



Mr Rob O'Neill
General Manager, Water & Energy Licensing & Compliance
Independent Pricing and Regulatory Tribunal
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New South Wales
Aboriginal Land Council

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Dear Mr. O'Neill,

Review of the Water NSW operating license

The NSW Aboriginal Land Council (**NSWALC**) is a self-funded statutory corporation established under the *Aboriginal Land Rights Act 1983 (ALRA)*¹. It has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples in NSW and is committed to pursuing cultural, social and economic independence for Aboriginal peoples and communities in NSW.

As the peak representative body representing a state-wide Land Rights Network with over 23,000 members and supporting the work of 120 autonomous Local Aboriginal Land Councils (**LALCs**) with similar statutory objectives, we appreciate the opportunity to submit comments to the Independent Pricing and Regulatory Tribunal's review of the Water NSW operating license.

NSWALC understands that the proposed operating license will establish a new *modus operandi* for Water NSW, covering its obligations to the environment, customers and stakeholders in providing water services throughout NSW. In its current form, the *Water NSW Draft Operating License* and other related documents, mention of Aboriginal peoples, communities and their concerns is minimal.

Aboriginal peoples possess inherent rights as Australia's First Peoples. It is recommended that a consideration of Aboriginal cultural, social and economic values be appropriately recognised and accommodated within Water NSW's new operating framework.

Aboriginal peoples and communities have both cultural and commercial interests in water, and Water NSW can play a key role in facilitating 'cultural flows'² as well as economic development outcomes for Aboriginal peoples in NSW. Cultural, economic and environmental flows need not be seen as competing priorities, but could potentially be mutually reinforcing under the right framework. As maintained by the NSW Office of Water, '[t]here are opportunities for Aboriginal communities not only to improve the local environment but also to use water for cultural activities and business purposes'³.

¹ See: <http://www.legislation.nsw.gov.au/#/view/act/1983/42/full>

² See: <http://culturalflows.com.au/>

³ NSW Office of Water 2012, *Our water, our country: An information manual for Aboriginal people and communities about the water reform process*, NSW Department of Primary Industries, Sydney, p. 1.

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The NSW Office of Water has provisions relating to Aboriginal peoples – for instance, in developing Water Sharing Plans – and now provides two Aboriginal-specific classes of water license: 1) Aboriginal Cultural Water Access Licenses; and 2) Aboriginal Community Development Water Access Licenses. For Water NSW, this should be the starting point for providing for Aboriginal interests within its own framework as a statutory corporation.

1. Aboriginal cultural interests in water

In the development of policy and delivery of programs which affect Aboriginal people and communities, it is essential that there is genuine and meaningful engagement with Aboriginal peoples and their representative organisations. The *United Nations Declaration on the Rights of Indigenous Peoples*⁴, which is considered the foremost piece of international law recognising Indigenous rights, including in relation to water, provides best practice principles regarding genuine community engagement. Note in particular the following articles:

- *Article 25* – that Indigenous peoples have a right to ‘maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources’.
- *Article 32* – that Indigenous peoples have the right to ‘determine and develop priorities and strategies for the development and use of their lands or territories and other resources’.

Aboriginal peoples and communities also have interests in water quality and environmental monitoring, not least of all for reasons of cultural heritage. As the United Nations Committee on Economic, Social and Cultural Rights maintains, states (including state-owned statutory corporations like Water NSW) must ensure that ‘Indigenous people’s access to water resources on their ancestral lands is protected from encroachment and unlawful pollution’.⁵

In NSW, the *Water Management (General) Regulation 2004* (under the *Water Management Act 2000*) provides for water use for cultural purposes by Aboriginal peoples. This opened the way for the Aboriginal Cultural Water Access License to be developed. In light of this, Aboriginal ‘cultural flows’ should be listed as a valid lawful purpose for water allocations in Clause 1.2.1 of the *Water NSW Draft Operating License, 2017-2022*. Water NSW must ensure that it facilitates rather than hinders, even if inadvertently, this aspect of NSW law.

2. Aboriginal commercial interests in water

The Indigenous worldview does not generally separate land and water in terms of rights and responsibilities⁶ and as such Aboriginal peoples’ interest in water is multifaceted. Water NSW can play its part to facilitate the economic development objectives of the ALRA by ensuring that its policies and *modus operandi* are in line with them.

The ALRA, enacted as a compensatory mechanism for historic dispossession, and to ameliorate the ongoing disadvantages faced by Aboriginal communities, established a network of LALCS to manage land as both an economic and cultural base for Aboriginal communities. LALCs are significant property holders in NSW and operate a range of social and cultural enterprises as well as businesses on their lands that require access to water.

⁴ See: <https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1>

⁵ O’Donnell, M. 2011, *Indigenous rights in water in northern Australia*, TRaCK, Charles Darwin University, Darwin, p. 26.

⁶ O’Donnell 2011, p. 10.

The NSW Office of Water has made Aboriginal Community Development Water Access Licenses available to support Aboriginal businesses, albeit with quite constraining parameters. There has been a low uptake of Aboriginal-specific water licenses in NSW, which is a fact that researchers Jon Altman and Bill Arthur attribute, not to low demand, but rather to ‘institutional barriers (like onerous terms or poor awareness)’⁷.

While it is not within Water NSW’s power to change the ‘onerous terms’ of the licenses, it can at least raise awareness of the two classes of Aboriginal-specific water licenses amongst Aboriginal peoples to ensure greater uptake into the future. Doing so would accord with Clause 6.11.1 of the Draft Operating License, which outlines the utility’s educational responsibilities to the community.

Another way in which Water NSW can play a part in facilitating Aboriginal economic development is by keeping detailed records on Aboriginal commercial water use, in accordance with Clauses 6.2 of the Draft Operating License (which states that ‘Water NSW must maintain a Water Allocation Account for each Customer that holds a Water License’) and 6.3 (which pertains to water metering and monitoring). It is important to note that since some Aboriginal businesses opt for a general commercial license over an Aboriginal-specific license, this data must be captured too. Overall, ‘there is a low knowledge base about those Indigenous businesses that are commercial water users’⁸. The greater the knowledge, the better that the needs of Aboriginal water users will be able to be met, which will go some way towards ‘Closing the Gap’.

3. Aboriginal representation

Clause 6.5.3 (b) (xi) of the *Water NSW Draft Operating License, 2017-2022* stipulates that at least one Indigenous Australian should be included as a member on each area-specific Customer Advisory Group. While NSWALC welcomes such a provision, we would seek further details as to how Indigenous representatives will be appointed. As a ready-made system of democratic Aboriginal representation, the state-wide network of LALCs would be well-placed to provide appropriate Aboriginal representation for Customer Advisory Groups. NSWALC would welcome the opportunity to liaise with Water NSW on this matter as it develops its Customer Advisory Group Charter in accordance with Clause 6.6.2 (b) of the Draft Operating License.

In addition, Clause 6.7.1 of the Draft Operating License mandates the development of ‘one or more Customer Service Charters, for different categories of Customers, as it deems appropriate’. NSWALC seeks to liaise with Water NSW on this matter as well; specifically to help develop a Customer Service Charter catering to Aboriginal peoples as a special category of customer.

⁷ Altman, J. & Arthur, B. 2009, *Water licences and allocations to Indigenous people for commercial purposes: An Australia-wide scoping exercise*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, p. 7.

⁸ Altman & Arthur 2009, p. 7.

4. Recommendations

NSWALC recommends that the new Water NSW operating license should:

- 1.1 Explicitly recognise and facilitate the objectives of the ALRA;
- 1.2 Align with the principles embedded within the *United Nations Declaration on the Rights of Indigenous Peoples*;
- 1.3 Acknowledge Aboriginal 'cultural flows' among the list of lawful water allocation purposes;
- 1.4 Provide for water quality and environmental monitoring to ensure that Aboriginal peoples' water resources are protected from pollution;
- 2.1 Expand the educational functions of Water NSW to include awareness-raising amongst Aboriginal peoples, businesses and communities as to the Aboriginal-specific classes of water license that they are entitled to apply for;
- 2.2 Require Water NSW to keep detailed records on Aboriginal commercial water use, so as to ensure a greater knowledge base for future water planning in the interests of Aboriginal economic development;
- 3.1 Ensure LALC representation within each Customer Advisory Group; and
- 3.2 Mandate that a Customer Service Charter specifically tailored to Aboriginal customers be developed.

Should you require further information in regards to any issues that have been raised in this submission, please do not hesitate to contact the NSWALC Policy Unit on (02) 9689 4444 or via e-mail: policy@alc.org.au.

Yours faithfully,



Malcolm Davis
Acting Chief Executive Officer

Date: 10 April 2017