Under the agreement, Australian governments have committed to:

- prepare water plans with provisions for environmental water;
- achieve sustainable water use in over-allocated or stressed water systems;
- introduce registers of water rights and standards for water accounting;
- expand trade in water rights;
- improve pricing for water storage and delivery; and
- better manage urban water demands, including the provisions of healthy, safe and reliable water supplies.

The *Water Act 2007* (Cth) requires regular assessment of progress towards implementing the NWI. The Productivity Commission conducted two of the previous inquiries; and has now called for submissions as it begins its third inquiry.

Importantly, we note that:

- The previous 2020 inquiry led the Productivity Commission to issue recommendations and advice for renewal of the NWI (**renewal advice**).<sup>2</sup>
- The Australian government has committed to reviewing and modernising the NWI.

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<sup>1</sup> Shahbaz Khan, 'Managing climate risks in Australia: options for water policy and irrigation management' (2008) 48(3) *Australian Journal of Experimental Agriculture* 265-273, accessible [here](#).

<sup>2</sup> Productivity Commission, Australian Government, *National Water Reform 2020: Findings, recommendations and renewal advice* (Recommendations report No 96, 28 May 2021) 1 ('**NWI Recommendations report**') <<https://www.pc.gov.au/inquiries/completed/water-reform-2020/report/>>.

As noted in the *National Water Reform 2024 - Call for submissions (Call for submissions)*, the “findings and recommendations from the 2020 inquiry, and the NWI renewal advice, remain relevant, as the Australian Government has committed to renew and modernise the NWI and is in the process of doing so”.

In response to the Call for submissions, this submission addresses the following key areas for feedback:

1. Jurisdictional progress towards implementing the NWI with a focus on the Northern Territory and Western Australia’s progress in relation to the following key issues:
  - Water allocation planning
  - First Nations water access, management and ownership
  - Community involvement/consultation
2. The Productivity Commission’s 2020 recommendations and advice for renewal of the NWI including the following areas for inclusion:
  - First Nations water access, management and ownership
  - Incorporating climate change and extreme weather events into water planning
  - Access to safe and secure drinking water
  - Transparency and access to information
3. Conclusion and summary of recommendations

This inquiry process provides a key opportunity for the Productivity Commission to strengthen and update its NWI renewal advice and to reset ambition when it comes to water regulation in Australia. It is particularly timely as the Australian Government begins work on its commitment to renew and modernise the NWI.

## 1. Jurisdictional progress towards implementing the NWI

### Introduction

The EDO provided extensive feedback on the implementation of the NWI and areas for inclusion in a new NWI, most recently in the Productivity Commission’s 2020 Inquiry into National Water Initiative Implementation Progress. We acknowledge and continue to endorse our recommendations in the 2020 and 2021 submissions made to that inquiry, which are included in this submission at **Appendix A**.<sup>3</sup>

In this submission, we seek to draw the Productivity Commission’s particular attention to jurisdictional progress and areas of concern in meeting the NWI in the Northern Territory (**NT**) and Western Australia (**WA**).

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<sup>3</sup> Environmental Defenders Office, *Submission to the Productivity Commission on the National Water Reform Inquiry* (21 August 2020) (**2020 Submission**) available [here](#); Environmental Defenders Office, *Submission on the Productivity Commission Draft Report: National Water Reform 2020* (1 April 2021) (**2021 Submission**), available [here](#).

The time for urgent reform to protect and maintain our water resources in these regions, and the environmental and cultural values which depend on them, has never been more pressing. The NT and WA contain some of Australia's last pristine free-flowing rivers, including the Martuwarra Fitzroy River in the Kimberley and the Roper and Daly Rivers in the Top End of the NT.

Surface and groundwater resources across both jurisdictions are under increasing pressure from development, including hydraulic fracturing, intensive irrigated agriculture, and mining. In addition, climate change will have substantial effects on water resources. The Central Australian region across NT and WA is projected to experience greater warming than coastal regions.<sup>4</sup> Northern Australia is likely to see impacts to water availability, including increased frequency of extreme rainfall events, yet projected average rainfall remains unclear.<sup>5</sup> Southern WA is particularly likely to see reduced rainfall and increased frequency of droughts.<sup>6</sup> First Nations people living on Country in regional and remote communities in these regions are likely to experience disproportionate impacts caused by climate change.<sup>7</sup>

Despite these pressures on water resources, there are significant deficiencies in water laws in each of these jurisdictions. In our view, water laws in the NT and WA are the weakest in the country.<sup>8</sup> Not surprisingly, the Productivity Commission's Assessment of National Water Initiative implementation progress report (2017–2020) (**NWI Implementation Report**)<sup>9</sup> raised a number of concerns with the implementation of the NWI in WA and the NT including, for example, the failure to enact legislation required to create secure, NWI-consistent water access entitlements for consumptive uses.<sup>10</sup>

An analysis of each jurisdiction's compliance and progress with the NWI is beyond the scope of this submission in the time allowed. Instead, this submission will focus on the following key issues in WA and NT:

- water allocation planning;
- First Nations access, management and ownership over water; and
- community involvement and consultation.

In our view, there is much more to be done in WA and the NT to bring those regimes in line with the NWI. This inquiry by the Productivity Commission is an opportunity to further highlight key deficiencies that must be remedied, including through ongoing reform in those jurisdictions.

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<sup>4</sup> IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Regional Fact Sheet- Australasia) 2 available [here](#).

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Natalie Teasdale and Peter Panegyres, 'Climate change in Western Australia and its impacts on human health' (2023) 12 *The Journal of Climate Change and Health* 6.

<sup>8</sup> Environmental Defenders Office, *October 2022 Update: Deficiencies in the existing water law and governance framework in the Northern Territory* (24 October 2022), available [here](#).

<sup>9</sup> Productivity Commission, Australian Government, *Assessment of the National Water Initiative implementation progress (2017-2020)* (Implementation report No 96, 28 May 2021) (**NWI Implementation Report**).

<sup>10</sup> NWI Implementation Report, 3.

The forthcoming renewal of the NWI will also provide a crucial opportunity to direct the future ambition for water management and protection in Australia, including with regard to the specific needs of the NT and WA. We deal with what EDO would like to see in this renewal process in **Part 2** of this submission and summarise our recommendations in **Part 3**.

## Overview – Northern Territory

In the NWI Implementation Report, the Commission found the NT had not implemented the agreed NWI commitments, and, in particular, was deficient in the following areas:

- failure to enact legislation to create secure, NWI-consistent water access entitlements;<sup>11</sup>
- overallocation of the Katherine Tindall Limestone Aquifer and several groundwater resources in the Darwin Rural area;<sup>12</sup>
- substantial declines in recent years in representation of Aboriginal people in water planning processes in the Territory;<sup>13</sup>
- use of a ‘use it or lose it’ policy which acts as a trade barrier;<sup>14</sup>
- failure to adopt trade approval service standards;<sup>15</sup>
- inadequate independent economic regulation;<sup>16</sup>
- issues relating to water quality regulation in regional and remote areas;<sup>17</sup>
- lack of drinking water standards set in NT legislation;<sup>18</sup> and
- inadequate and ineffective consultation and engagement.<sup>19</sup>

Since the NWI Implementation Report was published, EDO has also identified numerous shortfalls in the NT’s implementation of the NWI and raised concerns with its water regulation and management more generally. These are referred to throughout this submission.

In October 2022, as part of the *Draft Territory Water Plan*, the NT government announced plans to reform the Territory’s water legislation, promising to introduce standalone safe drinking water legislation by 2024 and replace the *Water Act 1992* (NT) (**NT Water Act**) with new legislation by 2026.<sup>20</sup> These commitments were retained within the final *Territory Water Plan*, which the NT Government describes as the first whole-of-government strategic plan for water security.<sup>21</sup>

In October 2023, the NT Government published a report it had commissioned from the Badu Advisory Group assessing the NT Government’s compliance with the NWI (**Badu Report**).<sup>22</sup> The Badu Report concluded that overall, the NT Government’s planning processes were consistent

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<sup>11</sup>NWI Implementation Report, 11.

<sup>12</sup>Ibid 33.

<sup>13</sup> Ibid 42.

<sup>14</sup> Ibid 58.

<sup>15</sup> Ibid 66.

<sup>16</sup> Ibid 1, 76-77, 89.

<sup>17</sup> Ibid 174.

<sup>18</sup> Ibid 174.

<sup>19</sup> Ibid 200.

<sup>20</sup> NT Government, *Draft Territory Water Plan* (October 2022) available [here](#).

<sup>21</sup> NT Government, *Territory Water Plan* (June 2023) available [here](#), 5, 24, 34.

<sup>22</sup> Badu Advisory, *Review of the NT’s implementation of the National Water Initiative in relation to water planning* (13 July 2023) available [here](#).



with the provisions of the NWI and subsequent guideline documents.<sup>23</sup> At the same time, the Badu Report’s authors noted that it constituted “*high-level strategic advice*” and did not provide legal advice.<sup>24</sup> It expressly considered as outside of the scope of the review:<sup>25</sup>

- commenting on the merits or otherwise of principles, strategies, rules etc. contained within, or the outcomes associated with, the specific provisions contained within WAPs, policies or guidelines;
- consideration of non-water planning related elements of the NWI (e.g. water pricing and urban water reform); and
- undertaking consultations beyond the NT Department of Environment, Parks and Water Security (**DEPWS**) water planning team.

In our view, these limitations and methodological constraints mean the Badu Report cannot be understood as a complete assessment of whether the NT is compliant with the NWI. EDO commissioned an independent report from water law expert Alex Gardner evaluating the Badu Advisory Report (**Gardner Report**).<sup>26</sup> The Gardner Report is **attached at Appendix B** to this submission. It analyses the NT’s water laws, policies and planning documents against the NWI and identifies areas of non-compliance and areas for improvement.

## **Overview – Western Australia**

In the NWI Implementation Report, the Commission found WA had not implemented the agreed NWI commitments and, in particular, was deficient in areas including:

- failure to enact legislation to create secure, NWI-consistent water access entitlements;<sup>27</sup>
- failure to create statutory water allocation plans;<sup>28</sup>
- clearly established risk assignment frameworks for changes in allocation;<sup>29</sup>
- independent economic regulation of urban and rural water;<sup>30</sup>
- identification of cultural objectives in statutory water allocation plans;<sup>31</sup>
- lack of publication of the location or timelines of enforcement actions;<sup>32</sup>
- issues relating to water quality regulation in regional and remote areas;<sup>33</sup> and
- lack of progress regarding community partnerships.<sup>34</sup>

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<sup>23</sup> Ibid 2.

<sup>24</sup> Ibid 1.

<sup>25</sup> Ibid 7.

<sup>26</sup> Professor Alex Gardner, *Evaluation of the Badu Advisory Report: Review of the NT’s implementation of the National Water Initiative in relation to water planning* (12 February 2024).

<sup>27</sup> NWI Implementation Report, 11, 14, 16.

<sup>28</sup> Ibid 12, 30.

<sup>29</sup> Ibid 12.

<sup>30</sup> Ibid 70, 77.

<sup>31</sup> Ibid 43.

<sup>32</sup> Ibid 166.

<sup>33</sup> Ibid 173.

<sup>34</sup> Ibid 200.

In many of its findings about WA, the Productivity Commission noted that WA was “*considering draft legislation*” to strengthen deficiencies in its compliance with the NWI.<sup>35</sup>

The WA government first announced plans to reform the State’s water legislation in 2006. This announcement was followed by a position paper released in 2013, ‘Securing Western Australia’s water future’ (**Position Paper**), providing the public with an opportunity to comment on the proposed future of water resource management in WA.

The Position Paper was followed by a public comment period within which multiple stakeholders made submissions on the need for reform.

Despite continued engagement for the past 10 years regarding this reform process, unexpectedly on 21 December 2023, the Minister for Water announced that plans to consolidate the State’s six water regulation Acts<sup>36</sup> would not proceed “*following stakeholder feedback*” that “*many of the existing and long-standing arrangements are suitable*”.<sup>37</sup> In the context of the NWI Implementation Report findings and broader issues with WA’s water regulation, this unexpected retreat from a long-term commitment towards water reform is nonsensical.

Some of the issues with WA’s current water framework are detailed below. The absence of statutory water allocation plans, lack of allocation for environmental water, and the need for increased First Nations participation in water governance, demonstrate a lack of progress with compliance with the NWI and are just some of the reasons why water reform should be put back on the Government’s agenda.

## a. Water allocation planning

### Overview

One of the objectives of the NWI is the “*statutory provision for environmental and other public benefit outcomes, and improved environmental practices*”.<sup>38</sup> States and Territories agreed to identify these outcomes “*with as much specificity as possible*.”<sup>39</sup> The NWI requires that water that is for environmental and other public benefit outcomes be given statutory recognition and have at least the same degree of security as water access entitlements for consumptive use and be fully accounted for.<sup>40</sup> In 2021, the Commission found that this requirement has been “*largely achieved*”, other than in WA.<sup>41</sup>

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<sup>35</sup> See for example NWI Implementation Report, 30.

<sup>36</sup> *Rights in Water and Irrigation Act 1914; Water Agencies (Powers) Act 1984; Metropolitan Arterial Drainage Act 1982; Metropolitan Water Supply, Sewerage, and Drainage Act 1909 or Country Areas Water Supply Act 1947.*

<sup>37</sup> Minister for Water, ‘Water priorities reset to focus on practical measures’ (Media statement, 21 December 2023) available [here](#).

<sup>38</sup> Intergovernmental Agreement on the National Water Initiative (25 June 2004) available [here](#) (NWI), [23](iii).

<sup>39</sup> NWI [78].

<sup>40</sup> NWI [35].

<sup>41</sup> NWI Implementation Report, 30.

A key mechanism to provide for the protection and maintenance of environmental and public benefit outcomes is through the enactment of statutory water plans, defined in the NWI as:<sup>42</sup>

*statutory plans for surface and/or ground water systems [...] developed in consultation with all relevant stakeholders on the basis of best scientific and socio-economic assessment, to provide secure ecological outcomes and resource security for users.*

The purpose of water plans is to assist governments and the community to determine water management and allocation decisions to meet productive, environmental and social objectives. The NWI largely permits States and Territories to determine the scope and content of their water plans, however, it does provide for key components to be included.<sup>43</sup>

Governments have committed under the NWI to, amongst other things:

- providing a statutory basis for environmental and other public benefit outcomes in surface and groundwater systems to protect water sources and their dependent ecosystems;<sup>44</sup>
- ensuring water plans have a binding legal effect on the management of water resources;<sup>45</sup>
- achieving sustainable water use in over-allocated or stressed water systems;<sup>46</sup>
- the application of the best available scientific knowledge and use of socio-economic analysis in the water planning process;<sup>47</sup> and
- consulting with stakeholders within or downstream of plan areas,<sup>48</sup> and ensuring the ‘inclusion of indigenous representation in water planning wherever possible’.<sup>49</sup>

## **Northern Territory**

### Water allocation plans

The Productivity Commission previously noted in its NWI Implementation Report that overall, jurisdictions other than WA had largely achieved their NWI commitments regarding water for environmental and public benefit outcomes, explaining that environmental water had at least the same level of security as water for consumptive uses, and referring to the ongoing monitoring of water plan areas in the NT.<sup>50</sup> However, as outlined in the Gardner Report, this evaluation is focused on whether water allocation plans are made under statutory provisions generally but did not consider the adequacy of the provisions of the NT *Water Act*.<sup>51</sup>

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<sup>42</sup> NWI, Schedule B(i).

<sup>43</sup> NWI [39] notes that water plans are to prepared “*along the lines of the characteristics and components*” stipulated in Schedule E to the NWI.

<sup>44</sup> NWI [25(ii)].

<sup>45</sup> NWI [29]; Alex Gardner, Richard Bartlett, Janice Gray and Rebecca Nelson, *Water Resources Law*, (2018; 2nd edition), at [14.39].

<sup>46</sup> NWI [41].

<sup>47</sup> NWI [6(ii)].

<sup>48</sup> NWI [6(i)].

<sup>49</sup> NWI [52(i)].

<sup>50</sup> NWI Implementation Report, pp 31, 140, discussed in Gardner Report, 18.

<sup>51</sup> Gardner Report, 18.

The NT *Water Act* has been described by the authors of *Australian Water Law* as containing “little detail about water planning, environmental water and environmental considerations.”<sup>52</sup> The NT *Water Act* simply provides that water is to be allocated “within the estimated sustainable yield to beneficial uses” and requires that an allocation is to be made to the environment.<sup>53</sup> However, since “estimated sustainable yield” is not defined in the NT *Water Act*, it is left entirely up to individual Water Allocation Plans (**WAPs**) to work out how this is done. There is no express requirement regarding the volume of the allocation for the environment, or the process by which the volume should be calculated.

Ultimately, the NT *Water Act* provides very little guidance as to the specific types of provisions which must be included in WAPs. This results in WAPs adopting different structures and approaches with key concepts such as the estimated sustainable yield not required to be applied consistently. EDO has previously noted that, unlike other Australian jurisdictions, WAPs do not take the form of delegated statutory instruments and often fail to provide clear, quantifiable, consistent and legally binding criteria and targets, such that they are arguably incapable of facilitating sustainable and equitable management of a vital, contested and increasingly constrained resource.<sup>54</sup>

Concerningly, there have been no improvements since the Productivity Commission’s review concluded in 2021. In fact, since late 2022, the NT has taken steps to strip out more of the already limited content from the statutory plan document and place it in supporting documents. This has been done for the Georgina Wiso Water Allocation Plan (declared in November 2023), the draft Western Davenport Water Allocation Plan (released in draft in April 2023, and yet to be declared). We understand that the Mataranka Water Allocation Plan due to be released shortly will also follow the same format. Minutes from meetings of the Western Davenport Water Allocation Plan in October 2022 indicate that the new structure was developed, amongst other things, due to “*legal advice which indicated the Department [DEPWS] needed to be specific regarding any material contained within the WAP*”<sup>55</sup> and “*to prevent further opportunities for litigation*”.<sup>56</sup>

Irrespective of the reasons for the change, the January 2024 decision of the NT Supreme Court in *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as Delegate of the Minister for Environment & Anor and Arid Lands Environment Centre Inc v Minister for Environment & Anor* [2024] NTSC 4 (**Singleton Station Case**), argued in September 2022, serves to highlight the deficiencies in the NT’s water planning frameworks. That decision includes a finding that section 22B(4) of the NT *Water Act*, which states that “*water resource management in a water control district is to be in accordance with any water allocation plan declared in respect of the district*”, does **not** require that water licences in a WAP area be consistent with the terms of a

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<sup>52</sup> Kate Stoeckal, Romany Webb and Amy Hankinson, *Australian Water Law*, Lawbook Co 2012, 501.

<sup>53</sup> *Water Act 1992* (NT), s 22B.

<sup>54</sup> Environmental Defenders Office, [Deficiencies in the existing water law and governance framework in the Northern Territory](#) (August 2021); and see Environmental Defenders Office, [October 2022 Update: Deficiencies in the existing water law and governance framework in the Northern Territory](#) (24 October 2022).

<sup>55</sup> Western Davenport and Ti Tree Water Advisory Committee, DRAFT Minutes 26 October 2022, available [here](#), 4.

<sup>56</sup> Western Davenport Ti Tree Water Advisory Committee, Minutes – Meeting #6, 3 October 2022 available [here](#), 6.

declared WAP.<sup>57</sup> Rather, the plan is just one of many factors which the Controller of Water Resources is required to consider or “*take into account*”, if relevant, when determining a water licence application.<sup>58</sup>

The NT is clearly not meeting its requirements under the NWI in circumstances where its water plans, already comparatively weak, have been found not to impose binding rules on the granting of water extraction licences. Paragraph [29] of the NWI expressly requires the allocation of water to a water access entitlement to be consistent with a water plan. If the decision in the Singleton Station Case is applied, not only are the plans not binding, but WAPs appear not to meet characteristics and components in Schedule E of the NWI in material respects, whilst deferring key aspects of decision-making to the water licensing assessment process.<sup>59</sup> These deficiencies affirm the need for an overhaul of the NT *Water Act*, to meet both its NWI commitments and the requirements of a renewed NWI as it is finalised in the coming years.

While the declaration of the Georgina Wiso WAP in November 2023 significantly increases the amount of the NT covered by WAPs, the decision in the Singleton Station Case undermines the effectiveness of WAPs in regulating water extraction. We are also concerned that the NT government’s approach to the Georgina Wiso WAP – which covers over 11% of the NT’s land mass and multiple regions – does not differentiate its application across the area it covers, increasing the risk of unsustainable over-extraction in one region of the WAP area. Without water levels being monitored and triggers being embedded in the WAP there is a risk that large areas within a WAP will allow the extraction of water that is inconsistent with the NWI (see paragraphs [36]-[40]).

#### Non-statutory planning processes

While deficiencies in water plans have already been highlighted above, there are also considerable issues with the legally unenforceable, non-statutory planning documents which apply outside of WAP areas. In some cases, these policy documents are also used to inform the preparation and application of WAPs.

The majority of the Northern Territory is not covered by a WAP. Prior to the recent declaration of the Georgina Wiso WAP in November 2023, which covers 11.55% of the Territory, it was estimated that approximately 5% of the Territory fell within a WAP area.<sup>60</sup> The Productivity Commission’s Assessment of the National Water Initiative in February 2021, found that only 28% of the NT’s licensed water entitlements fell within areas subject to a WAP.<sup>61</sup>

#### *NT Water Allocation Planning Framework*

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<sup>57</sup> [Singleton Station Case](#) [58]-[59].

<sup>58</sup> [Singleton Station Case](#) [44]-[47].

<sup>59</sup> See, for example, discussion of the recent Georgina Wiso Water Allocation Plan in the Gardner Report, 27-28.

<sup>60</sup> William Nikolakis & R Quentin Grafton, ‘Law versus justice: the Strategic Aboriginal Water Reserve in the Northern Territory, Australia’ (2022) 38(1) *International Journal of Water Resources Development*, 11-29, DOI:10.1080/07900627.2021.1882406; Northern Territory Government, ‘[Georgina Wiso water allocation plan](#)’ (Web Page, 2024).

<sup>61</sup> NWI Implementation Report, 18.

Outside the WAP areas, the setting of the consumptive pool is governed by a non-statutory policy document known as the ‘Northern Territory Water Allocation Planning Framework’ (**Framework**). The Framework is a two-page document, which was approved in 2000 and has not been amended since, other than minor formatting changes. It sets out that scientific research will be applied when allocating non-consumptive uses, but where scientific research is not available, there are a set of contingent rules which will apply.<sup>62</sup> The NT is divided into two main zones: the Top End and the Arid Zone,<sup>63</sup> with a separate set of contingent rules for each zone, set out **below**.<sup>64</sup>

- For the Top End zone, referred to in that Policy as the “*northern one third of the Northern Territory*”, at least 80% of both river flow and annual aquifer recharge is allocated to environmental and other public benefit use.<sup>65</sup>
- For the Arid Zone, referred to as the “*southern two thirds of the Northern Territory*”, at least 95% of river flow, and at least 20% of annual aquifer storage (calculated at the start of extraction) is allocated to environmental and other public benefit use.<sup>66</sup> The contingent rule for Arid Zone aquifers contain a qualifier that ‘*[t]here will be no deleterious change in groundwater discharges to dependent ecosystems*’.<sup>67</sup>

EDO has considerable concerns with the application of the NT Water Allocation Planning Framework as a means of allocating water. These include that:

- It is unclear whether the allocations provided for the Top End and Arid Zone under the Framework are based on scientific research about the sustainability of such takes in the circumstances of each zone.
- The use of aquifer storage to quantify allowable water take is inappropriate and constitutes water mining. This was raised in the Final Report from the the Scientific Inquiry into Hydraulic Fracturing in the NT, which found that the Arid Zone Rule – if applied to fracking – “*would again essentially permit ‘mining’ of the groundwater resource, and would be ecologically unsustainable, since the recharge rate of the groundwater in this southern part of the Cambrian Limestone Aquifer system is very slow*”.<sup>68</sup> Professor Matthew Currell, Sue Jackson and Dr Christopher Ndehedehe echoed these concerns in a 2024 paper, stating that safe extraction should be based on water flows to and from aquifers, along with considering the water cycle and its dependent values, rather than storage.<sup>69</sup>

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<sup>62</sup> Department of Environment, Parks and Water Security, ‘Northern Territory Water Allocation Planning Framework’, available [here](#), 1 (**Framework**).

<sup>63</sup> Ibid 1.

<sup>64</sup> Northern Territory Government, ‘[Water allocation framework](#)’ (Web Page, 2024); Department of Environment, Parks and Water Security, ‘Classification of the Top End and Arid Zone for Northern Territory water resources: Water Resources Division Technical Report 55/2020’, available [here](#).

<sup>65</sup> Framework, 2.1.

<sup>66</sup> Ibid, 2.2.

<sup>67</sup> Ibid, 2.2.2.

<sup>68</sup> Justice Rachel Pepper, *Scientific Inquiry into Hydraulic Fracturing in the NT*, Final Report, Water (17 March 2017), available [here](#), 137.

<sup>69</sup> Professor Matthew Currell, Sue Jackson and Dr Christopher Ndehedehe, Risks In The Current Groundwater Regulation Approach in the Beetaloo Region, Northern Territory, Australia [2024] *Australian Journal Of Water Resources* 1 , available [here](#), 11-12.

On 15 February 2024, the NT Government finalised its ‘Surface water take – wet season flow policy’ (**WSF Policy**).<sup>70</sup> This non-statutory policy provides rules for determining the volume of water that may be taken from rivers in the Top End of the Territory during the wet season. The stated purpose of the WSF Policy is to “*set the rules for quantifying wet season water flow volumes available for consumptive use from a river basin*”.<sup>71</sup> Under the policy, the volume of water available from wet season water flows to consumptive uses will be “*five per cent of the 25<sup>th</sup> percentile of total flows for the three highest flow months of the year based on the previous 50 years flow or modelled rainfall data of the river basin (five per cent of the 25<sup>th</sup> percentile)*”.<sup>72</sup> While calculation of consumptive pool is based on the three wettest months of the wet season, water extraction will not be restricted to that period.

The WSF Policy provides further principles which also apply in determining water availability from wet season water flows, including that:

- total flows will be determined “*using the historical data (typically 50 years) from relevant department gauging stations. If there is insufficient data, the total flows will be calculated using the department’s surface water models*”;<sup>73</sup> and
- the proportion of the total wet season consumptive flow available to take under a licence will be calculated “*as a proportion of total catchment flow... [g]enerally... the further downstream the point of take, the greater the portion of the wet season consumptive pool for the river basin that would be available*”.<sup>74</sup>

The WSF Policy allows for the determination of the consumptive pool *without* a NWI compliant (or indeed any form of) water plan in place. The WSF Policy does not appropriately explain the process by which the consumptive pool will be determined, noting that the total flows could be identified by reference to either the last 50 years of rainfall data or the “*modelled rainfall data of the river basin*”, and that the Department (DEPWS) will calculate flow using its own surface water models if there is insufficient data. Nor does it articulate how a proportion of total catchment flow will be arrived upon to set limits around surface water take licences. To the extent historical data (or modelling based on that data) is relied upon to determine the consumptive pool, there is no acknowledgement of changing climatic conditions and the impact of rising temperatures and more extreme weather events on catchment conditions.

The WSF Policy also claims that taking water will stop when specified minimum flow thresholds cannot be met in the river basin or point of take, being conditions which are location specific, “*greater than transitional flows*” and which “*use river height as a surrogate measure for flow*”.<sup>75</sup> There is no further information about how flow rate conditions are to be set, such as by reference to a determination of environmental and cultural water requirements and what is required to

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<sup>70</sup> Department of Environment, Parks and Water Security, *Northern Territory Government* (Web Page), available [here](#) (24 January 2024) (**WSF Policy**). This was released along with the final Interference with a Waterway Guideline’, which we do not comment on in this submission.

<sup>71</sup> WSF Policy, 5.

<sup>72</sup> WSF Policy, 5.

<sup>73</sup> WSF Policy, 5.

<sup>74</sup> WSF Policy, 5.

<sup>75</sup> WSF Policy, 7.

protect and maintain those values. Determination of these conditions (and indeed, the appropriateness of surface water take more broadly for any given catchment), should take place through an NWI-compliant statutory planning process. Flow-rate conditions should then be incorporated within a binding and enforceable statutory water plan.

When the Draft WSF policy was released in late 2022, EDO submitted that there was a concerning lack of transparency and detail in that policy, and that it had the potential to lock in perverse environmental, social and economic outcomes.<sup>76</sup> Whilst the final policy revises the principles for calculating the consumptive pool, many of EDO's concerns have not been mitigated.

Notwithstanding these numerous concerns, and despite the WSF Policy remaining in draft at the relevant time, the NT recently directed a water extraction licence applicant to re-submit its licence application with consideration of the Draft WSF Policy. The licence applicant, Australian Ilmenite Resources, seeks to capture surface water run-off from the catchment area of the Roper River, severely diminishing the flows to a number of the river's tributaries.<sup>77</sup> Whilst that application has not yet been determined by the NT's Controller of Water Resources, EDO is deeply concerned by the potential application of the WSF Policy to the catchment area of the Roper River, the second largest river in the Territory, and one of the last free-flowing tropical rivers in the country.

*The NT should move away from non-statutory policies in water planning*

We acknowledge that the current NWI leaves considerable discretion to States and Territories to determine whether a plan is prepared, the area it should cover, the level of detail required and so forth based on an “assessment of the level of development of water systems, projected future consumptive demand and the risks of not having a detailed plan”.<sup>78</sup> However, we also note Professor Gardner's consideration of the 2010 NWI Policy Guidelines for Water Planning and Management, in which he observes that it is “not consistent with the 2010 guideline to think that a WAP is not needed until there are high levels of water resource development”.<sup>79</sup>

We submit that the NT is over-reliant on non-statutory policies to set consumptive pools and make water licence determinations, especially in areas with significant ecological and cultural values. This includes decisions relating to the Territory's free-flowing tropical rivers. The consumptive pool should be determined through NWI compliant statutory water plans that are transparent, subject to regular independent review and public consultation, apply the best available scientific knowledge and socioeconomic analysis, and promote the concept of ecologically sustainable development. Without appropriate NWI compliant water planning processes in place, which take into account the cumulative impacts of proposals, the NT risks locking in unsustainable levels of extraction and destroying its precious ecological and cultural values.

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<sup>76</sup> See Environment Defenders Office, 'EDO Briefing Note: Northern Territory Surface Water Take Wet Season Flow Policy and Draft Interference with a Waterway Guideline' (16 December 2022) available [here](#).

<sup>77</sup> Application for surface water extraction licence, Australian Ilmenite Resources Pty Ltd, as advertised for public comment on 12 January 2024.

<sup>78</sup> NWI [38].

<sup>79</sup> Gardner Report, 36.



## Western Australia

### WAPs in WA – a neglected statutory framework

The *Rights in Water and Irrigation Act 1914* (WA) (**RIWI Act**) is the primary piece of water legislation in WA and provides for the creation of regional, sub-regional, or local area management plans – in other words, statutory WAPs.<sup>80</sup> Plans may relate to more than one area.<sup>81</sup> However, a statutory WAP cannot be approved without:

- review and advice from the Water Resources Council;<sup>82</sup> and
- consultation with the relevant water resources management committee (if one exists for the region, sub-region or area to which the plan relates).<sup>83</sup>

Statutory WAPs cannot be approved in WA because the Water Resources Council has not been formed. As a result, the statutory provisions for WAPs under the RIWI Act have not been used since they were introduced over 20 years ago.<sup>84</sup>

Even if the Minister for Water had established the Water Resources Council and statutory WAPs were created under the RIWI Act, the statutory framework itself has significant deficiencies.

While the RIWI Act provides that the ‘purpose’ of each plan is to set out ‘matters that are to guide the management [...] of water resources’ in the area where the plan applies,<sup>85</sup> this language appears non-binding and unlikely to impose mandatory considerations on the Minister for Water or alternative decision maker.

For example, the purpose of:

- a regional management plan is to set out general matters such as the definition of water resource values, including environmental values, and the protection of those values, the use of water resources, and the integration of water resources planning and management with land use planning and management;<sup>86</sup>
- a sub-regional management plan is to set out particular matters such as how rights in respect of water are to be allocated to meet various needs, including the needs of the environment, matters to be taken into account in considering licensing applications, the Minister’s assessment of the capacity of water sources to provide water at sustainable levels of use and the environmental impact of developing those sources;<sup>87</sup> and
- a local management plan is to set out particular matters such as how rights in respect of water are to be allocated, and water may be taken and used, to meet various needs

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<sup>80</sup> RIWI Act s 26GV(1).

<sup>81</sup> RIWI Act s 26GV(2).

<sup>82</sup> RIWI Act s 26GZE. The Water Resources Council is established under s 16 of the *Water Agencies (Powers) Act 1984* (WA).

<sup>83</sup> RIWI Act s 26GZ.

<sup>84</sup> Alex Gardner, Richard Bartlett, Janice Gray and Rebecca Nelson, *Water Resources Law*, (Lexis Nexis Butterworths, 2nd ed,2018) ch [15.2].

<sup>85</sup> RIWI Act s 26GW(2), 26GX(2), 2GGY(2).

<sup>86</sup> RIWI Act s 26GW(2).

<sup>87</sup> RIWI Act s 26GX(2).

including the needs of the environment, and matters to be taken into account in considering licensing applications.<sup>88</sup>

All plans must specify the monitoring and reporting that must be undertaken to ensure, “*as far as practicable*” that the objects of Part 3 are achieved in the implementation of the plan. Those objects begin:<sup>89</sup>

- (a) to provide for the management of water resources, and in particular —
  - (i) for their sustainable use and development<sup>90</sup> to meet the needs of current and future users; and
  - (ii) for the protection of their ecosystems and the environment in which water resources are situated, including by the regulation of activities detrimental to them.

The objects of Part 3 also include:

- (c) to foster consultation with members of local communities in the local administration of this Part, and to enable them to participate in that administration; and
- (d) to assist the integration of the management of water resources with the management of other natural resources.

While the objects of Part 3 look good on paper, they only need to be achieved “*as far as practicable*”.<sup>91</sup> Clear and mandatory considerations are needed.

#### Non-statutory WAPs

In the absence of statutory WAPs, WA uses non-statutory WAPs prepared by the Department of Water and Environmental Regulation (**DWER**) in accordance with its ‘Water allocation planning in Western Australia’ guide (**WA WAP Guide**).<sup>92</sup>

Water extraction in WA is managed through issuing licenses under the RIWI Act<sup>93</sup>. Licence decisions are guided by WAPs. As explained in the WA WAP Guide, “[WAPs] set out how much water can be licensed for abstraction and how much water is left in the system ... An allocation plan details allocation limits, water for the environment and our approach to managing water resources within a defined plan area.”<sup>94</sup> The WA WAP Guide makes no reference to a precautionary approach and does not require that the starting point for assessment be the identification of environmental and other public benefit outcomes in the relevant plan area.

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<sup>88</sup> RIWI Act s 26GY(2).

<sup>89</sup> RIWI Act s 4.

<sup>90</sup> The reference to ‘use and development’ includes use and development for domestic, commercial, recreational, cultural and navigational purposes: RIWI Act s 4(2).

<sup>91</sup> See RIWI Act, ss 26GW(3), 26GX(3) and 26GY(3).

<sup>92</sup> Department of Water, ‘Water allocation planning in Western Australia - A guide to our process’ (2011) accessible [here](#).

<sup>93</sup> RIWI Act ss 5C and 26D.

<sup>94</sup> WA WAP Guide, p 7.

DWER says the planning processes and the components of a non-statutory WAP reflect the RIWI Act and ‘closely align’ with water reform taking place under the NWI.<sup>95</sup> However, the WA WAP Guide is exactly that – a guide that does not mandate DWER’s licensing decisions. The absence of statutory WAPs means that water allocation limits are not binding or legally enforceable. Further, water allocation limits and statutory allocation plans are often only set where there is a risk to a water resource, other users or the environment, or where water resources are approaching or have approached full allocation.

DWER prepares non-statutory water allocation plans prioritising those which are:<sup>96</sup>

- at or approaching full allocation or with rapidly increasing water demand;
- strategic priorities for WA or Australia;
- the subject of commitments (i.e. government commitments or where a plan review is triggered or due).

There are 23 non-statutory WAPs or water management plans currently used by DWER with an additional five plans in various stages of preparation. The existing plans cover around 17% of WA’s land mass, or 418,000km.<sup>2</sup> More than two thirds are more than 10 years old, with the oldest being the 1999 Exmouth WAP, and with many of those including more recent addendum.<sup>97</sup>

These non-statutory WAPs are all structured slightly differently, but generally include a purpose or objects, allocation limits according to aquifer based on availability, water policy for the relevant area, a monitoring program and plan for implementing and evaluating the plan, and hydrogeological data about the region. The plans do not include an expiration date and instead provide a date of review – which has often been the trigger for the addendums.

For three areas – Skuthorpe, Serpentine River and North Dandalup – DWER has prepared a Water Allocation Statement. For Skuthorpe, this statement does not include allocation limits, but is instead a guide for those seeking to extract water about the steps they need to take to apply for a water licence. Both the Serpentine River and North Dandalup statements include information about how water will be released from the Serpentine River and the North Dandalup Dam, with defined triggers depending on the inflow into each system over a year.

The absence of statutory WAPs also has implications for the assessment of water licences. Under the RIWI Act, when assessing whether to grant a water licence, DWER is required to consider various factors, including whether the proposed taking and use of water are “*in keeping with a plan approved under Part III Division 3D Subdivision 2*” (i.e. a statutory WAP).<sup>98</sup> Although the Department says that it bases its licensing decisions on the limits and policies that are set out in a (non-statutory) WAP,<sup>99</sup> there is no legislative obligation for the Department to do so under the RIWI Act, given that there are no “*plans approved under Part III Division 3D Subdivision 2*”.

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<sup>95</sup> Ibid 5.

<sup>96</sup> Ibid 10.

<sup>97</sup> See, eg, Department of Water Government of Western Australia, The Carnarvon Artesian Basin Water Management Plan (December 2018) available [here](#).

<sup>98</sup> RIWI Act Sch 1, cl 7(1)(g)(iii).

<sup>99</sup> Department of Water, ‘Water Allocation Planning in Western Australia - A guide To Our Process’ (2011) 5.

The WA framework is also deficient from an enforcement perspective. In addition to WAPs being non-statutory and therefore non-binding and unenforceable, community members have little to no opportunity to engage with decisions about water extraction that is allegedly guided by WAPs. This is because water licence applications, determined by DWER, cannot be reviewed by third parties<sup>100</sup> and there is no merits review process available under the RIWI Act. Third parties are therefore left with only judicial review as a method of intervention – made more difficult by the absence of the publication of licence applications and decisions, discussed further below.

EDO recommends that WA should not only commit to using the statutory WAP mechanisms in the RIWI Act, but ensure that the first step in statutory planning is the identification of what the environmental and other public benefit outcomes are for any particular surface or groundwater management unit or area. Those outcomes should be developed by proper application of the precautionary principle. Any determination of allocation limits or plans must proceed from that starting point and always provide sufficient confidence for the achievement of those outcomes.

#### Failure to statutorily recognise environmental water

WA is the only jurisdiction that has not achieved statutory recognition of environmental water.<sup>101</sup> Non-statutory WAPs determine allocation limits for consumptive uses only and do not include allocations for non-consumptive uses like groundwater dependent ecosystems or cultural values.

The WA WAP Guide explains DWER determines how much water can be abstracted from a water resource by first assessing how much water the environment needs.<sup>102</sup> The Guide further explains that “*environmental water may be defined within the plan as an annual volume or as a regime.*”<sup>103</sup>

WA policy suggests allocations for consumptive use are determined after consideration of environmental water needs. This process is not NWI compliant.

WAPs should require allocations for both consumptive and non-consumptive uses and, in particular, allocate water to the environment to support ecosystems and sustain ecological values as well as providing the same level of security of water for consumptive uses.

In an article from 2017, authors Jensen and Gardner noted that:

- WA has prioritised water supply for consumptive use under pressure from a growing population. Urban areas draw a significant amount of water from outside urban regions to the detriment of the natural environment.<sup>104</sup>
- In WA, there is no legal duty to provide environmental water provisions, to make them at a certain level, or to make them in priority to the allocation and delivery of water to

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<sup>100</sup> Instead, review rights are limited to licence applicants, a who is entitled to have the licence transferred to them, or a person who is a ‘third-party agreement holder’ – someone who has entered an agreement with the licence holder for the taking of water under the licence for a limited period: RIWI Act Sch 7 cl 30(1).

<sup>101</sup> Productivity Commission (2021) National Water Reform 2020, Productivity Commission Inquiry Report. No 96, 28 May 2021, 100.

<sup>102</sup> WA WAP Guide, 18.

<sup>103</sup> WA WAP Guide, 19.

<sup>104</sup> Jeanette Jensen and Alex Gardner, ‘Legal Duties for Environmental Water Provisions in Western Australia’ (2017) 42 *University of Western Australia Law Review* 206, 207.

consumptive purposes. Nor is there a duty to restore or rehabilitate degraded waterways and wetlands affected by water development projects.<sup>105</sup>

In the NWI Implementation Report, the Productivity Commission noted that WA was “*considering draft legislation*” that would provide statutory recognition of water for environmental and public benefit outcomes.<sup>106</sup> Given the WA Government’s recent announcement to not proceed with legislative reform, and the absence of any update to the contrary, we no longer believe WA is looking to provide statutory protection to water for environmental and public benefit outcomes. We are therefore unable to see how WA will satisfy its commitment.

## **b. First Nations water access, management and ownership**

### **Overview**

- **Providing for First Nations people’s interests and engagement in water**

In 2017, the Productivity Commission found that most States and Territories had “*maintained or improved arrangements for engaging Aboriginal and Torres Strait Islander people in water planning*” and in 2021 found that partnerships had been further progressed and developed.<sup>107</sup> Notwithstanding this, the Productivity Commission also found that 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 had not been fully achieved.<sup>108</sup>

We agree with the Commission’s findings that much more needs to be done to include First Nations people’s interests in water in jurisdictional planning and the management of water.<sup>109</sup>

This inquiry provides a further opportunity to provide recommendations on actions States and Territories can take to address the ongoing dispossession of First Nations people from making decisions about water on Country and lack of representation (formally in legislative processes, and in practice) in water decision-making.

First Nations communities hold a deep cultural, customary and spiritual connection to water (both surface water and groundwater), a relationship that is unique from the Anglo-Australian paradigm of water ownership and extraction.<sup>110</sup> This spiritual significance extends to conferring rights, responsibilities, and obligations in accordance with customary laws, traditions and protocols.

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<sup>105</sup> Jeanette Jensen and Alex Gardner, ‘Legal Duties for Environmental Water Provisions in Western Australia’ (2017) 42 *University of Western Australia Law Review* 206, 241.

<sup>106</sup> NWI Implementation Report, 30.

<sup>107</sup> NWI Implementation Report, 35.

<sup>108</sup> NWI Inquiry Report, 122.

<sup>109</sup> NWI Recommendations Report, 15.

<sup>110</sup> Tony McAvoy, ‘Water - Fluid Perceptions’ (2006) 1(2) *Transforming Cultures eJournal* 97, 97-98 <<https://doi.org/10.5130/tfc.v1i2.262>>.

These include to protect, conserve and maintain the environment and ecosystems so as to ensure the sustainability of the whole environment.<sup>111</sup>

While the NWI has, to date, identified the need for First Nations water access, it has failed to provide the foundation for substantial reforms. First Nations people are leading the conversation about First Nations water rights policy in Australia,<sup>112</sup> including through various statements and initiatives of their own.

In 2017, leading academics published a key article titled “Australian Indigenous Water Policy and the impacts of the ever-changing political cycle”. The article provides a detailed analysis of contemporary Aboriginal water policy and initiatives. Key reflections from this analysis include:

- Water policy amongst First Nations in Australia is not homogenous,<sup>113</sup> meaning views and priorities may be different amongst First Nations peoples.
- First Nations’ water policies are underrepresented in the Australian water management literature, due to the largely oral traditions of First Nations knowledge transfer.<sup>114</sup>
- It is important to look at First Nations’ water policy because:
  - issues that concern First Nations peoples should be addressed by First Nations peoples, as a matter of principle;<sup>115</sup>
  - First Nations peoples’ perspectives as Traditional Owners and long-term land managers can provide unique insight into national water management policy development;
  - a substantial proportion of land is managed by First Nations peoples and communities; and
  - First Nations’ water policy is cutting edge, highly cognisant of colonial biases, and grounded in the contemporary context.<sup>116</sup>

Additionally, First Nations’ water policies are underrepresented in the Australian water management literature due to the prioritisation of western science over First Nations’ knowledge and perspectives, and inequities in the ability of first Nations peoples to pursue educational opportunities that allow the publication of knowledge in written literature.

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<sup>111</sup> North Australian Indigenous Land and Sea Management Alliance, *The Mary River Statement* (28 January 2020) <<https://nailsma.org.au/resource-library/mary-river-statement>>.

<sup>112</sup> Katherine Selena Taylor, Bradley J Moggridge and Anne Poelina, ‘Australian Indigenous Water Policy and the impacts of the ever-changing political cycle’ (2016) 20(2) *Australasian Journal of Water Resources* 132.

<sup>113</sup> Katherine Selena Taylor, Bradley J Moggridge and Anne Poelina, ‘Australian Indigenous Water Policy and the impacts of the ever-changing political cycle’ (2016) 20(2) *Australasian Journal of Water Resources* 132.

<sup>114</sup> Katherine Selena Taylor, Bradley J Moggridge and Anne Poelina, ‘Australian Indigenous Water Policy and the impacts of the ever-changing political cycle’ (2016) 20(2) *Australasian Journal of Water Resources* 133, 134.

<sup>115</sup> See also, [National Agreement on Closing the Gap](#) (July 2020), clause 19(a): Aboriginal and Torres Strait Islander people have been saying for a long time that they need to have a much greater say in how programs and services are delivered to their people, in their own places and on their own country.

<sup>116</sup> Katherine Selena Taylor, Bradley J Moggridge and Anne Poelina, ‘Australian Indigenous Water Policy and the impacts of the ever-changing political cycle’ (2016) 20(2) *Australasian Journal of Water Resources* 134.

Ultimately, First Nations peoples should lead ongoing discussions about First Nations water policy.<sup>117</sup>

The NWI Recommendations Report suggests that the renewed NWI include a new co-designed element dedicated to First Nations peoples' access to water and the involvement and participation of First Nations people in water management, as well as improved cultural outcomes using existing frameworks.

We agree with this advice but note that it can be strengthened, including by incorporating scope to – in circumstances as deemed appropriate by First Nations people) – acknowledge and develop legal and governance frameworks which directly reflect First Nations epistemology (ways of knowing) and ontology (ways of being). This includes support, resourcing and prioritisation of First Nations-led and co-governance models of water resources.

This advice can also be strengthened through the incorporation of the principle of Free, Prior and Informed Consent (**FPIC**) of First Nations peoples in water management frameworks.

We also note that resourcing is a particularly important consideration. The renewal advice should include consideration of funding and resourcing to achieve objectives relating to First Nations involvement. Consultation with First Nations people should be comprehensive and include the views of communities. Our full set of recommendations in relation to the Renewal Advice are summarised in **Part 3 of this Submission**.

### **Northern Territory**

The Northern Territory has the highest proportion of First Nations people of any Australian jurisdiction with 26.3 per cent (about 61,000 people) of Territorians being Aboriginal as at the 2021 Census. It is also unique in that the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) has facilitated greater rights to land for Aboriginal Territorians than exist under the rights enshrined by the *Native Title Act 1993* (Cth). ALRA has enabled Aboriginal people across the Territory to gain inalienable freehold title to their land, enabling them to have control over traditional lands and veto mineral and exploration projects on their land. Over 50% of land in the Territory is held under ALRA, whilst the *Native Title Act* applies to further large swathes of the Territory.

Unfortunately, these Commonwealth protections for Aboriginal land have not translated to strong rights to water for Aboriginal people in the Northern Territory. Under the NT *Water Act*, ownership and control over water vests in the Crown.<sup>118</sup> The Act provides limited opportunities for Aboriginal people to be involved, let alone to lead, decision-making around water allocation and management, and fails to facilitate the principles of FPIC. Deficiencies in water laws and governance and a failure to prioritise First Nations voices has a direct impact on First Nations' ability to manage and care for Country.

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<sup>117</sup> See Anne Poelina, [Lawful but Awful, and A Declaration for Peace](#) (2022) Submission to the United Nations Special Rapporteur on the Rights of Indigenous Peoples.

<sup>118</sup> NT *Water Act*, s 9.

The NWI Implementation report identifies that the NT has made progress through amendments to the NT Water Act which require that allocations in a WAP must include an allocation to the Aboriginal Water Reserve.<sup>119</sup> The Aboriginal Water Reserve (**AWR**) is defined in s 4(1) of the Water Act to mean “a reserve of water allocated in a water allocation plan for Aboriginal economic development in respect of eligible land designated under section 22C”.

The Minister must consult with the relevant Aboriginal Land Council before declaring a WAP that designates land as eligible land.<sup>120</sup> Section 71BA of the Water Act further provides that the Water Controller must not grant a water extraction licence in relation to an AWR unless Aboriginal persons of a class prescribed by regulation have given consent. However, no such regulations have been made under the NT *Water Regulations* to date. In other words, rights that Aboriginal persons have to access the AWR within WAPs have no practical effect because no licences can be granted. Outside a WAP area, there is no legal framework in relation to water allocations for future Aboriginal economic development.

We also note that the land which is determined to be “eligible land” for the purposes of an AWR under s 4B does not extend to land where Aboriginal people have non-exclusive possession native title (e.g., rights which co-exist with pastoral landholders) or those that do not have specific tenure rights over land altogether. The eligibility rules have been criticised, for example, by the Northern Land Council as being far too restrictive, given that most native title land in the NT is held under non-exclusive title.<sup>121</sup> The narrow focus of AWRs on economic development has also been critiqued more broadly as not doing enough to deliver water justice for First Nations communities.<sup>122</sup>

## Western Australia

In the NWI Implementation Report, the Productivity Commission noted that WA had:

- established the Aboriginal Water and Environmental Advisory Group in 2018 to advise the WA Government on matters of water and environmental policy, legislation and programs, including consultation for water allocation plans;<sup>123</sup> and
- executed the Yamatji Nation Indigenous Land Use Agreement, which included a Strategic Aboriginal Water Reserve.<sup>124</sup>

The Commission also stated that if passed, “*Western Australia’s Water Resources Management Bill will provide for an explicit power to incorporate cultural objectives into water allocation plans.*”<sup>125</sup>

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<sup>119</sup> NT *Water Act* s 22B(7); NWI Implementation Report, 41.

<sup>120</sup> NT *Water Act* s 22C(2).

<sup>121</sup> 2020 Submission (above n 3), 15.

<sup>122</sup> Kat Taylor, Anne Poelina and Qution Grafton, ‘The lie of aqua nullius, ‘nobody’s water’, prevails in Australia. Indigenous water reserves are not enough to deliver justice’ *The Conversation* (online, 23 December 2022) accessible [here](#).

<sup>123</sup> NWI Implementation Report, 37.

<sup>124</sup> [Yamatji Nation Indigenous Land Use Agreement](#) (executed February 2020).

<sup>125</sup> *Ibid* 38-39.



Unfortunately, given reform is now off the table, this no longer seems to be a possibility and is a significant missed opportunity.

The Productivity Commission notes that the WA Government had engaged Traditional Owners during the development of WAPs and scientific investigations to inform water plans in a number of locations, including Derby. Following consultation with Traditional Owners, DWER noted that a revised draft Derby plan was needed.<sup>126</sup>

In some jurisdictions, AWRs have been implemented as a mechanism to allow First Nations involvement in the management of water resources – see NT above. The WA WAP Guide does not make reference to AWRs. As noted above, in some cases, AWRs have been seen as limiting due to their narrow scope, with their purpose being to provide economic opportunities for First Nations.<sup>127</sup>

First Nations have proposed various models and initiatives for the management of water resources, including the incorporation of AWRs into land use agreements (due to their nature as negotiated settlements rather than a ‘one size fits all’ approach)<sup>128</sup> and the establishment of authorities for specific water resources.<sup>129</sup>

For example, the Martuwarra Fitzroy River Council has called for the establishment of a statutory authority to manage the Martuwarra River.<sup>130</sup> In 2019 article ‘Martuwarra Fitzroy River Watershed: One society, one river law’ the authors stated that “*there is a real opportunity for new sustainable economies and new ways of doing business with Indigenous people on Indigenous lands: Indigenous aspirations for alternative types of development, such as hybrid economies, life projects, and cultural actions, take into account economic, social, cultural and health considerations*”.<sup>131</sup>

It is imperative that the WA Government acknowledge the individual perspectives of First Nations peoples and engage in genuine and ongoing consultation with First Nations in relation to water management.

### c. Community involvement/consultation

#### Overview

One of the core elements of the NWI is “community partnerships”, which includes the “*open and timely consultation with all stakeholders*” in relation to “*significant decisions that may affect the*

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<sup>126</sup> Department of Water and Environmental Regulation, *Water planning in the Fitzroy* (Web page, updated 24 October 2023) accessible [here](#).

<sup>127</sup> Kat Taylor, Anne Poelina and Qution Grafton, ‘The lie of aqua nullius, ‘nobody’s water’, prevails in Australia. Indigenous water reserves are not enough to deliver justice’ *The Conversation* (online, 23 December 2022) accessible [here](#).

<sup>128</sup> *Ibid.*

<sup>129</sup> Anne Poelina, Kathrine S. Taylor & Ian Perdrisat, ‘Martuwarra Fitzroy River Council: an Indigenous cultural approach to collaborative water governance’ (2019) 26(3) *Australasian Journal of Environmental Management* 236.

<sup>130</sup> *Ibid.*

<sup>131</sup> Martuwarra, RiverOfLife et al, ‘Martuwarra Fitzroy River Watershed: One society, one river law’ (2023) 2(9) *Public Library of Science (PLOS) Water* (online) accessible [here](#).

security of water access entitlements or the sustainability of water use."<sup>132</sup> Relevant “actions” under this element include such things as the:

*“provision of accurate and timely information to all relevant stakeholders in relation to the progress of water plan implementation and other issues relevant to the security of water access entitlements”.*<sup>133</sup>

Schedule E of the NWI specifically requires water planning processes to include:

- “consultation with stakeholders including those within or downstream” of a plan area; and
- “adequate opportunity for consumptive use, environmental, cultural and other public benefit issues to be identified and considered in an open and transparent way”.<sup>134</sup>

As noted in the Gardner Report, the NWI provisions for water planning express “more generally applicable principles of open, transparent, well-informed community consultation in water allocation planning”.<sup>135</sup>

## **Northern Territory**

The Gardner Report observes that there is a complete lack of guidance on the water resource planning process under the NT *Water Act*, other than the Minister’s discretionary power to appoint Water Advisory Committees (**WACs**), discussed further **below**. He further notes that:

*“The NWI conceives of water allocation planning as a statutory process. All other Australian jurisdictions’ legislation includes legal guidance on the planning process; the Water Act (NT) is alone in not doing so” (citations omitted).*<sup>136</sup>

### Water Advisory Committees

Although the NT *Water Act* provides for the creation of “water advisory committees”, there are several issues with the relevant legislative provisions.

First, there is no requirement that WACs actually be established. Even in relation to the development of a new WAP the creation of these committees is entirely discretionary, with the *Water Act* only stating that the Minister “may” establish them.<sup>137</sup>

Second, these committees are to “consist of such members as the Minister thinks fit and the members shall hold office at the Minister’s pleasure.” This means there is no guarantee of adequate representation from key stakeholders, including Traditional Owners and local community representatives.

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<sup>132</sup> NWI [95].

<sup>133</sup> NWI, Schedule A.

<sup>134</sup> NWI, Schedule E, cl 6.

<sup>135</sup> Gardner Report, 8.

<sup>136</sup> Professor Gardner also observes, at fn 88, that the statutory provisions for water allocation planning in the WA legislation have not been used in more than twenty years.

<sup>137</sup> NT *Water Act*, s 23.

Third, there are no requirements that set out fundamental issues such as the:

- duration of committees;
- term of office for committee members;
- filling of vacancies on the committee;
- disclosure of conflicts of interests among committee members;
- requirements that meetings be recorded; or
- general procedures, such as meeting frequency or decision-making protocols.

A further issue is that while WACs are established by the Minister, there is no legislative mechanism by which the WAC is actually required to brief or report to the Minister. Instead, the NT *Water Act* only requires that the WAC provides advice to the Water Controller.<sup>138</sup> Once a WAP is declared in the NT, the relevant WAC is usually disbanded. This is despite one of the functions of the committees being described in the NT *Water Act* as to “advise the Controller on the effectiveness of the water allocation plan in maximising economic and social benefits within ecological constraints” – indicating that the role of WACs should include the assessment of WAPs after their implementation.<sup>139</sup>

It is therefore not surprising that in the NWI Implementation Report, the Productivity Commission noted in relation to the NT that “[w]hile water plans remain under development, community concern around the level of water extraction and the lack of community engagement is increasing.”<sup>140</sup> It pointed out that since 2017 there has been a decline in the number of WACs, with some committees ceasing as WAPs are declared, and others, such as the Howard Water Advisory Committee ceasing despite a WAP never being finalised.<sup>141</sup>

This concerning trend has continued since the Productivity Commission’s last assessment:

- The three Aboriginal representatives on the Mataranka Water Advisory Committee resigned in September 2023 and were not replaced, meaning that Aboriginal water interests are not represented in ongoing discussions about that plan.<sup>142</sup>
- There was no WAC appointed in relation to the development of the Georgina Wiso Water Allocation Plan, despite the plan area representing nearly 12% of the Territory, including significant tranches of land held by Aboriginal people under ALRA and the *Native Title Act 1993* (Cth).

Additionally, while WACs can have a role to play, they should not be seen as a complete replacement for broader, genuine community consultation, as envisaged by the NWI.

## **Western Australia**

In 2016, a group of leading water academics noted that in the context of NWI reforms, “the focus of public participation in water governance has been either via water markets or through non-binding

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<sup>138</sup> NT *Water Act*, ss 23(1B)(a) & (3).

<sup>139</sup> NT *Water Act*, s 23(1B)(a).

<sup>140</sup> NWI Implementation Report, p 27.

<sup>141</sup> NWI Implementation Report, p 37.

<sup>142</sup> Mataranka Tindall Water Advisory Committee: Meeting 15 Minutes (28 September 2023) 2,11.

*techniques of consultation undertaken by decision-makers. The extent of influence and genuine engagement by the broad range of interests and stakeholders in the governance of water resources has been at best uneven*".<sup>143</sup> This is certainly the case in WA.

This inequity is exemplified where consultation committees are either not established in the ways prescribed by legislation which provide for diversity of opinion, or at all. Even where legislation prescribes membership of a committee, there are significant gaps which should be addressed by reform. While management committees and advisory committees can have a role to play, they should not be seen as a complete replacement for broader, genuine community consultation, as envisaged by the NWI.

### Water resources management committees

The RIWI Act provides for the establishment of water resource management committees to:

- provide the Minister with assistance and advice "*to the extent that the Minister asks the committee to do so*";<sup>144</sup>
- make submissions to the Minister on by-laws relating to water;<sup>145</sup>
- consult on regional, sub-regional or local area management plans (i.e. statutory WAPs, noting that none exist in WA);<sup>146</sup>
- ensure the Minister is informed of, and has access to, community views on matters relating to water resources;<sup>147</sup> and
- assist the Minister in the resolution of disputes about the use of water resources involving persons having rights under this Act or persons affected by the exercise of those rights.<sup>148</sup>

The membership of these committees is also prescribed in the RIWI Act and includes residents, employees or business owners in the locality or area,<sup>149</sup> representatives of local government, and people who "*have knowledge and experience relating to the water needs and practices of local communities, including Aboriginal communities*".<sup>150</sup>

While the ability to create water resources management committees is a positive aspect of the RIWI Act, the regulatory framework remains insufficient noting:

- These committees are not mandatory. The Minister holds discretion as to whether a committee is established, and also whether to ask for "*assistance and advice*".
- The requirement that a committee include a person "*who has knowledge and experience relating to the water needs and practices of local communities, including Aboriginal communities*" is inadequate. The committee should include a First Nations representative from the area.

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<sup>143</sup> Carmody et al, 'The Future Of Water Reform in Australia —Starting A Conversation' (2016) *Australian Environment Review* 132, 134.

<sup>144</sup> RIWI Act s 26GM(1)(a).

<sup>145</sup> RIWI Act s 26N.

<sup>146</sup> RIWI Act s 26GZ.

<sup>147</sup> RIWI Act s 26GM(1)(d).

<sup>148</sup> RIWI Act s 26GM(1)(e).

<sup>149</sup> RIWI Act s 26GL(1)(a).

<sup>150</sup> RIWI Act s 26GL(1)(b).

- Historically, advisory bodies have been established outside the legislative framework, and therefore the membership of the bodies are not as broadly representative as that prescribed under the RIWI Act. In the Carnarvon Artesian Basin Water Management Plan, DWER noted that notwithstanding the provisions of the RIWI Act, there was no committee for general licensing or management advice in the Gascoyne Groundwater Area.<sup>151</sup> Instead, DWER established the ‘Carnarvon Artesian Basin Rehabilitation Group’ which included three pastoralists, one resource user (mining, horticulture or tourism), one community representative and officers from the Department of Water and the Department of Agriculture and Food.<sup>152</sup> There is no express mention of whether First Nations’ interests are represented by this body.
- There is no easily accessible list or database of existing committees. While the Minister is required to publish the creation of a committee in the *Gazette*,<sup>153</sup> this is an inaccessible record of information that hinders transparency and accountability in the water management system. Reforms should require recordings of meetings and publication of membership lists, minutes, and recommendations.

### Water advisory committees

Additionally, the Minister can “*establish committees for the purpose of advising the Minister on any aspect of the administration of [the Powers Act] or a relevant Act*”.<sup>154</sup> The Minister therefore can establish advisory committees in relation to WA’s non-statutory WAPs and for other purposes. This general function is in addition to the power to establish water resources management committees under the RIWI Act.<sup>155</sup>

Unfortunately, there is no mandatory requirement for the creation of advisory committees in WA’s water legislation. The terms of reference and the terms and conditions applicable to a person appointed to a committee fall entirely within the discretion of the Minister.<sup>156</sup>

The Warren Donnelly Water Advisory Committee is established under the Powers Act to provide advice and input to DWER in regard to surface water management and allocation within the Warren and Donnelly river catchments.<sup>157</sup> The Committee is an advisory body only – it can make recommendations to DWER but has no delegations or decision making powers.<sup>158</sup> There are 10 positions on the Committee. Six are for community or industry representatives and there are 4 positions for a representative from the Department of Primary Industries and Regional Development, Warren Catchments Council, Manjimup Shire, and the Department.

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<sup>151</sup> Department of Water, Carnarvon Artesian Basin Water Management Plan (December 2007) 28, accessible [here](#).

<sup>152</sup> *Ibid.*

<sup>153</sup> RIWI Act s 26GK(6).

<sup>154</sup> Powers Act s 109(1). A ‘relevant Act’ is the RIWI Act, *Metropolitan Arterial Drainage Act 1982*; *Metropolitan Water Supply, Sewerage, and Drainage Act 1909* or *Country Areas Water Supply Act 1947*: Powers Act s 5.

<sup>155</sup> Water Resources Management (Administration) Bill 2003 Explanatory Notes, accessible [here](#).

<sup>156</sup> Powers Act s 109(1), (3).

<sup>157</sup> Warren Donnelly Water Advisory Committee Terms of Reference, 18 August 2022, accessible [here](#).

<sup>158</sup> Warren Donnelly Water Advisory Committee Terms of Reference, cl 4.

The current framework does not provide a sufficient ability for the community to engage with the decision-making process on water resources regulation. WA's laws fall short of the NWI standards and do not recognise the extensive knowledge and potential contributions of First Nations peoples and communities. Further, more transparency in the role and functions of advisory committees to restore faith in the system is required.

## 2. The Productivity Commission's 2020 recommendations and advice for renewal of the NWI

In general, EDO supports the NWI renewal advice delivered in the Productivity Commission's National Water Reform 2020 Inquiry Report (**NWI Inquiry Report**). In particular, we welcome the Commission's conclusion that while the overarching goal of the NWI remains sound it "*should be modernized through reference to adaptation to climate change and recognition of the importance of water in the lives of Aboriginal and Torres Strait Islander People*".<sup>159</sup>

We also highlight as important, the Productivity Commission's earlier recognition of different challenges in water management across Australia's various regions. Currently, the NWI focusses on "*returning*" water extraction to sustainable levels. This has resulted in a predominant focus on water management in the south-east of Australia.<sup>160</sup> The water resource management issues facing other jurisdictions, including large portions of the NT and WA, are fundamentally different. WA Ministers have stressed this point, noting that the prescriptive measures in the NWI "*do not provide the tools required to meet the unique water management challenges in Western Australia*."<sup>161</sup>

Relevantly, the Productivity Commission has made recommendations that distinguish between "*undeveloped*", "*developing*" and "*fully developed*" systems with a degree of nuance not evident in the NWI.<sup>162</sup> It notes that in undeveloped and developing water systems, there is an opportunity to set consumptive and environmental shares in ways that manage the risk of future resource

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<sup>159</sup> Productivity Commission, Australian Government, *National Water Reform 2020: Findings, recommendations and renewal advice* (Recommendations report No 96, 28 May 2021) 1 ('NWI Recommendations report') <<https://www.pc.gov.au/inquiries/completed/water-reform-2020/report/>>.

<sup>160</sup> This point is evident from a reading of the NWI and is also made in; Barry Hart, Erin O'Donnell and Avril Horne 'Sustainable water resources development in northern Australia: the need for coordination, integration and representation (2020) 36(5) *International Journal of Water Resources Development* 777, 783.

<sup>161</sup> Honourable Dave Kelly, Minister for Water, [Submission made to the National Water Reform Inquiry](#), 25 August 2020 (see NWI Inquiry Report at 62).

<sup>162</sup> In its NWI Recommendation Report, the Productivity Commission describes these as:

- Relatively undeveloped systems have low demand for water resources and low risks to ecosystems.
- Developing systems show increasing demand for their water resources and may include sites with proposed development potential.
- Fully developed systems are characterised by water resources being fully allocated between consumptive users and the environment, with effective sharing arrangements, market rules and system operating rules.

reductions as a result of climate change.<sup>163</sup> However, in fully developed systems it stresses the need to “*rebalance*” environmental and consumptive uses as a result of climate change.<sup>164</sup>

### **a. First Nations water access, management and ownership**

As stated in Part 1 above, we agree with the inclusion of a co-designed element dedicated to First Nations people’s access to water and the involvement and participation of First Nations people in water management, as well as improved cultural outcomes using existing frameworks.

The Productivity Commission’s advice can be strengthened through:

- including scope to – in circumstances as deemed appropriate by First Nations peoples – acknowledge and develop legal and governance frameworks which directly reflect First Nations epistemology (ways of knowing) and ontology (ways of being). This includes support, resourcing and prioritisation of First Nations-led and co-governance models of water resources;
- ensuring resourcing is considered and funding is allocated prior to the making of commitments;
- genuine and comprehensive consultation with First Nations, including those in regional areas;
- accepting that in some circumstances, existing frameworks will not be sufficient to further achieve First Nations water justice, so new frameworks must include cultural outcomes and be co-designed;
- the incorporation of the principle of FPIC of First Nations in all water management frameworks.

### **b. Incorporating climate change and extreme weather events into water planning**

We agree with the renewal advice in the NWI Recommendations Report, that processes to better account for climate change are required.<sup>165</sup>

Climate change is impacting and will continue to impact on water resources in Australia. Climate change will lead to greater frequency of severe droughts, more intense extreme rainfall events, a continuing decrease in cool-season rainfall and an increase in the time spent in drought.<sup>166</sup> Climate change will also affect the quality of water, for example, increases in the severity of floods and droughts will change sediment loading, chemical composition, total organic carbon and microbial quality of drinking water.<sup>167</sup>

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<sup>163</sup> NWI Recommendations report (n 36) 9.

<sup>164</sup> NWI Recommendations report (n 36) 9.

<sup>165</sup> NWI Recommendations Report, 8.

<sup>166</sup> Steffen W, Vertessy R, Dean A, Hughes L, Bambrick H, Gegis J & Rice M (2018). Deluge and drought: Australia’s water security in a changing climate, Climate Council of Australia, Sydney.

<sup>167</sup> State of the Environment Report 2021 (<https://soe.dcceew.gov.au/inland-water/pressures/climate-change>), citing WHO (World Health Organization) (2011). Guidelines for drinking-water quality, 4th edn, WHO Press, Geneva.

The 2021 State of the Environment<sup>168</sup> report found:

- The past 5 years have demonstrated that Australia’s inland water is being impacted by climate change and emphasised the need to include climate change in water resources management.
- In light of the increased variability of Australia’s water resources, it is essential that water resource managers adopt an agile, risk-based approach, by considering cultural and environmental impacts that respond to the prevailing and predicted future hydroclimatic conditions.

There is a pressing need for the water management regimes to incorporate climate change projections into decision-making and to ensure fundamental ecosystem health through environmental flows.

Examples of specific opportunities to better embed climate considerations into water management include to:

- establish adaptive water allocation schemes with an embedded climate projection signal;
- in regulated river systems, manage public storages on the basis of climate projections, not historic climate data;
- introduce legislative provisions that require climate change to be considered in the preparation of plans, regulations and in the exercise of relevant functions by decision-makers including the granting of licences;
- an evidence-based cap on extractions at catchment and basin scales which is informed by climate projections;
- the inclusion of clear duties to, for example, act on the basis of best-available evidence and protect water resources from over-extraction.

The renewal advice states there should be development of a process for rebalancing between environmental and consumptive uses as a result of climate change where “*there is sufficient evidence that the expected benefits will outweigh the likely costs*”. A precautionary approach to assessment should be implemented. In particular, proper adaptive management and trigger values must be built in to prioritise environmental uses and maintain ecosystems and cultural values before the systems become over-extracted.

Conversations about the interaction between climate change and environmental water (and all water management) should be informed by First Nations perspectives and voices. As stated in a recent article:<sup>169</sup>

*Climate change impacts are already happening due to [the Martuwarra’s] geographic location and vulnerable environment. From an Indigenous perspective, the climate change space and discussions are currently highly dominated by Western science and politics. Unfortunately, the progress in understanding Indigenous culture and cultural needs has not advanced to a point*

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<sup>169</sup> Martuwarra, RiverOfLife et al, ‘Martuwarra Fitzroy River Watershed: One society, one river law’ (2023) 2(9) Public Library of Science (PLOS) Water (online) 13.



*where socio-ecological knowledge and primacy in ontological theory or rationale have been injected into the debate. Now more than ever, it is time to listen to the voices and wisdom of Indigenous people for the paradigm shift.*

The principles outlined below provide a useful guide for assessing the climate-readiness of water legislation. EDO recommends best practice water law should include these important elements.

**Key elements of climate-ready water laws:<sup>170</sup>**

- an evidence-based cap on extractions at catchment and basin scales which is informed by climate projections;
- an adaptive water allocation scheme with an embedded climate projection signal;
- protecting environmental flows from extraction;
- protecting different components of the flow regime (from no flows to overbank flows), each of which is required to maintain ecosystem function;
- promotion of longitudinal and latitudinal connectivity. To clarify, this requires catchment-based legal instruments to speak to one another;
- in regulated river systems, managing public storages on the basis of climate projections, not historic climate data;
- accurately measuring and reporting water extractions (noting the difficulty of enforcing the law at the licence holder and catchment levels in the absence of reliable evidence);
- fulsome monitoring of groundwater resources, and appropriate limits on extractions which take into account connectivity with surface water, as well as the tendency to shift to consumption from aquifers during periods of water scarcity;
- accurate water accounting which, takes into account return flows, water theft and floodplain harvesting;
- appropriate governance arrangements for subsidised irrigation modernisation projects, including a requirement to demonstrate that they are actually saving water;
- a requirement to ensure modelling for compliance purposes is based on latest levels of development and its assumptions are transparent and communicable;
- the inclusion of clear duties to, for example, act on the basis of best-available evidence and protect water resources from over-extraction;
- appropriately drafted civil and criminal offence provisions supported by an independent regulator, such as the NSW Natural Resources Access Regulator;
- third party standing (this is particularly important given the virtual impossibility of obtaining a writ of mandamus compelling the government to enforce its own laws); and
- more generally, provisions that are justiciable. While there is a clear need to furnish Ministers and their delegates with some discretion, broadly drafted powers can make it all but impossible for clients to seek judicial review of environmentally foolish decisions, which is deeply problematic. In short, hydrodenialism should give rise to the possibility of legal action.

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<sup>170</sup> Environmental Defenders Office, Submission to the Productivity Commission on the National Water Reform Inquiry (21 August 2020) 15 accessible [here](#).

### c. Access to safe and secure drinking water

The right to water is one of the most fundamental conditions for survival.<sup>171</sup> Adequate and appropriately managed water services reduce exposure to preventable health risks.<sup>172</sup>

Although a basic human right, many Australians do not have access to safe drinking water.<sup>173</sup> Recent research undertaken by ANU found that Australians in more than 400 remote or regional communities lack access to good-quality drinking water and 40% of all locations with reported health-based non-compliances were remote Indigenous communities.<sup>174</sup>

Under the NWI, governments have committed to urban water reform, including to provide healthy, safe and reliable water supplies. However, the “Objectives” and “Key Elements” of the NWI do not explicitly mention water quality, and more generally water quality tends to be separated out from other water planning and land use legislation.

The NWI Implementation Report noted that issues with drinking water quality remain in some regional and remote communities. The report found:<sup>175</sup>

*Safe and reliable drinking water can be more challenging and costly to supply to regional and remote communities than to major cities. Drought, bushfires and COVID-19 have brought service delivery issues into sharp relief, including water security challenges in regional New South Wales and Queensland, and drinking water quality issues in some remote communities.*

The NWI Inquiry Report suggested new objectives for the NWI that explicitly include access to safe and reliable drinking water.<sup>176</sup> It also recommended that a renewed NWI should ensure that State and Territory Governments commit to defining and ensuring access to a basic level of service, based on safe and reliable drinking water. Funding to local government-owned providers should be targeted at ensuring this basic level of service in high-cost areas where such service provision would otherwise be considered unaffordable.<sup>177</sup>

The Productivity Commission acknowledged that a definition of “safe” water should align with existing health guidelines under the Australian Drinking Water Guidelines (**ADWG**).<sup>178</sup> The ADWG provide guidance to water regulators and suppliers on monitoring and managing drinking water

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<sup>171</sup> Office of the Commissioner for Human Rights General Comment No. 15: The Right to Water (Articles 11 and 12 of the Covenant) at par 3. Retrieved from <https://www.refworld.org/pdfile/4538838d11.pdf>

<sup>172</sup> World Health Organisation (2023) *Drinking-water*. Retrieved from <https://www.who.int/news-room/fact-sheets/detail/drinking-water#:~:text=Water%20and%20health,individuals%20to%20preventable%20health%20risks.>

<sup>173</sup> ANU (2022) Remote Australians lack access to quality drinking water Retrieved from <https://www.anu.edu.au/news/all-news/remote-australians-lack-access-to-quality-drinking-water.>

<sup>174</sup> Ibid.

<sup>175</sup> NWI Implementation Report, 159.

<sup>176</sup> NWI Inquiry Report, 7.

<sup>177</sup> NWI Implementation Report, 159.

<sup>178</sup> NWI Inquiry Report, 172.

quality, including listing recommended maximum values for contaminants.<sup>179</sup> However, implementation of the ADWG is haphazard, and the ADGW is not legally binding.

Notably, the Productivity Commission's International Benchmarking Report: Arrangements for Setting Drinking Water Standards<sup>180</sup> found:

- relatively little resources are devoted to regulatory development and enforcement activities in Australia;
- benefit-cost analysis is rarely used in developing standards;
- there is a scarcity of information on the quality of drinking water in different parts of Australia and the accompanying risk levels; and
- an increase in standards is likely to require significant additional investment in water treatment infrastructure.

Further, it was noted that there is institutional fragmentation within jurisdictions in promulgating and enforcing standards in Australia. Health departments, water resources departments and the water suppliers are all involved. This sharing of responsibility potentially lessens accountability for public health outcomes.<sup>181</sup>

Legislative reform needs to take place across Australia in relation to the provision of and access to safe drinking water. In particular:

- State and Territory Governments should enshrine the legally binding right to water, including safe drinking water, as a basic human right in accordance with the 2010 declaration of the UN General Assembly.
- In line with the Productivity Commission recommendations, access to a basic level of service, based on safe and reliable drinking water should then be ensured.
- To ensure consistency of water quality standards, State and Territory laws should adopt the ADWG as the minimum, enforceable standard. These standards should then be regularly monitored and reported by the responsible department in publicly available registers. This reform would ensure accountability, transparency and public participation in relation to access to safe drinking water.

## Northern Territory

### Case study: Laramba

Access to safe drinking water remains a challenge for many communities in the NT where 28 of the Territory's 72 remote communities continue to have levels of contaminants above the ADWG. Although the NT Government have committed \$28 million in funding to address water quality issues in remote communities, this funding will only address 10 priority communities.<sup>182</sup>

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<sup>179</sup> National Health and Medical Research Council, Australian Drinking Water Guidelines (2011), available [here](#).

<sup>180</sup> Productivity Commission (2000) [Arrangements for Setting Drinking Water](#).

<sup>181</sup> Ibid.

<sup>182</sup> Chelsea Heaney, 'New funding to improve water quality in remote NT communities as data shows high contamination levels', ABC News (22 April 2021).

In Laramba, a remote community north-west of Alice Springs, NT Health provided residents with bottled water because their tap water contained naturally-occurring uranium levels that were nearly three times what was recommended by the ADWG.<sup>183</sup>

While uranium levels in the water at Laramba 'are now almost undetectable', after a new water treatment facility opened in Laramba in early 2023, such water quality issues have long been known to the Northern Territory government. An 18-month review conducted by the Water Services Association of Australia identified several key issues in relation to the delivery of safe drinking water to remote communities in the NT including that there are no minimum water quality standards applicable across the NT and that the provision of drinking water in remote communities is not currently regulated.<sup>184</sup>

## Western Australia

### Case study: Pandanus Park

Pandanus Park is a community 168km east of Broome in the Kimberley region of Western Australia. For years, community advocates and leaders have been advocating for clean drinking water in Pandanus Park.<sup>185</sup>

In 2015, water testing in the community found nitrate concentrations at levels of 80mg/L – below the 100mg/L safety guidelines recommended for adults by the Australian Drinking Water Guidelines, but above the 50mg/L limit for pregnant women and infants up to three months old.

Excessive nitrates in the diet reduce blood's ability to carry oxygen. In infants, this can cause the potentially life-threatening Blue Baby Syndrome, where the skin takes on a bluish colour and the child has trouble breathing.<sup>186</sup>

The Auditor General conducted audits and provided reports about drinking water quality in WA in 2015 and 2021. Although the 2021 follow up report found that water quality had improved in 38 communities, contamination of the water supply by microbes, nitrates or uranium still occurred in 37 of the communities that were assessed in 2015, with high nitrate levels existing in 19 communities.<sup>187</sup>

Media coverage and advocacy by local residents resulted in New South Wales charity, the Yaru Foundation, donating a water filtration system to the Pandanus Park community in 2018. The

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<sup>183</sup> Charmayne Allison, 'Aboriginal community of Laramba feels safe to drink tap water now uranium levels are within guidelines', ABC News (30 April 2023).

<sup>184</sup> See Water Services Association of Australia, Closing the Water for People and Communities Gap: A review on the management of drinking water supplies in Indigenous remote communities around Australia (7 November 2022).

<sup>185</sup> Royce Kurmelovs and Isabella Moore, 'I'm doing this out of my heart': the fight for clean water in one remote WA Indigenous town', *The Guardian* (online, 20 October 2021) available [here](#).

<sup>186</sup> Office of the Auditor General Western Australia, Delivering Essential Services to Remote Aboriginal Communities, Report 8 (May 2015) page 16, available [here](#).

<sup>187</sup> Office of the Auditor General Western Australia, Delivering Essential Services to Remote Aboriginal Communities – Follow up (Report 25, June 2021) pages 5, 19-20, available [here](#).

filter system delivers water to the community office only and not to residences. To address the risks of health impacts outlined above, the Department of Communities has supplied bottled water to pregnant mothers and young infants.<sup>188</sup>

Community members want a more permanent solution, with safe drinkable water provided directly to their houses.

#### d. Transparency/access to information

The NWI says relatively little about access to information and transparency.<sup>189</sup> The renewal advice makes a number of references to transparency, such as in water planning, trade strategies and infrastructure, service delivery and urban planning. We welcome the inclusion of transparency objectives into the renewal advice, but suggest that the advice be strengthened.

Access to information and good water governance arguably go hand-in-hand. Indeed, a great deal of mistrust in governments and between stakeholders could be avoided if more information was made publicly available (and in an accessible format). A peer-reviewed article by staff from the Stockholm International Water Institute (SIWI) affirmed the strong connection between rigorous water governance and access to information:

*For a multilevel governance structure to be effective it must be coherent and complimented by other governance attributes, such as effective and informed participation among the multiple decision-making centres and actors, for which transparent decision-making and access to information is needed.*<sup>190</sup>

EDO remains concerned that public access to certain water-related information is lacking or non-existent in some jurisdictions. In our experience, this includes but is not limited to:

- licensing and allocation details;
- the names of licence holders; applications and approvals for trades; and
- applications and approvals for other statutory permits (for pumps, or to construct a levee or on-farm dam, for example); and
- compliance and enforcement action.

Failure to supply this information in a readily accessible and meaningful format fuels distrust and makes it difficult to scrutinise approvals and accordingly assess their lawfulness (which calls into question the enforceability of relevant offence provisions).

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<sup>188</sup> Royce Kurmelovs and Isabella Moore, ‘‘I’m doing this out of my heart’’: the fight for clean water in one remote WA Indigenous town’, *The Guardian* (online, 20 October 2021) available [here](#).

<sup>189</sup> We note that paragraph [89] of the NWI refers to reporting, but is limited to four areas.

<sup>190</sup> Alejandro Jiménez, Panchali Saikia, Ricard Giné, Pilar Avello, James Leten, Birgitta Liss Lymer, Kerry Schneider and Robin Ward, *Unpacking Water Governance: A Framework for Practitioners*, *Water*, 2020: 12, p.

The latter is particularly problematic as judicial review of allegedly unlawful administrative decisions can generally only occur within a limited, statutorily defined window (often between 30 days and 3 months).

In the NT, WAPs are published on the NT Government website,<sup>191</sup> and there is a publicly available register of surface and groundwater extraction licences and applications for such licences.<sup>192</sup> Surface and groundwater extraction licences are advertised and subject to public comment, decisions must be published, and there is a third party merits review process on decisions to grant such licences.<sup>193</sup> However, a greater focus on transparency of decision-making and access to information is required, noting in particular:

- NT does not publish applications for, decisions on, and copies of other types of licences and permits under the NT *Water Act*, such as permits to interfere with a waterway, or include provision for public comment on the application process.<sup>194</sup> Whilst the third party merits review process is available for these other licence and permit categories,<sup>195</sup> these rights are largely nugatory without a requirement to publish the decisions that would be subject to review.
- There is no legislative requirement for the publication of minutes by WACs (where they are established). In our experience, whilst some WAC minutes are published, there are considerable delays in publication. There is also no legislative requirement for advice given by a WAC to be published.
- Whilst Power and Water Corporation (**PAWC**) publishes some drinking water quality statistics in relation to major town centres and 72 remote communities,<sup>196</sup> PAWC is excluded from access to government information provisions under the *Information Act 2002* (NT) (**Information Act**).<sup>197</sup>
- In general, the freedom of information processes under the *Information Act* are time consuming, costly and often subject to refusals or internal review.<sup>198</sup>

In WA, transparency of decision making and access to information are areas that should be prioritised noting in particular:

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<sup>191</sup> Northern Territory Government, *Water Allocation* (Web Page) available [here](#).

<sup>192</sup> Northern Territory Government, *Water Licensing Portal* (Web Page) available [here](#); see also Northern Territory Government, *Approved water extraction licences* (Web Page) available [here](#).

<sup>193</sup> NT *Water Act* s 30 and Pt 6A.

<sup>194</sup> Part 6A of the NT *Water Act*, which provides for public notification of applications and decisions, only applies to “*water extraction licence decisions*”, being applications for surface water extraction licences and groundwater extraction licences: see s 71A(1)-(2) and definition of “*water extraction licence*” in s 4.

<sup>195</sup> NT *Water Act* s 30.

<sup>196</sup> Power and Water Corporation, *Past drinking water quality reports* (Web Page) available [here](#).

<sup>197</sup> NT *Information Act* s 5(4) provides that a Government owned corporation is a public sector organisation for personal information only, and not in relation to applications to access government information. See *Power and Water Corporation Act 1987* (NT) s 5.

<sup>198</sup> The freedom of information scheme is currently being reviewed by the NT’s Information Commissioner given its widespread issues, although public comment has not been sought to our knowledge: Thomas Morgan and Matt Garrick, “[NT’s Freedom of Information system under scrutiny over delays, refusals and redactions](#)”, 18 January 2024 (ABC News, online).

- WA does not publish its licencing applications or approvals – these documents must be requested through Freedom of Information legislation, which in our experience is time consuming and often subject to refusal and internal review processes.
- Water Corporation does not publish its water quality testing other than in a ‘detailed overview’ format.<sup>199</sup> However, in our experience Water Corporation may provide information when requested.
- There is no legislative requirement for publication of minutes by water resources management committees (where they are established).
- Advisory committees, such as the Warren Donnelly Water Advisory Committee, are not required to publish minutes or advice provided to the Minister.

### 3. Summary of recommendations

As noted above, EDO provided feedback and recommendations to the Productivity Commission’s 2020 Inquiry into National Water Initiative Implementation Progress. Those recommendations are set out in Appendix A.<sup>200</sup> We acknowledge and continue to endorse those recommendations and note that we do not comment on all issues raised in those submissions in the present submission.

We also make the following additional, updated recommendations based on the analysis and case studies set out in this submission.

#### **First Nations water access, management and ownership**

The next iteration of the NWI must require States and Territories to provide for First Nations-led reform that generates genuine, legally binding water justice for First Nations. Building upon, and in addition to, EDO’s previous recommendations, this should:<sup>201</sup>

- include scope to acknowledge and co-develop legal and governance frameworks which directly reflect First Nations epistemology (ways of knowing) and ontology (ways of being), and which are adequately resourced.
- Include the incorporation of the principle of FPIC of First Nations in all water management frameworks.

#### **Water allocation planning:**

In addition to EDO’s previous recommendations, the next iteration of the NWI must require:

- All jurisdictions to have legally binding statutory water plans that allocate water to consumptive and non-consumptive uses, prepared in accordance with robust legislative requirements that deliver on modernised NWI commitments and underpinned by peer reviewed science.

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<sup>199</sup> See for example Water Corporation, Drinking Water Quality Annual Report 2022-23, accessible [here](#).

<sup>200</sup> These recommendations are taken from the 2020 Submission and 2021 Submission.

<sup>201</sup> See, in particular, EDO’s recommendations from the 2020 Submission in relation to (6) Aboriginal water rights, (7) water markets and (9) collaborative governance; and Recommendations 1-5 of the 2021 Submission.

- In the absence of statutory plans, non-statutory policies should provide guidance only and decisions must be made transparently, based on the best available, up-to-date science and incorporating principles of ecologically sustainable development.

### **Community participation:**

In addition to EDO's previous recommendations,<sup>202</sup> the next iteration of the NWI must require:

- Consultation processes for water management decisions to be enshrined in legislation with appropriate timeframes for genuine consultation and co-design.
- First Nations to decide appropriate consultation and engagement for their communities, which may include materials being provided in language and processes taking place on Country.

*Advisory committees:*

- Where advisory committees are used:
  - The role and functions of the committee should be set out clearly in legislation, including the role of advisory committees with respect to water allocation/management plans.
  - There should be clear governance arrangements for the advisory committee, set out in legislation.
  - The membership of the committee should be diverse and require community representatives from a range of stakeholders.

### **Climate change:**

The EDO continues to endorse its previous recommendations on climate change.<sup>203</sup> In summary:

- Under a renewed NWI, all jurisdictions must ensure water laws and policies are climate-ready, including by reviewing all relevant legislation with a view to incorporating clear and binding requirements for considering the impacts of climate change in decision making and clear requirements for climate change mitigation and adaptation.

### **Safe drinking water**

Building upon EDO's previous recommendations,<sup>204</sup> the next iteration of the NWI must require:

- State and Territory Governments to enshrine a legally binding right to water, including safe drinking water, as a basic human right in accordance with the 2010 declaration of the UN General Assembly.
- In line with the Productivity Commission recommendations, access to a basic level of service, based on safe and reliable drinking water should then be ensured.

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<sup>202</sup> See, in particular, EDO's recommendations from the 2020 Submission in relation to (9) Collaborative governance and Recommendation 1 of the 2021 Submission.

<sup>203</sup> For more detail, see EDO's recommendations from the 2020 Submission on (5) climate change.

<sup>204</sup> See, in particular, EDO's recommendations from the 2020 Submission on (10) Water quality.



- To ensure consistency of water quality standards, State and Territory laws should adopt the ADWG as the minimum, enforceable standard. These standards should then be regularly monitored and reported by the responsible department in publicly available registers. This reform would ensure accountability, transparency and public participation in relation to access to safe drinking water.

### **Transparency and access to information**

In addition to EDO's previous recommendations,<sup>205</sup> under the next iteration of the NWI, all jurisdictions must improve transparency and accountability by:

- Ensuring drinking water quality information is published and shared with communities in a timely, accessible and culturally appropriate manner.
- Open-standing, third-party merits review processes are in place with respect to water management decisions including on water licence and permit applications.
- Clearly and publicly reported information around compliance with and enforcement of water laws.

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<sup>205</sup> See, in particular, EDO's recommendations from the 2020 Submission on (3) Access to information. See also our recommendations with respect to (1) Measurement, water accounting and auditing and (2) compliance and enforcement.

# Appendix A: Recommendations from EDO's 2020 and 2021 Submissions to the Productivity Commission Inquiry on National Water Reform

## 2020 Submission

### 1. Measurement, water accounting and auditing

The next iteration of the NWI should emphasise the need for:

- “No meter, no pump” laws and the use of telemetry (and where relevant, the use of remote sensing technology to measure diversions of overland flows).
- Legislated, independent auditing (by Geoscience Australia, for example) of water accounts using remote sensing and other technologies.
- Appropriate adaptive management strategies capable of responding to audit results

### 2. Compliance and enforcement

**The next iteration of the NWI should emphasise the need for:**

- Strong compliance and enforcement culture, including appropriately resourced, independent water regulators (modelled on the [NSW Natural Resources Access Regulator]) underpinned by appropriate governance arrangements (as detailed in our recommendations for Section 1 [*above*]).

### 3. Access to information

The next iteration of the NWI should emphasise the need for:

- Access to information including but not limited to: details of licensing, allocations and works approvals (available in a centralised, easy to use register); the details of key assessments, decisions and transactions concerning water management (such as business cases for infrastructure projects, efficiency program grants and strategic buybacks).
- Water agencies to cultivate and advance a culture of transparency and openness

### 4. Sustainable levels of extraction

The next iteration of the NWI should emphasise the need for:

- Ongoing monitoring and auditing of rivers, wetlands and aquifers to assess their “health” (across different indicators) and public reporting on the same at regular intervals.
- The fact that additional reform is required to ensure extractions are sustainable in many catchments – as well as ongoing dialogue about what this concept means in different contexts (highly developed versus pristine catchments, for example)

### 5. Climate change

## Recommendations for Section 5

The next iteration of the NWI should emphasise the need for:

- Climate-ready water laws and policies (as exemplified by elements outlined in the table *extracted at p 34 of this submission*).
- Due consideration of the impacts of proposed infrastructure projects on sustainable extraction limits in a changing climate and Aboriginal cultural heritage

## 6. Aboriginal water rights

The next version of the NWI should emphasise the need for:

- Aboriginal-led reform that generates genuine, legally binding “water justice” for Aboriginal people.
- Support, resourcing and encouragement of Aboriginal-led collaborative governance approaches (such as that promoted by the Martuwarra Fitzroy River Council).
- Review of the relationship between water, native title, environment, land administration and cultural heritage legislation (at both Commonwealth and State/Territory levels) and appropriate reform

## 7. Water markets

The next version of the NWI should emphasise the need for:

- Careful analysis of the advantages and disadvantages of water markets, including proper consideration of perverse impacts on Aboriginal people;
- Careful consideration of the different values associated with rivers, wetlands and aquifers when developing water management laws and policies (and consideration of the impact of water markets on these values)

## 8. Groundwater

The next version of the NWI should emphasise the need for:

- Water planning practises and rules that:
- reflect that surface-groundwater connectivity is dynamic over time;
- clearly articulate the timeframes that are being contemplated vis à vis adverse impacts, and which prioritise a precautionary approach;
- reflect the fact that cumulative impacts can be significant over time; and
- reflect the interdependent relationship between biophysical environmental elements of water systems, and the impact of these interactions on surface- groundwater connectivity.
- Appropriate monitoring of groundwater resources, and metering of bores

## 9. Collaborative governance

The next version of the NWI should emphasise the need for:

- Deliberative, culturally appropriate, collaborative processes that allow participants to be properly engaged in the process of making decisions (rather than merely being “consulted” before a decision is made by government).
- Aboriginal-led collaborative governance models that are encouraged, supported and resourced.

## **10. Water quality**

The next version of the NWI should emphasise the need for:

- Legislated water quality objectives that must be considered as part of all relevant decision-making processes concerning water and land management.
- Governments to guarantee access to clean drinking water and water for domestic use, as per the Human Right to Life and SDG 6.

## **2021 Submission**

### **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.

### **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.

### **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.

### **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

### **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.

**Appendix B: Evaluation of the Badu Advisory Report: Review of the NT's implementation of the National Water Initiative in relation to water planning**