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Dear Ms Pryce,

**RE: Draft NSW Water Strategy February 2021**

Thank you for providing NTSCORP Limited (**NTSCORP**) with the opportunity to make a submission on the Draft NSW Water Strategy (**Draft Strategy**), in particular 'Priority 2 – Recognise Aboriginal rights and values and increase access to and ownership of water for cultural and economic purposes.'

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**).

NTSCORP is funded under Section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Peoples who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA.

In summary, the functions and powers of NTSCORP under sections 203B to 203BK (inclusive) are:

- Facilitation and assistance, including representation in native title matters;
- Dispute resolution;
- Notification;
- Agreement-making;

- Internal review;
- Certification; and
- Other functions.

NTSCORP thanks the Department of Planning, Industry and Environment (**DPIE**) for taking into consideration its previous comments provided on 9 November 2020 in relation to what was then referred to as 'Paper A: Empower Aboriginal rights and values to increase access to water for cultural and economic uses'. We provide the following further comments and recommendations on the revised Draft Strategy.

This submission is made by NTSCORP and is not intended to be made on behalf of the Aboriginal Traditional Owners (**Traditional Owners**) across NSW, however it is informed by our experience working with Traditional Owners of lands, waters and seas within NSW and the ACT.

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

We have also had the benefit of reviewing the submission made by the NSW Aboriginal Land Council (**NSWALC**) on the Draft Strategy and we support the comments and recommendations contained therein.

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

1. 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.
2. 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.

3. 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.
4. 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

5. 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.
6. 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.
7. 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.
8. 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.

### III. Recognition of native title in water policy/legislation

9. 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.
10. 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.
11. 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.
12. The Draft Strategy does not define native title rights with respect to water beyond listing Native Title rights as one of three basic landholder rights under the *NSW Water Management Act 2000* on page 137. 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 NSW Water Strategy. It is concerning that this feedback has previously been provided to the

Department in the context of the Regional Water Strategies and yet the lack of recognition of native title rights and interests continues.

13. The NSW Water Strategy should also include a statement in relation to section 55 of the *Water Management Act 2000* (NSW) (**WMA**). 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.*

14. 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.
15. 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.

#### **IV. General Comments on the Draft Strategy**

16. The comments provided in this submission are focused on 'Priority 2' however, we note that the Draft Strategy should be read as a whole and as such, the comments in relation to genuine consultation and engagement with Aboriginal People also apply in relation to progressing the other Priorities within the Draft Strategy (in particular, Priorities 1 and 3).
17. NTSCORP has previously provided submissions on the Draft version of Priority 2 in November 2020. NTSCORP has also provided submissions in relation to a number of

other water policy reforms currently being undertaken in NSW, including the Regional Water Strategies and Floodplain Harvesting License Rules. To date, the timeframes allowed for consultation and engagement with Aboriginal People for each stage of these reforms have been extremely condensed and thus the process has been fundamentally flawed.

18. NTSCORP has received feedback that:

- (a) Aboriginal communities are experiencing consultation fatigue. With multiple reforms being undertaken at once, the bombardment of information and lack of transparency in terms of how various policies and strategies interact has left Traditional Owners (along with the wider community) confused and overwhelmed; and
- (b) there is a strong desire to be more involved in water planning processes and water management but without first building a foundation of water literacy and approaching these issues with realistic timeframes in mind, the 'consultation' process remains ineffective. These comments are particularly relevant to Action 2.2.

19. NTSCORP has repeatedly requested that adequate notification be provided for upcoming face-to-face consultation meetings and we have offered our assistance in notifying the Traditional Owners for each region. Most recently, the notices for the Murray and Murrumbidgee RWS consultation sessions were received at the NTSCORP offices on Tuesday 11 May 2021 with the first consultation session to take place on Tuesday 18 May 2021. We reiterate our comments provided in November 2020 in that these short timeframes undermine the purported intent for stakeholders to provide meaningful contributions and ultimately affects the quality of the policy produced.

20. NTSCORP is concerned that despite continued assurances to the contrary, this failure to provide for meaningful engagement with Aboriginal People in NSW, and in particular Traditional Owners, will be an ongoing theme within DPIE in implementing the proposed NSW Water Strategy. NTSCORP recommends that DPIE make a commitment to prioritise the development of genuine, meaningful, culturally appropriate consultation processes with Aboriginal People going forward. DPIE should also be considering the resourcing necessary for Aboriginal People to effectively participate in consultation.

**Specific Comments – Priority 2 – Recognise Aboriginal rights and values and increase access to and ownership of water for cultural and economic purposes**

21. On page 62 under the heading 'work as partners to empower Aboriginal people in water management' the last paragraph should be amended to include engagement with Elders and people who may hold native title. The reference to the 'possible' existence of native title rights to water should be reconsidered.
22. On page 64 under Action 2.3., the reference to Native Title claimants and holders should be expanded to include Elders and people who may hold native title.
23. If you require any further information or would like to discuss this submission, please do not hesitate to contact 



