

NTSCORP Questions on Notice

Question 1:

The Hon. DANIEL MOOKHEY: Did any of the 52 water sharing plans that are in operation in New South Wales have any recognition of either your native title rights with Northern Rivers, for example, where there is a recognised plan, or any reference to cultural flows, cultural significance or anything that would indicate the concerns of a variety of Indigenous groups have been recognised?

Response:

The Water Sharing Plan for the Clarence River Unregulated and Alluvial Water Sources 2016 was updated to acknowledge the native title rights of the Yaegl People, the Bandjalang People and the Githabul People. The original Water Sharing Plan for the Clarence River Unregulated and Alluvial Water Sources and the draft revised plan released for public comment on 9 February 2015, failed to note the determined native title rights and interests in water. In July 2015 NTSCORP wrote to the Department of Primary Industries – Water (DPI-Water) and drew attention to the lack of acknowledgement of the native title rights of the Yaegl, Bandjalang and Githabul Peoples. DPI – Water subsequently amended the water sharing plan to acknowledge the native title holders for the determinations which overlap the water sharing plan.

The Water Sharing Plan for the Clarence River Unregulated and Alluvial Water Sources 2016: now provides the following:

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20 Native title rights

The requirement for water for native title rights is the water native title holders are entitled to take pursuant to their native title rights under section 55 of the Act.

Notes.

1 The NSD6052/1998 Native Title Determination provides that the Yaegl People have the right to take and use water for personal, domestic and communal purposes, including cultural purposes, in the following water sources:

- a Clarence Coastal Water Source,
- b Wooloweyah Lake Water Source.

2 The NSD1688/2011 Native Title Determination provides that the Yaegl People have the right to take and use water for personal, domestic and communal purposes, including cultural purposes, in the following water sources:

- a Clarence Coastal Water Source,
- b Wooloweyah Lake Water Source,
- c Angourie-Redcliffe and Sandon Rivers Water Source,
- d Coldstream Creek Water Source,
- e Wool River Water Source.

3 The NSD6034/1998 Native Title Determination provides that the Bandjalang People have the right to take and use water for personal, domestic and non-commercial communal purposes, including cultural purposes, in the Esk River Water Source.

4 The NSD6107/1998 Native Title Determination provides that the Bandjalang People have the right to take and use water for personal, domestic and non-commercial communal purposes in the following water sources:

- a Esk River Water Source,
- b Clarence Coastal Water Source,
- c Sportsman Creek and Stockyard Creek Water Source,
- d Alamy Creek Water Source.

5 The NSD6019/1998 Native Title Determination provides that the Githabul People have the right to take and use water for personal, domestic and non-commercial communal purposes in the following water sources:

- a Koroelah Creek Water Source,
- b Tooloom Creek Water Source,
- c Duck Creek Water Source,
- d Paddys Flat-Upper Clarence Water Source,
- e Peacock Creek Water Source.

6 A change in native title rights may occur pursuant to the provisions of the *Native Title Act 1993* of the Commonwealth.

To NTSCORP's knowledge, no other water sharing plans across NSW acknowledge native title rights. For instance, the Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2016 No. 366 (NSW), which commenced on 1 July 2016, does not acknowledge the native title rights of the Barkandji Traditional Owners, which were recognised by the Federal Court of Australia on 16 June 2015. On 13 July 2016, NTSCORP notified DPI – Water of this failure to acknowledge the Barkandji Traditional Owners' native title rights. DPI – Water subsequently advised NTSCORP that the plan would be revised. It is likely that other water sharing plans within New South Wales cover waters where native title rights were recognised in relation to the eight positive determinations of native title within the State.

Question 2:

The Hon. PAUL GREEN: I have a question about cultural waters. Yesterday we heard about the capacity being around 30 gegalitres a year down through the Menindee and that area. Do you know what capacity you are talking about in terms of gegalitres of cultural waters being stored in the

Menindee? You say you want to store it there, but does anyone know what sort of gigitalitres or megalitres you are talking about? Perhaps someone could take that on notice and see what sort of storage capacity you need reserved.

Response:

The Barkandji People do not wish to definitively quantify the gigitalitres of cultural waters required to be stored in the Menindee Lakes. Rather, the amount of cultural water required to be stored at Menindee Lakes to enable cultural flows is that which keeps the Menindee Lakes full. It is currently unclear what the capacity of water is for the Menindee Lakes area. Figures ranging from anywhere between 30 gigitalitres to 450 gigitalitres have been suggested as the capacity for the Menindee Lakes area. The question of the volume of water required to keep Menindee Lakes full is best directed to hydrologists.

Cultural flows cannot be quantified, rather the crucial issue is the inherent right to water itself, to allow Barkandji People to practice their native title rights, as reiterated in the definition below. The Murray Darling Basin Plan defines Cultural Flows as:

“Water entitlements that are legally and beneficially owned by the Indigenous Nations and are of sufficient and adequate quantity to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right. The provision of cultural flows will benefit Indigenous people in improving health, wellbeing and provides empowerment to be able to care for their country and undertake cultural activities.”

The Barkandji People agree with the above definition, in particular, the inherent right to water which allows the Traditional Owners to practice their native title rights. It should also be noted that cultural flows must be in place for all rivers, lakes and water courses on Barkandji country. Drops in the levels of water in Barkandji Country, not only affect the Barkandji Peoples’ right to take water but also affect native title rights such as the right to hunt, the right to fish and the right to take natural resources.

The Barkandji People also emphasise the importance that the source of cultural flows is natural water flows (such as from the north of Barkandji country). The source of cultural flows cannot be water piped from other sources, however it must be noted any water that is taken from Barkandji country should be replenished.

Question 3:

The Hon. MATTHEW MASON-COX: Can I ask you to go away and have a think about how you would practically define cultural flows in different valley systems and how we should appropriately deal

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with the native title issue within the structure we currently have under the Murray-Darling Basin Plan? I ask you to take that on notice.

Mr QUAYLE: Can I just say something?

The Hon. MATTHEW MASON-COX: Yes.

Mr QUAYLE: We can do that, but I also ask you to do the same thing. What is good for us should be good for you too.

Response

The Murray-Darling Basin Plan (**the Plan**) currently deals with native title in two ways. Firstly, the Plan established under the *Water Act 2007* (Cth) (**the Act**) provides at Section 13 that nothing in the Act affects the operation of the *Native Title Act 1993* (Cth). Secondly, cl 10.53(1)(a) of the Plan states '*a water resource plan must be prepared having regard to native title rights, native title claims and Indigenous Land Use Agreements provided for by the Native Title Act 1993 in relation to the water resources of the water resource plan area*'.

Clause 10.52(2) of the Plan requires consultation with 'relevant Indigenous organisations' on two aspects: The Indigenous people's objectives in managing the water resources, and the outcomes of water management that the Indigenous people desire. The Note under Part 14 of the Plan indicates that where a water resource plan is prepared by a Basin state, the Murray-Darling Basin Authority is expected to consult with 'relevant Indigenous organisations' as to whether the consultation requirements have been met. However, the Murray-Darling Basin Plan does not define 'relevant Indigenous organisations'. It is unclear whether the Murray-Darling Basin Plan incorporates native title bodies/concerns in its consultation requirements. Clause 10.52(2) states that the Murray Lower Darling Rivers Indigenous Nations and the Northern-Murray Darling Basin Aboriginal Nations are examples of 'relevant Indigenous organisation[s]'. Whilst the Plan refers to native title bodies, it does not clarify whether native title bodies are part of the consultation process as 'relevant Indigenous organisations' or whether they have any particular rights in the consultation process.

The interaction between the Plan and native title is problematic in its brevity and lack of clarity. Barkandji People note the Plan insufficiently addresses cultural flows and further notes that the Plan must recognise the Barkandji people's rights over the waters relevant to the Plan, as well as the all the waters within Barkandji Country.

Barkandji People recommend that the following amendments to the Plan be considered to address these issues:

- a) Clarifying the definition of 'Indigenous organisations', ensuring that it includes prescribed bodies corporate set up to manage and hold the native title rights on trust for native title holders. In light of the special role which native title prescribed bodies corporate have in relation to the management of native title, the Plan should also ensure that specific rights

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are accorded to prescribed bodies corporate in relation to consultation and preparation of plans.

- b) Amendment of cl. 10.53(1)(c) of the Plan to confirm the inclusion of native title holders in the representation for the preparation of plans. Such representation should be sought directly from the prescribed body corporate set up to hold and manage the native title rights of the native title holders, rather than through a general call of expressions of interest from native title holders.
- c) Ensuring that plans are amended as required to reflect newer determinations of native title.

NTSCORP welcomes the opportunity to make further submissions, in particular in relation to cultural flows and the structure of the Plan to effect native title rights in water. NTSCORP looks forward to making submissions and working with the Murray-Darling Basin Authority in reforming the Murray-Darling Basin Plan.