

Kaia Hodge
Executive Director of Regional Water Strategies
Department of Planning, Industry and Environment – Water
Locked Bag 5022
PARRAMATTA NSW 2124

By email regionalwater.strategies@dpi.e.nsw.gov.au

[REDACTED]

Dear Ms Hodge,

NTSCORP's comments on the Namoi Regional Water Strategy

Thank you for providing NTSCORP Limited (**NTSCORP**) with the opportunity to comment on the Namoi Regional Water Strategy being developed by the Department of Planning, Industry & Environment (**DPIE**).

1. NTSCORP has statutory responsibilities under the Native Title Act 1993 (Cth) (**NTA**) to protect the native title rights and interests of Traditional Owners in NSW (**NSW**) and the Australian Capital Territory (**ACT**).
2. NTSCORP is funded under Section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Peoples who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA.
3. In summary, the functions and powers of NTSCORP under sections 203B to 203BK (inclusive) are:
 - Facilitation and assistance, including representation in native title matters;
 - Dispute resolution;
 - Notification;
 - Agreement-making;
 - Internal review;
 - Certification; and
 - Other functions.
4. The comments provided in this letter are focused on the impacts of the Regional Water Strategies on native title claimants and holders in NSW. Specific comments in relation to native title rights and interests of the Gomeroi People in relation the Namoi RWS mentioned above are provided at **Section III** of this letter; the comments are otherwise intended to apply to all Regional Water Strategies being prepared by DPIE generally.

This submission is made by NTSCORP and is not intended to be made on behalf of the Gomeroi People; however, it is informed by our experience working with Aboriginal Traditional Owners (**Traditional Owners**) of lands and waters within NSW and the ACT. NTSCORP have spoken directly with members of the Gomeroi People Water Committee and their comments are included at Section VI of this letter.

5. The impact and interests of the broader Aboriginal and First Nations communities across NSW is beyond the scope of this correspondence.

I. **NTSCORP's involvement in the Aboriginal Water Coalition**

6. NTSCORP was contacted by the Department of Industry – Water (as it then was) in September 2019 to participate in an informal advisory group (**Advisory Group**) to provide recommendations to the Department on how to consult with Aboriginal People in NSW in relation to the development of Regional Water Strategies.
7. At this time, the Greater Hunter Regional Water Strategy had already been finalised, having been published in November 2018. Unfortunately, in terms of recognising Aboriginal People and Traditional Owners, it contains only a short section on 'the history of Indigenous communities' in the area, acknowledges the connection of Aboriginal People to water in a general sense and the only references to native title are in the description of basic landholder rights under the *Water Management Act 2000* (NSW). We understand that the Department acknowledges that consultation with Aboriginal People and Traditional Owners for the Greater Hunter Regional Water Strategy was not adequate.
8. Since September 2019, NTSCORP's participation in the Advisory Group, which is now referred to as the Aboriginal Water Coalition (**AWC**) has included representatives attending meetings of the AWC, assisting the Department in sending notices for consultation meetings using our contact lists and providing recommendations for locations for consultation meetings. The AWC is comprised of NTSCORP, NSWALC, NBAN and MLDRIN.
9. During this time, the scope of the AWC's work has evolved from providing input in relation to consultations with Aboriginal People and Traditional Owners, to providing substantive comments on the Regional Water Strategies themselves and also providing input on the development of the draft State Water Strategy and proposed Aboriginal Water Policy. NTSCORP welcomes these developments and the opportunity to provide input on these policies, but notes that we are not adequately resourced to participate fully in these processes.

II. Native Title and Water rights

10. Native title is an important recognition of the rights and interests of Traditional Owners. The NTA defines 'native title rights and interests' as being communal, group or individual rights and interests of Aboriginal Peoples or Torres Strait Islanders in relation to land or waters.
11. When the Federal Court of Australia makes a native title determination, the rights and interests that are, and always have been, held by the Traditional Owners in accordance with traditional law and custom are recognised at law.
12. Native title rights and interests are defined in accordance with the laws and customs by which they are held. The laws and customs of a native title holding group may provide that a native title holder has the right to take resources, including water, for any purpose, including to trade, share, exchange or to take for a commercial purpose. Native title rights and interests claimed in NSW, which directly concern water, have included:
 - the right to take and use water;
 - the right to have access to and use the natural water resources of the application area;
 - the right to fish in the application area; and
 - the right to share and exchange resources derived from the land and waters within the application area.
13. Other native title rights and interests claimed in NSW, which may be exercised on or in relation to water and waterways, include:
 - the right to hunt on the application area;
 - the right to participate in cultural and spiritual activities on the application area;
 - the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;
 - the right to conduct ceremonies and rituals on the application area; and
 - the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area.
14. The native title rights exercisable on or in relation to land may also be affected by the Regional Water Strategies where the land is physically or culturally connected with the waters or where an option is included that would involve inundation of land by water, potentially resulting in impacts to sites of significance, food security, water security and

the general wellbeing of Aboriginal Peoples living in affected areas.

III. Recognition of native title in water policy/legislation

15. The recognition of native title rights and interests in water requires, as a starting point, a legislative and policy setting which ensures that native title holders are able to *exercise* their rights and interests. As such, Commonwealth, State and Territory legislation and policy should provide for, amongst other things, access to water and waterways, cultural flows, and water allocations to be made to native title holders.
16. It also requires that rivers and water resources are managed in a way that ensures they are not depleted, which of course impacts on the exercise of native title. This requires that water from rivers is not overallocated, that monitoring and compliance regimes are adequately resourced, and that responsible Departments and Agencies undertake monitoring, conduct investigations and use enforcement mechanisms available to them in order to deter non-compliance.
17. Section 211 of the NTA provides that where a licence, permit etc. is required for a certain activity, native title holders are not required to obtain the licence, permit etc. for hunting, fishing, gathering or cultural and spiritual activities, where they do so for the purpose of satisfying their personal, domestic or non-commercial communal needs. A statement to this effect should be included in the Namoi RWS.
18. NTSCORP commends the inclusion in the Namoi RWS of a statement in relation to section 55 of the *Water Management Act (NSW) 2000* which provides:¹
 - (1) *A native title holder is entitled, without the need for an access licence, water supply work approval or water use approval, to take and use water in the exercise of native title rights.*
 - ...
 - (3) *The maximum amount of water that can be taken or used by a native title holder in any one year for domestic and traditional purposes is the amount prescribed by the regulations.*
19. We also encourage the NSW Government and its agencies to explore options wherever possible to hand back land and waters to native title holders and to consider establishing (and adequately resourcing) programs that allow native title holders to actively participate in the management of rivers and water resources, such as programs for river rangers.

¹ Namoi RWS, p. 117.

20. It should be acknowledged that the nature of native title rights and interests in water and therefore the manner in which Commonwealth, State and Territory policy and legislation should recognise, protect and accommodate these native title rights and interests is a developing area of the law. We expect further decisions and commentary from the Courts on these issues in the coming years, but also expect that Commonwealth, State and Territory Governments give serious consideration as to how these issues should be addressed in policy and legislative reform processes.

III.1. Acknowledgement of the Gomeroi People in the Namoi Regional Water Strategy

21. The draft Namoi RWS acknowledges the Gomeroi/Kamilaroi/Gamilaroi/Gamilaraay Nations as holding a 'significant connection to the lands upon which the Namoi Regional Water Strategy falls'.

22. The draft Namoi RWS acknowledges the Gomeroi People Native Title Application (NSD 37 of 2019), but does not outline the specific rights claimed by Gomeroi People.

23. NTSCORP suggests that the Namoi RWS be amended to include a section which sets out details of the Gomeroi Native Title Application, including the specific native title rights claimed by the Gomeroi People. These rights are listed below.

III.1.1. Native title rights claimed by the Gomeroi People

24. The native title rights claimed by the Gomeroi People in their native title application which are exercisable on or in relation to waters are as follows:

- the right to access the area;
- the right to use and enjoy the area;
- the right to move about the area;
- the right to fish in the area;
- the right to have access to and use the natural water resources of the application area;
- the right to have access to share and exchange resources derived from the land and waters;
- the right to participate in cultural and spiritual activities on the area;
- the right to gather natural resources of the area;
- the right to manage natural resources;
- the right to hunt in the area;
- the right to maintain and protect places of importance under traditional laws, customs and practices on the area;
- the right to participate in cultural and spiritual activities on the area;

- the right to conduct ceremonies and rituals on the area;
- the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area;
- the right to speak for and make non-exclusive decisions about the area in accordance with traditional laws and customs;
- the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs; and
- the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.

25. Native title rights and interests claimed by the Gomeroi People that are exercisable on or in relation to land, and that often relate to water or rely upon a water source for their exercise, and/or that will be affected where the land is connected culturally or physically to waters, include but are not limited to:

- the right to possession, occupation, use and enjoyments of the lands and waters where exclusive native title can be recognised;
- the right to camp in the area;
- the right to erect shelters and other structures;
- the right to live in the area; and
- the right to hold meetings on the area.

26. NTSCORP notes that the Namoi RWS provides that:

“Aboriginal people can apply for Aboriginal cultural water access licences. If granted, this licence can provide up to 10 ML/year for drinking, food preparation, washing and watering domestic gardens, as well as for Aboriginal cultural uses.”

27. Consistent with our feedback on the Border Rivers and South Coast Regional Water Strategies, NTSCORP considers that the Namoi RWS should acknowledge that any licence assessment framework needs to be culturally appropriate and accessible.

28. Further, as outlined above in **paragraph [17]**, the Namoi RWS should include a statement to the effect that under Section 211 of the NTA, where a licence, permit etc. is required for a certain activity, native title holders are not required to obtain the licence, permit etc. for hunting, fishing, gathering or cultural and spiritual activities, where they do so for the purpose of satisfying their personal, domestic or non-commercial communal needs.

IV. Inadequate recognition in water policy/legislation

29. NTSCORP continues to be dissatisfied with policies and legislation implemented by the Commonwealth and State Government for their inadequacy in effectively recognising and protecting native title rights and interests in land and waters.
30. The mismanagement at a Commonwealth and State level, including through the overallocation of water from rivers and a lack of effective monitoring and compliance, has meant that in recent years, some rivers in NSW have either not flowed, run dry, and/or have had poor water quality for extended periods, which has also resulted in a number of fish kill incidents across the State.
31. The various and complex factors contributing to these events are beyond the scope of these comments, but in our view, the policy and legislative setting which allowed this to occur constituted – and continues to constitute – an impairment and in some cases suppression of the native title rights and interests held by Traditional Owners along those rivers.
32. In July 2020, the NSW State Government entered the National Agreement on Closing the Gap (**Closing the Gap Agreement**). Clause 62 of the Closing the Gap Agreement states:

When Government Parties change, design or deliver policies and programs that impact on the outcomes of this Agreement, they will do so in line with this Agreement.

33. Outcome 15 of the Closing the Gap Agreement is:

Aboriginal and Torres Strait Islander people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters.

34. Under Outcome 15, Targets 15a and 15b of the Closing the Gap Agreement are:

By 2030, a 15 per cent increase in Australia's landmass subject to Aboriginal and Torres Strait Islander people's legal rights or interests.

By 2030, a 15 per cent increase in areas covered by Aboriginal and Torres Strait Islander people's legal rights or interests in the sea.

35. Through the Closing the Gap Agreement, the NSW Government has committed to designing its policies to achieve the outcome of a 15 per cent increase in Aboriginal and Torres Strait Islander people's legal interests in Australia's land and waters.
36. The obligations which the NSW Government took on in the Closing the Gap Agreement directly impact the content and preparation of NSW water policy. At present in NSW,

native title holders are generally unable to obtain allocations on the water market, as it is prohibitively expensive. It is NTSCORP's position that recognition of native title rights and interests requires that the NSW Government put in place measures, policies and funding to enable native title holders to obtain allocations of water within their determined or claimed areas.

V. Consultations with Aboriginal People and Traditional Owners

37. The NSW Government has an obligation to enable Aboriginal and Torres Strait Islander people to maintain a distinctive culture. This can be achieved through the proper engagement with Traditional Owners in decision making and planning processes that concern their traditional rights to land and waters.

38. We acknowledge the consultation that has been undertaken thus far by Governments with Aboriginal People and support the ongoing involvement of the AWC with water policy in NSW. However, to date, the method of consultation in relation to the Regional Water Strategies has not been adequate to allow for proper consultation with Aboriginal People and, in particular, native title holders and Prescribed Bodies Corporate (**PBCs**).

39. NTSCORP echoes the sentiments expressed by the AWC members in various meetings with DPIE that consultation with Aboriginal People must be comprehensive and culturally appropriate. Aboriginal People, including native title holders, must be involved in the development and implementation of all water policy, legislation, schemes, and grants. Aboriginal People have been the Traditional Owners of country for over 60,000 years, and with the benefit of the wealth of environmental and cultural knowledge amassed over this time, have sustainably managed land and water resources throughout history. It is crucial that Aboriginal People are included and represented in all decision-making processes relating to water policy in NSW.

40. Furthermore, the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**), which Australia accepted on 3 April 2009, declares that:

*Article 32(2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent prior** to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, **water** or other resources. (emphasis added)*

41. We acknowledge that intervening factors such as the COVID-19 pandemic and the catastrophic flooding across NSW in March 2021 of course impacts DPIE's ability to undertake consultation meetings, and NTSCORP recognises the need to postpone any

consultation meetings which presents a risk to the health and wellbeing of Aboriginal communities.

42. Having said this, the short timeframes adopted by the Department for the development of the Regional Water Strategies have prevented NTSCORP from facilitating consultations with native title holders in a culturally appropriate way.
43. As NTSCORP has noted in previous submissions and communications with DPIE, the Department's administrative processes related to the notification of consultations has hampered meaningful engagement by Aboriginal People. We note in this regard that the correspondence sent by DPIE to native title holders and those who may hold native title (**the intended recipients**) for the Far North Coast Regional Water Strategy did not reach the intended recipients, due to an error with the postage stamp as coordinated by DPIE. NTSCORP has previously discussed this issue with DPIE, but further wish to highlight the subsequent impacts on the capacity of the intended recipients to participate in consultation on the RWS.
44. We note also the failure by DPIE to notify Aboriginal communities by post of the consultation sessions in the Namoi and North Coast regions that were rescheduled due to the March 2021 floods. This failure resulted in no Gomeroi native title holders attending the consultation sessions for the Namoi region. We note further that as of our most recent communication with DPIE, the Department has no intention of holding another round of consultations in the Namoi region. In NTSCORP's view, this exclusion of Aboriginal People and Traditional Owners from the design process of policies that impact them is manifestly unacceptable.
45. We encourage the Department to take a more flexible approach with these timeframes and to not finalise any policies until Aboriginal People and Traditional Owners confirm that they have been adequately consulted and their comments addressed, in line with the UNDRIP requirement for free, prior and informed consent of Aboriginal People to measures that may affect them.

V.1. Complexity of law and policy during consultation

46. As has been noted in previous submissions, we consider that a significant barrier to Aboriginal People and Traditional Owners participating in these processes is the complexity of water policy and law. The Namoi RWS is 196 pages long. The extent and technical complexity of these materials is prohibitive and limits meaningful engagement by Aboriginal People.
47. We support the development of educational resources, such as fact sheets, notices and videos, tailored to the needs of Aboriginal People and Traditional Owners, to

ensure the purpose and content of any policy Aboriginal People are being consulted in relation to is understood to enable effective participation in these processes.

48. In our experience, consultation meetings with Government Departments and Agencies on water can be ineffective because Government representatives can speak only to very specific policies or aspects of policies, which does not enable a wide-ranging discussion on water and on the issues that affect Aboriginal People and Traditional Owners. We commend efforts by DPIE to amalgamate consultation sessions for different programs – Regional Water Strategies, Coastal Harvesting Rights Review, Floodplain Harvesting, etc. – in order to combat consultation fatigue in communities. Such amalgamated sessions must have clear delineations between the programs being run by DPIE, but be able to speak to how the intersections may impact communities in a clear and simple way.
49. NTSCORP continues to recommend that for consultation meetings, Government representatives are equipped to answer questions across a range of water policies and legislation and are able to contextualise the policy being discussed, to enable these conversations to be more productive.

VI. Gomeri Water Committee

50. Members of the Gomeri Native Title claim group have established a Gomeri Water Committee to liaise directly with DPIE Water and other water agencies on behalf of the Gomeri People in relation to the development of water policy and strategy relevant to Gomeri Country and the Gomeri People. NTSCORP supports the establishment of this Committee and the Gomeri People's right to be involved in water planning processes.
51. NTSCORP understands that DPIE Water have met directly with the Gomeri Water Committee to discuss the Namoi RWS and intend to meet again in early June 2021. We have been advised by representatives at DPIE Water that should the Committee have any further comments or input in relation to the draft strategy beyond Sunday 16 May 2021 (the final date publicised for submissions to be lodged), these comments will be taken into consideration by DPIE, particularly given that the consultation and engagement process has been fragmented to date. As such, the comments below are not intended to be comprehensive or reflect the final position of the Gomeri Water Committee.
52. The Gomeri Water Committee have requested that the following comments from them be noted:

- *The Gomeri Water Committee request that in regards to the Namoi RWS*

and other water strategies that affect Gomeroi Country, the Gomeroi Water Committee is included as a point of contact and reference group. We request that the Namoi RWS be discussed at length at the next meeting with DPIE scheduled for 2 – 3 June 2021 in Mungindi.

53. Consultation Process

- *The Gomeroi Water Committee note that consultation processes to date have not demonstrated cultural capability on behalf of the Department. The RWS Aboriginal consultation and engagement process has been rushed and remains inadequate culturally. Sending an email with a link to websites that sets out the relevant dates for information sessions and feedback does not constitute adequate consultation. It is not clear who is undertaking the Aboriginal engagement process on Gomeroi Country.*
- *The draft Namoi RWS includes an acknowledgement as follows*

The Namoi Region holds areas of great spiritual, cultural and economic importance to Aboriginal people and the NSW Government recognises the connection of the water to the people of these nations. We recognise the intrinsic connection of Traditional Owners to Country and acknowledge their contribution to the management of the Namoi Regional Water Strategy area landscape and natural resources.

NSW Department of Planning, Industry and Environment understands the need for consultation and inclusion of Traditional Owner knowledge, values and uses in water quality planning to ensure we are working towards equality in objectives and outcome

however, genuine ‘consultation and inclusion’ has not occurred to date.

- *Time and resources must be made available for independent nations to conduct their own consultations on Country. Substantial funding of peak body Aboriginal organisations to run consultation sessions on Country is not only culturally inappropriate and divisive, but also a form of lateral violence. This approach silences the voices of individual Aboriginal Nations whilst those with a seat at the table decide who is represented and who is not.*
- *There is concern with DPIE Water’s inability to articulate their position to the broader Aboriginal demographic in a culturally appropriate manner.*

54. Substance of draft Namoi RWS

- *The draft Namoi RWS does not include reference to any water entitlements being set aside for the Gomeroi People;*
- *As a part of the RWS to be developed, DPIE Water should fund the establishment of comprehensive guidelines on First Nations involvement*

in water management and give adequate acknowledgment to the Gomeroi People for their water knowledge and management skills including consideration of Gomeroi Peoples' intellectual property rights;

- *The Namoi RWS should include a commitment to create a Gomeroi-identified position for ongoing management in the region;*
- *The draft Namoi RWS does not provide for realistic implementation into the future and has not been endorsed by the Gomeroi People;*
- *There is confusion on the ground as to how the RWS aligns or interacts with other policy objectives including:*
 - i. the outcomes of the National Cultural Flows Research Project;*
 - ii. the Native Fish Recovery Strategy;*
 - iii. the Water Sharing Plans; and*
 - iv. the Barwon-Draling Operations Plan*
- *There is also confusion as to how the RWS addresses*
 - i. Cultural objectives of Gomeroi People;*
 - ii. Involvement of Gomeroi People, including in the management and regulation of waterways on Gomeroi Country*

VII. Summary of NTSCORP Recommendations

55. In relation to water legislation and policy generally, NTSCORP recommends that:
- i. Commonwealth, State and Territory legislation and policy should provide for, amongst other things, access to water and waterways, cultural flows, and water allocations to be made to native title holders.
 - ii. DPIE reconsider its current method of consultation with Aboriginal People and, in particular, native title holders and Prescribed Bodies Corporate (**PBCs**) to allow for comprehensive, culturally appropriate and genuine engagement with Traditional Owners in the drafting of water policy and legislation.
56. In relation to the Regional Water Strategies generally, NTSCORP recommends that each Regional Water Strategy should include:
- i. a detailed list of the rights and interests held or claimed by the native title groups that fall within the relevant region and include mapping for context;
 - ii. a statement in relation to section 55 of the *Water Management Act 2000* (NSW); and
 - iii. a statement in relation to section 211 of the *Native Title Act 1993* (Cth).
57. In relation to the Namoi RWS, NTSCORP recommends that the Namoi RWS be amended to include sections that set out details of the Gomeroi Native Title Application, including the specific native title rights claimed by the Gomeroi People.

If you require any further information or would like to discuss this submission, please do not hesitate to contact [REDACTED] or [REDACTED] [REDACTED] at NTSCORP.

Yours sincerely,

[REDACTED]