



**CENTRAL  
LAND  
COUNCIL**

**Central Land Council submission**

to the Department of Climate Change, Energy, the  
Environment and Water

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**Help shape a new National Water Agreement  
Consultation on the draft principles of a National  
Water Agreement**

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**18 September 2024**

## Introduction

The Central Land Council (**CLC**) welcomes the opportunity to provide comment to Department of Climate Change Environment and Water (**DCCEEW**) on the third phase of consults to inform the National Water Agreement. CLC welcomes and supports the intent of the national water reform process, it is overdue and critical to refresh an ambitious agenda for improved outcomes in water governance. CLC acknowledges the efforts DCCEEW has made to address the weaknesses of the previous NWI and supports the renewed focus on remote drinking water services, First Nations water rights and interests and climate change.

However, **CLC is deeply concerned that the overall nature of the agreement is a significant step backwards.** In sum, this is because the proposed new agreement is highly discretionary, vague on jurisdictional responsibilities and lacks clear governance and accountability mechanisms to compel reform and ensure compliance. Overall, we are concerned the proposed agreement will not be an effective enough tool for improving NT water planning or for our advocacy without stronger levers to push for much needed policy and legislative reforms.

The Northern Territory (**NT**) Government continues to fall behind other jurisdictions in water planning and governance. In CLC's view the NT Government often prioritises industry interests at the cost of Aboriginal people's rights and interests, equitable development outcomes and environmental health. Water governance has been characterized by a lack of transparency and disregard of evidence-based decision making. Weak regulatory systems have facilitated the approval of high-impact developments and associated licences prior to meaningful engagement with traditional owners and adequate consideration of evidence regarding ecological and cultural impacts, and broader socio-economic interests beyond those of industry stakeholders.

As per our comments to DCCEEW during the first phase of consultations and our joint-submission with the Northern Land Council (**NLC**),<sup>1</sup> the NT is failing to comply with the 2004 National Water Initiative (**NWI**) on multiple fundamental grounds. According to the most recently documented by the Productivity Commission's Inquiry report, it is now backsliding in key areas.<sup>2</sup>

A weaker agreement than the previous NWI will not drive jurisdictions like the NT - that have not yet met their NWI commitments 20 years on - to do so in the future. As acknowledged by the Productivity Commission, a weaker agreement risks undoing the progress jurisdictions have made. CLC has called upon the previous NWI on many occasions to advocate for improved water planning based on best practice. We need a strong national agreement more than ever that not only clearly outlines what is best practice, but compels reform and ensures compliance. In this context, we seek the governance of a new agreement to be vastly improved. Please read this submission in conjunction with our previous submission attached at **Appendix A**.

CLC's concerns with the new agreement as indicated by DCCEEWs' 'Consultation on the draft principles of a National Water Agreement: Discussion Paper (**Discussion Paper**) are that:

1. **The structure of the agreement lacks binding commitments to specific actions and is highly discretionary.** 'Principles' need only be 'considered' by jurisdictions. Even the most important principles can be easily disregarded and Parties will still be able to claim they are implementing the agreement if they have 'considered' them.

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<sup>1</sup> Appendix A: Northern Land Council and Central Land Council, *Joint submission to the Department of Climate Change, Energy, the Environment and Water: Future national water agreement*, 10 May 2024.

<sup>2</sup> Productivity Commission, *National Water Reform 2024: Inquiry report*, Report no 105 28 May 2024

2. **The content requires strengthening to ensure there are clear obligations and guidance for jurisdictions and levers to advocate for improved decision-making and water reform in line with First Nations water justice.** There are critical elements for statutory planning missing in the proposed objectives, and many of the principles, while important, do not set clear obligations for jurisdictional action plans and such are easier to disregard.
3. **The governance framework and process will not compel reform and ensure compliance as it lacks strong accountability measures,** including incentives and disincentives. The governance framework leaves too much discretion to jurisdictions without an expert independent agency to hold parties to account; and is not backed by appropriate resourcing and guidelines for meaningful jurisdictional engagement or transparent reporting and monitoring.

CLC fears that a crucial opportunity for genuine renewal is being missed, and that the Productivity Commission’s warning from the Inquiry Report will come to fruition: there is a ‘risk that, for consensus to be reached between the parties, the new agreement may represent a weaker commitment to some of the fundamentals of water policy than the NWI. This could have negative implications for longer-term water security because an erosion of the authorising environment for implementation could lead to backsliding’.<sup>3</sup>

We acknowledge the difficulties in finding consensus among jurisdictions, however there is little point improving the content of a new agreement if it will not compel action to improve water management. It is imperative that the Commonwealth Government embed jurisdictional accountability for water governance a renewed agreement. To this end the new agreement requires much stronger governance arrangements – with clear actions and responsibility for jurisdictions, mechanisms and transparent public reporting to hold parties to account for their compliance.

## Recommendations

1. The new agreement must *at a minimum deliver at least the same level* of accountability as the 2004 National Water Initiative (NWI).
2. Elevate and strengthen critical principles under each objective (e.g. 1.1.) as non-negotiable actions to which jurisdictions agree to implement and can be held to account.
3. Strengthen all remaining principles that Parties will consider so they read as substantive actions in line with best practice and require a detailed explanation in action plans in cases where Parties have not implemented them.
4. clarify stronger protections for drinking water in objective 1
5. Amend objective one to read ‘... to sustain [*and promote*] our natural environments, culture, economic prosperity and communities’.
6. Review all principles with the Committee on Aboriginal Water Interests to ensure
  - a. they set clear obligations and/or benchmarks for jurisdictions, and levers to advocate for improvements to water governance outlining best practice water management and in line with First Nations water justice

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<sup>3</sup> Productivity Commission Inquiry Report 2024, 6

- b. strengthened language for shared-decision making with First Nations people and self-determination
7. Strengthen and elevate the fundamental principles of water management in the 2004 NWI for 'statutory water plans' and 'statutory provision for environmental outcomes and public benefit outcomes and improved environmental management practices' in the new agreement.
  8. Strengthen the requirements in the outcomes and principles to protect cultural values, as identified by the relevant First Nations peoples with cultural authority to do so. Require each jurisdictional action plan to clearly set out the mechanisms to monitor and protect cultural values, based on co-design with Aboriginal people and organisations.
  9. Establish an external independent agency to:
    - a. Accredit jurisdictional implementation plans,
    - b. regularly monitor and transparently report on the progress of all jurisdictions in achieving the specified actions, and
    - c. fund independent investigations (undertaken by itself, or by funding other organisations, such as Aboriginal organisations) to drive water policy reform
  10. Establish funding to support jurisdictions to meaningfully consult with jurisdictions.
  11. Require jurisdictions to provide a detailed engagement plan to DCCEEW, developed in consultation with jurisdictional Aboriginal peaks. Funding should be released to jurisdictions only when an external agency has confirmed it aligns with best practice.
  12. Develop clear guidelines that jurisdictions explicitly agree to follow in developing their own engagement plans to ensure best practice engagement. This cannot be left to the discretion of jurisdictions. The engagement guidelines must be developed through consultation with CAWI and First Nations organisations.
  13. Develop an additional Schedule with clear guidelines on the reporting requirements for each jurisdiction including content and regularity. Implementation of this Schedule should be explicitly agreed to by Parties in the agreement.

## 1. There are no binding commitments to specific substantive actions

While CLC acknowledges the intent of a flexible agreement so that jurisdictions can ensure fit-for-purpose reform, we respectfully submit that the proposed agreement has taken this too far. Flexibility must not be used as a reason to avoid politically difficult reform. The previous NWI was not strong enough to ensure compliance however it did have objectives, outcomes and *actions* that all parties *agreed* to. As per the Productivity Commission's recommendations, this structure should be maintained and *built upon* in the new agreement, not weakened.

The new structure of the agreement as proposed by the Discussion Paper is a setback because:

1. The high level 'objectives' of the proposed agreement are the only commitments that Parties will agree to 'work towards'. Agreement to 'work towards' is a vanishingly low bar – whereby progress will be measured not by whether jurisdictions have implemented the objective but attempted to implement it.
2. The 'Outcomes' are described as 'the *acts* that *need to occur* to achieve the objectives,'<sup>4</sup> however this is misleading and veils the lack of substantive actions, as
  - a. The outcomes in the Outcomes Framework are - as per the definition of an outcome - not *actions* but the *results of actions*.
  - b. The framing 'need to occur' is passive – it does not clarify how, when, or by whom. There is no clarity about how this will be written into the agreement or what it will mean for jurisdictional responsibilities to meet these outcomes.
3. **The principles are completely discretionary and non-binding.** They now need only be 'considered' by Parties to the agreement. A Party can simply choose to disregard any of the principles and as long as they identify they have done so (without requiring any explanation as to why)<sup>5</sup> they have 'considered' the principle and therefore can claim to be implementing the agreement. This means that, while all the principles are important, CLC submit that **even the most important principles can be easily disregarded** and Parties will still be able to claim they are implementing the agreement if they have 'considered' them.

In sum, the proposed agreement is missing any binding or specific actions that Parties agree to implement.

**Recommendation 2:** Elevate and strengthen critical principles under each objective (e.g. 1.1.) as non-negotiable actions to which jurisdictions agree to implement and can be held to account.

**Recommendation 3:** Strengthen all remaining principles that Parties will consider so they read as substantive actions in line with best practice and require a detailed explanation in action plans in cases where Parties have not implemented them.

## 2. The content of the new agreement requires strengthening, with clearer levers to advocate for improvements to water reform in line with First Nations water interests

Given Commonwealth Government has limited powers over jurisdictions, the primary compliance mechanism of the NWI is the soft diplomacy of 'naming and shaming' to encourage reform. CLC use the previous NWI where we can to advocate for reform in line with First Nations water rights and

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<sup>4</sup> DCCEEW, Consultation on the draft principles of a National Water Agreement: [Discussion Paper](#), August 2024, p2

<sup>5</sup> DCCEEW Discussion Paper Aug 2024, p2

interests as defined by our constituents. Weakening the agreement limits its critical role of providing levers to progress reform.

To illustrate this point we provide the below examples but this is non-exhaustive list of recommendations to strengthen the content of the objectives and principles. In conjunction with our submission at **Appendix A**, please see [CLC's submission to the Productivity Commission](#) in February 2024 for further detail on the reform priorities of our constituents.

### Strengthening objectives

#### a. For statutory water planning

The previous NWI had specific objectives for 'transparent, statutory water planning',<sup>6</sup> and 'statutory provision for environmental outcomes and public benefit outcomes and improved environmental management practices'.<sup>7</sup>

The Productivity Commissions Inquiry Report identifies these objectives as core NWI principles that 'benefit communities, economies and the environment in every jurisdiction'.<sup>8</sup> In CLC's view these are not controversial nor are they too prescriptive. They provide a 'scaffold' for embedding best practice water management in legislation and should be explicitly agreed to in the new plan.

CLC has drawn on these specific objectives in the past to highlight backsliding in NT against best practice, and advocate for reform. Statutory protections in the NT are woefully inadequate, as illustrated by the recent Supreme Court decision in relation to the Singleton water licence that water allocation plans are not binding on decision-makers when making water licencing decisions.<sup>9</sup> This outcome directly contradicts the 2004 NWI, but it is much harder to argue that it contradicts the new proposed agreement. This fundamental principle of the previous NWI is instead buried in a vague outcome 6.A, which calls for 'statutory water plans, or ... appropriate water management regulation or policy'<sup>10</sup> – leaving this fundamental tenet entirely to the discretion of jurisdictions and critically weakening our lever to advocate for statutory planning.

#### b. For Objective 1

*Objective 1: The safe and secure supply of sufficient water quality and quantity to sustain our natural environments, Culture, economic prosperity and communities.*

As per our comments to DCEWW in the first round of consults with stakeholders:

- a. Drinking water cannot be balanced with the other needs – it must be prioritized as critical to human health.

**Recommendation 4:** Clarify stronger protections for drinking water in objective 1.

- b. The objective to 'sustain' is not ambitious enough nor will it push for the reform required. For many of our constituents, the environment is already damaged by mismanagement, and current water planning threatens to further damage country. Peoples' cultural values have

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<sup>6</sup> National Water Initiative 2004 Objective ii.

<sup>7</sup> Objective iii.

<sup>8</sup> Productivity Commission 2024 Inquiry Report, p.54

<sup>9</sup> *Mpowerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as Delegate of the Minister for Environment & Anor and Arid Lands Environment Centre Inc v Minister for Environment & Anor* [2024] NTSC 4 [59].

<sup>10</sup> Outcomes Framework, Aug 2024, p. 12

already been impacted and cultural practices curtailed. We know this is also the case for First Nations peoples in the Murray Darling Basin. This is the same for drinking water – sustaining current service levels and coverage is not enough for many of our remote communities and homelands. We seek for this reform agenda to facilitate healing country and changing the status quo rather than maintaining current trends.

**Recommendation 5:** Amend objective one to read ‘... to sustain [*and promote*] our natural environments, culture, economic prosperity and communities’.

### Strengthening the principles

Some principles read as general statements or more outcomes rather than substantive actions based on best practice management. As such it is not clear what obligations or expectations they set for jurisdictional action plans and are easier to disregard. For example:

- a. **many of the principles under Objective 3, while fundamentally important, are high-level outcome statements without clear obligations or actions**, such as:
  - a. 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’. While this is deeply symbolically important, it is not clear what this means in practice and what is expected of jurisdictions to demonstrate they have adhered to this principle - which makes it even easier to disregard.
  - b. 3.6 Is similarly fundamental, but provides no guidance on what it would mean in practice: ‘Gendered access to, management and/or ownership of water is deeply rooted in matrilineal and patrilineal landscapes. This encompasses ways in which Aboriginal and Torres Strait Islander Peoples understand and interact with lands and waters through the lens of gendered roles and reciprocal relationships.’
- b. 1.1.2. ‘determining service levels in collaboration with communities, including Aboriginal and Torres Strait Islander Peoples’ would be stronger if ‘collaboration’ was replaced with ‘in partnership’ or ‘through shared-decision-making’.

Useful principles for guiding jurisdictions and for advocacy purposes are those that set clear obligations and benchmarks, timeframes, require consultation or shared-decision making with First Nations in specific matters and throughout water planning, and/or clarify best practice water management in particular areas. Some non-exhaustive examples from the new agreement that set stronger obligations and/or are more useful advocacy tools include:

- a. 1.1: ‘Drinking water supply, including in regional and remote communities, is secure and maintained at a quality that meets the Australian Drinking Water Guidelines.’
- b. 1.5. ‘Water service provider investment and operation decisions are evidence-based, transparent and take account of the full suite of economic, environmental, social and Cultural costs and benefits.’
- c. 1.23. ‘States and territories report publicly on cost recovery for water planning and management as part of annual reporting requirements, including on...’
- d. 1.31 ‘As far as possible, the roles of water resource management, standard setting and regulatory enforcement are separated institutionally from service provision.’
- e. 1.34 ‘The states and territories will report independently on pricing and service quality for all urban water service providers. This reporting will be done each year and made public.’

**Recommendation 6:** Review all principles with the Committee on Aboriginal Water Interests to ensure

- a. they set clear obligations and/or benchmarks for jurisdictions, and levers to advocate for improvements to water governance outlining best practice water management and in line with First Nations water justice
- b. strengthened language for shared-decision making with First Nations people and self-determination

**Recommendation 7:** Strengthen and elevate the fundamental principles of water management in the 2004 NWI for ‘statutory water plans’ and ‘statutory provision for environmental outcomes and public benefit outcomes and improved environmental management practices’ in the new agreement.

**Recommendation 8:** Strengthen the requirements in the outcomes and principles to protect cultural values, as identified by the relevant First Nations peoples with cultural authority to do so. Require each jurisdictional action plan to clearly set out the mechanisms to monitor and protect cultural values, based on co-design with Aboriginal people and organisations.

### 3. The overarching governance framework and process will not compel reform and ensure compliance as it lacks strong accountability measures

CLC has consistently raised throughout the consultation process the concern that jurisdictional compliance will be the critical challenge for a new water agreement. As such we recommended the need for a clear compliance model and strong governance mechanisms to hold Parties to account.

#### **There must be a dedicated, independent agency to hold all parties to account**

As per CLC’s (and NLC’s) recommendation to DCCEEW in the second phase of consults<sup>11</sup> and DCCEEW’s summary of findings through consultation so far,<sup>12</sup> a common theme from public submissions was the need for an external independent agency to review implementation plans, monitor compliance and administer funding for ongoing analysis of water policy (as below). We also note that reintroducing the National Water Commission was an explicit commitment of the Labor Government at the 2022 election.

The proposed governance framework does not include such an agency or present a satisfactory proposal in this regard, as:

1. While the Productivity Commission currently assesses jurisdictional progress for the 2004 NWI, it is not clarified that this will continue for the new agreement and so **it remains unclear which, if any, independent body is proposed to undertake this critical role.**
2. Furthermore, the scope of work undertaken by the Productivity Commission does not cover all the matters CLC and (according to the Productivity Commission’s Inquiry Report and DCCEEW’s summary of findings) many participants in consultations so far have recommended to embed accountability, including:
  - a. the capacity to accredit jurisdictional action plans

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<sup>11</sup> Appendix A: NLC and CLC Submission to DCCEEW May 2024

<sup>12</sup> DCCEEW, [What We Heard report for phase 1 and 2 consultation on a new National Water agreement](#), Aug 2024

- b. fund independent investigations (undertaken by itself, or by funding other organisations, such as Aboriginal organisations) to drive water policy reform

We posit that one, dedicated external agency to undertake all the above functions at (1) and (2) could act as a one-stop-shop with specific expertise and resources to support the intent of the new agreement.

3. The National Water Committee and the Ministerial Council are not independent of jurisdictional governments. While they of course are essential to the governance structure, they cannot provide independent advice. According to the Outcomes Framework, 5 yearly action plans will be approved by the jurisdictional Water Minister and noted by the Ministerial Council. This leaves far too much discretion to jurisdictions. CLC submit these action plans should be accredited by an independent expert body which can confirm they align with best practice as per the new agreement.

**Recommendation 9:** CLC reiterates its recommendation to establish an external independent agency to:

- a. Accredit jurisdictional implementation plans,
- b. regularly monitor and transparently report on the progress of all jurisdictions in achieving the specified actions, and
- c. fund independent investigations (undertaken by itself, or by funding other organisations, such as Aboriginal organisations) to drive water policy reform

### **There must be clear guidelines and funding for jurisdictional engagement to develop action plans**

We understand DCCEEW intends for each jurisdiction to conduct public engagement to develop jurisdictional action plans within 2 years of the agreement being signed. However, there is no mention of funding or resourcing to support jurisdictions with this consultation. From CLC's experience, this will mean in jurisdictions such as the NT that consultation is severely curtailed due to budget constraints, nor are there any incentives to consult meaningfully.

**Recommendation 10:** Establish funding to support jurisdictions to meaningfully consult with jurisdictions.

**Recommendation 11:** Require jurisdictions to provide a detailed engagement plan to DCCEEW, developed in consultation with jurisdictional Aboriginal peaks. Funding should be released to jurisdictions only when an external agency has confirmed it aligns with best practice.

**Recommendation 12:** Develop clear guidelines that jurisdictions explicitly agree to follow in developing their own engagement plans to ensure best practice engagement. This cannot be left to the discretion of jurisdictions. The engagement guidelines must be developed through consultation with CAWI and First Nations organisations.

### **There must be requirements and guidelines to ensure robust, transparent and consistent jurisdictional reporting**

In the February 2024 Consultation paper for the targeted stakeholder engagement, there was a specific objective (7) for '**Robust and transparent monitoring, reporting and evaluation of progress towards achieving water reform and management objectives.**'<sup>13</sup> At the first stage of consultations roundtable with NTG and DCCEEW on 5 February 2024, and at the First Nations only stakeholder

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<sup>13</sup> DCCEEW, [Sustainable Water Use for Australia's Future - A new national agreement](#), February 2024, p. 9.

roundtable with DCCEEW on 8 February 2024, the CLC (and other organisations) gave feedback that we strongly supported the inclusion of this objective, agreeing that transparent and consistent reporting is critical to measure compliance and ensure accountability.

We are deeply concerned that this objective has been taken out without being replaced by any specific requirements/Schedule to ensure jurisdictions undertake transparent reporting against overall compliance with the new agreement.

**Recommendation 13:** Develop an additional Schedule with clear guidelines on the reporting requirements for each jurisdiction including content and regularity. Implementation of this Schedule should be explicitly agreed to by Parties in the agreement.