

9 January 2025

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Sent Via Electronic Mail

**Re: Feedback on version 0.2 of new National Water Agreement – January 2025**

Thank you for the opportunity to provide input into the latest draft of the National Water Agreement (NWA), renewing and updating the National Water Initiative (NWI).

We acknowledge the work of the Department to consider feedback throughout the drafting of the Agreement. Whilst the process is resource intensive for stakeholders, the opportunity for engagement and feedback from all stakeholders, is critical to shape the future of water management across Australia.

Our firm view is that the NWA must remain as a highly regarded and respected roadmap to best-practice water management in Australia. A replacement version should not be executed until we have it right. While the NWI is a couple of decades old, it is not broken, and appropriate time should be taken to get it right, not get it done on a political timetable. The initial NWI development was a much more inclusive and considered process, we expect the same, or better. It is noted that signing up one jurisdiction does not demonstrate a collegiate approach or meet our expectations of a national agreed blueprint. At least the majority of jurisdictions must formally engage for the IGA to have proper standing. Whilst we appreciate the work undertaken to improve the NWA, there are several areas of concern which we consider critical to address. These are categorised as follows:

- Requesting processes for governance, accountability and transparency aimed to improve confidence and trust in future implementation.
- Drafting refinements to further streamline and reduce principles.
- Further enhancing the value and roles of irrigated agriculture for national security and food security, within the principles and included as part of the preamble.
- Ensuring consultation principles are fair and equitable for all stakeholders.
- Providing due processes for international agreements and their considerations by jurisdictions.
- Improvements to the risk assignment framework to recognise the value of water property rights as established by the NWI.
- Improvements to water recovery methods for clarity.
- Further suggestions for context, clarity and avoiding duplication of principles for Aboriginal and Torres Strait Islanders peoples.

These issues and our nineteen recommendations are outlined below.

**Governance, accountability, and transparency:** As we raised, an ongoing gap is understanding how the agreement will be implemented by states and what evidence the Federal Government and jurisdictions, may need to demonstrate they've actioned a principle or decided not to implement one. Key issues include:

- How will the phrase 'consider' be interpreted in assessing compliance – i.e. what counts as having considered a principle?
- What principles will be implemented and what principles will not be?
- Are any principles non-negotiable or mandatory?
- Who approves the reason(s) for a jurisdiction not adopting a principle as a reasonable and with what evidence?

- In an audit and compliance context what guidance/scope will there be for allowing reviewers to accept a unilateral choice by a jurisdiction to 'not adopt' a principle?
- What will jurisdictional action plans, including the Commonwealth's plan look like, will they be consistent or locally determined?

Guidance and commentary in both our Phase 3 submission and a review of submissions from other stakeholders also highlights that governance and implementation is an issue amongst many stakeholders. No further clarity has been provided on these issues in the next version.

Following our recent discussions, it has been made clearer that Objective and Outcomes are all agreeable elements and that jurisdictions may provide evidence to not adopt a principle, provided their actions can still meet the Objective and Outcome. If this is indeed the correct assumption, then this must be clear prior to the Agreement being signed and form part of the Agreement, roles and responsibilities itself.

Suggestions that this implementation detail will be in jurisdictional 'Action Plan' development, post execution of this Agreement, does not provide sufficient clarity, confidence or certainty for stakeholders and jurisdictions about what happens next. Without understanding the intended implementation processes, jurisdictions are being asked to trust in the Australian Government.

*Recommendation 1: Insert a section on Implementation, Commencement, Interpretation, and Roles and Responsibilities in the NWA, was in the original NWI (clauses 8 – 22). If it will be the case that (some) principles are optional, this section must outline the processes for how that is to occur, what evidence is needed and who has the role of determining if that is appropriate or not, as well as how plans will be monitored.*

*Recommendation 2: Insert a preamble to the Agreement, like the introductory narrative of the original NWI as a blueprint to Australia's water management, requiring jurisdictions to undertake best endeavours to implement the Agreement and outlining the process of accepting Objectives and Outcomes.*

*Recommendation 3: Provide the amended schedules as well as the proposed Action Plan template for consideration and comment.*

**Number of principles:** Whilst efforts have been taken to reduce the number of outcomes and principles, we still consider the agreement long, overly prescriptive, and with some internal inconsistency. This will make it difficult, and time consuming for jurisdictions to implement, decide priorities and will create confusion as to what occurs to the extent of any inconsistency between principles. Further refinement to address duplication and potential inconsistencies is needed. Key areas of duplication relate to engagement, evidence, and unallocated water, with specific examples below.

For example:

- Unallocated water is addressed in Outcome 7F and the subsequent principles 7.32-7.34, yet principle 3.12 relates to considering making unallocated water available for Aboriginal and Torres Strait Islander peoples. These clauses are inconsistent. It is recommended to delete 3.12 to avoid this inconsistency and given it is already captured (i.e. it is duplicated) in 3.9 – 3.11 that relate to good faith efforts to improve water access, management, and ownership.
- Principle 5.7 states that communities are informed of and provided with suitable opportunities to shape the design of water planning and management activities. It is



our understanding that this is intended to apply to all peoples, irrespective of ethnicity. A range of other principles have similar effect (i.e. duplicate) but are specific to only Aboriginal and Torres Strait Islander peoples (e.g. 4.13 and 3.2-3.4, and 3.13-3.14). It is our recommendation that the same engagement principles apply to all stakeholders, rather than having a separate duplicate section specific to one group.

*Recommendation 4: Remove duplication, particularly amalgamating where the same principles are written to apply in the general case (i.e. all peoples), and then specifically to Aboriginal and Torres Islander peoples.*

**Recognition of irrigated agriculture for national security and food security:** We note that agriculture now occurs six times in the new agreement (mostly in the glossary). However, we do not believe the value of irrigated agriculture, and the role of the water management framework to underpin water access for Australian's and Australian agriculture (also including stock and domestic rights and use), is appropriately reflected in the agreement. The original NWI established a water entitlement system to enhance Australia's use of water for economic prosperity that optimised economic, social, and environmental outcomes, with agriculture and irrigation-water dependent communities a major beneficiary as well as Australians. This agreement must recognise and value the earlier outcomes and look to maintain and enhance how consumptive water is optimised for the future prosperity of Australians and provide overall balance to the new blueprint.

The Agreement therefore must include stronger references within the principles but also within the preamble to ensure balance of perspectives and outcomes and clarity of intent and purpose of the Agreement.

*Recommendation 5: Insert a section titled "Consumptive Water" (equivalent to "environmental and other public benefit outcomes (NWI, Clause 35) and "Environmental Water" (NWA, 6E)". This should specify how water management frameworks support the use of water for agriculture, to meet food security, national security, macroeconomic and socio-economic outcomes.*

*Recommendation 6: Insert in the preamble to the Agreement, statements which highlights how that this Agreement continues the legacy of the National Water Initiative to ensure water use is optimised for economic, social and environmental outcomes for the ongoing prosperity of Australians and that implementation of the Agreement will maintain and enhance water management planning systems that are foundational pillars of our nation; our industries including agriculture, communities, culture and critical to our future growth and resilience, and food security.*

**International Agreements:** We have ongoing concerns relating to the high reliance on international agreements in the NWA and seek for those to be removed. Their inclusion provides a means for the Federal Government to subvert state powers or compel states to take actions they otherwise may not, in the name of the "external affairs" powers. To our knowledge, there are no formal processes for states (who have powers over water) to engage with the Australian Government prior to 'signing an international agreement.' If the Federal Government, would like to pursue greater power over water management and decisions, it should do so on a transparent case by case basis rather than a broad non-transparent approach which is suggested by the inclusions of these principles.

*Recommendation 7: Remove references to international agreements, such as 1.3 and 3.1.*



**Purpose of the Risk Assignment Framework:** We acknowledge the work undertaken to return the risk assignment principles to those drafted in the original NWI. It is our understanding that the risk assignment framework is intended to be read in conjunction with Clauses 31-32 in the original NWI (Principles 7.2.1-7.2.10 in NWA – Version 2) which describe the characteristics and functions of a water access entitlement.

This risk assignment framework of the NWI was drafted to refer to instances where 'new share-based water access entitlements framework has been established,' which has now largely occurred. Given this, rather than removing this language, it should continue to reflect this framework, by reference to the entitlement framework established in Principles 7.2.1-7.2.10, as to contemporise the language rather than remove it.

While a minor change, linking back to these provisions describing the entitlement characteristics will alleviate concerns that the risk assignment framework could otherwise change those characteristics which are subject to misinterpretation but also reinforces the foundational elements of the NWI consistently throughout the NWA.

*Recommendation 8: Insert the below point of clarification in the NWA to link back to the entitlement framework (see blue font).*

Specifically, based on Principle 7.27 of the new NWA:

Where a water access entitlements framework has been established, *and consistent with those essential characteristics outlined at 7.2*, the risk assignment framework at principles 7.28 – 7.31 apply to any future reductions in the availability of water for consumptive use

Based on Clause 47 (original NWI):

*47. The Parties agree that an effective risk assignment framework occurs in the context that: the new share-based water access entitlements framework has been established; occurs in conjunction with those provisions outlined in 31-32; water plans have been transparently developed to determine water allocation for the entitlements; regular reporting of progress with implementing plans is occurring; and a pathway for dealing with known overallocation and/or overuse has been agreed,*

**Issue with the Risk Assignment Framework (RAF):** We do not support the RAF clause that requires water access entitlement holders to bear the first 3% reduction in water allocation that arises from bona fide improvements in the knowledge of water systems' capacity to sustain extraction levels (7.29.1). This enables incremental erosion of the water property right, without consent or compensation, contrary to the core design of the water entitlement framework established by the NWI (and reinforced within the NWA version 2). We have seen jurisdictions exploit this clause to bypass compensation, subsequently undermining water property rights. We are concerned about potential implications from the way that financial institutions may view and value water rights.

*Recommendation 9: Remove this clause to address this loophole. Water allocations on an entitlement can be varied (as the NWA/NWI recognise), but any variation to the entitlement itself must be fully compensable, as per other property rights and the clear principles outlined Principles 7.2.1-7.2.10.*



**Water recovery methods:** We support the positive changes to 6.3, which outlines the principles that will be used *where it is necessary to recover water* to achieve environmental and other public benefit outcomes (i.e. the addition of 6.3.4 for early consideration of complementary measures, as well as stronger language on managing socio-economic impacts). One additional principle which we consider an omission from this list is the consideration of avoiding third-party impacts.

The main example of where this has become a problem is rules changes in water plans that serve to reduce the consumptive pool, but by doing so, has a socialised impact across all water users, irrespective of their voluntary or willing participation (contrary to the essential entitlement characteristics in 7.2). This is compared to other methods, such as market-based measures, where participation is based on voluntary participation from willing sellers. While we do not support water recovery, where it is necessary or will occur (as per 6.3), selection of measures respecting the voluntary and willing participation must be a key principle to be considered and is consistent with what has occurred through reforms such as the Basin Plan.

*Recommendation 10: Add to 6.3.3 "and avoiding third party impacts".*

Specifically, based on Principle 6.3.3 of the new NWA, insert the blue text:

6.3.3. selection of measures based on optimising cost-effectiveness and with a view to managing socio-economic impacts and *avoiding third party impacts wherever possible.*

### **Recognition and protection of Aboriginal and Torres Strait Islander water interests and values**

**(Objective 3):** It has been established through regular consultation that there is support for the modernisation of the NWI to address contemporary challenges (as highlighted by the Productivity Commission). We recognise that there was considerable feedback from many stakeholders on the original drafting of this Objective and understand a legal and constitutional review has contributed to some of the amendments in this latest version. While there is significantly more clarity provided than in the previous version, our Members are still concerned by the intent of some of the principles, their consistency within Government programs and existing processes and how they may be actioned by jurisdictions.

Further, it is apparent that much of this narrative is predicated on a closing the gap target which is at best opaque and at least poorly defined or articulated. We seek clarity on what the inland waters closing the gap target is, including references to intergovernmental decisions. We also seek clarity on how the target whatever it is, if it formally exists, and how it is measured for example, what is the baseline information, is it a total target or a growth target. Noting our experience is identifying options for indigenous water in the Murray Darling Basin (which is at or near at fully allocated already) means providing additional water entitlement has the effect of undermining existing rights. We do not want to apply similar tensions to developing catchments.

The Objective states:

*This objective provides outcomes and principles that are foundational to Aboriginal and Torres Strait Islander peoples' water interests and values and apply across the Agreement. For the purposes of this objective, water 'interests and values' means 'cultural, spiritual, social, economic, and environmental water interests and values.*



*Aboriginal and Torres Strait Islander peoples consider that waters in all their forms are interconnected with lands and move freely between water landscapes, including upstream, downstream and between surface water and groundwater.*

*This Agreement recognises the value of Aboriginal and Torres Strait Islander peoples' involvement, knowledge and contributions to land and water management.*

*Governments across Australia are working to integrate Aboriginal and Torres Strait Islander peoples' interests and values into water planning and management.*

The first outcome states:

**Outcome 3A – Aboriginal and Torres Strait Islander peoples are recognised as custodians and knowledge holders of the lands and waters of Australia.**

The two phrases underlined above, and the broader context of this narrative continue to cause concern given the practical and legal implications. There are still formal and recognised processes for determination of native title for land (not water, though water is impliedly captured by land), care should be taken to ensure language does not reach beyond those well-established principles and the recognition within the Constitution that jurisdictions have authority over water.

We are also concerned that wording unintentionally suggests that Aboriginal and Torres Strait Islander peoples are the **only** custodians and knowledge holders of lands and waters in Australia, which is not the case. As such the key phrases should be reconsidered to ensure inclusivity.

We, also, seek further clarification on the interaction between existing Constitutional arrangements, Native Title and the principles and outcomes expected within Objective 3 of this draft agreement.

*Recommendation 11: For transparency and to satisfy the legal uncertainty of this largely new Objective, we recommend the Australian Government provide legal response on the following areas (noting that legal advice is not available for publication):*

- a) Are the draft principles consistent with other Australian Government Laws and policies?*
- b) What does 'apply across the Agreement' mean? Does this provide a hierarchy of Aboriginal and Torres Strait Islander people's rights/value over others?*
- c) Does Outcome 3A – 'Aboriginal and Torres Strait Islander peoples are recognised as custodians and knowledge holders of lands and waters of Australia', impact the knowledge and rights of other non-Aboriginal and Torres Strait Islander stakeholders? Do any Objectives, Outcomes or Principles in this agreement suggest that Native Title applies or should apply to water?*
- e) If implemented by a jurisdiction, do any Objectives, Outcomes or Principles change the current level of power a jurisdiction may have over water or title to it within their boundary.*

Furthermore, clarification in the glossary that Free, Prior, and Informed Consent (FPIC) does not mean a veto power is welcomed clarification. However, we are concerned that many stakeholders will see FPIC as this anyway, which may lead to confusion or false expectations. There are also a range of international interpretations of this principle, which adds to the broader confusion.

We believe as well as saying what FPIC is not, it needs to also say what it is intended for jurisdiction to consider implementing as part of overall engagement principles with





stakeholders. We believe this already occurs through some of the principles relating to engagement and consultation (of all peoples, including Aboriginal peoples) and therefore, question the purpose of its specific inclusion for one group of stakeholders.

*Recommendation 12: Amend the definition of Free, Prior, and Informed Consent (FPIC) in the glossary, to expand it to specify what it is intended to capture and what expectations may result.*

*In revising the definition, we also recommend considering how these principles of FPIC should apply to all impacted stakeholders.*

Further, and as above, principle 3.12 is inconsistent with Outcome 7F and the later principles 7.32-7.34. We believe the core of this principle is already captured in the above principles (3.9-3.11) and is therefore duplication anyway. These principles already provide guidance to jurisdictions to meet this outcome without prescribing the mechanism, which is inconsistent with the other NWA provisions, and may not be the most appropriate anyway.

*Recommendation 13: Remove principle 3.12 (as already captured by 3.9-3.11, and inconsistent with 7F).*

#### **Other drafting suggestions:**

- In Objective 6, there are multiple references to 'connectivity', being surface water and groundwater, rivers, and floodplains as well as land and rivers for example, the preamble discusses the need for planning across "connected systems". However, there is no clarity on what this means in practical terms, the level, reliability and frequency and extent of 'connectivity' or 'connected catchments' which can vary considerably in Australian river systems and whether these considerations allow for a proportional response and consideration in planning arrangements. We therefore recommend that definitions for distinct types of connectivity are provided, with consideration to the natural limitations of Australian river systems in achieving these outcomes to manage expectations, particularly in unregulated river systems. We also recommend removing language such as "strong" and "firm" to recognise these natural limitations and manage expectations of when and how connectivity can be planned for and achieved.
  - *Recommendation 14: Provide definitions to provide consistency for how connectivity is described and its natural constraints of reliability and frequency and extent.*
  - *Recommendation 15: Amend principle 6.1.13 to – "maintain ~~strong~~ longitudinal and latitudinal waterway connectivity".*
- Principles 6.1.5 sets a hierarchy of uses that serves the greatest public interest, this should be clarified to provide 'critical' needs for both humans and the environment.
  - *Recommendation 16: Amend principle 6.1.5 to insert critical with environmental sustainability".*
  - Specifically, based on Principle 6.1.5 of the new NWA, insert the blue text:

6.1.5. set out a hierarchy of uses that serves the greatest public interest, prioritising critical human water needs and critical environmental sustainability

- Principle 6.1.9 – this currently specifically refers to Aboriginal and Torres Strait Islander people's rights and interests, this should be reframed to refer to all property rights and water users, which includes Aboriginal and Torres Strait Islander peoples as clearly articulated in



Objective 3. It should not specifically reference one group of users by removing the following strike-through sections and referring to all water users.

- *Recommendation 17: Amend 6.1.9 to – “respect the property rights and interests of ~~Aboriginal and Torres Strait Islander peoples~~ water users in a water resource area, this can include but is not limited to including Aboriginal and Torres Strait Islander peoples and holders of native title”*
- *Specifically, based on Principles 6.1.9 of the new NWA should remove the strike through and insert the blue text and read:*

6.1.9 respect the rights and interest of *water users* in a water resource area, *this can include but is not limited to include* Aboriginal and Torres Strait Islander peoples and holders of native title.

- Principle 6.9 – currently reads: water policies, strategies and/or legislative frameworks clearly and transparently identify circumstances that trigger reconsideration of existing water-sharing arrangements under a water plan. It is recommended that this be reframed to provide more certainty.
  - *Recommendation 18: Amend 6.9 to establish regular review periods noting most water plans are for 10-years.*
  - *Specifically, based on Principle 6.9 of the new NWA, insert the blue text:*

6.9 water policies, strategies and/or legislative frameworks clearly and transparently identify *regular review periods for* existing water-sharing arrangements under a water plan

- Definition of upper and lower bound pricing, are as drafted with the NWI but in practice it is our experience that lower bound pricing has been considered by jurisdictions to be the minimum recovery cost of fees and charges for maintaining infrastructure and therefore, does not include externalities or dividends. As a result of this practice, the definition should be amended with the words deleted as proposed by the strike through text.
  - *Recommendation 19: Lower bound pricing definition is amended to – “the level at which to be viable, a water business should recover, at least, the operational, maintenance and administrative costs, ~~externalities~~, taxes or tax equivalent regimes (not including income tax), the interest cost on debt, ~~dividends (if any)~~ and make provision for future asset refurbishment/replacement. ~~Dividends should be set at a level that reflects commercial realities and stimulates a competitive market.~~”*

We thank you for the opportunity to provide this additional feedback and would welcome the opportunity to meet and discuss solutions to these issues with you.

Please feel free to contact either of us, to discuss further. Thank you for your attention to this matter.

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