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Submission on the Independent Pricing and Regulatory Tribunal's (IPART's) Issues Paper regarding Maximum Prices for Water Administration Ministerial Corporation (WAMC) and WaterNSW from 1 July 2025

Introduction

Murray Lower Darling Rivers Indigenous Nations (MLDRIN) welcomes the opportunity to provide a submission to IPART for its Review of Prices for Water Administration Ministerial Corporation (WAMC) from 1 July 2025. MLDRIN is a Confederation of Sovereign First Nations in the lower part of the Murray-Darling Basin, including many Traditional Owner Nations across southern NSW. Since 1998, MLDRIN has worked to provide a united voice to advance First Nations water justice in the Basin.

Traditional Owners have never ceded inherent rights as guardians and custodians of rivers and waters. This advice does not constitute consent to, or endorsement of, laws, policies and instruments which have been instituted by successive settler colonial governments over the Country and waterways of Traditional Owners.

Important context to this submission

Since colonisation, First Nations people have been dispossessed of their rights to manage, control, own and care for water and our waterways. For example, NSW assumed and codified the right and authority to control and manage water resources on behalf of the Crown, ignoring and excluding Traditional Owners' inherent rights. Successive NSW governments have significantly modified and changed waterways and water flows, and issued water entitlements (predominantly to non-Indigenous licence holders) permitting unsustainable levels of water take. Water management decisions have been predominantly based on seeing waterways as channels that move water to places of extraction for industry and economic productivity, with essentially no consideration for the ecosystems that depend on the rivers (until recently), let alone the rivers themselves. This has all been detrimental to the health of Country and, by extension, the health and wellbeing of First Nations people.

State sanctioned water dispossession continues today. For instance, the NSW water management framework works to protect and enhance the value of water entitlements,¹ assets held nearly exclusively by non-Indigenous interests. These same entitlement holders reap significant wealth benefits from owning, using and/or trading this water.² Noting this continuation of colonisation, it follows that First Nations people fundamentally oppose the notion that they must purchase water that was stolen from First Nations in the first place, and/or pay ongoing fees to continue to use or benefit from any water which has been reacquired.³

We remain concerned that NSW still has not meaningfully acknowledged or offered redress or compensation for the past and ongoing acts of water-related dispossession and the associated legacies First Nations people endure. Although government policies and commitments at the NSW and national scales have started to shift in a positive direction, at least in principle, we are yet to see this materialise into on-the-ground change in the state of NSW. Water justice is far from being served in NSW.

MLDRIN has played a central role in advocating for measures to address the dispossession of First Nations' water rights for over 25 years. This includes advocating for meaningful policy and legislative reform to recognise and advance First Nations' water rights and interests in the State of NSW. In recent years, MLDRIN contributed to the development of Priority 2 of the NSW Water Strategy and has worked with many NSW Traditional Owners to document and advocate for their water related rights and interests.

In our recent experience from working with NSW, we have found that statements or claims in NSW Government policies, plans and strategies can lack adequate justification, be subject to poor drafting that leaves them open to problematic misinterpretation, and/or inaccurate. Because of this, we have approached the WAMC documentation with a heightened level of scrutiny, and we strongly encourage IPART to do so as well.

The following analysis and commentary is offered in an effort to encourage IPART to better consider First Nations' rights and interests in assessing the immediate WAMC and WaterNSW's

¹ For example, WAMC's pricing proposal states: "Through ensuring the sustainable use and management of water resources, WAMC's water management activities *essentially protect and enhance the value of customers' water entitlements*. These entitlements can be used or traded over time, *generating significant value for customers*. This value is highlighted by the market price of water entitlements" (p. 211, emphasis added).

² See for example, WAMC's pricing proposal pp. 211-213.

³ Cultural Water for Cultural Economies

https://law.unimelb.edu.au/__data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf

proposals, and more deeply in its future work. MLDRIN's advice is mostly based around WAMC's submission, and IPART's issues paper. MLDRIN's capacity to more extensively review and understand the materials provided by WAMC, WaterNSW and IPART is constrained due to resource limitations.

Development of WAMC's pricing proposal

Traditional Owners and First Nations people are not mere stakeholders, but rights holders. This particular status entitles Traditional Owners to the expectation of strong involvement and oversight of decision making about work happening on or in relation to Country. In fact, it should bring shared responsibility and decision making. This core principle is relevant to the WAMC's development of its pricing proposal (as set out here) *and* IPART's review process (addressed later).

Overall, MLDRIN finds that WAMC's description of First Nations consultation and input into the pricing proposal, as well as opportunities for First Nations water justice priorities to inform its development, lack transparency. We suggest IPART seek clarification on several fronts.

Specifically, the WAMC Pricing Proposal summary states that 'Targeted' First Nations engagement occurred "through the WaterNSW First Nations Roadshow in late 2023 and to develop the department's draft Aboriginal Water Strategy" (p. 53). However, the development of the draft Aboriginal Water Strategy as published in mid-2024, did not include any targeted engagement. Instead, it has drawn from the outcomes and findings from consultation workshops for previous NSW water planning processes, some dating back as far as 2018.⁴ MLDRIN's concerns with this approach, and the implications for free, prior and informed consent, are documented elsewhere.⁵ The only targeted consultation related to the draft Aboriginal Water Strategy has occurred *after* the draft was published in mid-2024, but this is very late in the development of this pricing proposal.

MLDRIN cannot provide direct advice or insights about how much consideration the pricing proposal was given during the WaterNSW First Nations Roadshow in late 2023 as we were not party to this work. We suggest, though, that if the Pricing proposal was discussed, it was one of several topics, so we raise questions about the quality of input that could have been gathered. These issues raise questions about the transparency and accuracy of the WAMC pricing proposal's description of First Nations' input and influence.

⁴ https://water.dpie.nsw.gov.au/_data/assets/pdf_file/0003/616431/aws-consultation-paper.pdf p. 4

⁵ See, for example, MLDRIN's advice to the MDBA on the Murrumbidgee Surface Water Resource Plan, <https://www.mdba.gov.au/sites/default/files/publications/attachment-c-murrumbidgee-surface-water-water-resource-plan-wrp-murray-lower-darling-rivers-indigenous-nations-mldrin-part-14-advice-redacted.pdf>

Another issue we see that requires further clarification is the opportunity for First Nations peoples and groups to participate in the four Water Working Groups across the state. The Terms of Reference for these groups is included in Section 4.6 of the appendix to Attachment D. Problematically, the membership section does not list First Nations as a unique “customer or community group with an interest in how water is delivered and managed in NSW” from which participants were drawn from (Attachment D, pp. 88-89). Instead, it states “Further focused engagement with Aboriginal stakeholders and representatives will occur through WaterNSW’s First Nations Roadshow in mid-late 2023, and through DPE’s Aboriginal Water Strategy engagement in late 2023” (p. 89). (Issues with these supposed ‘focused’ engagement options are noted above.) By contrast, Section 4.7 of this same appendix lists that First Nations groups *were* approached to participate in the working groups, listing a recruitment goal of two First Nations participants per working group. The documentation does not provide any further information such as how many or which First Nations groups were approached and/or how many First Nations participants did in fact participate. IPART should seek clarification about the actual extent of opportunities for First Nations to participate in these Water Working Groups.

Separately, we are concerned about the consultation approach that WAMC used to refine its priorities. The WAMC notes that it “asked engagement participants to rank” priorities identified through previous engagement efforts. The results of this ranking exercise were considered in the development of the four WAMC outcomes (p. 63). One such priority was “Access to water for First Nations people for cultural and economic needs” (p. 63). We argue that work to address and advance First Nations water justice is non-negotiable, and framing it as a “customer priority” for ranking is unsatisfactory and inappropriate. This is especially true given the previously mentioned contradictory descriptions and the likely limited opportunities for First Nations participation.

Confusion about pricing proposal inclusions (and exclusions)

Despite MLDRIN’s best efforts to review WAMC’s materials, we are left uncertain about what exactly was included in the pricing estimates to advance First Nations’ aspirations. Several issues of clarity are presented below to demonstrate this. We recommend that IPART seek further clarification on whether, how, and to what extent First Nations interests have been considered in the pricing proposals.

The first source of confusion is the seemingly conflicting statements about the NSW Aboriginal Water Strategy. On the one hand, WAMC lists the NSW Aboriginal Water Strategy as one of several long-term strategies that set the direction for water policy, planning and infrastructure decisions over the next 20 to 40 years. According to the proposal, these strategies “will guide WAMC’s water management activities over the 2025 determination period and beyond” (p. 61).

Additionally, the Aboriginal Water Strategy is identified as a “driver of activity costs” for several WAMC activities in Attachment F.⁶ During an August 2024 NSW Aboriginal Water Strategy workshop that MLDRIN participated in, a NSW Department staff member also stated that WAMC may fund at least part of the NSW Aboriginal Water Strategy.⁷ This framing leads the reader to understand and expect that activities arising from the Aboriginal Water Strategy will be included in the proposed pricing. Elsewhere, however, the pricing proposal states: “Funding for key projects that support access to water for First Nations communities, as outlined in the NSW Aboriginal Water Strategy, will be delivered as part of a coordinated NSW Government program. This funding is secured separately to the WAMC pricing proposal process.” (p. 8)

These messages about the relevance of the NSW Aboriginal Water Strategy to the pricing proposal appear to be contradictory. We acknowledge that the latter point may mean that other projects and activities not related to access to water *are* included in the WAMC pricing proposal process, but this is not clarified. Overall, we encourage IPART to seek greater clarification from WAMC about the relationship between the pricing proposal and the NSW Aboriginal Water Strategy, including what parts or activities are included in the pricing proposal and their pricing estimations, what are not, and why. (MLDRIN acknowledges that funding for Aboriginal Water Strategy related activities not included in the WAMC pricing process will be sought through a separate process.)

The second source of confusion stems from what activities WAMC appears to have included in its proposal as it stands. There are several parts to this. Firstly, we observe the pricing proposal includes the following activities “for example”:

“continue to waive water charges for cultural water licences, strengthening statutory planning engagement with [F]irst [N]ations peoples, developing a framework to evaluate statutory plan outcomes in relation to benefits for Aboriginal people and ensuring that assessment of the condition of surface water ecosystems includes local cultural values, consistent with the objectives of NSW Aboriginal Water Strategy” (p. 62)

These activities are considered in turn below. However, what these activities are “an example” of is unclear, i.e., are they “examples” of water management activities that *are* included in the pricing, or examples of water management activities that WAMC *could* undertake?

This uncertainty is further driven by the difficulty we have found in lining these activities up with the proposed expenditure and services listed in the 31 WAMC water management

⁶ For example, W06-01 Water plan development (coastal); W06-02 Water plan development (inland); W06-03 Floodplain management plan development; W06-06 Development of water planning and regulatory framework.

⁷ NSW Government ‘Webinar - Draft Aboriginal Water Strategy and Action Plan’ (13 August 2024) <<https://vimeo.com/998486217> > 00:11:27.

activities in Attachment F. At best, several⁸ mention that proposed price increases reflect “increased input to First Nations engagement, [and] implementation of state strategies” (which may or may not include the Aboriginal Water Strategy, as noted above), but no further detail is provided. We suggest that IPART request additional information from WAMC to clarify what specific First Nations related activities are included in the pricing proposal.

The third source of confusion relates to the proposal’s transparency in relation to if and how the WAMC Outcomes address the “Access to water for First Nations people for cultural and economic needs” priority as claimed. Table 24 (p. 77) claims that Outcome 2 (“Sustainable and effective water resource management”) picks up this priority. However, our review of this outcome’s detail, including its performance metrics and targets (pp. 69-71 of the main proposal and listed in Attachment E), suggests that it does not directly address this priority. We recommend that IPART seek further clarification about this link to better understand if and how First Nations interests will be addressed, if at all. MLDRIN is not entirely sure how important these WAMC Outcomes are in the overall scheme of the pricing submission and work moving forward. It would be helpful if this purpose and weighting could be clearly detailed.

WAMC’s pricing proposal inclusions

Notwithstanding the above sources of uncertainty about whether listed ‘example’ activities have been included in the pricing proposal or not, here we offer some feedback and reflections about these activities on the assumption that they are included. Specifically, these are: (i) waiving water charges for cultural water licences, (ii) strengthening statutory planning engagement with First Nations peoples, (iii) developing a framework to evaluate statutory plan outcomes in relation to benefits for Aboriginal people and (iv) ensuring that assessment of the condition of surface water ecosystems includes local cultural values (p. 62). Each activity is considered in turn here.

Overall, while these activities appear to be headed in the right direction, we are of the view that much more can and should be included (both in terms of number of activities, and how far they go). This is not just to address First Nations’ aspirations or the growing community expectation

⁸ For example, W06-01 Water plan development (coastal); W06-02 Water plan development (inland); slightly different but similar implications for W06-06 Development of water planning and regulatory framework.

for action on this front,⁹ but also in line with the objects of the *Water Management Act 2000*, including the WAMC's Functions.¹⁰

(i) Waive water charges for cultural water licences

We welcome WAMC's commitment to continue to exempt Aboriginal cultural licences from charges in the next pricing period (p. 167), but see that this is the bare minimum and does not go far enough. As noted already, First Nations people are fundamentally opposed to the notion that they must pay ongoing fees to use or benefit from water that is rightfully First Nations to begin with. Since the last IPART determination, research has demonstrated that water entitlement fees and charges can be a burden for First Nations entities that hold water, and constrain how Nations choose to use and benefit from their water.¹¹ Additionally in this period of time, Aboriginal water policy and community expectations have expanded considerably. Therefore, we argue that there is strong evidence for and momentum to expand this existing commitment to be more impactful. We offer several suggestions to this effect.

At a minimum, we recommend that *all* fees and charges¹² be waived and/or paid by the NSW Government for *all* Aboriginal special purpose water access licences including:

- Aboriginal cultural licences
- Aboriginal community development licences
- Aboriginal commercial licences
- Supplementary Aboriginal environmental water access (unregulated river).

WAMC should also waive (or pay for) all fees and charges associated with applying for and/or granting water supply works and/or water use approvals relating to the use of these specific purpose licences, and relating to the take of water in accordance with native title basic landholder rights.

⁹ See, for example, S Jackson, D Hatton Macdonald, & RH Bark, 'Public Attitudes to Inequality in Water Distribution: Insights From Preferences for Water Reallocation From Irrigators to Aboriginal Australians' (2019) 55(7) *Water Resources Research* 6033-6048; A Zuo & S Wheeler, 'The Australian public's preferences for further environmental and cultural water recovery options in the Murray-Darling Basin' (2024) 633 *Journal of Hydrology* Article 130983.

¹⁰ One of WAMC's functions is "to do anything for the purpose of enabling the objects of this Act to be attained" (*Water Management Act 2000*, section 372(1)(d)), noting that one of the objects of the Act is "to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including ... benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water" (section 3(c)(iv)).

¹¹ LD Hartwig, S Jackson, & N Osborne, 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession' (2020) 99 *Land Use Policy* Article 104869; LD Hartwig, S Jackson, JCR Smart, N Osborne, 'Water trading by Aboriginal organisations in NSW, Australia' (2023) 100 *Journal of Rural Studies* Article 102997; E O'Donnell

¹² This includes WAMC charges (including application fees, consent transaction charges, and take and use fees), and MDBA and BRC charges, where applicable.

Based on past applications for and issuances of Aboriginal specific purpose entitlements (and by extension, water supply works and use approvals), such a measure would likely represent an insignificant cost to WAMC. It is still an important minimum action, however, as these fee waivers would remove a well known barrier to First Nations applying for and using water via these mechanisms into the future.¹³ It also signals that the Government is invested in making water access possible for First Nations people, a key Priority in the State Water Strategy.

A much stronger and more meaningful approach to waiving entitlement fees would be for IPART and WAMC to mimic the Victorian Government’s commitment in *Water is Life* to fund First Nations people and entities to pay fees and charges associated with all water entitlements unless use is purely commercial (Outcome 9).¹⁴ Such an approach would more effectively “begin addressing the harms of colonisation, including the almost total exclusion of Traditional Owners from holding water entitlements”,¹⁵ compared to merely waiving the use fees associated with NSW’s Aboriginal cultural licences as currently proposed.

As a final point here, MLDRIN notes that WaterNSW proposes to continue to waive consent transaction charges for Aboriginal water licences for any licence dealings (e.g. trades) (p. 180). However, this seems like an empty commitment given that (a) Aboriginal cultural licences cannot be traded and (b) “there is no clear policy guidance on what conditions or use limitations might be placed on” the other Aboriginal specific water entitlements (p. 167) and so, their ability to be traded seems unlikely.

(ii) First Nations engagement in statutory planning

MLDRIN is pleased to see that WAMC has included strengthening statutory planning engagement with First Nations peoples as part of its pricing submission. This is overdue, with Traditional Owners long expressing frustration and disappointment with the NSW Government’s approach to First Nations engagement on water related issues.

¹³ Other complementary measures are also necessary to support the uptake of these specific purpose entitlements. The NSW Government has conducted several reviews on this matter (For example, Alluvium Consulting Australia Pty Ltd, *Recommendations for improving use of Cultural Access Licences* (30 June 2022)). MLDRIN has supplied submissions on this issue to other inquiries too (Most recently, MLDRIN’s submission to the New South Wales Natural Resources Commission review of the Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2016 (2023) <<https://www.nrc.nsw.gov.au/Murray%20Lower%20Darling%20Rivers%20Indigenous%20Nations.pdf?downloadable=1>>).

¹⁴ Victorian Government ‘Water is Life: Traditional Owner Access to Water Roadmap - Section A: Victorian Government policy’ (September 2022) p. 44 <https://www.water.vic.gov.au/__data/assets/pdf_file/0029/658523/water-is-life-traditional-owner-access-to-water-roadmap-section-a-victorian-government-policy.pdf>.

¹⁵ Ibid, p. 44.

MLDRIN observes that Attachment D describes this potential activity slightly differently, stating that the “WAMC proposal includes allowances for *best practice* first nations engagement in statutory plans” (p. 6, emphasis added). “Strengthening” engagement and “best practice” are not necessarily the same. Similarly, “strengthening” engagement from WAMC’s perspective is likely to differ from First Nations’ perspectives. This is important because resourcing directly underpins the quality of engagement that can be delivered. MLDRIN has raised a number of concerns about inadequate or absent First Nations consultation for replacement of statutory plans in 2023 and 2024. In an assessment of the NSW Lachlan Water Resource Plan conducted for the Murray Darling Basin Authority in November 2023, MLDRIN noted that funding constraints meant Water Sharing Plans for unregulated water sources are being replaced through a process that does not involve any notification or involvement of First Nations and, in fact, appears to be weakening the recognition of First Nations values and uses through removal of targeted objectives, strategies and performance indicators.¹⁶ These issues are detailed in our assessment report for the Lachlan, and other, NSW WRPs. MLDRIN recommends that WAMC seek further clarification on the quality of engagement that WAMC intends to deliver, including its proposed methods and associated costing estimates. Further, WAMC should detail how First Nations people have guided and shaped these methods.

(iii) developing a framework to evaluate statutory plan outcomes in relation to benefits for Aboriginal people

MLDRIN welcomes WAMC’s inclusion of developing a framework to evaluate statutory plan outcomes in relation to benefits for Aboriginal people as part of its pricing proposal. However, the proposal does not offer transparency around the opportunities for First Nations people to be part of this development, or (preferably) to share decision making authority on its design. Additionally, the *implementation* of such a framework – again, with First Nations involvement – must also be included in the pricing estimate, not just its development. A framework that is not implemented seems pointless. MLDRIN is eager to understand more about this evaluation framework, and encourages IPART to gather further information, including about estimated costings, from WAMC.

(iv) ensuring that assessment of the condition of surface water ecosystems includes local cultural values, consistent with the objectives of NSW Aboriginal Water Strategy

¹⁶ DPE staff confirmed that the decision not to undertake targeted consultation with First Nations was made because the Department was not able “to resource both the WSP consultation and WRP consultation. See MLDRIN’s Assessment Report for the 2023 version of the Lachlan Surface Water (SW) Water Resource Plan (WRP) https://www.mdba.gov.au/sites/default/files/publications/attachment-d-lachlan-water-resource-plan-first-nations-advice-redacted_0.pdf p. 23

MLDRIN is unclear what this activity entails. From reviewing the draft Aboriginal Water Strategy, objective three seems the most relevant here: “work with Aboriginal people to maintain and preserve water-related cultural sites and landscapes.”¹⁷ It will therefore be important that the costing estimates for this activity include provisions for Traditional Owners to be involved in the assessments in question. MLDRIN is eager to understand more about this activity, and encourages IPART to gather further information, including about estimated costings, from WAMC.

Implications of WAMC and WaterNSW pricing submissions (and IPART’s determination) for First Nations

Although maximum pricing increases are still to be determined, it appears extremely likely that the cost of water fees and charges will increase over the coming five year period. MLDRIN notes that this creates a greater burden for existing First Nations water holders, as well as a challenge for new First Nations water holders. For example, advancements with the Australian Government’s Aboriginal Water Entitlement Program mean that water is likely to be purchased in the very near future.¹⁸ We can only assume that First Nations water ownership in NSW is likely to further increase when the priorities and actions under the NSW State Water Strategy and NSW Aboriginal Water Strategy and direction under the National Closing the Gap Agreement (Target 15c) are considered.

If at all possible, we strongly recommend considering provisions that waive fees and charges associated with water entitlements to First Nations people and entities. Again, we suggest NSW mimic commitments from the Victorian Government’s *Water is Life*, particularly Outcomes 9 and 10.

First Nations involvement in IPART’s processes

As noted above, Traditional Owners are not mere stakeholders, but rights holders. IPART must review and adjust its approaches to reviewing the maximum prices that WAMC and WaterNSW will charge in the future to ensure that they are more accessible and supportive for First Nations and Traditional Owners’ input and influence, should they wish to participate. Best practice would see IPART empower and engage First Nations people to be part of such a review. MLDRIN appreciates this feedback is beyond the scope of the current review, but it would be remiss not to include this point now. MLDRIN welcomes the opportunity to discuss further advice on this.

¹⁷ NSW DCCEEW ‘Consultation paper for draft NSW Aboriginal Water Strategy and Action Plan’ (July 2024) p. 18

<https://water.dpie.nsw.gov.au/__data/assets/pdf_file/0003/616431/aws-consultation-paper.pdf>.

¹⁸ <https://www.dcceew.gov.au/water/policy/first-nations/aboriginal-water-entitlements-program>