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16 May 2021

Dear Ms Hodge,

**NTSCORP's comments on the North Coast Regional Water Strategy**

Thank you for providing NTSCORP Limited (**NTSCORP**) with the opportunity to comment on the North Coast 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 for the North Coast Regional Water Strategy (**NCRWS**) 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 traditional owner groups in the North Coast region; however, it is informed by our experience working with Aboriginal Traditional Owners (**Traditional Owners**) of lands and waters within NSW and the ACT.

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. Native title rights and interests claimed in NSW, which directly concern water, have included:
  - (a) the right to take and use water;
  - (b) the right to have access to and use the natural water resources of the application area;
  - (c) the right to fish in the application area; and
  - (d) 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:
  - (a) the right to hunt on the application area;
  - (b) the right to participate in cultural and spiritual activities on the application area;
  - (c) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;
  - (d) the right to conduct ceremonies and rituals on the application area; and
  - (e) 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.
18. The NCRWS defines native title rights with respect to water as rights to “*take and use water for personal, domestic and non-commercial communal purposes*”.<sup>1</sup> At law, this is incorrect. 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. A statement to this effect should be included in the NCRWS.
19. NTSCORP identifies further limitations with the proposed definition being that it is not a comprehensive description of the rights and interests to water which native title groups may hold, nor a comprehensive description of the interaction between native title and water policy or legislation. Detailed descriptions of the native title rights and interests held by the Githabul People, the Western Bundjalung People, the Yaegl People, the Bandjalang People, the Gumbaynggirr People, and the Dunghutti People, as per determinations of the Federal Court are outlined below. The Regional Water Strategies should include detailed lists of these rights and interests and include mapping for context.
20. Each of the separate Regional Water Strategies should also include a statement in relation to section 55 of the *Water Management Act 2000* (NSW) (**WMA**), such as has

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<sup>1</sup> North Coast RWS, p. 102.



been included in the draft Namoi Regional Water Strategy. Section 55 of the WMA provides:

*(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.*

21. 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.
22. 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. North Coast Regional Water Strategy**

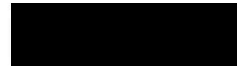
23. The draft NCRWS acknowledges the “people of the Anaiwan, Biripi, Bundjalung, Dunghutti, Githabul, Gumbaynggirr and Yaegl Nations” as holding “a significant connection to the lands in which the North Coast Regional Water Strategy falls upon”.
24. The draft NCRWS makes a series of statements in relation to the boundaries of traditional lands of the Anaiwan, Biripi, Bundjalung, Dunghutti, Githabul, Gumbaynggirr and Yaegl Nations.<sup>2</sup>

“The Clarence River marks the boundary of the Bundjalung and Gumbaynggirr people.”

“The Bundjalung Nation is a large mix of around 15 groups or clans whose lands extend across the North Coast and Far North Coast regions and into southern Queensland.”

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<sup>2</sup> North Coast RWS, p. 98.



“The Yaegl people and Githabul people are the traditional custodians of the lower and upper reaches of the Clarence River, respectively.”

“The sovereign ties of the Githabul people were acknowledged in 2007 when the Federal Court recognised Githabul Native Title rights for 1,120 km<sup>2</sup> of public land.”

“The Gumbaynggirr Nation, one of the largest coastal nations in New South Wales, stretches south from the Clarence River to the Nambucca River and inland to the Great Dividing Range.”

“The Macleay Valley is the heartland of the Dunghutti people. The land extends from the coast to the tablelands.”

25. The draft NCRWS acknowledges but does not outline the specific rights held by the Bandjalang, Western Bundjalung, Dunghutti, Githabul/Galibal, Gumbaynggirr and Yaegl Peoples as determined by the Federal Court of Australia.
26. NTSCORP suggests that the NCRWS be amended to include a section which sets out details of the relevant native title determinations, including the specific native title rights held by the Bandjalang, Western Bundjalung, Dunghutti, Githabul/Galibal, Gumbaynggirr and Yaegl Peoples. These rights are listed below.

#### **III.1.1. Acknowledgement of the Bundjalung Nation and the Githabul Nation**

27. The NCRWS acknowledges that “The Bundjalung Nation is a large mix of around 15 groups or clans whose lands extend across the North Coast and Far North Coast regions and into southern Queensland.” It however does not name all of the relevant groups within the Bundjalung Nation, despite including some details of relevant native title applications and determinations on pages 100-101. NTSCORP considers that the NCRWS could be enhanced by making specific reference to the various groups comprising the Bundjalung Nation within the NCRWS area including the Bandjalang People and the Western Bundjalung People.
28. Similarly, the reference to the Githabul Nation should include reference to both Githabul People and Galibal People, in accordance with the rules of the Githabul Nation Aboriginal Corporation RNTBC.

#### **III.1.2. Acknowledgement of Bundjalung People**

29. The NCRWS acknowledges the Bundjalung Nation as ‘a large mix of around 15 groups or clans’, but does not outline the specific rights held by the Western Bundjalung



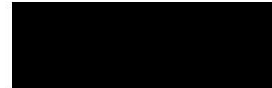


People or Bandjalang People within the North Coast region, as they have been recognised by the Federal Court of Australia.

30. NTSCORP suggests that the NCRWS be amended to include a section which sets out details of the Western Bundjalung and the Bandjalang People Native Title Determinations, including the specific native title rights held by the respective groups which are outlined at III.1.3 and III.1.4 respectively below.

### **III.1.3. Native title rights held by the Western Bundjalung People**

31. As per the native title determination (NSD 2300 of 2011), the Western Bundjalung People hold native title rights and interests exercisable on or in relation to water, as follows:
- the right to enter, traverse across and remain on the land;
  - the right to take and use the water for personal, domestic, communal purposes (including cultural purposes) but not extending to a right to control the use and flow of the water in any rivers or lakes;
  - the right to gather and use the traditional natural resources (other than water) including food, medicinal plants, timber, stone, charcoal, ochre and resin as well as materials for fabricating tools and hunting implements, and making artwork and musical instruments;
  - the right to fish;
  - the right to hunt;
  - the right to engage in cultural activities, conducting and participating in ceremonies and rituals including in relation to birth and death; holding cultural gatherings;
  - the right to visit places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;
  - the right to pass on knowledge about the physical and spiritual attributes of places of importance; and
  - the right to be accompanied by persons who, though not Native Title Holders, are specified family, whose presence is required under traditional laws and customs for the performance of cultural activities, practices or ceremonies, or other people requested by the Native Title Holders to assist in, observe or record cultural activities, practices or ceremonies.
32. Those native title rights and interests held by Western Bundjalung 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 include but are not limited to:
- the right to camp on, erect shelters and live but not to permanently camp on,



- possess or occupy the land; and
- the right to light fires for domestic purposes, but not for the clearance of vegetation.

#### **III.1.4. Acknowledgement of native title rights held by the Bandjalang People**

33. The NCRWS does not include the Bandjalang People as native title holders within the area of the NCRWS, despite noting the details of their native title applications and determinations on page 101.
34. The Bandjalang People have had their native title recognised in the Federal Court of Australia in Bandjalang People #1 (NSD 6034 of 1998), Bandjalang People #2 (NSD 6107 of 1998), Bandjalang People #3 (NSD 426 of 2016) and Bandjalang People #4 (NSD 122 of 2019). Bandjalang People #3 and #4 (NSD 426 of 2016 and NSD 122 of 2019) were recently determined on 30 April 2021. The draft NCRWS should be amended to reflect this.
35. NTSCORP suggests that the NCRWS be amended to include the Bandjalang People as native title holders and claimants within the region, and include a section which sets out details of the Bandjalang Native Title Determinations, including the specific native title rights held by the Bandjalang People.
36. As per the Federal Court decision for Bandjalang People #1 and #2 (NSD 6034 of 1998 and NSD 6107 of 1998) and Bandjalang People #3 and #4 (NSD 426 of 2016 and NSD 122 of 2019), the Bandjalang People hold native title rights and interests exercisable on or in relation to water, or that are exercisable on or in relation to land and that often relate to water or rely upon a water source for their exercise, as follows:
  - the right to hunt, fish and gather the traditional natural resources of the Consent Determination Area for non-commercial personal, domestic and communal use;
  - the right to take and use waters on or in the Consent Determination Area;
  - the right to access and camp on the Consent Determination Area;
  - the right to do the following activities on the land:
    - conduct ceremonies;
    - teach the physical, cultural and spiritual attributes of places and areas of importance on or in the land and waters; and
    - have access to, maintain and protect from physical harm, sites in the Consent Determination Area which are of significance to the Bandjalang People under their traditional laws and customs.

#### **III.1.5. Acknowledgement of native title rights held by the Githabul People**





37. The NCRWS acknowledges the Githabul People, but does not outline the specific rights and interests held by the Githabul People.
38. NTSCORP suggests that the NCRWS be amended to include a section which sets out details of the Githabul Native Title Determination, including the specific native title rights as they have been recognised by the Federal Court of Australia (NSD 6019 of 1998).
39. As per the native title determination (NSD 6019 of 1998), the Githabul Native Title Holders hold native title rights and interests exercisable on or in relation to water, or that may often relate to water or rely upon a water source for their exercise, as follows:
- the right to access, and camp on, the Consent Determination Area;
  - the right to fish, hunt and gather animal and plant resources for personal, domestic and non-commercial communal consumption
  - the right to take and use water for personal, domestic and non-commercial communal purposes;
  - the right to access the Consent Determination Area for spiritual purposes and to access sites of spiritual significance in the Consent Determination Area; and
  - the right to protect, by lawful means, places of importance to the Githabul People in the Consent Determination Area from physical harm.

#### **III.1.6. Acknowledgement of native title rights held by the Dunghutti People**

40. The NCRWS acknowledges the Dunghutti People, but does not outline the specific rights and interests held by the Dunghutti People.
41. NTSCORP suggests that the NCRWS be amended to include a section which sets out details of the Dunghutti People Native Title Determination, including the specific native title rights as they have been recognised by the Federal Court of Australia (NSD 6002 of 1996).
42. As per the native title determination (NSD 6002 of 1996), the Dunghutti Native Title Holders hold native title rights and interests in lands where their native title has been recognised. On these lands, the Dunghutti People hold:

*“... possession, occupation and enjoyment of the land to the exclusion of all others, such that the Dunghutti people may exercise whatever rights and interests (whether communal, group or personal) are recognised by their traditional laws and customs as in force at any relevant time, subject to any laws of the State of New South Wales or the Commonwealth of Australia*

*which are not inconsistent with the Racial Discrimination Act 1975 or the Native Title Act 1993.”*

### **III.1.7. Acknowledgement of native title rights held by the Gumbaynggirr People**

43. The NCRWS acknowledges the Gumbaynggirr People, but does not outline the specific rights and interests held by the Gumbaynggirr People.
44. NTSCORP suggests that the NCRWS be amended to include a section which sets out details of the Gumbaynggirr People Native Title Determinations, including the specific native title rights as they have been recognised by the Federal Court of Australia (NSD 6054 of 1998, NSD 6104 of 1998, NSD 1312 of 2018 and NSD 1350 of 2016).
45. As per native title determinations NSD 6054 of 1998 and NSD 1350 of 2016, the Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation RNTBC holds non-exclusive native title rights and interests on trust for Gumbaynggirr People. These rights and interests that are exercisable on or in relation to water, or that may often relate to water or rely upon a water source for their exercise, as follows:
- the right to have access to and camp on the Consent Determination Area;
  - the right to take and use waters on or in the Consent Determination Area;
  - the right to hunt and gather natural resources of the Consent Determination Area for personal, domestic and non-commercial communal use;
  - the right to take fish in the temporary waters occurring above the mean high water mark in the Consent Determination Area;
  - the right to do the following activities on the land:
    - conduct ceremonies;
    - teach the physical, cultural and spiritual attributes of places and areas of important on or in the land and waters; and
    - to have access to, maintain and protect from physical harm, sites in the Consent Determination Area which are of significance to Gumbaynggirr People under their traditional laws and customs.
46. As per native title determinations NSD 6104 of 1998 and NSD 1312 of 2018, the Gumbaynggirr Wenonah Head Aboriginal Corporation RNTBC holds non-exclusive native title rights and interests on trust for Gumbaynggirr People. These rights and interests that are exercisable on or in relation to water, or that may often relate to water or rely upon a water source for their exercise, as follows:
- access, to remain on and traverse the land and waters;





- access natural resources and to take, use, share and exchange those natural resources for any purpose;
- hunt and gather traditional natural resources;
- fish;
- take and use water for personal, domestic, communal purposes (including cultural purposes) but not extending to a right to control the use and flow of the water in any creeks or intermittently closing and opening lakes and lagoons;
- live, being to camp on and erect temporary shelters and other temporary structures for that purpose, but not to permanently reside on, possess or occupy the land or waters;
- light fires for domestic purposes;
- conduct and to participate in cultural and religious activities, practices and ceremonies, including the conduct of burials;
- conduct and to participate in meetings;
- teach on the area the physical, cultural and spiritual attributes of places and areas of importance under traditional laws and customs;
- maintain and to protect from physical harm, places and areas of importance or significance under traditional laws and customs;
- to be accompanied by persons who, though not Native Title Holders, are:
  - spouses, partners or parents of native title holders, together with their children and grandchildren; and
  - people required under traditional laws and customs for the performance of, and to assist in, observe or record, cultural activities, practices or ceremonies.

### **III.1.8. Acknowledgement of native title rights held by the Yaegl People**

47. The NCRWS acknowledges the Yaegl People, but does not outline the specific rights and interests held by the Yaegl People.
48. NTSCORP suggests that the NCRWS be amended to include a section which sets out details of the Yaegl Native Title Determinations, including the specific native title rights as they have been recognised by the Federal Court of Australia (NSD 6052 of 1998 and NSD 168 of 2011).
49. As per the native title determinations for Yaegl People #1 and Yaegl People #2, the Yaegl Native Title Holders hold native title rights and interests exercisable on or in relation to water, or that may often relate to water or rely upon a water source for their exercise, as follows:
- the right to enter, travel over and remain on a non-permanent basis on the



Determination Area;

- the right to live on the land, to camp, to erect shelters, and to move about the land in the Determination Area but not extending to a right to permanently occupy or possess the land;
- the right to engage in cultural activities, to conduct ceremonies, to hold meetings, and to participate in cultural practices relating to birth and death in the Determination Area;
- the right to hunt in the Determination Area;
- the right to fish in the Determination Area;
- the right to take and use the water of the Determination Area for personal, domestic and communal purposes (including cultural purposes) but not extending to a right to control the use and flow of the water in any rivers or lakes which flow through or past or are situated within the land of two or more occupiers;
- the right to gather and use the natural resources in the Determination Area including food, medicinal plants, timber, stone, charcoal, ochre and resin as well as materials for fabricating tools and hunting implements and making artwork and musical instruments;
- the right to light fires on the Determination Area for domestic purposes, but not for the clearance of vegetation;
- the right to share, offer and exchange traditional resources derived from the Determination Area;
- the right to have access to, maintain and protect from physical harm, sites and places of importance in the Determination Area which are of significance to Yaegl People under their traditional laws and customs;
- the right to teach on the Determination Area the physical, cultural and spiritual attributes of places and areas of importance on or in the Determination Area; and
- the right to be accompanied on the Determination Area by persons who, though not native title holders, are:
  - spouses, partners or parents of native title holders, together with their children and grandchildren;
  - people whose presence is required under traditional laws and customs for the performance of cultural activities, practices or ceremonies; and
  - people requested by the native title holders to assist in, observe or record cultural activities, practices or ceremonies.

50. As per the native title determination for Yaegl People #2 (Part B), the Yaegl Native Title Holders hold native title rights and interests in relation to an Inner Extent Native Title Area and an Outer Extent Native Title Area. In the Outer Extent, the Yaegl People's rights and interests exercisable on or in relation to water, or that may often relate to water or rely upon a water source for their exercise, are as follows:





- the right to access, to remain on and to traverse those areas;
- the right to maintain and to protect places, objects and areas of importance or significance under traditional laws and customs on those areas;
- the right to be accompanied on those areas by persons who, though not Native Title Holders, are spouses, partners or parents of Native Title Holders, together with their children and grandchildren, or people required under traditional laws and customs to perform or requested by the native title holders to assist in, observe or record cultural activities, practices or ceremonies.

51. In the Inner Extent Native Title Area, the Yaegl People hold all the rights and interests listed at paragraph [50], with the addition of the right to access resources in those areas and to take, use, share, offer and exchange resources, including traditional trade, in those areas for non-commercial purposes.

#### IV. Inadequate recognition in water policy/legislation

52. 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.

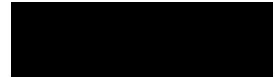
53. The mismanagement at a Commonwealth and State level, including through the overallocation of water from rivers and a lack of effective monitoring and compliance, has meant that in recent years, some rivers in NSW have either not flowed, run dry, and/or have had poor water quality for extended periods, which has also resulted in a number of fish kill incidents across the State.

54. 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.

55. 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.*

56. 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.*

57. 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.*

58. 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.

59. 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**

60. 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.

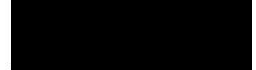
61. We acknowledge the consultation that has been undertaken thus far by Governments with Aboriginal People and support the ongoing involvement of the AWC with water policy in NSW. However, to date, the method of consultation in relation to the Regional Water Strategies has not been adequate to allow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

62. NTSCORP has received specific feedback from native title groups in the North Coast region that consultation to date has been poor. Native title holders have reporting being fatigued and confused by repeated changes to consultation dates and times and by the high number of consultation sessions that are occurring across different water policy programs and regions.





63. Ngullingah Jugun Aboriginal Corporation (**Ngullingah Jugun AC**) and Yaegl Traditional Owners Aboriginal Corporation (**Yaegl TOAC**) have both expressed their preference for targeted and face-to-face consultation sessions with native title holders in community, as opposed to broad-focused workshops in regional centres or online. We further note that this is consistent with the advice provided when Aboriginal groups, including Ngullingah Jugun AC, were consulted in 2020 regarding the methods by which RWS consultation sessions should proceed.
64. NTSCORP encourages the Department to reach out directly to the representative organisations of native title groups, namely the Applicant of claim groups and the representative PBCs of recognised native title holders, to arrange face to face consultation sessions in community.
65. 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.
66. 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)*
67. 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.
68. 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.

69. 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.
70. 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 claimants attending the consultation sessions for the Namoi region. We have not received any information from DPIE as to how many North Coast native title holders or claimants may or may not have attended the rescheduled consultation sessions. In NTSCORP's view, failure to adequately notify communities is an exclusion of Aboriginal People and Traditional Owners from the design process of policies that impact them. Such exclusion is manifestly unacceptable.
71. 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**

72. 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 NCRWS is 174 pages long. The extent and technical complexity of these materials is prohibitive and limits meaningful engagement by Aboriginal People.
73. 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.
74. 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.

75. 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.

## 6. Summary of NTSCORP Recommendations

In relation to water legislation and policy generally, NTSCORP recommends that:

- 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.
- 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.

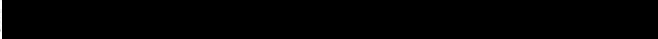


In relation to the Regional Water Strategies generally, NTSCORP recommends that:

- the current definition of native title rights used in the Regional Water Strategies be amended to recognise that native title rights and interests are defined in accordance with the laws and customs by which they are held; and
- each Regional Water Strategy should include:
  - 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; and
  - a statement in relation to section 55 of the *Water Management Act (NSW) 2000*.

In relation to the NCRWS, NTSCORP recommends that:

- the NCRWS should accurately refer to and include all of the Aboriginal Nations and Peoples within the strategy area, being the Githabul Nation, including the Githabul People and Galibal People, and the Bundjalung Nation, including the Bandjalang People, the Western Bundjalung People, the Yaegl People, the Gumbayngirr People, the Dunghutti People, the Birpai People and the Anaiwan People;
- the NCRWS be amended to include sections that set out details of the Western Bundjalung, Bandjalang, Yaegl, Gumbayngirr, Dunghutti and Githabul Native Title Determinations, including the specific native title rights held by them.

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

