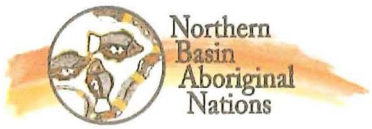

Barkindji (Paakantya) Barunggam Bigambul Bidjara Budjiti Euahlayi Gomeroi (Kamilaroi) Githabul Gunggari Gwamu (Kooma) Jarowair Kunja Kwiambal Kambuwal Maljangapa Mandandanji Mardigan Murrawarri Ngemba Ngiyampaa Wailwan Wakka Wakka

NSW

Murray Darling Basin Royal Commission
Commissioner Walker SC
17 May 2018

Dear Commissioner

Thank you for the opportunity to address the Murray Darling Basin Royal Commission today, 17 May 2018. We wish to put the following as our formal submission to the Royal Commission.

SUMMARY

NBAN notes that the Aboriginal Peoples' of the Basin have been substantially dispossessed by the national water reforms. As rights for every water user, and the environment have increased, Aboriginal Peoples' rights have been eroded.

NBAN notes that the States proceeded to implement the National Water Reform process by starting with existing use rights as the basis for planning a pathway to more sustainable access and use. The difficulty with that approach was that at that time, Aboriginal People did not have large riparian land holdings, or history of use of water.

All State-based water reform regimes failed to acknowledge that by adopting this approach the process was indirectly discriminatory.[1] The essential preconditions of riparian rights and a history of use were conditions that Aboriginal People, by reason of past discrimination and dispossession of their lands, were unable to meet.[2]

As a result, these reforms resulted in a second wave of dispossession[3] for Aboriginal People, as non-Aboriginal peoples' rights in water were entrenched,[4] and the rights that had been established in the earlier *Mabo*[5] decision were not accommodated in the early stages of reform. This has rightly been referred to as a "structural injustice".[6]

The original injustice of dispossession of Aboriginal People of their lands was later replicated in the design of a more secure water rights framework at exactly the same time as Aboriginal Peoples' rights with respect to water were emerging from case law and the legislative response to that case law.[7]

It is time for the Water Act 2007, Basin Plan and the Water Resource Plans to ensure that they are compliant with the Native Title Act 1993 (Cth), and the human rights of Aboriginal Peoples' protected at International Law.

NBAN

We are the Traditional Owners for the Sovereign First Nations of the Northern Murray Darling Basin. Our people and the Basin land and waters have a relationship that spans all time. We have always been here, and we will always be here.

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[1] *Racial Discrimination Act 1975* (Cth) s 10.
[2] McAvoy, T (2006) *"Water: fluid perceptions"* Transforming Cultures E Journal 1, 97 – 103, at 101, NBAN submission to 2014 review of the *Water Act 2007* (Cth).
[3] Sheehan, J and Small, G (2007)*"Aqua Nullius"* Presentation given at the 13th Pacific-Rim Real Estate Society Conference 21 – 24 January Fremantle WA.
[4] Jackson, S (2017) *"Enduring and persistent injustices in Australian water governance"* in Lukasiewicz, A., Dovers, S., Robin, L., McKay, J., Schilizzi, S and S. Graham (Eds) *Natural Resources and Environmental Justice: The Australian Experience*, CSIRO Publishing Melbourne: 121-132 at 123.
[5] *Mabo v Queensland [No 2]* 1992, and the subsequent passing of the *Native Title Act 1993* that afforded statutory recognition and protection of native title rights and interests to water.
[6] Young, M (2006) *"Taking the basic structure seriously"* Perspectives on Politics, 4 91 – 97 at 114, cited in Jackson, S (2017) *"Enduring and persistent injustices in Australian water governance"* in Lukasiewicz, A., Dovers, S., Robin, L., McKay, J., Schilizzi, S and S. Graham (Eds) *Natural Resources and Environmental Justice: The Australian Experience*, CSIRO Publishing Melbourne: 121-132 at 129.
[7] McAvoy, T (2006) *"Water: fluid perceptions"* Transforming Cultures E Journal 1, 97 – 103; Jackson, S (2017) *"Enduring and persistent injustices in Australian water governance"* in Lukasiewicz, A., Dovers, S., Robin, L., McKay, J., Schilizzi, S and S. Graham (Eds) *Natural Resources and Environmental Justice: The Australian Experience*, CSIRO Publishing Melbourne: 121-132 at 130.

We acknowledge our ancestors, our elders and their role in maintaining healthy, rivers and wetlands and caring for all of the animals and plants under each Nations cultural LAW. We note the damage that has occurred in their lifetime, and ours, to our natural and cultural heritage.
We are one with our lands and waters, and damage to our Mother Earth is damage to us all, our children, and our children's children. Our water is our lifeblood, and all of us depend on healthy rivers and wetlands.

Our preferred way is to work together collaboratively to ensure the best for all people, and our environment. We request that you actively seek our knowledge, as our experiential and observational science is based on many thousands of years living in our Country, through many different climatic regimes. Our knowledge compliments your 130 year scientific measurements and modelling.

We request that you actively seek to protect and respect our cultural law in respect to water, and ensure that you engage in a culturally appropriate way that recognises the expertise of our Elders and Knowledge holders.

The Northern Basin Aboriginal Nations (NBAN), with 22 participating Sovereign First Nations, is an independent self-determining Traditional Owner based organisation with a primary focus on cultural and natural resource management in the northern Murray–Darling Basin.

It advocates greater recognition and respect for Aboriginal knowledge and cultural values and uses regarding water and land management in the northern Murray–Darling Basin. NBAN has contributed to the development of the Murray–Darling Basin Plan and will assist the Murray-Darling Basin Authority and the Basin States by providing advice regarding the implementation of the Basin Plan.

NBAN also provides ongoing advice to the National Cultural Flows Planning and Research Committee regarding cultural flows research and the involvement of Traditional Owners in the northern Murray–Darling Basin. Full gatherings of Nation Delegates from our participating Nations occur at least twice annually and our Board meets at least four times annually. NBAN maintains a small office in Moree NSW, and is supported by a 9 person Board of Directors and its staff based in Moree.

Failure to recognise Native Title rights and interests and rights to extract water

NBAN is of the view that water laws, like fishing licences, and cultural heritage, are laws that the various State governments have enacted to control access to a resource, rather than create a property right. Properly understood, they do not extinguish native title (see Appendix 1).

Further most state water acts, such as the NSW Water Management Act 2004 (NSW) do not purport to affect native title rights and interests, nor is a licence required for native title holders[8]. To date, none of the water resource plans have followed a future act consent process. Accordingly, the presumption should be that native title rights exist, pending determination.

NBAN is of the view that native title rights and interests, once determined, would have a primacy, requiring water resource plans to be rewritten in a manner which adjust for the native title.

The National Water Initiative provided that:

> *52. "The Parties will provide for indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, through planning processes that ensure:*
>
> *i) inclusion of indigenous representation in water planning wherever possible; and*
>
> *ii) water plans will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.*
>
> *53. Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth Native Title Act 1993.*
>
> *54. Water allocated to native title holders for traditional cultural purposes will be accounted for."*[9]

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[8] Section *55 Water Management Act 2000 (NSW)* note no regulations have been made for over 17 years.

[9] National Water Initiative (2004), clauses 52 – 54.

In 2009, the National Water Commission found:

- *Many water plans were taking Indigenous interests into consideration, as evidenced by consultation and research reports.*
- *In general, Indigenous participation in decision-making relating to water management varied regionally but could be improved in most cases.*
- *Limited steps were being taken to allocate water for Indigenous economic purposes and to native title holders.*
- *Indigenous-led governance organisations capable of driving Indigenous water interests forward were emerging and strengthening.* [10]

However in 2013, the National Water Commission conducted a further review of Indigenous engagement in water planning, and found that very few of the jurisdictions had recognised Indigenous entitlements to water or adequately articulated management through water management plans.[11]

Most recently in 2017, the Productivity Commission published an issues paper[12] which referred back to the National Water Commission 2014 review and its finding:

> *"... while progress had been made incorporating Indigenous social, spiritual and customary objectives into water plans, there had been no material increase in water allocation for Indigenous social, economic or cultural purposes."*[13]

The Productivity Commission Draft Report has recommended:

> *"Draft Recommendation 3.3*
>
> *Where State and Territory Governments provide access to water for Indigenous economic development they should:*

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[10] Jackson, S. (2009) *Background Paper on Indigenous Participation in Water Planning and Access to Water*, Report prepared for the National Water Commission, Canberra: CSIRO Sustainable Ecosystems.

[11] National Water Commission (2014) *A review of Indigenous involvement in water planning, 2013*. Canberra: National Water Commission.

[12] Australian Government Productivity Commission (2017) *National Water Reform, Productivity Commission Issue Paper March 2017*. Canberra: Australian Government Productivity Commission. Available at: https://www.pc.gov.au/inquiries/current/water-reform/issues/water-reform-issues.pdf

[13] National Water Commission (2014b) Fourth Assessment of the National Water Initiative, p 114

a. *Source water within existing water entitlement frameworks, such as by purchasing water on the market or as part of transparent processes for releasing unallocated water*
b. *Ensure adequate supporting arrangements (such as training and business development) are in place to enable indigenous communities to maximise the value of the resource*
c. *Involve indigenous communities in program design;*
d. *Ensure future governance arrangements are specified and implemented."*

The Cultural Flows Research Project has been underway for 7 years, but no significant water allocation, or interest has been provided anywhere in the Basin as a result.

Human Rights based systemic approach required

NBAN is of the view that the States and Commonwealth reforms and processes have been largely diversionary on research and consultation while at all times comprehensively failing to deliver Aboriginal Peoples' water rights.

NBAN notes that whilst political commitments may be made from time to time, time has shown that they are illusionary, and that the type of redress required is systemic, and rights based, such as that recommended in 2016, by COAG, through its Indigenous Property Rights Framework and the Indigenous Property Rights Network.

NBAN advocates for the Indigenous Property Rights Network approach which adopts the following principles to apply when allocating property rights (equally applicable to incidents in land and natural resource access and use)[14]:

1) *Application of international human rights and principles*
2) *First Nations led*
3) *Inclusive process*
4) *Experience, advice, research and evidence based*
5) *Self-determination*
6) *Secure and protect the Indigenous Estate*
7) *Right to make decisions*
8) *Respect for and protection of culture*[15]

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[14] This has been referred to the newly established COAG Ministerial Council on Aboriginal Affairs
[15] Reported at page 119 of the Social Justice and Native Title Report 2016.

Terms of reference 5 – Is the Basin Plan consistent with objects of Water Act 2007 with respect to Aboriginal Peoples' rights

NBAN is of the view that the current Basin Plan fails to meet the requirements of the Water Act 2007 (Cth). NBAN submits that the current Basin Plan fails to adequately respect, preserve and maintain Aboriginal Peoples' knowledge of, customary practices, and use of, water as is required by sections 3 and 21(1) of the *Water Act 2007 (Cth)* (**Water Act**).

The Water Act objects (section 3) provide, relevantly:

> *"(b) to give effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources) and, in particular, to provide for special measures, in accordance with those agreements, to address the threats to the Basin water resources; and*
>
> *(c) in giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes"*

Section 4 of the Water Act defines relevant international agreements as follows:

> *"**relevant international agreement** means the following:*
>
> *(a) the Ramsar Convention;*
>
> *(b) the Biodiversity Convention;*
>
> *(c) the Desertification Convention;*
>
> *(d) the Bonn Convention;*
>
> *(e) CAMBA;*
>
> *(f) JAMBA;*
>
> *(g) ROKAMBA;*
>
> *(h) the Climate Change Convention;*
>
> *(i) any other international convention to which Australia is a party and that is:*
>
> *(i) relevant to the use and management of the Basin water resources; and*
>
> *(ii) prescribed by the regulations for the purposes of this paragraph."*

The International Convention on Biological Diversity('**CBD**')[16] importantly provides at Article 8(j) a requirement to:

> "*respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*

NBAN recommends that, in order to more consistently give effect to the CBD, such as Article 8(j), there could be an amendment to section 21 of the Water Act, to ensure consistency with how the biodiversity elements of the convention are treated within the Water Act and how the Act treats the cultural rights of Aboriginal Peoples.

> **Insert at 21**
> Insert new Section 21(2)(a)(iii)
> *"the fact that the cultural rights of Aboriginal People have been adversely impacted, as a result, and require special measures to ensure consistency with relevant international agreements"*

NBAN notes Article 8 (j) of the CBD requires Australia to:

> "*respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."*

NBAN notes that Section 21(1) of the Water Act requires the Basin Plan to be prepared so as to give effect to the relevant international agreements. Accordingly NBAN submits that the Basin Plan must give effect to Article 8 (j) of the CBD.

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[16] Rio de Janeiro 5 June 1992

The Conference of the Parties 7 set out a plan of action to improve implementation of Article 8 (j) by member nations and requires, amongst other things greater adoption and use of the Akwe Kon Principles, which are used for strategic assessments such as the Water Resource Plans, as well as individual developments:

- *Notification and public consultation of the proposed development by the proponent;*
- *Identification of Indigenous and local communities and relevant stakeholders likely to be affected by the proposed development;*
- *Establishment of effective mechanisms for indigenous and local community participation, including for the participation of women, the youth, the elderly and other vulnerable groups, in the impact assessment processes;*
- *Establishment of an agreed process for recording the views and concerns of the members of the indigenous or local community whose interests are likely to be impacted by a proposed development;*
- *Establishment of a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community;*
- *Identification and provision of sufficient human, financial, technical and legal resources for effective indigenous and local community participation in all phases of impact assessment procedures;*
- *Establishment of an environmental management or monitoring plan (EMP), including contingency plans regarding possible adverse cultural, environmental and social impacts resulting from a proposed development;*
- *Identification of actors responsible for liability, redress, insurance and compensation;*
- *Conclusion, as appropriate, of agreements, or action plans, on mutually agreed terms, between the proponent of the proposed development and the affected indigenous*
- *and local communities, for the implementation of measures to prevent or mitigate any negative impacts of the proposed development;*
- *Establishment of a review and appeals process.*

NBAN notes that the Conference of the Parties requested governments to use the Voluntary Guidelines and encouraged them to initiate a legal and institutional review with a view to exploring options for incorporation of the guidelines in national legislation and policies.

Issues Paper 1 - Particular focus area f)

NBAN has already corresponded with the NSW Government in a joint letter with MLDRIN regarding their views of the inadequacy of the current Water Resource Planning process to comply with Part 14 of the Basin Plan, and clauses 10.52, and 10.54 (Appendix 2).

To outsource those requirements in a limited consultancy on a short time frame and say that the outcomes have been delivered in good faith is highly questionable.

NBAN notes that the current draft Water Resource Plans do not articulate cultural flows, or set aside significant amounts of water for native title holders and Nations, despite registered claims[17] having satisfied to a prima facie standard the expert National Native Title Tribunal that they have such rights pursuant to (s 186(1)(g), 190B(6)).

NBAN also notes that the Water Resource Plans stay in place for a long period of time, so cannot be changed should a determination occur, to reflect the outcomes of that determination.

NBAN is in no position to interrogate the NSW Government on the true extent to which they have had regard to the repeated assertions of Aboriginal People to water, the health of their waterways and associated wetlands to practice culture and maintain healthy communities, but notes that the Commissioner is able to, and we would welcome that line of inquiry and the responses being made public.

[17] Gomeroi claim, see paragraph (j) of registered rights and interests

Appendix 1 – Native Title

It should be noted that the States' regulation of access to a natural resource, such as water or fish, as repeatedly held by the High Court, does not extinguish native title rights or interests. Nor is native title a common law right, although it is recognised and protected at common law.[18]

The High Court has analysed these regimes and determined in *Akiba,* Finn J (at first instance) that the previous fisheries regimes which applied in Queensland had not extinguished the non-exclusive Applicant's native title rights because:

1. *The legislature had not evidenced a clear and plain intention to do so;*[19]
2. *The common law public right to take fish from tidal waters for commercial purposes had been affected by licensing regimes;*
3. *The native title right is a private right, rather than the common law public right which was more amenable to extinguishment;*
4. *A legislative measure which merely regulates the exercise of a native title right does not evidence an intention by the legislature to extinguish the Native Title right;*
5. *The licensing regimes do no more than regulate the exercise of the native title rights to take fish for commercial purposes.*[20]

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[44] *Mabo v Queensland (No 2)* ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992) at 43,52 and 68; O'Bryan, K (2016) "*More Aqua Nullius? The Traditional Owner Settlement Act 2010 and the neglect of Indigenous rights to manage Inland Water resources*" MULR Vol 40 page 547 at 567–568.

[19] *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No.2)* at [768]; *Ward HC at [78]; either by express provision in the statute or by necessary implication: Wik Peoples HC, at 247. As was said by Brennan J in Mabo [No 2] at [64]:*

> *This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealings with the extinguishing of the native title of Indian bands in North America. ... [R]eference to the leading cases in [Canada and the United States] reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so. That approach has been followed in New Zealand. It is patently the right rule.*
>
> ....

At [770] "*Given the contemporary significance now attributed to "context" in statutory interpretation: CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCATrans 242; (1997) 187 CLR 384 at 408; where the extinguishment is said to have resulted directly from legislation itself without, for example, the conferral of inconsistent rights on a third party: cf Fejo at 126; the absence in contextual material of any indication of a purpose to override native title rights, could, I would respectfully suggest, be of some significance in the interpretation of a statute enacted after the decision in Mabo [No 2]; cf the comments of Gummow J in Wik Peoples HC at 184-185; see also by way of contrast, Haida Nation v British Columbia (Minister of Forests) (2004) 245 DLR (4th) 33 at [25], [27], [32].*

[20] *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No.2)* (2010) 270 ALR 564; 2010 FCR 643 at [763 – 861], *Karpany v Dietman* [2013] HCA 47; 88 ALJR 90; 303 ALR 216, per JJ Full Court at [23] for where SA Fisheries Act regime was determined.

In *Ward v West Australia (2002)*[21] the High Court held that the West Australian Water legislation did not extinguish native title rights and interests, but was inconsistent with exclusive rights being recognized in water.

Accordingly, Native Title rights in water are likely to be non-exclusive in regimes where access to water has been regulated and accessed. Native title rights are likely to include the right to take, including for commercial purposes. In non-regulated water sources with very little extraction, it is the authors view that exclusive native title rights may still be established.

Any impact upon native title rights and interests from various State statutory regimes granting licences to take and use water has been validated by operation of the *Native Title Act 1993* (Cth) as a past or intermediate period act,[22] but it does give rise to both compensation[23] and is subject to the non-extinguishment principle.[24]

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[21] Ward v West Australia (2002) 213 CLR 1 at 151 – 152, at [263]

[22] Native Title Act 1993 (Cth), s 22F, s 228, s 232A- 232E

[23] Ibid at s 22G

[24] Ibid at s 238, it means that once the inconsistent right is abolished, terminated, or lapses, then the underlying native title rights are fully restored