



National Irrigators' Council

Food · Fibre · Future

NATIONAL WATER AGREEMENT:
PHASE 3 CONSULTATION –
PRINCIPLES

To the Department of Climate Change, Energy,
Environment and Water
18 September 2024

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Background

The National Irrigators' Council (NIC) is the peak industry body for irrigated agriculture in Australia. NIC is the voice of irrigated agriculture and the industries producing food and fibre for domestic consumption and significant international trade. Put simply, our industry is helping to feed and clothe Australia and our trading partners.

Irrigated agriculture in Australia employs world leading practices in water management. Industry has extensively adopted and embraced new technologies and knowledge to ensure we are consistently growing more with less water. Australian farmers also operate under strict regulations and compliance mechanisms. These factors mean we lead the world in both farming practices and produce quality.

NIC's policy and advocacy are dedicated to growing and sustaining a viable and productive irrigated agriculture sector in Australia. We are committed to the triple bottom line outcomes of water use - for local communities, the environment, and for our economy.

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Introduction

The NIC is deeply concerned by the draft principles proposed for the National Water Agreement (NWA) and is of the position, it is not fit-for-purpose to be signed in its current form.

The original National Water Initiative (NWI) set the blueprint for water reform in Australia over the past two decades and is a fundamental underpinning of Australia's water management. It is a document that needs to be taken seriously by all stakeholders and jurisdictions, and its content upheld to be a first-class and best-practice approach to water management.

The original NWI was the product of nearly a decade of consultation with jurisdictions and stakeholders (from the 1994 COAG meeting when it was conceived, to 2004 when it was signed), which involved shaping principles (formerly 'actions') adopted from state jurisdictions that were demonstrated as working well, as well as researching and trialling potential new approaches during this time. It was this practical 'bottom-up' process of shaping the NWI to be a visionary approach to addressing water challenges that gained it respect from diverse stakeholders and jurisdictions as an appropriate roadmap forward. It was and remains world leading framework.

It is unfortunate that the proposed contents of this new NWA do not adopt the same best-practice, evidence-based, and collective basis that was so integral to the success and general support of the original NWI, which promoted the sustainable and efficient use of our water resources for Australians. Instead, the draft principles lack the rigor and evidence-base to gain merit as the visionary approach to water management that state jurisdictions should come together to implement.

While not all stakeholders agreed with all the contents of the NWI and its implementation had significant repercussions for industries and regional economies and communities - the original NWI was a respected document. It was respected because of the process it went through to be developed, and stakeholders could understand the vision it was working towards. The



rushed and cumbersome process of this document, with a top-down approach and little detail, gives no confidence the NWA will gain that same degree of respect in current form.

Overall, the NWA continues to be centred on past issues, such as addressing overallocation, which was the centrepiece of the original NWI as this was the key issue at that time (2004). However, two-decades later, significant reforms such as the \$13 billion Murray Darling Basin Plan designed to address overallocation (and purchasing 1 in 3 litres of irrigation water from agriculture to implement Sustainable Diversion Limits), this no longer needs to be the centrepiece. The NWA has missed the opportunity to bring stakeholders and jurisdictions on a journey and move on to the next chapter of water management.

The NWA barely mentions irrigated agriculture and lacks recognition of the industry as a legitimate user of water, and the role of the NWA to provide a stable and certain framework to underpin the water security for Australia's food and fibre production.

We are particularly concerned that:

- This document is being rushed through with considerable knowledge gaps and under-developed solutions, meaning they may not be fit-for-purpose and risk perverse outcomes;
- There are major changes being proposed, including fundamental changes to legal and planning frameworks with little detail provided on the merits, risks, and intended arrangements (such as how it will integrate within existing frameworks);
- Creates ambiguity which undermines the value of the NWA as a blueprint to provide certain and stable management frameworks;
- Many principles go outside the scope of water management, and require much larger constitutional and institutional reform to address properly and transparently, with proper process that respects Australia's democratic values and engages all Australian peoples. The Australian Government appears to be trying to solve a fundamental constitutional issue via a water management intergovernmental agreement.

The NIC is of the position that the NWI/NWA must remain as a highly regarded and respected roadmap to best-practice water management in Australia. . While the NWI does require modernization to address contemporary challenges (as highlighted by the Productivity Commission), rushing to get jurisdictions to sign up to 'principles' that may not be the best way forward (or worse, produce perverse outcomes) is premature and undermines the respect and success of the NWI to date.

The NIC makes several recommendations in this submission, ultimately that the Federal Government must **go back to the drawing board and get this done right**.

There is considerable remaining work to do first on identifying, researching, trialling and consulting upon the contemporary solutions to contemporary issues, in collaboration with jurisdictions and stakeholders, before putting them in an intergovernmental agreement for States to implement.

Our experience is that regardless of intent of governments to work through the detail in action plans, any objective or principle within a signed agreement builds the expectation amongst stakeholders that it will be implemented. Government, therefore, must get the final agreement right prior to signing.

Overall Recommendations

1. The NWA requires significant further work before it can be fit-for-purpose to be practically adopted into an intergovernmental agreement for jurisdictions to sign and implement. This further work will require significant ongoing engagement with state



jurisdictions and stakeholders, as well as further research on 'solutions' to address clearly articulated problem-definitions.

2. Only when the NWA is a first-class, solutions-focused and evidence-based blueprint with collective support, should it be brought to jurisdictions for signing.
3. The timeframe for implementation must be extended. As such a centrepiece document to Australia's systems of water management, getting it right must be a priority over simply getting it done to meet election timeframes.

General Comments

Without water rights, there is no national framework for water management

The core outcome of the NWI was to establish "a nationally compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimizes economic, social and environmental outcomes"¹. The establishment of water access entitlements (water rights) and planning arrangements to manage competing demands, were central to these objectives.

The establishment and maintenance of water rights enables:

1. **Resource Management:** Water property rights are crucial for the sustainable management of water resources. They help allocate water among competing users, ensuring that water is used efficiently and equitably.
2. **Economic Value:** These rights can have significant economic implications. They can be bought, sold, or leased, creating a market for water that can incentivize conservation and efficient use.
3. **Legal Clarity:** Clearly defined water property rights provide legal certainty for users, reducing conflicts over water access and usage. This clarity is essential for planning and investment in water-dependent activities.
4. **Environmental Protection:** Well-structured water rights systems can incorporate environmental considerations, ensuring that ecosystems receive adequate water flows to maintain their health and resilience. They are also the mechanism which enabled 'rebalancing' to occur to address over-extraction, as well as a significant volume of water rights now held by environmental water holders for targeted use (in addition to river flows).
5. **Adaptation to Change:** As climate change and population growth increase pressure on water resources, property rights can facilitate the transfer of water to where it is most needed, allowing for more adaptive management strategies.
6. **Social Equity and Cultural Outcomes:** Properly designed water rights systems can help address social equity issues and enable considerations of Cultural outcomes.

The implementation of the NWI framework (partially in some jurisdictions) does not diminish the significance of the original NWI objective, now, or in the future. As competition for water and complexities of decision-making has intensified, not decreased. Having a compatible, robust and secure water property framework will be more essential than ever.

For this reason, the principles (7.1 onwards) which relate to the characteristics of water entitlements (perpetual, exclusive, tradable, separate from land, etc) are critically important.

¹ <https://www.dcceew.gov.au/sites/default/files/sitecollectiondocuments/water/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>



There is opportunity to strengthen these, by detailing the importance of this system of property rights. Further detail on this is contained in the below 'Detailed Comments' section.

Water rights must be central to any national blueprint for water management. The drafting of the NWA must be reconsidered to reflect this foundational importance.

Recommendation 1

NIC recommends that re-drafting of objectives and principles is undertaken to enhance the critical importance of water property rights, their existence, security and persistence as being foundational to any new NWA as they were for the NWI.

Knowledge gaps need addressing prior to being added to NWA

Given the NWA will set the water management framework for Australia into the future, the Federal Government must prioritize getting it right, rather than rushing it through for political opportunity prior to the election.

There remains considerable knowledge-gaps in how (i.e. the actions or specific mechanisms) that will be most appropriate to respond to most of these contemporary water challenges and meet the objectives and outcomes. Simply – many of these contemporary issues don't yet have developed solutions.

In the absence of these evidence-based, trialled, and tested mechanisms, it is premature to ask state jurisdictions to sign up to implement those actions (or lack thereof). Instead, governments must do the work to better understand these issues and design and develop ways forward – and present the case to other jurisdictions and stakeholders on the merits (and potential implications).

The principles contained in the draft NWA lack the evidence-based to become accepted solutions by stakeholders. They are also new ideas that have not otherwise appeared in consultation with stakeholders, and are making their first appearance in a very critical way. Many of those principles which would result in large-scale change should have an entire discussion paper to explain the concept, its intended use, potential risks, merits, regulatory and legislative changes required, and insights on implementation.

There is little confidence that the principles are the 'solutions' to these water issues.

Lack of clarity on binding nature of principles

A point of confusion by stakeholders (including jurisdictions) during this consultation process has been the binding nature of the principles, and the NWA more broadly.

It is noted that the principles are intended to form part of the NWA (replacing what was formerly 'actions' in the NWI), which ultimately make up the bulk of the NWI/NWA contents – i.e. it is what jurisdictions are agreeing to do.

However, during consultation sessions, DCCEEW has advised that the principles themselves are not 'binding' and are guiding only for states, but they "must be considered". Further, points have also been suggested that intergovernmental agreements more broadly are not binding (taken to mean there are no legal levers to pull for enforceability).



It is difficult to see how the NWI/NWA could be read in such a way that the bulk of the document is not binding upon signatories. At least, there is an expectation from stakeholders (and most likely jurisdictions) that a state signing up to the NWA is a commitment to undertaking the actions within. There is also a degree of accountability of states to meet NWI/NWA commitments, including political and public scrutiny into the future.

If the principles are not intended to be binding upon signatories, then there needs to be very clear terms in the NWA to indicate that – i.e. language such as ‘jurisdictions may consider’ or ‘it is to the discretion of the jurisdiction if they choose to implement these principles’ or opt-out clauses. However, such an approach undermines the entire core purpose of the NWA – to adopt nationally-consistent approaches to water management best-practice.

Alternatively, the non-binding guiding-only principles could be pulled from the NWA itself and put into supporting documents such as practitioners’ notes. However, this too would leave the NWA rather slim. The lack of enforceability and compliance arrangements also undermines the integrity and significance of the NWA more broadly.

Legal technicalities aside – the practical reality and past experience is that a jurisdiction signing up to the NWA sets an expectation that they will implement its contents, and irrespective of the powers of the Commonwealth to enforce the agreement or not, jurisdictions will inevitably be held to account through public scrutiny and political process, well into the future. For this reason, the concerns of the appropriateness of many of the principles cannot be disregarded as simply to the discretion of the jurisdictions to decide if they wish to proceed with the principle – each principle must be viewed as an integral feature of the document that will no doubt have enduring relevance into the future.

We are concerned that both stakeholders and jurisdictions have been misled on this and offer the following recommendation.

We also see that this approach is a product of the work not having been done with States to gain their support, in order to create a binding document that all states can agree to. This undermines the integrity of the NWA, as well as its entire purpose.

Recommendation 2

NIC recommends that the NWA provides a pathway to close these knowledge gaps and address ambiguity about expectations agreeing to principles prematurely and the future accountability of jurisdictions to these principles. To do this, NIC recommends, either:

- a. Removing the principles from the NWA itself, so they do not form part of the *binding* agreement at this premature stage (i.e. shift to practitioner’s notes); or
- b. Not progressing with the NWA until those knowledge gaps are closed, and investing appropriate resourcing into closing the knowledge gaps, so that appropriate actions can be developed; or
- c. Developing a transition pathway for how these actions will be developed, and incorporated into an NWA in the future once the solutions are developed and agreed upon (with the NWA only signed after such solutions are developed, to ensure transparency on what is being signed up to).

Any chosen pathway must include all key stakeholders, equally, including jurisdictions for the journey.

Function of the NWI vs NWA

It is noted that a change from the NWI to the NWA is the change from the term ‘actions’ in the NWI to ‘principles’ in the NWA. It was explained to stakeholders that this was because



jurisdictions would be needing to develop action-plans in coming years, partly due to (aforementioned) knowledge gaps.

There is also a noticeable shift from definitive actionable steps (with timeframes and agreed mechanisms) to aspirational statements, or just statements of fact.

While it may seem like simple wording changes, it does show a pivot from the NWI being a more definitive roadmap or blueprint to reform, and the NWA being a more theoretical and aspirational document. In many ways, this changes the purpose and function of the NWI/NWA.

Is the purpose of the NWI/NWA clear to all stakeholders and jurisdictions, and does this new NWA still serve that purpose in its current format when it lacks the detail on mechanisms and approaches to solutions that the NWI included.

It also makes it difficult for stakeholders to comment on these principles, without information on how authorities will interpret them, and what specific policy mechanisms will be adopted in response.

It appears that in the rush to develop the NWA, and in the absence of those agreed mechanisms as ways forward, the NWA has become downgraded to serve a much less practical purpose.

Lack of certainty a cause for concern

The NWA is described in consultation documents as being a 'living document', in that it can be changed into the future through adaptive management as new knowledge becomes available. It must be recognized by all that the NWI has provided stability as an underlying policy framework for the past two decades. While the importance of adaptive management is recognized as a principle, this needs to be balanced with the need for stability and certainty. For such a foundational document, stability is required.

At minimum, if the NWA is intended to be a 'living document' there needs to be clear and agreed processes in place for how amendments are made. For example:

- Which parts of the NWA can be amended?
- Does an amendment require all signatories to agree and re-sign? What happens if there is not unanimous support amongst signatories for an amendment?
- Will amendments be subject to public consultation?

Recommendation 3

NIC recommends that an amendment process must be written into the NWA if it is intended to be a living document, this should also include the designed governance and compliance regime and accountability mechanisms

NIC also recommend retaining clause 102 of the NWI, which reads:—*This Agreement may be amended at the request of one of the Parties, subject to the agreement of all the Parties*”

Volume of principles unnecessary and poses risks

There are over 300 principles proposed in the draft NWA.

There are a number of problems with this approach:



- Risks being overly prescriptive on States;
- Risks all parties (jurisdictions and the public) not understanding the extent and nature of changes involved;
- Risks principles slipping through unnoticed, if hidden amongst the volume of principles, which lacks transparency;
- Risks duplication and inconsistency.

While stakeholders did ask for further detail in earlier rounds of consultation, this is not what was meant. The detail stakeholders need to see is what specific policy mechanisms (i.e. actions) are intended to be undertaken – and thus, what are the merits, implications, reasons, costs, processes and impacts (regulatory, financial, etc). It is our understanding that this level of detail is to be developed by state jurisdictions at the action-plan stage – however, that is to occur after the NWA has been signed.

This raises serious procedural concerns, as jurisdictions will be asked to sign the NWA with no knowledge (by both jurisdictions and stakeholders) of the level of detail on what actions will be developed, whether or not they will be considered to align with the principles (and who the arbiter of that will be), and what support (i.e. funding) will or will not be offered by the Commonwealth. It also raises questions regarding the enforceability of the NWA, and governance arrangements to hold jurisdictions to account.

In the absence of this information, how do jurisdictions and stakeholders alike know what they're signing up for?

Recommendation 4

NIC recommends the following drafting suggestions:

- a) Streamlining principles where possible to avoid repetition and duplication, which will remove inconsistencies and complexity.
- b) Provide detail on the actions that are required to be undertaken by jurisdictions in order to meet / align with the NWA principles, or amend the process to enable states to provide this information via their action-plans for review to determine if it will be accepted as compliant, prior to signing up.
- c) Provide information on the assessment process for jurisdictional action-plans – i.e. what assessment process will be used to determine compliance with the NWA, who will be the arbiter, what happens if an action-plan is considered non-compliant and how will plans be amended.

International agreements a call on 'external affairs' powers

It is noted that there is no express legislative power of the Commonwealth to enact a law providing for regulation of water usage' in Australia, so the Water Act relies on a number of constitutional powers under the Australian Constitution.²

One of the most significant powers under the Australian Constitution used to enact the Water Act and reforms such as the Basin Plan has been the "external affairs power" (subsection 51(xxix)), regarding implementation of international agreements, particularly Australia's obligations under the Convention on Biological Diversity and the Ramsar Convention on Wetlands (Ramsar Convention), as well as other treaties listed in section 4 of the Act under the definition of 'relevant international agreement'.

² [CHAPTER 2 – Parliament of Australia \(aph.gov.au\)](http://aph.gov.au)



This is why one of the objects of the Water Act 2007(Cth) is: “to give effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources) and, in particular, to provide for special measures, in accordance with those agreements, to address the threats to the Basin water resources”.

This is consistent with advice provided by the Australian Government Solicitor (AGS) to Parliamentary Inquiries relevant to this matter.³

The use of the “external affairs power” marks a significant shift in the powers of the Commonwealth to manage waters, which is otherwise a reserved power of the States. It is for this reason that the multitude of new references in the draft principles to international agreements and obligations, including specific new instruments, raises concerns of a further power transfer between the Commonwealth and State jurisdictions.

For context, there are 11 mentions of the word “international” agreements / conventions / obligations within the discussion paper.

As specific examples:

1.21) In line with Australia's national and **international agreements**, including the **National Agreement on Closing the Gap** and the **United Nations Sustainability Development Goals**, efforts are made to ensure people living in regional, rural and remote areas are not excluded from access to water services due to high service costs.

3.9) Free, prior, and informed consent principles are best conceptualised as safeguards against actions that may impact or seek to enhance Aboriginal and Torres Strait Islander Peoples' rights and interests, **supported through agreements** such as the **United Nations Declaration on the Rights of Indigenous Peoples**, and other international instruments, national and jurisdictional human rights legislation.

NIC is concerned that through the NWA, the Commonwealth Government intends to pursue more power over waters than it currently has.

For the avoidance of doubt, this is not expressing opinion either-way on those agreements or the sentiment of those principles, rather, drawing to attention the impact of including these elements in the NWA and the reasons why “external affairs” are being relied upon in how these principles are drafted, and what this means for the powers of the Commonwealth over water resources.

Furthermore, it should also be noted that the draft principles reference international agreements that are currently not expressly included in the definition of 'relevant international agreement' in the Water Act 2007.

Specifically, the Water Act presently defines 'relevant international agreement' to specifically include:

- (a) the Ramsar Convention;
- (b) the Biodiversity Convention;
- (c) the Desertification Convention;
- (d) the Bonn Convention;
- (e) CAMBA;
- (f) JAMBA;
- (g) ROKAMBA;
- (h) the Climate Change Convention;
- (i) any other international convention to which Australia is a party and that is:
 - (i) relevant to the use and management of the Basin water resources; and

³ [CHAPTER 2 – Parliament of Australia \(aph.gov.au\)](#)



(ii) prescribed by the regulations for the purposes of this paragraph

Again, this is not expressing opinion either-way on those agreements, rather drawing to attention how the use of “external affairs” in the drafting of the principles has a reason, and those implications must be understood by all.

The implications for the power of the Commonwealth over States must be further detailed, and transparently presented to jurisdictions and stakeholders. Jurisdictions must be fully aware what they are signing up to.

Recommendation 5

NIC recommends the Australian Government clarify their intent and legal implications of the NWA references to ‘international agreements’ via the Australian Government solicitor and this is communicated to all stakeholders prior to the signing of any intergovernmental agreement.

Consultation with states and stakeholders

We had been informed by DCCEEW that state governments would be undertaking their own consultations with their stakeholders (such as state peak bodies) to inform their response to the draft principles.

However, we can confirm that only two jurisdictions are doing this. This means that there are many stakeholders who are not directly captured by consultation processes.

States will be the ones implementing the principles arising from the NWA. States will need to understand the implementation costs, including funding arrangements (or lack thereof) from the Commonwealth. Currently this information is not within the NWA.

It is imperative that jurisdictions are aware of what they are signing up to, and that all stakeholders are involved in the process.

Recommendation 6

NIC recommends that further consultation processes occur on a re-worked draft agreement and this is jurisdictionally implemented.

Detailed response to principles

Water property rights

The principles which describe the characteristics of water entitlements are fundamental (for the aforementioned reasons to establish the entire water management framework) and we support that these actions from the NWI have been largely carried forward as principles in the NWA (with minor amendments).

The NWI contains key descriptions of water entitlements as perpetual, exclusive, able to be traded, collateral for accessing finance, enforceable, etc which are key components of establishing water entitlements as a property right (under the ‘bundle of rights’ approach in property law).



NIC is of the position that this section should be strengthened by explicitly referring to water entitlements as a property right. Water entitlements are widely recognised as a property right anyway, including by banks and financial institutions. This change would provide further clarity, and bring the NWA into line with the expectations and functions of water entitlements in practice.

Recommendation 7

Add at 7.5. *Water access entitlements or licences will also: 'be recognised as a property right, akin to property rights to land'.*

Recommendation 8

Continue the below principles which have been brought forward from the original NWI.

Table 1 Principles relevant to water property rights

| No. | NWA Principle | Status | Mapping to NWI |
|--------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 7.1.1. | Water access entitlements are described as a perpetual or open-ended share of the consumptive pool of a specified water resource, separate from land. | Amended | 28: The consumptive use of water will require a water access entitlement, separate from land, to be described as a perpetual or open-ended share of the consumptive pool of a specified water resource, as determined by the relevant water plan (paragraphs 36 to 40 refer), subject to the provisions at paragraph 33. |
| 7.1.2. | Water access licences are described as fixed term agreements to take a specific quantity of water from a water resource under certain conditions. | New | N/A |
| 7.2. | The allocation of water to a water access entitlement or licence will be made consistent with a water plan or a jurisdiction's water legislation. | Amended | 29: The allocation of water to a water access entitlement will be made consistent with a water plan (paragraph 36 refers). |
| 7.3. | Regulatory approvals enabling water use at a particular site for a particular purpose will be specified separately to the water access entitlement, consistent with the principles set out in schedule D. | Existing | 30 |
| 7.4. | Water access entitlements or licences will: | Amended | 31: New text "or licenses". |
| 7.4.1. | specify the essential characteristics of the water product | Existing | 31)i) |
| 7.4.2. | be exclusive | Existing | 31)ii) |
| 7.4.3. | be able to be traded , given, bequeathed or leased | Existing | 31)iii) |
| 7.4.4. | be able to be subdivided or amalgamated | Existing | 31)iv) |
| 7.4.5. | be able to be used as collateral for accessing finance | Amended | 31)v): be mortgageable (and in this respect have similar status as freehold land when used as collateral for accessing finance); |
| 7.4.6. | be enforceable and enforced | Existing | 31)vi) |
| 7.4.7. | be recorded in publicly accessible, reliable water registers that foster public confidence and state unambiguously who owns the entitlement, and the nature of any encumbrances on it. | Existing | 31)vii) |
| 7.5. | Water access entitlements or licences will also: | Amended | 32: New text "or licenses". |
| 7.5.1. | clearly indicate the responsibilities and obligations of the entitlement holder consistent | Amended | 32)i): New addition of "or a jurisdiction's water legislation". |



| | | | |
|--------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|---------|
| | with the water plan or a jurisdiction's water legislation relevant to the source of the water | | |
| 7.5.2. | only be able to be cancelled at Ministerial and agency discretion where the responsibilities and obligations of the entitlement holder have clearly been breached | Existing | 32)ii) |
| 7.5.3. | be able to be varied, for example to change extraction conditions, where mutually agreed between the government and the entitlement holder, and | Existing | 32)iii) |

It is noted that provisions from the NWI such as “25)j) *enhance the security and commercial certainty of water access entitlements by clearly specifying the statutory nature of those entitlements*” have been omitted.

Risk assignment framework

The NIC does not support the proposed changes to the current NWI risk assignment framework

Specifically:

- The removal of the word 'any' in principle 7.12 compared to the original NWI – this suggests an intention that the risk assignment framework is being weakened to no longer 'have to' apply to reductions in the availability of water for consumptive use. The removal of the word 'any' creates the discretion for the risk assignment framework to not have to apply. This is interpreted to be to enable circumstances where compensation would not have to be paid. This is contrary to the established water property right system, importance of just compensation, highly inequitable, and would undermine confidence (for both agricultural and non-agricultural entitlement holders).
- The addition of the word '*permanent reduction*' compared to the original NWI – the question is what is considered 'permanent'? NIC is concerned that this also could be intended to avoid compensation, as it could be argued that some changes (i.e. if a water sharing plan rule change) are not 'permanent'. Again, this is not in the spirit of the NWI which is to create a system of water property rights within a certain and secure water management framework.

Recommendation 9

Revert to original NWI wording for the risk assignment framework (see changes marked in red below).

Table 2 Changes to the Risk Assignment Framework

| No# | NWA Principle | Status | Mapping to NWI | Commentary |
|--------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 7.12 **** | The following risk assignment framework is intended to apply to future reductions in the availability of water for consumptive use, that are additional to those identified for the purpose of addressing known overallocation and/or overuse. | Amended | The following risk assignment framework is intended to apply to any future reductions in the availability of water for consumptive use, that are additional to those identified for the purpose of addressing known overallocation and/or overuse in accordance | These changes suggest an intention to weaken when the risk assignment framework has to be applied . There is no longer anything in the new NWA which requires that this 'must' be applied. Recommendation: revert to original. |



| | | | | |
|-------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | | with pathways agreed under the provisions in paragraphs 41 to 45 above. | |
| 7.16. | When a government makes a permanent reduction or has not previously provided for a water allocation which becomes less reliable, the government is to bear the risks arising from changes in government policy (for example, new environmental objectives). In such cases, governments may recover this water in accordance with the principles for assessing the most efficient and cost-effective measures for water recovery (as per outcomes under objective 6). | Amended | Governments are to bear the risks of any reduction or less reliable water allocation that is not previously provided for, arising from changes in government policy (for example, new environmental objectives). In such cases, governments may recover this water in accordance with the principles for assessing the most efficient and cost effective measures for water recovery. | The change to “permanent reduction” further weakens the application of the risk assignment framework, as it enables discretion on what is considered permanent. |

A market-mechanism preferred approach to risk assignment framework

NIC is of the firm position that no water entitlements should be eroded via deliberate actions by governments. This disregards the entire water property framework.

The risk assignment framework is important to providing compensation where the water property right is impacted – and thus it should be maintained (as a last resort option).

However, NIC is of the position that market-based mechanisms (i.e. water recovery) is a preferred approach. This is because water purchases respect the water property right and participation is by willing sellers (rather than impacts being socialised).

It is emphasized that NIC does not support further reductions in the consumptive pool, either from an impact to the reliability of entitlements, or a reduction to the size of the consumptive pool itself without mitigation and compensation with affected parties.

However, where Governments decide to implement policy to this effect (i.e. seek to reduce the volume of water available for use via water recovery), the preferred approach is via firstly offsets or efficiency gains, then at least, voluntary water purchases from willing sellers. We oppose socialised reductions across the consumptive pool via deliberate actions by governments that result in reliability impacts (which then triggers the application of the risk assignment framework for compensation).

Background

The reasons for this position are:

- Respects the property right of the water entitlement, in that it is not eroded by government policy without the consent of the entitlement holder;
- Avoids what is ultimately a form of ‘compulsory acquisition’ in the forced removal of part of the water property right via reliability reductions;



- Applies (directly) to willing sellers who voluntarily participate in the purchase (noting the impacts indirectly extend to others in the market and community), rather than a direct impact to all entitlement holders;
- Has greater transparency than reliability impacts.

The context of this position is that governments have been impacting the reliability of water entitlements (through water sharing plan rules changes, changes to allocation policies, or new modelling approaches), which has been poorly accounted and not compensated (through non-transparent methods of bypassing compensation provisions, and not recognized by the wider public).

Research from the NSW Irrigators' Council in 2022 showed that NSW Murray general-security licences were allocated, on average, 81% of their general-security licence volume before the turn of the century, but now licence reliability is only around 57%. Similarly, Namoi general-security reliability has declined from 77% to around 39%. While this does include climatic forces (including severe periods of low in-flows, but also two exceptionally wet periods in the data timeframe), this is also the product of government decision-making, eroding reliability.

Erosion of the reliability of entitlements disrespects the water property right which has been an integral feature of the NWI (and earlier) and lacks transparency and due process.

As outlined previously, water property rights are the critical element that allow for resource and environmental management, legal clarity and security, economic and social value and adaptation to change. These must be respected fully to be effective in their role in managing water.

Again, it is reiterated that NIC does not support water recovery, and this position is intended as a preferred position in the event where water recovery is being pursued by governments.

Recommendation 10

Insert in Objective 7: *The parties agree that no water entitlements will be eroded or compulsorily acquired as a result of implementation of this Agreement, or other purposes.*

[Note this language comes from the *Intergovernmental Agreement on Implementing Water Reform in the Murray Darling Basin*, June 2013]⁴

Recommendation 11

Insert in Objective 7: *The parties recognize that erosion of a water entitlement from changes to government policy is a form of compulsory acquisition of property and subject to just terms.*

[Note this language comes from the Australian Constitution, Section 51 (xxxi)].

Recommendation 12

Insert blue text at 7.12:

Assigning risks for changes to water availability

7.12 The following risk assignment framework is intended to apply to future reductions in the availability of water for consumptive use, which are additional to those identified for the purpose of addressing known overallocation and/or overuse.

7.12.1 *Where governments intend to reduce the availability of water for consumptive use for any purpose, reductions to the reliability of entitlements are to be avoided, with*

⁴ [iga-on-implementing-water-reform-mbd-9-august-2019.pdf \(federation.gov.au\)](https://www.federation.gov.au/intergovernmental-agreements/iga-on-implementing-water-reform-mbd-9-august-2019.pdf)



preference to water purchases from willing sellers in respect of the water property right.

Water users bearing the first 3% reduction is used as a loophole and needs reconsideration

The current NWI (and proposed NWA) assigns the first 3% of an impact under the risk assignment framework to water users. This means that water users can have their water entitlements eroded incrementally year-by-year without receiving adequate compensation provided the threshold of 3% is not reached.

This has occurred in many jurisdictions as a way for governments to bypass compensation provisions. This is not in the spirit by which the risk assignment was designed and is a perverse outcome from the original NWI and undermines the value of a water property right, and industry certainty and security.

It is understood that banks and financial institutions were involved in selecting 3% as this figure, as this was a risk that the banks could manage when the water entitlement was being used to access finance. Two-decades later, with the value of water having significantly increased and the volume of the consumptive pool decreased, it is likely that this risk threshold from banks would be different.

For these reasons, in addition to Recommendation 10- 12, we recommend further work is undertaken to determine the appropriate risk thresholds and ensure that the assignment framework remains fit for purpose.

Recommendation 13

7.15.1 Change "of between 3% and 6%" to just 'up to 6%' to remove this loophole that avoids compensation to water users below 3%.

Recommendation 14

Engage with banks and financial institutions to determine if the 3% remains a fit-for-purpose risk threshold.

Clarification required on 7.14

Water users have understood principles in the original NWI that licence holders are to bear the risks of less reliable water from changes in climate and drought conditions as relating to direct changes in water allocations from lower water availability. It has been supported in-principle on that basis.

However, we are concerned that these provisions are being incorrectly applied, in order to avoid paying compensation under the other provisions of the risk assignment framework. For example, it has been argued by governments that changes to government policy due to climate change or new information to inform decision making relating to climate change should not be compensated because of this provision (rather than those respective provisions in the risk assignment framework). This must be clarified to again close this loophole which avoids compensation.

Recommendation 15



Insert clarification to 7.14 (see blue text):

7.14 Water access entitlement or licence holders are to bear the risks of any reduction or less reliable water allocation, under their water access entitlements, arising from reductions to the consumptive pool as a result of:

7.14.1 seasonal or long-term changes in climate

7.14.2 periodic natural events such as bushfires and drought.

7.14.3 *Note: For the avoidance of doubt, this section is intended to apply to natural and direct impacts from changes to water availability (such as reduced water allocations), and does not extend to policy decisions in response to these events, which are intended to be captured by 7.16.*

Climate change

NIC is of the position that all water users will need to adjust to 'new climate futures', not just consumptive water users. There will be an increasing need for food and fibre production under dry climate change scenarios too, so consumptive users can't carry all the risk.

Climate change is already factored into water management via water allocation processes, whereby the water allocated to consumptive users varies based on how much water is available.

The effects of these current systems are demonstrated in that water allocations were low or zero for extended periods of time leading into and during recent drought periods, and increased again afterwards as water availability increased.

NIC is concerned that the principles in the NWA could set expectations that new or additional measures need to be undertaken, beyond the existing mechanisms. This could impact the reliability of water access, and also undermine business certainty and confidence if there are major changes to the water allocation process.

You can't adjust to climate change only by rebalancing water shares – there is too much focus on this as the solution.

The use of language such as 'precautionary approach' is open for broad interpretation (detailed below).

It also needs to be noted that climate change scenarios include both wetter and drier scenarios – the NWA has a focus on only drier scenarios, and must also consider wetter scenarios. This is particularly important given many areas of Australia are forecast to be wetter (including the Northern Murray-Darling Basin) under many climate change scenarios. For example, if we apply the same logic as is being used for dry scenarios, does this mean under wet scenarios consumptive users should receive more water?

Table 3 Principle relating to climate change with NIC commentary

| No# | Principle | Mapping to NWI | Change from Original NWI | Commentary |
|-----|-----------|----------------|--------------------------|------------|
|-----|-----------|----------------|--------------------------|------------|



| | | | | |
|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|-----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 6.5 | A precautionary approach is taken to allocation for resources with high uncertainty. Adaptive planning cycles will incorporate revision of water plans and planning instruments, and flexible water allocations that are informed by seasonal and inter-annual water availability as future climate conditions occur. | New | N/A | <p>For context, the precautionary principle is a legal term in environmental law to consider uncertainty and to ensure that potential, though not well-defined or understood, hazards are taken into account in decision making.</p> <p>There is considerable scope for interpretation of this principle: * a pre-cautionary approach towards whom? And about what hazards? * what threshold is considered to be a high-degree of uncertainty? * what does a pre-cautionary approach look like in practice? *How does this change existing processes for how allocations are made? * What would be the impact on reliability? * If there are forecast for wetter conditions, how is that considered?</p> <p>The language of "as future climate conditions occur" is a better outcome to manage uncertainty than just adopting those future scenarios now.</p> |
|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|-----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Recommendation 16

Rephrase the recommendations relating to climate change to recognize how water allocations to consumptive users already consider climate variability and climate change.

E.g. Insert: "States are to continue to allocate water based on water availability, as this incorporates changes to water availability from climate variability on an ongoing basis, and will thus manage for climate change on an ongoing basis".

Recommendation 17

Insert a principle that recognizes that all water users will need to adjust to 'new climate futures'.

First-Nations

NIC is respectful of First-Nations peoples and culture, and consider water access to First Nations peoples (along with all Australians) as an important issue. The below comments relate to our utmost disappointment in the Federal Government attempting to address this issue without proper process, nor effectively developed solutions, or consultation processes that provide sufficient detail for stakeholders to be informed and engaged in this discussion.

The Australian irrigation industry has proud partnerships with First Nations peoples in our communities, and calls on the Australian Government to do better to get this right. We are concerned that the approach taken is divisive by lack of clarity regarding the intent and implementation of these new draft principles and objectives.

We strongly recommend the Australian Government revisit these principles and specifically the new Objective 3, working together with a diversity of First Nations stakeholders to capture



a diversity of views, alongside all Australian peoples (including our irrigation sector) to reach solutions.

The principles in this section go outside the scope of water management, and require much larger constitutional and institutional reform to address properly and transparently, with proper process that respects Australia's democratic values and engages all Australian peoples. These principles are trying to solve a fundamental constitutional issue via a water management intergovernmental agreement.

NIC is concerned that it would be impossible, and improper, for states to be expected to action these principles without the Federal Government establishing these overarching frameworks – such as constitutional change – and undertaking the due process for that to occur (i.e. with a referendum).

Irrespective of opinion, this approach lacks the transparency to engage all Australian peoples in an important matter for Australia more broadly, by burying very foundational questions of land and water sovereignty, veto powers for decision-making and changes to legal frameworks – within 302 principles on an intergovernmental agreement without drawing attention to such important components or engaging stakeholders out of the national platform.

During this period of Government there has been considerable debate and political interest in reform for First-Nations peoples, including with the voice referendum. It must be noted that there are aspects of that unsuccessful referendum contained in these principles. Irrespective of opinion, it is inappropriate for a government to weave these principles in when in direct contradiction to a failed referendum. While an important matter, Government must instead do the work of developing agreed solutions and working together with all Australian people to progress this important issue in a collaborative and effective way.

In a democratic society, all people must be considered equally, and our natural resources managed accordingly for all Australians.

It is noted that the Racial Discrimination Act 1975 says: *“It is unlawful for a person to do any act involving a distinction, exclusion, restriction or **preference** based on race, colour, descent or national or ethnic origin which has the purpose or effect of **nullifying** or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.”*

First-Nations peoples absolutely should be at the table for water management, and have valuable knowledge to contribute. However, preference and priority based on racial grounds is highly problematic, and should not be tolerated in any direction.

While it is important to recognise cultural rights, this must sit within the water management and planning system that was developed through the initial NWI. NIC is concerned that the proposed principles will erode the rights of other users, or create exceptions to the existing framework. The NWA provides a lack of detail on how the principles will work within the existing framework, not against it.

It must be recognised that this is a complex matter, and one faced by many former colonial countries globally. NIC is concerned that some approaches have been taken from other countries without recognising Australia has very different constitutional and parliamentary settings at present. Significant further work is required.

The language from international agreements is noted, raising concerns regarding the Federal Government drawing on the external affairs powers (as detailed above).



We support approaches that work together to improve outcomes for all in our communities and allowing processes that address the gaps of the first NWI, to improve engagement and inclusivity of water planning arrangements. We support processes that enable this without creating uncertainty for the frameworks that it established which we feel many of the draft principles risk.

A snapshot of specific concerns is provided below, and further detailed.

Table 4 Principles relating to First Nations with NIC commentary

| No# | Principle | Mapping to NWI | Change from Original NWI | Commentary |
|------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|--------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 3.16 | Self-determination and Indigenous Cultural and Intellectual Property are protected and defined in water planning and management processes by ensuring that meaningful consultation with Aboriginal and Torres Strait Islander Peoples occurs early and often and is underpinned by the principles of free, prior and informed consent . | New | N/A | <p>Meaningful consultation with Aboriginal and Torres Strait Islander Peoples is absolutely supported, alongside meaningful consultation with all parties impacted by decision-making.</p> <p>However, there are concerns regarding the word ‘consent’, as this is read as having veto power over decision-making. No one stakeholder should have veto power. All stakeholders need to be considered equally.</p> <p>It is also noted that this term comes from international agreements (see earlier section regarding ‘external affairs’).</p> <p>Practical implementation challenges have been noted globally around this concept, including: who is the community, how is their consent determined, and what occurs when these are disputed?</p> <p>Concerns have also been raised regarding the intention of including IP provisions here. States need to be aware of the financial implications if they need to purchase IP, particularly if a requirement that this knowledge must be used. A market for cultural IP is a matter beyond the scope of water management.</p> |
| 3.3 | Waters in all their forms are acknowledged to be living entities , which are interconnected with lands and move freely between water landscapes, including upstream, downstream, and between surface and groundwater. | New | N/A | <p>It is noted that recognising a river as a 'living entity' is generally associated with a change to the legal framework, as it can be recognised as 'legal personhood' (therefore capable of bearing rights and duties).</p> <p>This is not just a 'symbolic' change, but a very significant change to the legal framework, and sufficient details have not been provided of the rights, duties, powers or governance arrangements – particularly how it will (or will not) integrate with existing frameworks.</p> <p>NIC is concerned it adds more complexity, moves away from democratic governance of natural resources, and cannot be implemented without overarching reform (i.e. constitutional and parliamentary reform).</p> |
| 4.14 | Aboriginal and Torres Strait Islander Peoples’ knowledge and traditional knowledge systems are brought together with other information and considered an equal part of the evidence base in decision making. | New | N/A | <p>The knowledge that informs decision-making must not discriminate or preference based on racial grounds, rather the merits of that knowledge, its integrity (supported by multiple lines of evidence), and its relevance.</p> <p>Traditional knowledge should be considered and valued as part of the knowledge base, alongside other forms of knowledge. The weighting of</p> |



| | | | | |
|------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | | | <p>knowledge for each decision varies depending on the decision at hand, the integrity of information, and necessary information inputs.</p> <p>Suggest “valued” or “considered” rather than “equal”. This applies to all knowledge, not just traditional knowledge.</p> |
| 1.25 | <p>Consideration is given to making unallocated water available for Aboriginal and Torres Strait Islander Peoples, which contributes to their access to, management and/or ownership of water for Cultural, spiritual, social, economic and environmental values, in line with the National Agreement on Closing the Gap.</p> | New | N/A | <p>This is very case-specific (needs to be consistent with 1.24) as is best a matter for states to determine.</p> <p>Utilizing unallocated water can have impacts to other water users, via reductions in water reliability. This concern is not in relation to how the entitlement is used (i.e. for First Nations), but would apply to utilizing any currently non-utilized water.</p> <p>Consideration needs to be given to aligning with the existing planning and entitlement frameworks in the jurisdiction. All water access must operate within these same management frameworks, and special treatment to any user must be avoided.</p> <p>There are significant policy questions, such as whether this water would be accounted for within or outside of extraction limits.</p> <p>In the MDB, PEW is protected under Basin Plan provisions, which would make this difficult to implement without change to that legislation.</p> |

Recommendation 18

If the Federal Government wishes to pursue these approaches, the necessary constitutional and parliamentary changes must occur with proper process that respects all Australian people.

Working together

NIC highlights that we see the socio-economic circumstances facing many of our First-Nations in our communities, and fully support getting better socio-economic outcomes.

We also highlight that agriculture is an economic base in many of these communities which brings the services (like healthcare and education) to regional and remote areas. History shows that irrigation communities impacted by reforms have lost services, which directly flows on all in the community, including Indigenous people.

NIC recommends including principles valuing irrigated agriculture for providing services and socio-economic outcomes in communities to all. We are concerned that principles in the draft NWA that seek to limit irrigated agriculture have not taken into account these impacts to our community, both Indigenous and non-Indigenous.

NIC also highlights the partnerships the industry are currently undertaking alongside First-Nations – see Cultural Billabong Restoration Project.⁵

Value of irrigated agriculture: snapshot from Restoring our Rivers Parliamentary Inquiry

⁵ 2023-01-27-Cultural-Billabong-Restoration-Project-Project-Summary-Package.pdf (nswic.org.au)



"A further permanent reduction in water is likely to permanently constrain any economic and social recovery of Bourke and entrench and significantly worsen existing high levels of social disadvantage, particularly among its large indigenous population"⁶.

- Bourke Shire Council

"I know a lot of local councils and farming groups talk about the socio-economic impacts of buybacks, but I think it's time decision-makers realise that this hits our people too in these communities. We are part of these communities too. I'd say, it probably hits us the hardest.

If you look at many of our communities in the Northern Basin, agriculture is the economic backbone, which brings jobs (on farms and in town) and essential services for all who live within the community. Please don't forget our First-Nations people who live in these communities too. Towns like Bourke have 32% of the population Indigenous, Walget 29% and Moree 22%, to name a few. These towns have already experienced buybacks, and are vulnerable to more under this Bill.

What we've seen already is that when our communities lose their economic backbone, it hits us all. The loss of access to services is a big worry. The doctors and nurses leave town meaning our peoples can't access basic healthcare, not least within a reasonable distance to home. Our towns lose teachers, or have schools close or merge, making it even harder to keep our kids in schools, off the streets and motivated. The local councils lose revenue, and with it we lose services and facilities such as public swimming pools. I have seen from experience that when our towns suffer, we see increases in drug and alcohol abuse, domestic violence, crime and our health suffers."⁷

- Feli McHughes (BCC Member)

Free, prior and informed consent

It is noted that the term Free, Prior and Informed Consent (FPIC) is derived from international instruments, such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). NIC has raised concerns with the reliance on international instruments (see above) in this draft NWA, as a mechanism for the Federal Government to gain greater powers over water management by the States.

A recurring theme through the draft NWA is a failure to recognise the complexities and challenges of bringing together Australian law with Indigenous customary law. These two legal systems do not seamlessly integrate – rather there are considerable points of direct overlap / conflict – such as existing water property right systems (a key outcome of the original NWI), land tenure arrangements, and decision-making processes. There is no information provided on how the Australian Government intends to manage these conflicts, or which legal systems will prevail where inconsistent. This is a major oversight. This is also no simple task, and if this is the intention of the Federal Government, requires significantly greater consideration of the complexities.

One example of this is the challenges of adopting FPIC in practice. The implementation of FPIC has faced many problems globally, particularly attempting to integrate FPIC where there are well-established legal frameworks and property rights systems, governed through democratic institutions. Specifically, the notion of 'consent' can be in conflict to democratic values where all people are considered equally in decision-making, irrespective of racial or ethnic background, and represented by elected officials in a democratic government.

⁶ [Submissions – Parliament of Australia \(aph.gov.au\)](#)

⁷ [Submissions – Parliament of Australia \(aph.gov.au\)](#)



To be clear, NIC absolutely supports meaningful consultation with Aboriginal and Torres Strait Islander Peoples, alongside meaningful consultation with all parties impacted by decision-making. All stakeholders should be at the table. However, no one stakeholder should have the power of 'consent' as a veto-power. In Australia, the power for decision-making is vested in democratically elected governments, with their decision informed by consultation with a diverse range of all stakeholders - not one stakeholder group, who holds the veto power to subvert this process.

We are concerned that FPIC will be relied upon in future to justify or block changes to water management, including government planning processes. How will governments manage this conflict, where 'consent' may not be provided, but current property right and legislative frameworks developed by democratically elected governments do enable it to occur?

While this may be well intended to enable proper consultation with Indigenous people, the current drafting of this principle creates an implicit right to a veto power by one stakeholder.

Waters as a Living Entity

NIC cannot support this approach being progressed at the present time.

It is noted that recognising water as a 'living entity' is more than just a symbolic recognition, as it has been associated with a change to the legal framework where applied globally, as it becomes recognized as 'legal personhood' (therefore capable of bearing rights and duties).

This potentially means a very significant change to the legal framework. The details of those intended rights, duties, powers and governance structures have not been detailed.

There is a significant question on how this approach will integrate (or not) within existing legal and planning frameworks, particularly in highly developed water sources.

NIC is concerned that this approach adds another layer of complexity to an already complex system.

While this approach has been adopted (to varying degrees of success) in other countries such as New Zealand – it must be recognized that those countries have very different constitutional and parliamentary structures which can enable these types of approaches to be integrated. It is difficult to see how this approach could work effectively in practice in Australia at this point in time without those overarching structures, and the due process required for those changes to occur.

Where it has been applied in Australia (the Yarra), the Birrarung Council is described as the "independent voice" of the Yarra with an advisory status. Commentary says it "*enshrine[s] a voice for traditional owners in the river's management and protection – a voice that has been unheard for too long*"⁸. This is strikingly familiar to the unsuccessful 'the voice' referendum by this Government – irrespective of opinion for or against that referendum, the Australian Government not respecting a democratic outcome of a referendum and continuing to pursue the outcome via less transparent means should be concerning to all Australians.

There are also large questions on the governance arrangements for how this 'living entity' would be represented (i.e. who determines its viewpoint)? In a democratic society, water must be managed for all peoples, and that is currently done through parliament and elected representatives. How this concept integrates within existing democratic structures requires consideration.

⁸ [New law finally gives voice to the Yarra River's traditional owners \(theconversation.com\)](https://www.theconversation.com/news/500000)



In the case of the Yarra, the Birrarung Council members are selected by the environment minister for four-year terms⁹. This gives more weighting to those stakeholders, over all other stakeholders. This goes against the spirit of water planning to date to achieve triple bottom lines outcomes, and to be inclusive of all parties in the decision making.

NIC is also concerned that this approach is being used to subvert democratic parliamentary process to fast-track changes to water management to limit water availability for agriculture. Even within academia, supporters of this concept have highlighted "*the disturbing trend of recognising rivers as legal persons and/or living entities whilst also denying rivers the right to flow*"¹⁰. This makes us concerned regarding the next step, and the real intentions of this concept to be another vehicle to reduce water use.

This is another example of a concept which has not been sufficiently explored to understand how it will (or won't) work in practice. At best, the Federal Government would need to provide the detail of how and where this would be applied, and a roadmap for implementation that included the overarching constitutional and parliamentary reform with proper process. Questions include:

- As a living entity, what rights, powers and duties does that entity have?
- Who is entitled to represent the entity? How are they elected/selected?
- How does that representation exist alongside democratic institutions elected to manage natural resources for all Australian people?
- How does this change the existing water entitlement and planning framework?
- How do Australia's constitutional and institutional frameworks need to be reformed to enable this concept to function, and what are the proper processes for that to occur?
- Does signing of this IGA automatically make all waters within that jurisdiction a living entity, or is an Act of the State Parliament required?
- Is this concept suitable to all waters in all jurisdictions, or should it be applied on a river-by-river basis?
- What are the funding arrangements for the institutions required to govern the living entity?

For the avoidance of doubt, NIC respects that waters for First Nations have ancestral and cultural value, and respects the integration of those values within currently established water management frameworks.

Recommendation 19

If the living entity approach is to remain, suggested rewording:
'Waters in all their forms are acknowledged to be living entities [under some Indigenous laws in Australia](#)'.

Pricing frameworks

- Pricing frameworks require a rethink in order to consider how public interest items are to be funded.
- Since 'user pays' or 'impactor pays' principles were developed (at a time where rivers were generally operated for consumptive use), the landscape of water management has changed to account for a diverse range of outcomes and to meet public interest

⁹ [New law finally gives voice to the Yarra River's traditional owners \(theconversation.com\)](#)

¹⁰ [Rivers as living beings: rights in law, but no rights to water?: Griffith Law Review: Vol 29 , No 4 - Get Access \(tandfonline.com\)](#)



needs (such as environmental management, water quality monitoring, natural disaster management, climate change adaptation, etc).

- Existing water pricing systems such as user-pays are becoming increasingly problematic as the 'user' becomes harder to define, and cost-drivers are increasingly relating to not just users – i.e. public interest cost drivers.
- It is noted that the costs of managing water are increasing over time, in part, as higher expectations are placed on management standards and community expectations change.
- This increasing management cost is combined with a general decline in the consumptive pool of water in many areas (i.e. decline in the user-base to fund costs) – a double-edge sword effect. This means costs are becoming higher and higher on the remaining users, which will eventually reach a point of becoming prohibitive. This is already occurring in some jurisdictions, such as with fish passageways which are an important environmental and public interest item, but costs tend to fall on users (which has stalled progress to date).
- This is not a sustainable pricing framework and will only be exacerbated under climate change scenarios that signal declining water availability, as users' ability-to-pay will again decline, and costs will again increase.
- Further consideration must be given to how water management costs will be met, as users cannot be expected to cover public interest costs. Consideration of enabling a broader, fit for purpose pricing arrangement should be established to allow jurisdictions to better manage and tailor their pricing systems.

New principles

Water for irrigation

A large omission from this document is irrigated agriculture.

Water for irrigated agriculture is important to Australia's food and fibre production (and thus food security, agricultural sovereignty, and availability and affordability of produce), our economy (in terms of GDP, employment and economic relations) as well as service access in rural and remote areas (such as education, healthcare, etc).

This value must be stated in the NWA, to recognise water for agriculture as a valuable, legitimate and important user of water for all Australians.

There is a concerning trend in this document of a move away from 'triple bottom line' outcomes which must instead be retained.

Recommendation 20

Insert a principle to recognize:

"Water for irrigated agriculture is an important use of water, for food and fibre production, economic development and prosperity, social outcomes including service provisions in regional and remote areas, and national security."

Insert a principle to signal intent of the document to:

"This document is intended to provide a stable and fit-for-purpose water management framework to support Australia's agricultural sector to be sustainable and productive into the future, with certainty and confidence in water access arrangements".

Insert a principle to signal intent of the document to:

"Irrigated agriculture as a key water user needs to be considered in changes to water management alongside other stakeholders."



Optimization of water and environmental outcomes

Optimisation

A large focus of water reform over the previous two decades has been on 'rebalancing' or addressing overallocation/overuse. With significant volumes of water now available adaptively and directly as held environmental water, the next era of water management must seek to instead focus on the optimization of that water within the established water shares. This may take the form of:

- Identifying management strategies for the use of environmental water, to optimize outcomes (such as timing of releases, coordination of releases, and joint-release strategies);
- Complementary measures to sit alongside environmental watering;
- Integrated catchment management through land and water partnerships.

Scientists have highlighted that:

*"While recovering water will provide good outcomes, as a sole intervention, it is not enough to deliver the desired environmental benefits... .. recovering water is not enough to deliver all the anticipated environmental benefits. In a highly modified system, equal attention should be given to addressing other threats that water delivery alone cannot ameliorate."*¹¹

These authors identify 10 examples of complementary measures, such as:

- Integrated aquatic pest control (such as carp control);
- Addressing cold water pollution;
- Enhancing fish passage;
- Habitat restoration;
- Re-establishing threatened species;
- Integrating complementary measures into Basin-scale flow delivery strategies

While of value to every river system, this should be a primary focus for developed river systems that have undergone transitions to achieve sustainable diversion limits, such as the Murray-Darling Basin. For example:

*"The Murray-Darling Basin Plan and earlier reforms have reduced diversions to an annual average 28% of inflows, within acceptable impacts in global frameworks for the ecological limits of hydrologic alteration. However, non-water components, known as complementary measures, have received little attention, despite being considered equally important to deliver all anticipated environmental benefits."*¹²

This has also been emphasized by the MDBA in their 'Early Insights Paper' as part of the Basin Plan Review, with a section on "Moving beyond 'just add water'". The Paper says:

"Providing water for the environment has been essential to achieving Basin management outcomes, but 'just adding water' is not sufficient. Achieving Basin Plan environmental outcomes depends not only on the quantity of water for the environment, but on other legislation, rules and practices. These inform how:

- river operators run the river
- environmental water holders manage their portfolio

¹¹ Lee J. Baumgartner, P Gell, J D Thiem, C Finlayson, N Ning (2019) "Ten complementary measures to assist with environmental watering programs in the Murray–Darling river system, Australia": <https://onlinelibrary.wiley.com/doi/abs/10.1002/rra.3438>

¹² [Take it as a compliment: integrating complementary measures as the next chapter of Murray–Darling Basin water management: Water International: Vol 49 , No 3-4 - Get Access \(tandfonline.com\)](#)



- *land managers maintain and improve riparian areas*".¹³

Part of taking this more holistic and integrated approach is the importance of working together with landholders, water users and communities through collaborative partnerships. For example:

*"A contemporary paradigm of best-practice based on participation and co-benefit outcomes not only offers significant further opportunity for environmental outcomes, but also to work with communities to begin rebuilding trust, ownership and acceptability of water management in the Basin."*¹⁴

There are a number of great success stories already, including partnerships between irrigators, IIOs, private landholders, First-Nations, environmental water holders, and others.¹⁵ These are the types of success stories that must be built from, as ground-up exemplars of what works, and adopted into policy frameworks such as the NWI/NWA.

Key to furthering these, however, is that adequate resourcing must be provided.

Recommendation 21

Insert a principle that:

The parties agree that complementary measures will be adopted alongside environmental watering to optimize outcomes.

The parties agree to support partnership-based approaches to achieve co-benefit outcomes with willing collaboration from water users and IIOs.

Conclusion

The recommendations contained in this submission are intended to improve the NWA to be a fit-for-purpose document into the future. The NWA is not fit for purpose in current form.

¹³ [Early Insights Paper publication – Basin Plan Review | Murray–Darling Basin Authority \(mdba.gov.au\)](http://mdba.gov.au)

¹⁴ [Contemporising best practice water management: lessons from the Murray-Darling Basin on participatory water management in a mosaiced landscape: Australasian Journal of Water Resources: Vol 27 , No 2 - Get Access \(tandfonline.com\)](http://tandfonline.com)

¹⁵ For example, see: [Working-together.pdf \(nswic.org.au\)](http://nswic.org.au)



Appendix 1: List of recommendations

Recommendation 1

NIC recommends that re-drafting of objectives and principles is undertaken to enhance the critical importance of water property rights, their existence, security and persistence as being foundational to any new NWA as they were for the NWI.

Recommendation 2

NIC recommends that the NWA provides a pathway to close these knowledge gaps and address ambiguity about expectations agreeing to principles prematurely and the future accountability of jurisdictions to these principles. To do this, NIC recommends, either:

- d. Removing the principles from the NWA itself, so they do not form part of the *binding* agreement at this premature stage (i.e. shift to practitioner's notes); or
- e. Not progressing with the NWA until those knowledge gaps are closed, and investing appropriate resourcing into closing the knowledge gaps, so that appropriate actions can be developed; or
- f. Developing a transition pathway for how these actions will be developed, and incorporated into an NWA in the future once the solutions are developed and agreed upon (with the NWA only signed after such solutions are developed, to ensure transparency on what is being signed up to).

Any chosen pathway must include all key stakeholders, equally, including jurisdictions for the journey.

Recommendation 3

NIC recommends that an amendment process must be written into the NWA if it is intended to be a living document, this should also include the designed governance and compliance regime and accountability mechanisms

NIC also recommend retaining clause 102 of the NWI, which reads: *“This Agreement may be amended at the request of one of the Parties, subject to the agreement of all the Parties”*

Recommendation 4

NIC recommends the following drafting suggestions:

- d) Streamlining principles where possible to avoid repetition and duplication, which will remove inconsistencies and complexity.
- e) Provide detail on the actions that are required to be undertaken by jurisdictions in order to meet / align with the NWA principles, or amend the process to enable states to provide this information via their action-plans for review to determine if it will be accepted as compliant, prior to signing up.

Provide information on the assessment process for jurisdictional action-plans – i.e. what assessment process will be used to determine compliance with the NWA, who will be the arbiter, what happens if an action-plan is considered non-compliant and how will plans be amended.

Recommendation 5

NIC recommends the Australian Government clarify their intent and legal implications of the NWA references to 'international agreements' via the Australian Government solicitor and this is communicated to all stakeholders prior to the signing of any intergovernmental agreement.

Recommendation 6

NIC recommends that further consultation processes occur on a re-worked draft agreement and this is jurisdictionally implemented.

Recommendation 7



Add at 7.5. *Water access entitlements or licences will also: 'be recognised as a property right, akin to property rights to land'.*

Recommendation 8

Continue the below principles which have been brought forward from the original NWI.

Recommendation 9

Revert to original NWI wording for the risk assignment framework (see changes marked in red below).

Recommendation 10

Insert in Objective 7: *The parties agree that no water entitlements will be eroded or compulsorily acquired as a result of implementation of this Agreement, or other purposes.*

[Note this language comes from the *Intergovernmental Agreement on Implementing Water Reform in the Murray Darling Basin*, June 2013]¹⁶

Recommendation 11

Insert in Objective 7: *The parties recognize that erosion of a water entitlement from changes to government policy is a form of compulsory acquisition of property and subject to just terms.*

[Note this language comes from the Australian Constitution, Section 51 (xxxi)].

Recommendation 12

Insert blue text at 7.12:

Assigning risks for changes to water availability

7.13 The following risk assignment framework is intended to apply to future reductions in the availability of water for consumptive use, which are additional to those identified for the purpose of addressing known overallocation and/or overuse.

7.13.1 *Where governments intend to reduce the availability of water for consumptive use for any purpose, reductions to the reliability of entitlements are to be avoided, with preference to water purchases from willing sellers in respect of the water property right.*

Recommendation 13

7.15.1 Change "of between 3% and 6%" to '*up to 6%*' to remove this loophole that avoids compensation to water users below 3%.

Recommendation 14

Engage with banks and financial institutions to determine if the 3% remains a fit-for-purpose risk threshold.

Recommendation 15

Insert clarification to 7.14 (see blue text):

7.15 *Water access entitlement or licence holders are to bear the risks of any reduction or less reliable water allocation, under their water access entitlements, arising from reductions to the consumptive pool as a result of:*

7.15.1 *seasonal or long-term changes in climate*

7.15.2 *periodic natural events such as bushfires and drought.*

7.15.3 *Note: For the avoidance of doubt, this section is intended to apply to natural and direct impacts from changes to water availability (such as reduced water allocations), and does not extend to policy decisions in response to these events, which are intended to be captured by 7.16.*

¹⁶ [iga-on-implementing-water-reform-mbd-9-august-2019.pdf \(federation.gov.au\)](#)



Recommendation 16

Rephrase the recommendations relating to climate change to recognize how water allocations to consumptive users already consider climate variability and climate change.

E.g. Insert: "States are to continue to allocate water based on water availability, as this incorporates changes to water availability from climate variability on an ongoing basis, and will thus manage for climate change on an ongoing basis".

Recommendation 17

Insert a principle that recognizes that all water users will need to adjust to 'new climate futures'.

Recommendation 18

If the Federal Government wishes to pursue these approaches, the necessary constitutional and parliamentary changes must occur with proper process that respects all Australian people.

Recommendation 19

If the living entity approach is to remain, suggested rewording:

'Waters in all their forms are acknowledged to be living entities [under some Indigenous laws in Australia](#)'.

Recommendation 20

Insert a principle to recognize:

"Water for irrigated agriculture is an important use of water, for food and fibre production, economic development and prosperity, social outcomes including service provisions in regional and remote areas, and national security."

Insert a principle to signal intent of the document to:

"This document is intended to provide a stable and fit-for-purpose water management framework to support Australia's agricultural sector to be sustainable and productive into the future, with certainty and confidence in water access arrangements".

Insert a principle to signal intent of the document to:

"Irrigated agriculture as a key water user needs to be considered in changes to water management alongside other stakeholders."

Recommendation 21

Insert a principle that:

The parties agree that complementary measures will be adopted alongside environmental watering to optimize outcomes.

The parties agree to support partnership-based approaches to achieve co-benefit outcomes with willing collaboration from water users and IIOs.

