

INQUIRY INTO WATER AUGMENTATION

Organisation: NTSCORP
Date received: 15 August 2016

14 AUGUST 2016

General Purpose Standing Committee No 5
NSW Parliament Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Submitted online

Dear Sir/Madam,

Inquiry into the Augmentation of Water Supply for Rural and Regional NSW

We thank you for the opportunity to make a submission to the General Purpose Standing Committee's Inquiry into the Augmentation of Water Supply for Rural and Regional NSW.

BACKGROUND

NTSCORP Limited (**NTSCORP**) has statutory responsibilities under the *Native Title Act 1993* (Cth) (**NTA**) to protect the native title rights and interests of Traditional Owners in NSW and the Australian Capital Territory (**ACT**).

NTSCORP is funded under Section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Peoples who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA. In summary, the functions and powers of NTSCORP under sections 203B to 203BK (inclusive) are:

- Facilitation and assistance, including representation in native title matters;
- Dispute resolution;
- Notification;
- Agreement-making;
- Internal review; and
- Other functions.

NTSCORP acted for the Barkandji Traditional Owners #8 in relation to their successful Native Title Determination Application (Federal Court Proceedings NSD 6084/1998) which was finalised by the Federal Court in June 2015. We continue to act for the Barkandji native title holders and the Barkandji Native Title Group Aboriginal Corporation RNTBC

(BNTGAC), the Corporation which holds native title on trust on behalf of the native title holders.

We welcome the opportunity to provide input to the Committee on behalf of the BNTGAC. Our submission is informed by our role, responsibilities and experiences working with Traditional Owners of lands and waters within NSW in seeking best practice in assessment, protection and mitigation of impacts of water management plans and licences, and in seeking to ensure the continued exercise of native title rights and interests in land and waters. We make this submission on behalf of the BNTGAC.

Traditional Owners have a strong and unique connection to their Country and waterways, and are key stakeholders in all water management, development assessment and approval processes, including any such processes which come under the purview of the Murray-Darling Basin Plan.

In light of the geographic specificity of the Inquiry's Terms of Reference, this submission focuses in detail on the Murray Darling Basin Plan as a critical component of water management in western NSW.

It has been estimated that in 2010 Indigenous bodies held more than 80 water licences in the Basin, totalling an allocation of 8,237 ML.¹ Water management and associated development including constraint infrastructure such as weirs has a range of impacts on Traditional Owners' country, native title rights and interests and cultural heritage, often irreversibly so.

The Murray-Darling Basin is home to more than 40 Indigenous communities² and encompasses a number of native title determinations including the recent Barkandji Traditional Owners # 8 determination³, and native title determination applications. Effective and genuinely representative involvement in these processes is vital to maintaining, strengthening, and transmitting to future generations Traditional Owners' history, beliefs and their traditional laws and customs.

The Barkandji Traditional Owners #8 determination includes a native title right to water:

The right to take and use the water of the Non-Exclusive Areas for personal, domestic and communal purposes (including cultural purposes and for watering native animals, cattle and other stock, and watering gardens not exceeding 2

¹ Report of the Independent Review of the Water Act 2007, p 6 citing Arthur, WS., 2010, *The Murray-Darling Basin Regional and Basin Plans: Indigenous water and land data*, report to the Murray-Darling Basin Authority.

² Report of the Independent Review of the Water Act 2007, November 2014
<<http://www.environment.gov.au/system/files/independent-review-water-act-2007.pdf>>

³ *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604 (18 June 2015)

*hectares), but not extending to a right to control the use and flow of the water in any rivers or lakes which flow through or past or are situate within the land of two or more occupiers.*⁴

We encourage the Standing Committee to utilise this opportunity to make recommendations to government that facilitate more collaborative decision making processes and build positive relationships with Traditional Owners in NSW to secure cooperation on water management issues in future.

Scope of the Inquiry

This Inquiry was established in March 2016 to investigate water management practices in rural and regional NSW, with a focus on the suitability of water storages, flood risks and technology. We welcome the Committee's specific focus on water management practices in the Menindee Lakes district, South Western and North Western NSW.

Our submissions directly address the following Terms of Reference:

(c) review the NSW Government's response to the recommendations of the June 2013 report by the Standing Committee on State Development on the adequacy of water storages in New South Wales

(e) examine technologies available to mitigate flood damage, including diversion systems, and the scope of infrastructure needed to support water augmentation, by diversion, for rural and regional New South Wales

(f) examine social, economic and environmental aspects of water management practices in New South Wales and international jurisdictions, including the following case studies:

- i. Broken Hill town water supply/Menindee Lakes system*
- ii. South Western NSW water management practices*
- iii. North Western NSW water management practices*

(g) the efficiency and sustainability of environmental water being managed by different State and Federal Government departments and agencies.

We note that this Inquiry follows the release of the 'Refreshing the Plan' report by the Australian Parliament Select Committee on the Murray-Darling Basin Plan on 17 March 2016.

⁴ In paragraph 6(c).

Moreover, we note that this Inquiry coincides with the NSW Legislative Council's Inquiry into *Economic Development in Aboriginal Communities*, with the committee due to report on 30 September 2016. We understand that an interagency taskforce within the NSW Government is also currently considering the issue of native title more broadly.

It is important that there is harmony and consistency between the findings and implementation of these reports and inquiries for the benefit of all stakeholders concerned.

SUMMARY OF RECOMMENDATIONS

NTSCORP makes the following recommendations:

1. Australia's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* must be adhered to;
2. The cultural significance of water resources must be acknowledged and improved cooperative strategies must be implemented to ensure that Traditional Owners of the Murray Darling Basin are actively consulted as important community stakeholders in water management strategies;
3. The NSW Office of Water must ensure that all Water Sharing Plans issued accurately depict the state of native title rights and interests within that geographic area and explicitly recognise successful or pending determinations where they arise;
4. The Murray Darling Basin Plan should be amended to include specific allocations of water for cultural flows;
5. Better communication and coordination strategies between the Commonwealth and State Government Departments must be introduced to improve water management outcomes in western NSW;
6. The use of appropriately qualified representation of Traditional Owners' and native title holders rights and interests is crucial in water management practices;
7. The role of native title must be identified and actively considered by governments as a significant factor shaping water management of the Menindee Lakes, North Western and South Western NSW in future;
8. The NSW State Government must acknowledge Traditional Owners' concerns about the health of the Menindee Lakes, as voiced in the recent 'Save the Menindee Lakes' petition;

9. Cultural heritage factors including anthropological evidence should be taken into account taken into account when assessing the importance of the Menindee Lakes System; and
10. The NSW State Government must comply with its statutory notification obligations under Part 2 Division 3 of the NTA, including in relation to future acts such as the Murray Pipeline proposed by Premier Baird which may impact upon determined native title rights and interests or other water infrastructure.

INTRODUCTION

Traditional Owners in NSW have a strong connection to their land, sea and waterways. NTSCORP welcomes the opportunity provided by this inquiry to promote engagement and collaboration between Traditional Owners in western NSW, government and stakeholders in the collective management of water resources.

A holistic approach to managing the State's water resources is not complete unless it recognises native title and responds to the concerns of Traditional Owners and Aboriginal organisations.

The National Water Council's *Review of Indigenous involvement in Water Planning* found in 2014 that:⁵

Indigenous participation in water management decision-making continues to vary regionally. Indigenous needs for water in over-allocated catchments are still not accounted for in water planning, and a gap remains in the actual provision of water to Indigenous people to be managed by them. Further work also needs to be undertaken to better incorporate Indigenous knowledge into water planning.

NTSCORP agrees that access to water consumption has the potential to help close the gap by empowering Indigenous Australians to generate economic development opportunities. In our experience, we note that the needs of Aboriginal communities will vary regionally, in this particular case, the Barkandji native title holders. We strongly encourage the Committee to take advantage of the opportunity this Inquiry presents to work collaboratively and effectively with Traditional Owners to improve water sharing and water management, especially in the Murray-Darling Basin, to achieve better social, economic and environmental outcomes for both Traditional Owners and the local community.

⁵ National Water Council, *A review of Indigenous involvement in water planning*, p 5
<http://www.nwc.gov.au/_data/assets/pdf_file/0010/36865/Review-of-Indigenous-Involvement-in-Water-Planning-2013.pdf>.

Unfortunately, native title interests have consistently been unrepresented and under-acknowledged in environmental and planning development assessment, water policy management and approval processes in New South Wales. This situation has been exacerbated by a lack of policy direction and government leadership to address these issues.

Recently, the Chair of the NSW State Development Committee, the Hon Greg Pearce MLC, admitted that *'there continues to be a lack of urgency and accountability, and only siloed responses'* to Aboriginal development in NSW.⁶

Effective and genuinely representative involvement in these processes is vital in remedying this siloed approach and strengthening Traditional Owners' history, beliefs and their traditional laws and customs, and transmitting this knowledge to future generations.

Accordingly, we address the following issues in our submission:

1. Australia's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* and other international treaties;
2. Traditional Owners and water resources;
3. Water Allocation for Native Title and Cultural flows;
4. Sustainability and Environmental Flows;
5. Menindee Lakes and the 'Save the Menindee Lakes' Petition;
6. Future Acts regime under the NTA;
7. Proposed Murray Pipeline;
8. NSW Government Response to the 2013 report by the NSW Standing Committee on *State Development on the adequacy of water storages in NSW*.

1. Australia's International Obligations

The Committee's terms of reference includes at 1(f) to 'examine social, economic and environmental aspects of water management practices in NSW and international jurisdictions'. The Australian Government has ratified three landmark international agreements that recognise the rights of Aboriginal people to plan, decide, manage and access cultural water resources including fishing:

⁶ Standing Committee on State Development Media Release, *Options to drive Aboriginal Economic Development – Discussion paper released today*, 7 July 2016.

- *United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP)* Articles 14, 20, 25, 26;
- *United Nations Convention on Biological Diversity* Article 8(j); and
- *International Covenant on Civil and Political Rights* Articles 1.2 and 27.

The UNDRIP specifically provides in Article 25 for the right of Indigenous people to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, "water and coastal seas" and other resources. In addition, Aboriginal rights to subside, secure and enjoy their own means of subsistence provided for in Article 20 are inextricably linked to the right to fish in local waterways.

NTSCORP considers it imperative that any water management policy at any level of government upholds and complies with Australia's international obligations under these instruments.

Recognising and committing to upholding the UNDRIP throughout the implementation of environmental, planning and industry policies is not without precedent. In February 2016, the Australian Government released its updated *Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*. These Guidelines contain a clear commitment on page 3 to upholding the UNDRIP, stating:

The Australian Government supports the United Nations Declaration on the Rights of Indigenous Peoples (2008). The Declaration recognises the importance of consulting with Indigenous peoples on decisions affecting them and that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.

The NSW Government should likewise demonstrate its sincerity in engaging Aboriginal communities and Traditional Owners by pledging to uphold the UNDRIP in the future management of the water in NSW.

An important purpose of the Murray Darling Basin Plan is to give effect to relevant international agreements to the extent that they relate to the use and management of Basin water resources pursuant to Section 20(a) of the *Water Act 2007* (Cth) (WA).⁷ Relevant agreements are currently defined by Section 4(1) of the WA and include the *Ramsar Convention on Wetlands* and the *Convention on Biological Diversity*.

⁷ *Explanatory Statement – Basin Plan 2012*, issued by authority of the Minister for Sustainability, Environment, Water, Population and Communities, p 1
<<http://www.mdba.gov.au/sites/default/files/Basin-Plan/Explanatory-Statement-Nov2012.pdf>>

Section 21(1) of the WA states that the Basin Plan must be prepared so as to provide for giving effect to relevant international agreements. Section 21(2)(a)(i) and (ii) add that it must be prepared having regard to:

- (a) *The fact that the use of the Basin water resources has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity; and*
- (b) *The fact that the Basin water resources require, as a result, special measures to manage their use to conserve biodiversity.*

NTSCORP believes that both NSW and Commonwealth governments and decision makers should draw upon the *Convention on Biological Diversity's Akwé: Kon Guidelines* where appropriate when preparing water management policies such as the Basin Plan.

Article (j) of the Convention on Biological Diversity states that:

Each Contracting Party shall, as far as possible and as appropriate: ... subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

The *Convention on Biological Diversity Akwé: Kon guidelines* elaborate on Article 8(j) and provide further clarification to support parties and governments in determining whether proposed developments that take place on, or are likely to impact on, sacred sites and lands and waters traditionally used by Indigenous communities.

We believe that more must be done to secure the confidence of Traditional Owners in the long-term future protection of their cultural heritage and associated rights. In reviewing the way that water is managed in NSW, and the way that responsibility is shared amongst Governments, all parties must have regard to international instruments to which Australia is a signatory. These instruments are best practice mechanisms and the Commonwealth and State Governments should cooperate to carry out the obligations and protect the rights that international declarations such as the UNDRIP enshrine.

Additionally, the *Ramsar Convention on Wetlands* outlines a number of considerations for the involvement of Indigenous people in wetland management, including:

- *developing participatory management arrangements;*
- *developing trust among stakeholders;*
- *providing flexibility;*

- *ensuring knowledge exchange and Indigenous capacity building;*
- *establishing continuity of resources and effort; and*
- *engaging local and Indigenous people.*

The Basin Plan's effectiveness in meeting these outcomes should be revisited and reconsidered by the committee.

NTSCORP made submissions in February 2012 in relation to the Proposed Murray Darling Basin Plan. We welcomed the fact that the Murray-Darling Basin Authority was "to have regard to" the social, spiritual and cultural values of Indigenous people as determined through consultation with traditional Indigenous owner organisations, where these align with or enhance environmental outcomes when preparing the Basin Annual environmental watering priorities.

However, we expressed concern that the words "consultation" and "have regard to" fell short of the level of management involvement required for Traditional Owners under International Instruments such as the *Ramsar Convention on Wetlands* and UNDRIP, both of which provide for an active Indigenous participation in decision-making in respect to water resources.

We continue to hold concerns about the lack of meaningful and effective consultation and engagement with Traditional Owners and relevant native title service providers and representative bodies in these processes, and in particular the discrepancies between these approaches between State Governments.

NTSCORP reiterates our concern from 2012 that no other stakeholders have their entitlements linked to environmental outcomes. We suggest that if Aboriginal consultation and participation is to be linked to environmental outcomes, then Traditional Owners should themselves be involved in determining whether their social, spiritual and cultural values align with or enhance environmental outcomes.

To this effect, NTSCORP recommends that consultation with Traditional Owners in particular native title holders be mandatory. We suggest that the "consultation" referred to in the Plan be defined more clearly to include participation in decision-making and active involvement in management involving free, prior and informed consent.

As the native title service provider for NSW and the ACT, NTSCORP must be included as a key stakeholder in such consultations. NTSCORP is the legal representative for native title claim groups and native title holders within the Murray Darling Basin. As such, NTSCORP is able and willing to operate as a key mechanism for the distribution of information and gauging input from Traditional Owners of the Murray Darling Basin.

Furthermore, we recommend that the Basin Plan include a mechanism for ensuring State compliance, and sanctions for non-compliance, in respect to the requirement to consult with

Indigenous people. The goals of the Basin Plan could be better progressed by improving the quality of consultation required and facilitated between agencies and Traditional Owners and native title holders in the Murray-Darling Basin.

2. Native Title Holders and water resources

Section 2 of the *Constitution Act 1902* (NSW) explicitly recognises the unique spiritual, social, cultural and economic relationship that Aboriginal People have with their traditional lands and waters. The health of the waterways and surrounding ecosystems can have an indelible impact upon the health and spirits of the local Aboriginal community.

The Preamble of the NTA identifies the intention of the Australian people to '*rectify the consequences of past injustices by the special measures contained in this Act... for securing the adequate advancement and protection of Aboriginal people and Torres Strait Islanders*'.

Moreover, it states that '*Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to claims to land, or aspirations to land, by Aboriginal peoples and Torres Strait Islanders; and proposals for the use of such land for economic purposes*'.

In this spirit, the WA, Basin Plan and the Basin Constraints Management Plan requires consultation with Traditional Owners in relation to water management. Part 14 of the Basin Plan titled "Indigenous values and uses" features a note stating that "If a water resource plan is prepared by a Basin State, it is expected that the Authority will consult with relevant Indigenous organisations in relation to whether the requirements of this Part have been met, for the purposes of paragraph 63(3)(b) of the Act". The following Sections are especially relevant to the question of the extent of Indigenous representation required under the Basin Plan:

10.53 Consultation and preparation of water resource plan

(1) A water resource plan must be prepared having regard to the views of relevant Indigenous organisations with respect to the matters identified under section 10.52 and the following matters:

- (a) 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;
- (b) registered Aboriginal heritage relating to the water resources of the water resource plan area;
- (c) inclusion of Indigenous representation in the preparation and implementation of the plan;
- (d) Indigenous social, cultural, spiritual and customary objectives, and strategies for achieving these objectives;

- (e) encouragement of active and informed participation of Indigenous people;
- (f) risks to Indigenous values and Indigenous uses arising from the use and management of the water resources of the water resource plan area.

Note: For examples of the principles that may be applied in relation to the participation of Indigenous people, see the document titled 'MLDRIN and NBAN Principles of Indigenous Engagement in the Murray-Darling Basin'.

(2) In this section, **registered Aboriginal heritage** means Aboriginal heritage registered or listed under a law of a Basin State or the Commonwealth that deals with the registration or listing of Aboriginal heritage (regardless of whether the law deals with the listing of other heritage).

10.54 Cultural flows

A water resource plan must be prepared having regard to the views of Indigenous people with respect to cultural flows.

NTSCORP believes that consultation is not being undertaken as extensively as it should be in order to satisfy Section 10.53 and avail decision makers of the benefits of the hyperlocalised cultural knowledge of Traditional Owners.

Effective consultation requires meeting with local Aboriginal communities living within the Murray Darling Basin and in Western NSW more broadly including native title holders. On the ground knowledge is vital to developing effective policies around cultural flows, environmental and water sustainability.

To secure the long term confidence of Traditional Owners regional workshops, consultations, updates, and information sessions are required from the Murray Darling Basin Authority and State Government departments implementing the Basin Plan. Local concerns on water issues must be afforded the opportunity to be presented to Commonwealth and State organisations.

We note that the Murray Lower Darling Rivers Indigenous Nations (**MLDRIN**) and Northern Basin Aboriginal Nations (**NBAN**) have contributed and continue to participate in the Basin Plan. MLDRIN and NBAN is comprised of Traditional Owner nominated representatives. While we support the inclusion of these representatives, it is important that these leaders are afforded the opportunity to go back to the communities they represent to put issues to the local people and ensure these voices and perspectives are relayed back to and heard in the decision-making process. In order to ensure that principle 5 of the Constraints Management Plan is adhered to *"Traditional Owners need to be involved from the beginning to identify potential impacts and solutions..."*

While the inclusion of Indigenous Leaders in these discussions is an important step, more work needs to be done to engage with a broader cross section of Aboriginal regional communities including native title holders to ensure the depth and breadth of concerns are registered and taken into account. To that end, NTSCORP encourages more local consultation with regional Aboriginal communities to ensure that local cultural issues, especially those that are particular to a particular waterway, may be brought to the forefront.

With regard to consultation, we question the effectiveness of consultation with solely “Indigenous Leaders” in relation to investigating cultural flows initiatives. In order to ensure that principle 5 of the Constraints Management Plan is adhered to “*Traditional Owners need to be involved from the beginning to identify potential impacts and solutions...*” NTSCORP encourages more local consultation with regional communities, so that local cultural issues are brought to the forefront.

3. Allocation for Native Title and Cultural Flows

Another purpose of the Basin Plan is to uphold “economic, social and environmental outcomes” as outlined in Section 20(d) of the WA. Furthermore, Section 21(4)(c)(v) requires the Basin Plan to be developed with regard to “social, cultural, Indigenous and other public benefit issues”.

Section 21(4)(c)(i) of the WA states that in preparing the Basin Plan and where the Authority and the Minister exercise their powers they must have regard to the *National Water Initiative*. Clause 53 of the National Water Initiative states that:

Water planning processes will take account of the possible existence of native title rights to water. States note that Plans may need to allocate water to native title holders following recognition of native title rights.

There are now areas within the Murray Darling Basin where the Federal Court of Australia has handed down a native title determination recognising native title rights and interests of native title holders, including the right to water. Plans must acknowledge and take into consideration the reality of water allocation for the exercise of native title rights. We encourage discussion with native title holding bodies to effectively plan for native title allocations as well as allocations for agricultural industries, local businesses and community wellbeing.

NTSCORP recognises the importance of the ‘Acknowledgement of the Traditional Owners of the Murray-Darling Basin’ at the commencement of the current Murray-Darling Basin Plan and the Basin Constraints Management Plan.

Moreover, we note that in paragraph 2 of the Acknowledgement, the Basin Plan states that:

'Further research is required to assist in understanding and providing for cultural flows. The Authority supports the belief of the Northern Murray-Darling Basin Aboriginal Nations and the Murray Lower Darling Rivers Indigenous Nations that cultural flows will provide beneficial outcomes for Traditional Owners.'

The Murray Lower Darling Rivers Indigenous Nations ('MLDRIN') and the Northern Murray-Darling Basin Aboriginal Nations ('NBAN') have defined cultural flows as:

Water entitlements that are legally and beneficially owned by the Indigenous Nations and are of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right.

The Basin Plan provides at 10.54 that a water resource plan must be prepared having regard to the views of Indigenous people with respect to cultural flows.

Despite the existence of a determined native title claim, while quite general, the Basin Plan requires that Aboriginal Cultural flows be considered and planned for.

This inquiry provides an opportune moment to revisit and include specific allocations of water for cultural flows in Basin and Water Sharing Plans to better use and manage water resources to optimise economic, social and environmental outcomes and improve water security for all uses of Basin resources, pursuant to Sections 20(a)(d) of the WA.

The Independent Report acknowledged the ongoing work of the National Cultural Flows Research Project, managed by the National Native Title Council in collaboration with the Northern Basin Aboriginal Nations, the Murray Lower Darling Rivers Indigenous Nations and the North Australian Indigenous Land and Sea Management Alliance.

However, the Expert Panel noted that *"Commonwealth environmental water held by the Australian Government and managed by the Commonwealth Environmental Water Holder cannot provide cultural flows that meet the Northern Basin Aboriginal Nations' and Murray Lower Darling Rivers Indigenous Nations' definition of cultural flows (see Chapter 1 and Box 1.2 for more detail on cultural flows), because the definition refers to entitlements 'legally and beneficially owned by Indigenous Nations.'*"

The Panel was of the view that the Environmental Watering Plan allows the Commonwealth Environmental Water Holder to secure complementary cultural outcomes as part of its activities.⁸

⁸ Report of the Independent Review of the Water Act 2007, p72.

We support the Panel's recommendation that the Commonwealth Environmental Water Holder develop a more structured, transparent approach to Indigenous engagement.

However, we also believe that Cultural Flows cannot be so easily dismissed and do hold merit as an initiative for strengthening Indigenous engagement and achieving better social, cultural and environment outcomes.

We suggest that the committee call evidence on the work of the National Native Title Council and the National Cultural Flows Research Project when inquiring the effectiveness of the current WA, with a view to adopting a holistic approach to Cultural Flows at a state and federal level.

We suggest that a nominal provisional percentage could be included and adjusted on the basis of evidence arising from further research. NTSCORP emphasises that specific allocations of water to satisfy cultural flows should be separate from and additional to all other flows.

In NSW, water access licences may be granted by the Office of Water for "Aboriginal community development" under the NSW State Water Sharing Plans. We note that the NSW Office of Water has been reviewing the policy for the granting of Aboriginal Community Development Licences in groundwater sources.⁹

However, we note that it is extremely distressing for Traditional Owners when the NSW Office of Water publishes Water Sharing Plan that do not acknowledge successful native title determinations or pending claims for native title rights and interests within the area covered by the Plan. Not only is this misleading, it is culturally insensitive and non-compliant with future act notification requirements which are discussed later in this submission.

Accordingly, we encourage better communication and coordination between the State and Commonwealth to ensure allocation for cultural flows are effectively implemented across both jurisdictions to achieve the goals of continued on-going cultural practices and relationship with country as well as improving health, wellbeing and empowering Traditional Owners to be able to care for their country.

⁹ NSW Department of Primary Industries – Office of Water, *Water Sharing Plan for the Clarence River Unregulated and Alluvial Water Sources 2015 Draft Order*, p 43
<http://www.water.nsw.gov.au/__data/assets/pdf_file/0007/548017/wsp_clarence_unreg_alluvial_order.pdf>.

4. Sustainability and Environmental Flows

Water allocation impacts the sustainability of catchment and river systems. Native title holders in and around the Murray Darling Basin have expressed that the quantity of water presently allocated for commercial use within their traditional country is unsustainable and that the water system is being degraded as a result of water depletion, pollution and salinity. The poor health of the water system impacts upon the determined native title rights, to fish and use water resources for subsistence, recreation and other traditional purposes. The degraded water systems also affect Aboriginal People's health and wellbeing as well as ecosystems dependent upon the water systems.

Native title holders have an obligation under their own traditional laws and customs to protect the environmental and cultural integrity of water sources within their country.

Barkandji Native Title Determination

The largest native title claim in the state's history was finalised in a Federal Court decision in June 2015 that saw the recognition of the Barkandji People's rights to land and waters in western NSW.¹⁰ NTSCORP represented the Barkandji People in their native title determination application. The area covered by the claim included "land and waters"¹¹ within the Murray Darling Basin.

As determined, Barkandji native rights and interests include:¹²

The right to take and use the water of the Non-Exclusive Areas for personal, domestic and communal purposes (including cultural purposes and for watering native animals, cattle and other stock, and watering gardens not exceeding 2 hectares), but not extending to a right to control the use and flow of the water in any rivers or lakes which flow through or past or are situate within the land of two or more occupiers.

The Plan must now be adapted accordingly to recognise the native title rights and interests of the Barkandji People to take and use waters.

Moreover, NSW and Commonwealth governments should prepare for the possibility of further native title determinations in NSW and ensure that water management policy frameworks possess the requisite versatility and cultural competence to react to and recognise such determinations if and when they occur.

¹⁰ *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604 (18 June 2015)

¹¹ *Description of the area Covered by the Claim in Extract from Register of Native Title Claims*, National Native Title Tribunal p 1
<http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/RNTC%20Extracts/NC1997_032/RNTCExtract_NC1997_032.pdf>

¹² In paragraph 6(c).

5. Menindee Lakes and the 'Save the Menindee Lakes' Petition

Menindee Lakes is a culturally significant area for Barkandji People. Its significance transcends its geographical location to impact upon the welfare of the broader Barkandji community across western New South Wales. The Barkandji People have cherished their responsibility over thousands of years to nurture the rivers and waterways.

As best practice, Traditional Owners must be engaged and involved in any and all plans and strategies to manage water from the very genesis of that development process and throughout the planning and implementation phase.

The opportunity to collaborate and work alongside the Government and other stakeholders in the Murray Darling must be continuous, not simply confined to a particular public comment period. Collaboration must be ongoing and organic in recognition of Traditional Owners' and native title holders ongoing spiritual and cultural connections with water.

NTSCORP is aware that the Menindee Lakes System, amongst other lake systems within the Murray Darling Basin, has recently dried up. This is of significant concern for three reasons. First, the water in these lakes contributes significantly to the security of water supply in the Lower Murray Darling River in NSW and the Murray Valley in NSW, Victoria and South Australia. Secondly, these waters retain significant cultural importance for the Traditional Owners. Thirdly, the explanations advanced by the Murray Darling Basin Authority are not satisfactory.

Barkandji native title holders question the explanation put forward by MDBA that natural evaporation is the predominant cause of the substantial reduction in water levels. This is an oversimplification of historical environmental phenomena and is misleading because this approach adopted by the MDBA downplays the significance of extractions authorised by NSW and Commonwealth Governments.

Evaporation is a natural phenomenon that communities and Traditional Owners are only too familiar with, having had to contend with its consequences for decades. The *State of the Darling – Interim Hydrology Report*,¹³ prepared for the Murray-Darling Basin Commission in 2007, notes that at Menindee, the Darling River ceased to flow on 48 occasions between 1885 and 1960. Importantly, the Report states that this was “prior to any large scale water use”.¹⁴

¹³ Webb, McKeown & Associates Pty Ltd for the Murray-Darling Basin Commission, *State of the Darling Interim Hydrology Report*, March 2007
<[http://www.mdba.gov.au/sites/default/files/archived/mdbc-SW-reports/17 State of the Darling Interim Hydrology Report 2007.pdf](http://www.mdba.gov.au/sites/default/files/archived/mdbc-SW-reports/17%20State%20of%20the%20Darling%20Interim%20Hydrology%20Report%202007.pdf)>.

¹⁴ Ibid, p 13

While river flows are highly variable, evaporation has been a historic reality. What has significantly changed in the water flow equation, however, and exacerbated the situation over the last 50 years, has been the new threat posed by water extractions and the increased need for nuanced, coordinated and vigilant management of water resources.

Darling River communities have reported a “severe ecological decline” in the river system over the last two to three decades, corresponding with increased water diversions to assist the expansion of the cotton industry.¹⁵

The *State of the Darling* Report identifies that flows in the Darling are affected by the dual factors of local extractions and by evaporations from Menindee Lakes. A discussion about water management that fixates on evaporations and neglects the impact of extractions is misleading and deceptive.

The Menindee Lakes were converted into water storages in 1968 and are the largest water storage in the Darling Basin. Most of the water regulated by the Lakes is used to supplement supply through the Murray system.¹⁶

The 2007 report noted that “evaporation losses from Menindee Lakes (393 GL/annum) are much less than total evaporations from on farm water storages upstream of Menindee”.¹⁷

The use of average numbers is extremely fraught due to significant weather and climate variations. This danger was clearly identified by the *State of the Darling* report authors who warned that “viewing the hydrologic records for rivers in the Darling Basin as a single homogenous set of data could prove misleading for policy makers and farmers”.¹⁸

However, even accepting the statistics provided by the MDBA, this is still problematic. For example, the MDBA has stated that in 2013-14, 405 GL evaporated, 135 GL was released by NSW for irrigation use and flow and another 180 GL was ordered by the MDBA into the Lower Darling to meet minimum flow requirements.¹⁹ Of the 720 GL used, evaporated accounted for 56% and combined water releases 44%.

Although weather cannot be controlled, water releases can be controlled by the Governments. Any decision to release water must be carefully considered and all consequences, including detriments to local communities. Native title holders and their rights to water, Traditional Owners and cultural heritage, should be taken into account.

¹⁵ Broken Hill Menindee Lakes “We Want Action” Group, Submission to the Murray-Darling Basin Plan.

¹⁶ Webb, McKeown & Associates Pty Ltd for the Murray-Darling Basin Commission, *State of the Darling Interim Hydrology Report*, March 2007, p 16.

¹⁷ Ibid, p 20.

¹⁸ Ibid, p 15.

¹⁹ Murray-Darling Basin Authority *Fact Sheet: Menindee Lakes*.

The *State of the Darling report* identified in 2007 that “continued increases in surface water use” and “future groundwater use” posed future risks to the Basin that should be considered and taken into account. The report noted:²⁰

Use of groundwater from aquifers may impact on surface water flows, and possibly outflows to other surface ecosystems such as wetlands. In most instances, the full extent of these impacts is not realised for 10 to 20 years. It is likely that the impact of recent groundwater development has yet to be felt. In addition, in many Basin groundwater sources, current entitlements and use remain well below the extraction limits (sustainable yields) identified by jurisdictions.

This reiterates the importance of a unified approach to water management that involves meaningful collaboration between State and Federal Governments, agencies, Departments and local communities including native title holders. Since evaporation is not a new phenomenon and has been well researched, it should be considered and accounted for as part of an integrated management strategy.

While the Menindee Lakes System may be in the care and control of the NSW Office of Water, their operation is subject to the longstanding Murray-Darling Basin Agreement between NSW, Victoria, South Australia and the Commonwealth.

We note MBDA uses the Lakes’ water to fulfil downstream demand. Again we note that better coordination between State and Commonwealth departments is required, taking into consideration natural evaporation, seasonal and climate variations to determine as a consequence whether the water should be taken from the Menindee lakes Water System.

Better coordination of State and Commonwealth Departments is necessary to ensure the Basin Plan is afforded the opportunity to be effectively implemented, risks mitigated and resources allocated to issues around the reduction of water levels in significant places.

Cultural heritage factors including anthropological evidence should be taken into account when assessing the importance of the Menindee Lakes System. We note that the MDBA has previously trialled a cultural health index to measure the importance of rivers and wetlands to Aboriginal people, as identified in its 2013-14 Annual Report. Such initiatives should be further progressed to increase cultural awareness of water resources and their value to Aboriginal communities.

Whether or not it is a consequence of the Basin Plan, the Drying up of the Menindee Lake System and other lakes is unacceptable. The Basin Plan must have measures in place to respond flexibly to the challenges of the natural environment to rectify such atrocities and ensure local communities have ongoing access to water sources.

²⁰ Webb, McKeown & Associates Pty Ltd for the Murray-Darling Basin Commission, *State of the Darling Interim Hydrology Report*, March 2007, p 3.

Open dialogue and ongoing consultation with affected stakeholders including Traditional Owners throughout this process is critical.

The strength of the community's outrage over the mismanagement of the Menindee Lakes has been demonstrated by the sheer volume of signatures collected in support of the 'Save the Menindee Lakes' petition that was presented to Federal Parliament in 2016. The text of the petition read:²¹

The petition of residents in the Farrer/Murray-Darling Electorates draws to the attention of the House that they are opposed to the proposal to drain Lake Menindee and Cawndilla and decommission those lakes. The aquifer proposed by the Federal Government to supply Broken Hill with water is an unrealistic and costly alternative and has the potential to price water beyond the capacity of Broken Hill consumers. The Government must also realise that the Menindee Lakes are a tourism asset and provide a recreational area for people in the far west and tourists. Your petitioners therefore request the House ensures local consultation is undertaken to gain local knowledge before any decision is made.

Consultation about the proposed aquifer or any other water infrastructure must involve meaningful dialogue with the Barkandji Traditional Owners. Moreover, the proposed aquifer and associated changes to water flows may constitute a future act, triggering statutory obligations for both State and Commonwealth governments as proponents.

We attach a further petition signed by Traditional Owners across New South Wales in support of the Barkandji Peoples right to save the Barka (the Darling River) and the Menindee Lakes system. See **Attachment A**.

6. Future Acts regime under the NTA

Traditional Owners who are registered native title claimants or native title holders are afforded a number of legal procedural rights in relation to 'future acts' under Part 2 Division 3 of the NTA. The term 'future acts' encompasses acts which may affect native title rights and interests. Thus, the future acts regime provides Traditional Owners with an ongoing voice in the future management of their land and waters. This can and should facilitate the ongoing development and empowerment of Aboriginal Communities.

Native title rights and interests which are likely to be affected by the water management initiatives or the Basin Plan such as the issuing of a water licence application or construction of a pipeline or a bore to take water are the right to access, use natural

²¹ See Australian Parliament House Committee Petitions, <http://www.aphref.aph.gov.au/house-committee-petitions-petitions_43-terms-members-terms389.pdf>.

resources (including natural water resources), hunt, fish and gather on land and in and around waters within the Basin.

While native title groups may not always use their land for development, protection of cultural heritage and connection to country may nevertheless provide vital opportunities for economic development, growth and empowerment that could sustain the local community over a longer term. For example, this could include setting up a business to care for country. Heritage monitoring work may also provide income-generating opportunities in some Communities.

The High Court affirmed in *Akiba v Commonwealth* that the designation of native rights and interest as “usufructuary rights and interests” does not necessarily preclude their use for commercial purposes, including the commercial right to fish.²² This has been supported by the Australian Law Reform Commission who last year recommended in its *Connection to Country – Review of the Native title Act 1993* (Cth) that the Commonwealth repeal Section 223(2) of the NTA, and substitute the following:

Without limiting subsection (1), native title rights and interests in that subsection:

(a) may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes; and

*(b) may include, but are not limited to, hunting, gathering, fishing, and trading rights and interests.*²³

Where the future acts regime is triggered, Traditional Owners are required to be notified in the form prescribed by the NTA and depending upon the provision relied upon by the proponent this may result in a range of formal procedural rights for Traditional Owners including the right to comment, be consulted, negotiate or to be compensated for the impact on native title.

Failure to comply with notification requirements can result in the act being invalid and create a compensation liability. Section 13 of the WA states that nothing in the act affects the operation of the NTA. Consequently, NTSCORP considers that any changes made to the Basin Plan or water sharing plans in western NSW would constitute a future act (as a plan which affects native title).

As such, we seek assurances from the NSW Government that future changes to Water Sharing Plans or to the Murray Darling Basin Plan will be notified under the NTA and the arising procedural rights afforded.

²² *Akiba v Commonwealth* (2013) 250 CLR 209, [21] (French CJ and Crennan J), [60] (Hayne, Kiefel and Bell JJ).

²³ Recommendation 8-1, Australian Law Reform Commission, *Connection to Country – Review of the Native title Act 1993* (Cth) 2015.

7. Murray Pipeline

While NTSCORP cannot comment specifically on Terms of Reference (e) regarding technologies and infrastructure available to mitigate flood damage including diversion systems, much of the content of this Term of Reference would constitute a future act and thus require appropriate notification.

The BNTGAC and NTSCORP remain concerned at the Premier's recent announcement that the NSW Government will build a pipeline from the Murray River to Broken Hill to alleviate water supply problems.²⁴

Scant detail is available about the pipeline. Media reports suggest the pipeline will stretch 270km from Wentworth on the Victorian border to Broken Hill's water treatment plan. It is forecast to be completed in 2018.

Such infrastructure would constitute a future act and therefore attracts statutory notification and consultation requirements under the NTA. To date, these requirements have not been complied with.

This is yet another example of siloed decision making that affects Aboriginal communities and directly impacts upon native title rights and interests yet the decision has been taken seemingly without adequate consultation or notification to Traditional Owners.

Such decisions have a deleterious effect in eroding the trust of Aboriginal communities in State Government and compromising the reconciliatory relationships and opportunities that the NTA strives to achieve.

8. NSW Government Response to the 2013 report by the NSW Standing Committee on State Development on the adequacy of water storages in NSW

We note that Term of Reference (c) refers to the NSW Government's response to the recommendations of the June 2013 report by the Standing Committee on State Development on the adequacy of water storages in New South Wales.

Neither the *Adequacy of Water Storages in NSW* report nor the Government's Response mentioned native title or Traditional Owners, let alone identify their concerns and interests in water management and storage or advance mechanisms to foster cooperation and engagement.

²⁴ See, eg, Declan Gooch and Brigid Glanville, 'Broken Hill water crisis: NSW to build Murray pipeline under \$500m supply plan', *The Guardian* (online), 16 June 2016 < <http://www.abc.net.au/news/2016-06-16/mike-baird-broken-hill-water-pipeline-plan/7515854>>.

This unfortunate oversight must be rectified. The voice of Traditional Owners and Aboriginal communities cannot be ignored in discussion of this important issue, especially where native title determinations have successfully been recognised by the courts and attract statutory compliance obligations.

There is a clear need for change in the way that government decision-makers at both a state and federal level consider and value native title and Aboriginal engagement in water management, especially in the Murray Darling Basin. This would undoubtedly attract benefits for all stakeholders involved in making important decisions about the management of this precious resource.

Thank you again for the opportunity to contribute to this Inquiry. We look forward to being notified of the outcome and working with the Standing Committee in future. If we can be of assistance, or if you require any further information, please do not hesitate to contact Hema Hariharan, Manager Strategic Development, on [redacted] or [redacted]

Yours sincerely,

Hema Hariharan
Manager – Strategic Development
NTSCORP Limited