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Dear Kaia,

NTSCORP's comments on the Lachlan, Gwydir and Macquarie-Castlereagh Regional Water Strategies

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

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.

The comments provided in this letter are focused on the impacts of the Regional Water Strategies on native title claimants and holders in NSW. The impact and interests of the broader Aboriginal and First Nations communities across NSW is beyond the scope of this correspondence.

1. NTSCORP's involvement in the Aboriginal Water Coalition

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 New South Wales in relation to the development of Regional Water Strategies.

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.

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.

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.

2. Native Title and Water rights

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*.

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.

Native title rights and interests claimed in New South Wales, which concern water, have included:

- (a) the right to have access to and use the natural water resources of the application area;
- (b) the right to fish in the application area; and
- (c) the right to share and exchange resources derived from the land and waters within the application area.

Other native title rights and interests claimed in New South Wales, which may be exercised on or in relation to water and waterways, include:

- (a) the right to participate in cultural and spiritual activities on the application area;
- (b) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;
- (c) the right to conduct ceremonies and rituals on the application area; and
- (d) the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area.

The native title rights exercisable on or in relation to land may also be impacted 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.

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.

3. Recognition of native title in water policy/legislation

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 for water allocations to be made to native title holders.

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.

The Regional Water Strategies defines native title rights with respect to water as rights to “take and use water for personal, domestic and non-commercial communal purposes”.

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.

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 Barkandji People and claimed by the Gomeroi/Kamilaroi/Gamilaroi People, the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People and the Warrabinga-Wiradjuri People as per determinations and proceedings 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.

The Regional Water Strategies should also include a statement in relation to *section 55* of the *Water Management Act (NSW) 2000* which 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.

We also encourage the New South Wales 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.

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.

3.1. Lachlan Regional Water Strategy

3.1.1. Acknowledgement of Barkandji and Malyangapa People

The draft Lachlan Regional Water Strategy (**Lachlan RWS**) acknowledges the Barkandji native title holders but does not mention the Malyangapa native title holders. The Barkandji and Malyangapa Peoples had native title recognised in Federal Court proceedings NSD 6084 of 1998, The Lachlan RWS should refer to both the Barkandji and Malyangapa People in the acknowledgement of this proceeding.

The Lachlan RWS does not outline the specific rights held by the Barkandji and Malyangapa People as they have been recognised by the Federal Court of Australia.

3.1.2. Native title rights held by Barkandji and Malyangapa People

As per the native title determination (NSD 6084 of 1998) the Barkandji and Malyangapa Native Title Holders hold rights exercisable on or in relation to water as follows:

- the right to enter, travel over and remain on the area;
- the right to take and use the water of the non-exclusive areas for personal, domestic and communal purposes (including cultural purposes and for watering native animals, cattle and other stock, and watering gardens not exceeding 2 hectares), 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 have access to, to maintain and to protect from physical harm sites and places of importance in the non-exclusive areas which are of significance to the Barkandji and Malyangapa People under their traditional laws and customs;
- the right to fish in the non-exclusive areas;
- the right to teach the physical, cultural and spiritual attributes of places and areas of importance on or in the area; and
- the right to be accompanied on the area by persons who are not native Title Holders but are specified family, whose presence is required under traditional laws and customs or other people request to assist in, observe or record cultural activities, practices or ceremonies.

Those native title rights and interests held by Barkandji and Malyangapa 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 take and use natural resources (other than water);
- the right to camp and for that purpose to erect temporary structures;
- the right to light fires for domestic purposes, but not for the clearance of vegetation;

- the right to engage in cultural activities on the land, to conduct ceremonies, to hold meeting, and to participate in cultural practices relating to birth and death including burials on the land; and
- the right to hunt.

3.1.3. Acknowledgement of Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People

The Lachlan RWS acknowledges the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan Peoples registered Native Title Claim (NSD 38 of 2019) but does not outline the specific rights claimed. We suggest that the Lachlan RWS should outline the rights and interests claimed. These are outlined below.

3.1.4. Native title rights claimed by the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan nations

The claimed rights of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People (NSD 38 of 2019) 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 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 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.

Native title rights and interests claimed by the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People (NSD 38 of 2019) exercisable on or in relation to land that will be affected where the land is physically or culturally connected to waters include but are not limited to the following:

- 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;
- the right to hold meetings; and
- the right to hunt in the area.

3.2. Gwydir Regional Water Strategy

3.2.1. Acknowledgement of the Gomeri People

The draft Gwydir Regional Water Strategy (**Gwydir RWS**) acknowledges the Gomeri Native Title Application (NSD 37 of 2019), but does not outline the specific rights claimed by Gomeri People.

NTSCORP suggests that the Gwydir RWS be amended to include a section which sets out details of the Gomeri Native Title Application, including the specific native title rights claimed by the Gomeri People.

3.2.2. Native title rights claimed by the Gomeri People

The native title rights claimed by the Gomeri 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 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.

Native title rights and interests claimed by the Gomeroi People on or in relation to land 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;
- the right to hold meetings on the area;
- the right to hunt in the area; and
- the right to manage natural resources.

3.3. Macquarie-Castlereagh Regional Water Strategy

The draft Macquarie-Castlereagh Regional Water Strategy (**Macquarie-Castlereagh RWS**) acknowledges the Wiradjuri, Gomeroi, Ngemba, Wayilwan, and Ngiyampaa Peoples having 'cultivated and cared for' the lands and water of the area. The Macquarie-Castlereagh RWS does not acknowledge the native title claims of:

- the Warrabinga-Wiradjuri People (NSD 857 of 2017);
- the Gomeroi people (NSD 37 of 2019); or
- the Ngemba Ngiyampaa Wangaaypuwan Wayilwan Peoples (NSD 38 of 2019).

NTSCORP suggests that the Macquarie-Castlereagh RWS should be amended to include a section which sets out details of these applications, including the specific rights claimed in each.

Please refer to section 3.1.4 for a detailed description of the rights claimed by the Ngemba Ngiyampaa Wangaaypuwan Wayilwan Peoples and section 3.2.2 for the rights claimed by the Gomeroi People.

3.3.1. Native title rights claimed by the Warrabinga-Wiradjuri People

The native title rights claimed by the Warrabinga-Wiradjuri People (NSD 857 of 2017) exercisable on or in relation to waters are as follows:

- the right to have access to, remain on and use the land and waters;
- the right to access and take resources of the land and waters; and
- the right to protect places, areas and things of traditional significance on the land and waters.

The native title rights and interests claimed by the Warrabinga-Wiradjuri People in land 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 against the whole world where exclusive native title can be recognised.

4. Inadequate recognition in water policy/legislation

In NTSCORP's view, the Commonwealth, State and Territory policy and legislation are presently failing to recognise and protect native title rights and interests in water.

The mismanagement of the Murray-Darling Basin 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, rivers in the basin 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.

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 – a suppression of the native title rights and interests held by Traditional Owners along those rivers.

At present in New South Wales, native title holders are generally unable to obtain allocations on the water market, as it is prohibitively expensive. We believe recognition of native title rights and interests requires that the New South Wales Government put in place measures, policies and funding to enable native title holders to obtain allocations of water within their determined or claimed areas.

5. Consultations with Aboriginal People and Traditional Owners

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 New South Wales. 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 (**PBC**).

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.

The COVID-19 pandemic of course impacts DPIE's ability to undertake consultation meetings at present and NTSCORP recognises the need to postpone any consultation meetings which presents a risk to the health and wellbeing of Aboriginal communities.

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.

In addition, the Department's administrative processes related to the notification of consultations has also hampered meaningful engagement by Aboriginal People in the recent consultations.

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.

As has been noted by various participants in the AWC meetings, we consider that a significant barrier to Aboriginal People and Traditional Owners participating in these processes is the complexity of water policy and law.

We support the development of educational resources, such as fact sheets, notices and videos targeted at Aboriginal People and Traditional Owners, to ensure the purpose and content of any policy they are being consulted in relation to is understood to enable effective participation in these processes.

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 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.

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

Yours sincerely,

[REDACTED]

