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Murray Lower Darling Rivers Indigenous Nations (MLDRIN)

Submission to the Murray Darling Basin Royal Commission

Dear Commissioners,

Thank you for the opportunity to provide comments for your consideration, as part of the Royal Commission into the Murray Darling Basin. We trust these submissions will be of use.

We look forward to meeting you in person to elaborate on the issues raised in these submissions.

Context

1. These submissions respond to the areas of particular focus identified in Issues Paper 1. In addition, we respond to the specific questions put to MLDRIN regarding sections 21 and 22 of the Act and Chapter 10 part 14 of the Basin Plan.
2. We note that many of the matters raised in this submission have been previously communicated to relevant authorities (including Federal Departments, the MDBA and Basin-State government departments and agencies). Notably, we have highlighted our position on the relevance of the *Convention on Biological Diversity* ('Biodiversity Convention') Article 8(j) in a range of submissions and forums since 2014.

Determining an environmentally sustainable level of take

3. We note the Commissioner's views in Issues Paper 2 concerning the legal construction of the Water Act and the issue of the compliance (or otherwise) of the Basin Plan with the Act. The view that the Basin Plan, including the setting of a sustainable diversion limit ('SDL'), must reflect an environmentally sustainable level of take ('ESLT') and that the determination of the ESLT must accord with environmental criteria is a view supported by

earlier legal opinion¹ and consistent with academic legal writing² on the question at the time of the preparation of the Basin Plan.

4. Key sources of the primacy of environmental criteria in determining the ESLT lie in the role of the Act in giving effect to international obligations under 'relevant international agreements', in particular the *Biodiversity Convention* and *Ramsar Convention*, each of which is essentially an environmental treaty. The issue as to whether Australia has correctly implemented obligations under those treaty instruments is dealt with at length elsewhere, such as by Emma Carmody³. We consider the role of those Conventions further below, in respect of Indigenous interests.
5. In this regard the approach taken to construction of the Act and preparation of the Basin Plan – namely, an exercise in integrating economic, social and environmental criteria – is, as the Commissioner has pointed out, legally in error. A principal consequence of this error is that the setting of annual water recovery for the Basin is too low, when considered against scientific evidence and opinion. Rather than reduction of 2750 GL/yr recovery target for the environment an SDL of between 3000 GL/ya and around 7000 GL/ya would be necessary to reflect properly an ESLT, depending the level of certainty required.
6. Given legal and academic opinion available, MLDRIN accepts the view put forward by the Commissioner, at [14] of Issues Paper 2, that a proper construction of the Act requires environmental considerations to be paramount and it likely that the Basin Plan (including the setting of SDL) has not been prepared correctly in accordance with the Act. Among the questions this raises is whether, or to what extent, SDLs set for the various water resource plans areas in Schedule 2 of the Basin Plan do not reflect the ESLT for the MDB.

Views of Indigenous People

Sections 21 and 22 of the Water Act

¹ See EDO (Victoria) *Legal Analysis of the Proposed Murray-Darling Basin Plan* (2012), <https://www.envirojustice.org.au/murray-darling-basin-plan-and-water-act-cth/>

² Emma Carmody 'The silence of the plan: Will the Convention on Biological Diversity and the Ramsar Convention be implemented in the Murray-Darling Basin?' (2013) 30 *Environmental and Planning Law Journal* 56; Jamie Pittock, Max Finlayson, Alex Gardner and Clare McKay 'Changing character: the Ramsar Convention on Wetlands and climate change in the Murray-Darling Basin, Australia' (2010) 27 *Environmental and Planning Law Journal* 401; Tim Bonyhady 'Putting the environment first?' (2012) 29 *Environmental and Planning Law Journal* 316.

³ Carmody, n 2 above

7. Sections 21 and 22 of the *Water Act 2007* (Cth) do not provide adequate or appropriate consideration or protection of First Nations' rights and interests in water.
8. Under section 21 Indigenous interests are treated as an ancillary category of subject-matter on which the Basin Plan is to be prepared. Specifically, 'Indigenous... interests' are contained within a bundle of required considerations to be taken into account in development of the Basin Plan.⁴
9. This is an inappropriate approach to the recognition and treatment of Indigenous interests in water. First Nations' interests in water, as noted above, include deep, distinctive and special attachments to waters as intrinsic foundations of society, law, economy, culture and spirituality. Those interests also encompass, in the face of extensive regulation and modification of water systems and violent disruption of First Nations' attachments to those waters, an interest in the rebuilding of attachments to and environmental restoration of waters of the MDB.
10. Further, the construction of section 21 arguably fails to give full and proper regard to Australian obligations under relevant international agreements, specifically the *Biodiversity Convention*. As the Commissioner and others have remarked, the incorporation into Australian law of environmental treaty obligations is key basis for the Act.
11. Under section 22,⁵ consideration of Indigenous interests in the making of the Basin Plan arguably traverses a wide ambit ('social, spiritual and cultural matters relevant to Indigenous people in relation to water resources' in water resource planning) but does so on the weak, procedural foundations of mandatory considerations. This means that water interests, rights, values and protections sought by First Nations can be given variable weight by planners and decision-makers. In practice, this typically means little weight is given to First Nations' interests, leads to little in the way of substantive outcomes for First Nations, and permits those interests to be subordinated invariably to other interests.
12. Recognition of First Nations' interests and rights in terms of the formula at subs 22(3)(ca) permits Basin States (in the preparation of WRPs) to treat '... matters relevant to Indigenous people' as an evidentiary issue rather than an issue of legal recognition and protection of First Nations' interests in water.

⁴ Subs 21(4)(c)(v)

⁵ Subs 22(3)(ca)

13. The construction of subs 22(3)(ca) expressly omits regard to be had to economic matters and interests relevant to First Nations. This is an important omission, notwithstanding the weak obligations operating under subs 22(3), as it fails to require consideration of First Nations' economic and development needs in relation to water resources (as these are to be managed under water resource plans).

Sections 21 and 22 in the context of relevant international agreements

Biodiversity Convention

14. The Basin Plan must be prepared so as to give effect to relevant international agreements.⁶ Relevant to First Nations' interests in particular is the *Biodiversity Convention* and Articles 8(j) and 10(c) in particular.
15. Article 8(j) establishes a framework for the protection and promotion of Indigenous knowledge, practices, innovations and lifestyles in the conservation and sustainable use of biodiversity and the equitably sharing of benefits deriving from knowledge, practices and innovations. There has been an extensive body of work undertaken by the Conference of the Parties ('CoP') in the interpretation and implementation of Article 8(j). This includes inter alia A Programme of Work on the Implementation of Article 8(j).⁷ The Work Program includes requirements on Parties to take measures to enhance and strengthen the capacity of Indigenous communities to be involved in decision-making related to the use of their traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biodiversity.⁸ The work program also requires the development of appropriate mechanisms to foster and promote effective participation of Indigenous communities in the conservation and sustainable use of biodiversity.⁹
16. The CoP has interpreted access by Indigenous peoples to traditional lands and waters as 'paramount to the retention of traditional knowledge and the development of innovations and practices relevant to the conservation and sustainable use' of biodiversity.¹⁰

⁶ Section 21(1)

⁷ CoP 5 Decision V/16 Article 8(j) and related provisions – Program of Work on the Implementation of Article 8(j) and Related Provisions of the Convention on Biological Diversity

⁸ Ibid, Task 1

⁹ Ibid, Task 2

¹⁰ CoP 10 Decision X/42. The Tkarihwaie:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities (Adopted 29 October 2010), 2

17. Article 10(c) obliges Parties protect and encourage customary use of biological resources in accordance with traditional cultural practices consistent with conservation and sustainable use.
18. These provisions of the Biodiversity Convention recognise the strong and distinctive inter-relationship of Indigenous peoples with the environment and sustainable use of environmental resources. A series of guidelines and decisions have been made by CoP for the implementation of Art 8(j) including inter alia those relating to ethical conduct and ensuring respect for Indigenous peoples' cultural and intellectual heritage.¹¹
19. The affirmative language used in Articles 8(j) and 10(c), including 'respect, preserve and maintain' 'approval and involvement' 'promote' and 'encourage', is distinct from and creates a more robust approach to the involvement of Indigenous peoples in biodiversity conservation than the language of 'having regard to' used in the *Water Act* and the *Basin Plan*. There is no direct and explicit connection between Articles 8(j) and 10(c) and Indigenous provisions in the *Water Act* and *Basin Plan*. Nevertheless, what should be considered is the general approach taken under the Biodiversity Convention (including CoP decisions on implementation) as compared to that of the *Water Act* and *Basin Plan*. The approach of the former can be said to be premised upon an active, effective and influential involvement of Indigenous communities in decision-making,¹² directed to *benefit and support the integrity of Indigenous peoples* in relation to biodiversity conservation and use. In our submission, the Convention establishes substantive as well as procedural obligations in relation to Indigenous communities.
20. The content of obligations under sections 21(4)(c)(v) and 22(3)(ca) requires Indigenous peoples' views to be identified and considered but this falls short of the standards expressed in Article 8(j). It does so in two ways: those provisions are not directed actively and beneficially to the subject of Indigenous communities themselves (including their knowledge, innovations and practices as these relate to water resources), nor is it required or even

¹¹ CoP 10 Decision X/42 *Tkarihwaie:ri Code of Ethical Conduct to Ensure the Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities*, <https://www.cbd.int/decision/cop/?id=12308>

¹² Article 8(j) refers to the 'wider application [of knowledge, innovations and practices] with the *approval and involvement* of the holders of such knowledge, innovations and practices...' (emphasis added).

perhaps relevant that Indigenous participation *influence* the use and management of water resources in any manner (affect outcomes).

21. In this respect, sections 21 and 22 of the *Water Act* are arguably not in conformity with international obligations on which the Act is based. This could also be said of Chapter 10 Part 14 of the *Basin Plan* to the extent the model of Indigenous consultation relied upon is a weak form of 'regard' to enumerated matters under that Part. This characterisation is reflected in the MDBA's construction of obligations to consider matters in its policy and guidance.¹³
22. The *Water Act* and *Basin Plan* provisions do not, for example, require Basin States to consult with Indigenous communities in order that steps are taken to accommodate their views and incorporate uses and values into water planning, nor to do so in a manner directed to respect, preservation and maintenance of Indigenous communities (including the knowledge, innovations and practices intrinsic to them).

Ramsar Convention

23. The *Ramsar Convention* is also a key international agreement underpinning the *Water Act* and *Basin Plan*. The Convention text does not directly refer to the role of Indigenous communities and peoples in the management of wetlands of international importance. Nevertheless, the CoP to the *Ramsar Convention* have made resolutions adopting guidelines establishing and strengthening local communities and Indigenous people's participation in the management of wetlands ('Ramsar Guidelines')¹⁴ and taking into account cultural values in wetlands.¹⁵
24. The Ramsar Guidelines are directed to the involvement of local communities and Indigenous peoples in wetlands management. The model of involvement advanced under the Ramsar Guidelines is one of 'participatory management', which is seen as analogous to co-management, collaborative or joint management.¹⁶

¹³ See MDBA *Position Statement 1B* (2015); see also *Position Statement 14A* (2015)

¹⁴ Resolution VII.8 – Guidelines for establishing and strengthening local communities and Indigenous people's participation in the management of wetlands (7th meeting of the CoP, San Jose Costa Rica, 10-18 May 1999)

¹⁵ Resolution IX.21 - Taking into account cultural values in wetlands (9th meeting of the CoP, Kampala, Uganda, 8-15 November 2005)

¹⁶ Ramsar Guidelines, [7]

25. Indigenous 'participatory management' is to be integrated into the 'wise use' objective and accompanying decision-making and planning. 'Participatory management' is to be consistent with the wise use framework for wetlands management.¹⁷
26. Participatory management should be evident in all facets of wetlands management including water resource planning as this is relevant to the management of Ramsar sites. Consistent with points below, water resource plan preparation should be based on a high degree of participation, negotiation relating to and clear respect for the rights, interests and outcomes sought by First Nations in relation to Ramsar wetlands.

Obtaining and acting on the views of Indigenous people through consultation: legal meaning and actual practice

27. The above submissions are relevant to the meaning and content of 'Indigenous consultation' under the *Water Act* and *Basin Plan*. Moreover, they reflect on the disparate status of First Nations under the *Water Act* and under international instruments: in the former instance, treatment as at best 'stakeholders' with some statutory recognition of their interests, in the latter as juridical or political entities.
28. Engagement of Basin States and other organisations such as the MDBA with Indigenous communities is a practical and legal requirement under the *Basin Plan*. The focus of this obligation lies in Chapter 10 Part 14, which concerns Indigenous identification and consultation on Indigenous uses and values, but Indigenous engagement applies elsewhere under the Basin Plan, including: in the identification and management of risks to water resources;¹⁸ preparation of a Basin-wide environmental watering strategy;¹⁹ principles to be applied to environmental watering.²⁰
29. Two actions are typically required under these provisions: identification of a matter (eg risk, objective or outcome) and regard to be had to a matter.
30. MDBA policy²¹ on interpreting 'having regard to' classifies that applying to Indigenous consultation as 'class A', which is the weakest approach of three identified, requiring 'proper, genuine and realistic' consideration

¹⁷ Ramsar Guidelines, [22]

¹⁸ Ss 4.02, 4.03

¹⁹ Ss 8.15, 8.29

²⁰ S 8.35

²¹ MDBA *Position Statement 1B* (2015)

accompanied by supporting evidence of 'regard' but not requiring any consequential outcome, action or addition to a water resource plan.

31. It is intended, as a matter of policy, that consultation is guided by reference to broad environmental and cultural assessment provisions contained in the *Akwe:Kon Guidelines*,²² endorsed by the CoP of the *Biodiversity Convention*.
32. Other guidance endorsed by the CoP is not referred to or incorporated into MDBA policy or practice, such as the *Tkarihwaie:ri Code of Ethical Conduct*.
33. The policy of consultation is focused on clear planning, notice and information to Indigenous communities, opportunities to express views, and the recording and documentation of views and information from communities. Arguably, this is an elaboration of the common law position in respect of the content of consultation, which includes, minimally, information, notice and opportunity to participate in decision-making.
34. The actual approach taken to Indigenous consultation by government is that there is no duty to act on or accommodate Indigenous interests or views in binding outcomes, adapt government position or policy, negotiate or bargain with First Nations, recognise at law the special connection or relationships of First Nations to waters, or construe dealings with First Nations as a unique question of the governance of water resources.
35. A restrictive reading of Indigenous consultation, including Ch 10 Part 14, is evidenced in the preparation of WRPs to date, including, as detailed below, the Water Resource Plan for the Wimmera-Mallee region. Please see attached the draft Index Table for the Wimmera-Mallee WRP, outlining proposed accredited text against the key requirements of Chapter 10, Part 14. There is no accredited text proposed to accommodate Indigenous interests or views in binding outcomes, for key requirements under the Basin Plan.
36. Indigenous consultation should be seen as a device for both full and effective participation and delivering outcomes for Indigenous communities, in the context of best practice conservation and use of biodiversity associated with water resources. As noted above, the international legal basis on which the

²² CoP 7 Decision Vii/16F *Akwe:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental And Social Assessments Regarding Developments Proposed To Take Place On, Or Which Are Likely To Impact On, Sacred Sites or on Lands and Waters Traditionally Occupied by Indigenous and Local Communities*

Water Act and *Basin Plan* operate in respect of Indigenous communities is an interdependent social and ecological basis.

37. A key weakness of Indigenous consultation provisions under water legislation has been their vague or indeterminate policy basis. The social-ecological basis characteristic of Article 8(j) is not reflected in the law or practice of Indigenous consultation under the *Water Act*.
38. Another way in which Indigenous consultation can be approached is what is referred to as 'deep consultation'. The model of 'deep consultation' derives from the Canadian experience of First Nations' participation in planning and decision-making, especially in relation to natural resources projects.
39. A premise of the Canadian approach to First Nations' participation in resource governance lies in the treaty arrangements recognised under the Canadian Constitution and the common law position that the relationship of the Crown to First Nations is fiduciary in character. Obligations on the Canadian Crown flowing from this are based in the 'honour of the Crown' and a duty of fair dealing and reconciliation.²³ Reconciliation is the 'reconciliation of pre-existence of Aboriginal societies with the sovereignty of the Crown.'²⁴ This underpinning constitutional and legal position is distinguishable from Australia but nonetheless instructive as to models and content of Indigenous engagement and participation in decision-making in respect of water resources.
40. The obligation to consult on the part of the Canadian Crown is triggered by actions of the Crown affecting the rights and interests of First Nations, including potential (eg claimant) rights and interests), generously interpreted. The content of the duty is proportionate to matters such as the strength of First Nations rights or claims and the significance or gravity of potential impacts of actions on interest or claims.²⁵ 'Deep consultation' is required where claims or interests are strong and potential consequences and impacts of serious. This is a situation that can be said to apply to Indigenous communities' ongoing interests in water resources in the MDB in many circumstances.
41. 'Deep consultation' requires consultation to be conducted with a view to dialogue and accommodation. It is a model analogous of bargaining and

²³ *Haida Nation v British Columbia (Minister for Forests)* [2004] 3 SCR 511

²⁴ *R v Van der Peet* [1996] 2 SCR 507, at [31], see more generally [30]-[43]

²⁵ *Haida Nation v British Columbia (Minister for Forests)* [2004] 3 SCR 511, at [39], [44]

negotiation,²⁶ short of a requirement to obtain consent.²⁷ The obligation includes the requirement to be prepared to test proposals and amend positions in pursuit of agreement and reconciliation, in addition to other procedural obligations such as notice, opportunity to comment, reasoned outcomes, and so forth. In short, 'deep consultation' comprises substantive (demonstrable scope for changed or amended outcomes) as well as procedural (participatory) obligations.²⁸

42. The model of 'deep consultation' is one more appropriate to the spirit and content, for instance, of obligations established under Article 8(j) of the Biodiversity Convention. Language of respect and honour is common to both frameworks. Consideration of consequences for Indigenous communities, as well as for resource management, are relevant to both.
43. It is also a model or approach relevant to emerging practice in international law, of which an instrument such as the UN Declaration on the Rights of Indigenous Peoples is the exemplar. This practice includes obligations to obtain 'free, prior and informed consent' of Indigenous peoples in relation to matters (including resource management) affecting the integrity of their culture and society. For example, UNDRIP provides for the following:
 - i. States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
44. 'Deep consultation' is a model that should be applied to the dealings of Basin States with First Nations in the preparation of WRPs. Invariably, water resource planning concerns the management of water resources to which First Nations in the MDB have deep, distinctive and spiritual connection and in which First Nations' interests relate not only to the impact and extent of interference with and impact on those water resources but the course and nature of their restoration. This is not the approach that has been taken to date.

²⁶ See *Haida Nation v British Columbia (Minister for Forests)* [2004] 3 SCR 511, at [25]

²⁷ *Gitxaala Nation v Canada* [2016] FCA 187

²⁸ *Gitxaala Nation v Canada* [2016] FCA 187, [232]-[236]; Lorne Sossin "The duty to consult and accommodate: procedural justice as Aboriginal rights" (2010) 23 *Canadian Journal of Administrative Law and Practice* 93

45. Additionally, the ‘deep consultation’ approach is one that should be applied to other forms of water transactions and decision-making likely to have significant impacts on First Nations’ communities, interests, ways of life, capacity to revitalise culture, or achievement of reconciliation. Such transactions and decision-making could include water market transactions or amendment of water instruments.

Disparity of treatment of Indigenous peoples in respect of land and water resources

46. The approach taken by Basin States noted above in practice, as well as the legal construction of Indigenous involvement in water resources management, is reflective of disparate treatment of Indigenous interests and rights in relation to land and water. Native title, in particular, has largely been held to vest in land. As a consequence, key rights and interests, including procedural rights such as the right to negotiate under the future acts regime applies more readily to native title interests in land. Native title in respect of water is a more unsettled proposition and likely extends at most to rights analogous to private (eg domestic, ancillary) rights in water.²⁹

47. In fully allocated water systems such as the MDB there is little scope for First Nations to exercise native title rights in relation to waters, including those waters that by custom, tradition or spirituality are centrally connected to culture and its revitalisation. The NWI (to which regard must also be had in preparation of the Basin Plan³⁰) provides only for access to water resources in a highly qualified manner, through Indigenous representation and incorporation of Indigenous outcomes and objectives in water plans. Notwithstanding the relatively weak nature of native title (where determined), Indigenous communities’ rights and interests in respect of water are even more limited, circumscribed and tenuous.

Constitutional basis for *Water Act*

48. In light of submissions above, MLDRIN questions whether the *Water Act* and *Basin Plan* are a proper and correct (proportionate) expression of Australia’s commitments under international agreements, in particular the Biodiversity Convention. MLDRIN therefore questions the constitutionality of the *Water Act* and *Basin Plan* to the extent this exercise of Federal legislative power is directed to implementation of international obligations under the

²⁹ See eg ALRC *Connection to country: Review of the Native Title Act 1993 (Cth)* (Report 126,), [8.97]-[8.105]

³⁰ Section 21(4)(c)(i)

Biodiversity Convention. The deficiency of those laws is not trivial. They are substantially inconsistent with the provisions of that Convention relating to preservation, respect and maintenance of Indigenous communities' knowledge, innovations and practices in relation to the conservation and sustainable use of biodiversity.

49. MLDRIN additionally makes the submission that provision in the *Water Act* and *Basin Plan* for Indigenous access to and involvement in the management of water resources should be read with regard to the emerging and strengthening rights-based approach governing states' dealings and interactions with Indigenous peoples. The leading international instrument in this respect is the UN *Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), which Australia has endorsed. At a minimum, UNDRIP is an interpretive device. Various UNDRIP Articles deal with the question of Indigenous communities' relationships with water. A copy of UNDRIP is attached to this submission.

50. Close scrutiny needs to be given to legal conformity of water resource plans with Australia's international environmental obligations, to the extent those obligations are to be effected through the *Water Act* and *Basin Plan* and thereby through water resource plans consistent with those laws.³¹

Supply measures and SDL adjustment mechanism

51. MLDRIN has consistently communicated concerns about the potential risks and impacts associated with the operation of the SDLAM and, in particular, the development of supply measures. These concerns have been raised in detail in submissions to the Murray Darling Basin Authority, the Productivity Commission as well as in correspondence to the MDBA, Basin Officials Committee ('BOC') and Basin States. This material can be made available to assist the Commission.

52. Specifically, MLDRIN's concerns include:

- a. Risks to tangible and intangible cultural heritage (including knowledge, innovations and practices of Basin Traditional Owners) from the construction of supply measure projects and associated site impacts
- b. Risks to the water-related cultural knowledge, innovations and practices of Basin Traditional Owners from an increase in the SDL, and

³¹ The Minister must accredit a WRP on his/her satisfaction that the WRP is consistent with the *Basin Plan: Water Act 2007*, subs 63(6)

inequitable outcomes arising from trade-offs between reaches through the operation of the environmental equivalence methodology

- c. Risks to environmental outcomes and the achievement of environmental objectives under the Basin Plan as a result of supply measure development and operation and 'offsetting' water recovery
- d. Failure to include an assessment of cultural and Indigenous impacts in the design and implementation of the SDL Adjustment

53. Critically, MLDRIN is concerned that there has been no adequate process of free, prior and informed consent in the development and implementation of the SDLAM. Consultation with First Nations has focussed on site and project specific issues without adequate consideration of system-wide impacts and First Nations' objectives. State governments, the proponents of the projects, are required to consult with Traditional Owners to ensure compliance with planning and approvals processes, however MLDRIN is concerned that Traditional Owner groups have not been adequately informed about the objectives of the mechanism as a whole (offsetting water recovery by more than 600GL) nor been provided with the opportunity to negotiate or have their views about the efficacy of the SDLAM considered.

54. For example, during the public consultation period for the SDLAM Draft Determination in 2017, MLDRIN was provided with approximately one week's notice for a series of workshops targeted at Aboriginal community members and run by the MDBA. Timeframes were clearly inadequate to mobilise community involvement or to provide for thorough consideration of complex, technical information. Similarly, an offer was made by MDBA to provide funding to MLDRIN to run targeted workshops with First Nations, during the consultation period. However, only a month was allowed to design the workshops, engage facilitators, run the activities and prepare submissions before the consultation closing date (5th November). A request to extend the consultation period by two weeks was denied. First Nations were not afforded proper, genuine and realistic consideration of views during negotiations for this critical aspect of Basin Plan implementation, reflecting the weak formulation of requirements in the Act and Basin Plan.

55. MLDRIN is also concerned that all supply measure projects may not have been assessed rigorously against the Phase 2 Assessment Guidelines and associated criteria. In particular, MLDRIN is concerned that businesses cases have not been adequately scrutinised in relation to how they meet criteria for Stakeholder Management (Phase 2 Guidelines, Section 4.11.1). Business

Cases for Victorian supply measure projects, that MLDRIN has reviewed³², have provided template letters, signed by individual Traditional Owners as ‘evidence of broad community support’ for projects. MLDRIN is concerned that endorsement of pre-prepared form letters is being used as evidence of support for projects by First Nations, when we are aware of significant concerns amongst Traditional Owners relating to the same projects. Appropriate, broad engagement to support the free, prior and informed consent of First Nations has not been completed. However, projects have been assessed against the Phase Two Criteria and approved. These disparities raise concerns about the level and quality of consultation undertaken with First Nations regarding the design, construction and operation of supply measures.

56. The treatment of potential risks to cultural values and outcomes has not been adequately addressed in risk assessments of the impacts of the operation of the measure (Section 4.7) or Project Development and Delivery (4.11.4). In Business cases that MLDRIN had reviewed, only two specific risks³³ relative to First Nations have been identified. Only risks associated with the *operation* of the structures have been addressed. Impacts on the cultural value and significance of affected sites, through extensive construction works and alteration of Country, have not been addressed. MLDRIN contends that this does not fulfill the phase 2 guidelines, which require that all significant operating risks and impacts be identified and analysed.

57. MLDRIN is concerned that the planned construction of supply measure projects and reconciliation through to 2024 will continue to evidence lack of appropriate consultation demonstrated to date.

Northern Basin Review

58. MLDRIN has provided submissions and commentary on the Northern Basin Review and associated amendments to SDLs for groundwater areas in the Southern Basin, including a detailed submission to the MDBA, which can be provided as an attachment to assist the Commission. The Northern Basin Aboriginal Nations (NBAN) coordinated extensive engagement with First Nations in the Northern Basin, to inform decision-making about changes to SDLs and associated impacts on Aboriginal outcomes. MLDRIN undertook

³² Nine Business Case reports provided by Victoria for Supply Measure projects proposed by the Mallee and North Central Catchment Management Authorities

³³ Loss of artefacts by erosion and inundation and damage to relationships with Traditional Owners

consultation with Traditional Owners in the Western Porous Rock, Eastern Porous rock and Goulburn Murray Groundwater resource areas and to seek their views on the proposed changes.

59. Consultation conducted across the Basin documented the cultural significance of natural surface water flows and groundwater resources. Research documented the importance of restoring flows through environmental water recovery to Aboriginal wellbeing³⁴ and communicated strong opposition to proposed reductions in recovery targets and SDL increases.
60. Consultation conducted by MLDRIN, in partnership with the MDBA, with First Nations regarding proposed increases to extraction limits for groundwater areas provided evidence of the cultural significance of groundwater and a strong rejection of proposed increases.
61. The decision-making framework³⁵ used by the MDBA to determine changes to SDLs in the Northern Basin and groundwater areas failed to meaningfully incorporate or account for First Nations' views or objectives as communicated through consultation and research activities. The 'triple bottom line' assessment privileged a comparison of socio-economic outcomes based on quantitative indicators about industry production and employment, but largely externalised critical social and cultural implications for First Nations.
62. The proposed 70 GL cut in water recovery in the Northern Basin, and significant increases in SDLs for groundwater resources, threaten to further erode the maintenance of cultural traditions, knowledge and practices, while entrenching the disadvantage already experienced by Aboriginal people in the Basin.
63. Traditional Owners from the Barkandji, Mutthi Mutthi, Latji Latji, Wemba Wemba and Tatti Tatti Nations, in a submission to the MDBA responding to a proposed increase in the SDL for the Western Porous Rock area explained that: *"If you draw out all the water in our country and don't compensate us for that, where does that leave us socially and economically? We are disadvantaged. We are not being given the rights to our cultural heritage and*

³⁴ NBAN and MDBA (2016) *Our water, our life: An Aboriginal study in the Northern Basin*. <https://www.mdba.gov.au/publications/mdba-reports/aboriginal-study-northern-basin>

³⁵ Murray Darling Basin Authority, 2017. *The triple bottom line framework: A method for assessing the, economic, social and environmental outcomes of sustainable diversion limits for the northern basin*. <https://www.mdba.gov.au/sites/default/files/pubs/763-NB-triple-bottom-line-report.pdf>

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practices. Groundwater is a great resource – we need to see a program to support our social capital. Once they dig into that ground and they interrupt that, that is our spiritual connections gone. That has to be compensated because it can never be replaced.”³⁶

64. The proposed amendments for both the Northern Basin and Groundwater resources fundamentally disregarded the Australian Government’s obligations, stipulated in international agreements and domestic law and policy, to respect, preserve and maintain traditional knowledge³⁷ and cultural values associated with waterways and groundwater resources
65. We refer the Commission to detailed information and recommendations provided in our Submission to the MDBA on the Northern Basin Review.

Darling River and Menindee Lakes

66. Outcomes for Aboriginal people along the *Baarka* or Darling River illustrate both the distinct systems of knowledge and obligations that frame First Nation’s relationship to water resources, as well as the devastating impacts of contemporary water management on these extant frameworks.
67. Outcomes for First Nations on the Baarka further demonstrate the inadequacy of Basin jurisdictions’ water policy, planning and management frameworks, in light of international standards and obligations for consultation and protection of Indigenous rights.
68. The case study of the Barkandji people is exemplary of the substantive inconsistency between Indigenous consultation provisions and practices under the Water Act (include the Basin Plan) and Australian’s international obligations (including under Article 8(j) of the Biodiversity Convention. Specifically:
- a. Barkandji culture and society (as expressed in knowledge, innovations and practices) do not expressly benefit nor are recognised in relation to water management. Indeed, Barkandji is threatened by water resources management.
 - b. Barkandji involvement in water management is weak and marginalised by current law and practice.

³⁶ Dareton Groundwater Consultation Statement. Submission to the Basin Plan Amendment consultation 2017. Available at: <https://getinvolved.mdba.gov.au/22346/documents/50391>

³⁷ *Convention on Biological Diversity*, Article 8(j) viewed at: <https://www.cbd.int/traditional/>

69. The Barkandji people have inherited and maintain distinct systems of responsibility and reciprocity which inform codes of behaviour for managing the Baarka. This body of law informs personal and community understandings of cultural identity and sustains cultural knowledge.
70. In a recent paper, Hartwig summarises the cultural significance of the Baarka to Barkandji people and some of the challenges faced under existing water management regimes: *'The Barka is of great significance to the Barkandji People in interconnected cosmological and material ways. Central to Barkandji culture, spirituality, and teachings, the Barka is home to the Ngatji (Rainbow Serpent), who created the lands and the rivers. The Barkandji are responsible for the Ngatji's health and wellbeing, although they find this increasingly outside of their control under contemporary water governance arrangements'*³⁸
71. Non-Indigenous laws and rules governing use of water in the Barwon-Darling River system are contributing to devastating impacts on Barkandji people, from the level of personal health and well-being to the survival of cultural knowledge, traditions and practices. The increasing frequency of cease to flow events³⁹, poor water quality, blue-green algae blooms⁴⁰, impacts on native fish populations⁴¹ and the ability to engage in recreational activities impact on Aboriginal people and militate against Barkandji people's cultural obligations.
72. Respected Barkandji Elder, Uncle Badger Bates has described the impacts of upstream water sharing arrangements on First Nations people and culture: *"We say that the old turtle or the yabby can jump up and walk away. But the fish can't. There are a lot of other little animals that live in there too that keep*

³⁸ Hartwig, L et al (2018). 'Recognition of Barkandji Water Rights in Australian Settler-Colonial Water Regimes'. *Resources* **2018**, 7(1), 16; <https://doi.org/10.3390/resources7010016>

³⁹ Fifteen cease to flow events have occurred in the LDR downstream of Pooncarie since 2002 (gauged at Burtundy). Only two cease to flow events were recorded between 1941 and 1958 when construction of the Menindee Lakes Scheme was initiated, with no cease to flow events between 1970 and 2002. The most recent cease to flow event spanned more than 510 days from April 2015 to August 2016 at Burtundy.

⁴⁰ Murray Darling Basin Authority, 2017. *Ecological needs of low flows in the Barwon-Darling*. Analysis by Mitrovic et al (2006) indicated that the number of events that exceed the critical flow threshold for the suppression of algal blooms at Brewarrina, Bourke and Wilcannia has increased as a result of the water sharing arrangements in the northern Basin.

⁴¹ Sheldon, F (2017). *Characterising the ecological effects of changes in the 'low-flow hydrology' of the Barwon-Darling River*. Australian Rivers Institute, Griffith University. Viewed 6th June 2018: <http://www.environment.gov.au/system/files/resources/bb774e1f-d7fa-4825-8851-cb5e5f1b3f51/files/characterising-eco-effects-changes-low-flow-barwon-darling.pdf>

the river healthy. They can't walk away. To us, that's our family. We have to protect them. If we don't protect Natji, then it hurts us. In the last five years, our elders are giving up and dying. Then our young people are committing suicide and it's hurting, because of the river. How can I teach culture when they're taking our beloved Barka away? There's nothing to teach if there's no river. The river is everything. It's my life, my culture. You take the water away from us; we've got nothing."⁴²

73. Research indicates that poor river health and associated community impacts are the direct result of rules, licencing arrangements and management decisions relative to the upstream catchment. Sheldon (2017) reports that 'Hydrological changes in the Barwon-Darling are likely associated with water resource development and water management,' which has led to modified flow regimes and contributed to a marked change in the character of flood frequencies.⁴³
74. Barkandji people have proactively sought redress for impacts on community wellbeing, livelihood and cultural sustainability arising from inequitable management regimes. Between 2016-2018, Barkandji Traditional Owners in the Wilcannia and Menindee areas have organised protests, lobbied State and Federal governments and sent contingents to Federal Parliament to highlight their concerns. Despite this strong advocacy, Barkandji people's views have been consistently marginalised in negotiations over water sharing and management.
75. Despite a Native Title Determination that recognises Barkandji people's cultural authority over Darling River Country, NSW's water sharing regimes do not respond to legal recognition of native title and fundamentally disregard the Native Title rights of Barkandji people. Hartwig (2018) found that the use of Ministerial powers to develop Water Sharing Plans (WSPs) in NSW limits opportunities for Aboriginal peoples to provide sustained and comprehensive input. Water Sharing Plans, including a WSP for the Lower Darling, have failed to recognize the existence of Native Title rights to water, despite being prepared or updated *after* Barkandji people received their Native Title determination. Finally, exclusion of Barkandji rights and perspectives from WSPs has led to a failure to protect water and maintain

⁴² Bates, W. 'When they take the water from a Barkandji person, they take our blood'. *The Guardian*, 26th July 2017. <https://www.theguardian.com/commentisfree/2017/jul/26/when-they-take-the-water-from-a-barkandji-person-they-take-our-blood>

⁴³ Sheldon, F (2017), n 41 above

sustainable water levels that support Barkandji's enjoyment and exercise of their other water-related native title rights and interests.⁴⁴

76. Water sharing frameworks and water resource decisions at a Commonwealth and State level have disregarded and undermined Barkandji law, cultural knowledge, innovations and practices. Again the weak construction of legislative requirements for consultation and recognition of First Nations rights and interests contribute directly to the exclusion and distress of Barkandji people. These experiences are illustrative of outcomes experienced by First Nations across the Basin.

77. Proper recognition of First Nations law and custodial relationships with waterways and water-dependent landscapes would undoubtedly mitigate the ecological and social impacts of current water management.

Deadlines for WRPs

78. MLDRIN has concerns about WRP preparation in the MDB. WRPs are to be accredited and come into operation by 1 July 2019. To date, one WRP has been accredited and others are in the process of preparation.

79. The MDBA's 2017 Water Compliance Review report⁴⁵ highlighted that:

- a. Progress with the development of water resource plans has not been adequate,
- b. NSW and Victoria are behind schedule in the development of WRPs and
- c. Consideration is being given to implementing step-in provisions under the Commonwealth *Water Act*.^[SEP]

80. As discussed above, the existing provisions and requirements relating to consultation with First Nations do not accord with international standards and best practice. Indigenous communities' participation in WRP has not accorded with an approach comparable to 'deep' or respectful engagement discussed above. This is, as noted, a product of the legal and policy settings, as well as practices of Basin States.

81. Inadequate planning, resourcing and prioritization of water resource plan development has further reduced the extent and quality of Aboriginal

⁴⁴ Hartwig, L. 2017, n 38 above

⁴⁵ Murray Darling Basin Authority, 2017. *The Murray–Darling Basin Water Compliance Review* <https://www.mdba.gov.au/sites/default/files/pubs/MDB-Compliance-Review-Final-Report.pdf>

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consultation. There is a risk that standards of consultation will fall below the already weak Basin Plan requirements.

82. This risk is most starkly exemplified in the development of WRPs in NSW. In 2012, the NSW Government established Australia's first dedicated Aboriginal water unit, the Aboriginal water Initiative, within the Department of Primary industries. The AWI's creation was primarily based on the Objectives and Principles of the NSW *Water Management Act* 2000 and further to meet the requirements of the Murray-Darling Basin Plan. The AWI was also to be compliant with COAG's agreed National Water Initiative (NWI), NSW State Plan, NSW DPI Strategic Plan and NSW Aboriginal Employment Strategy. At the highest level of employment there were 11 staff with 10 Identified Aboriginal members of the AWI.
83. In 2015-16 a departmental restructure led to the dismantling of the AWI and significant loss of funding and staff resources dedicated to engagement with First Nations in water planning.
84. Despite the requirements clearly stipulated in Chapter 10, Part 14 of the *Basin Plan*, the NSW government abolished a dedicated team of Aboriginal staff with established community networks and water planning knowledge. This decision has created critical gaps in capacity for engagement to inform water resource plan development.
85. As of June 2018, there are now only three Aboriginal staff within the Department of Primary Industries, required to coordinate consultation with First Nations across 22 water resource plans before June 2019. As of June 2018, consultation with only two Nation groups had been initiated.
86. Direct consultation with First Nations in NSW will now be undertaken by contractors, who have no accountability or direct responsibility for water allocation and other management decisions made through the WRP and WSP development process.
87. MLDRIN is aware that one Traditional Owner group in the Northern Basin received only one week's notice of workshops dedicated to consultation for WRP development in their area. NSW DPI staff have conceded the impact on constrained timelines. NSW DPI staff have indicated that some Nations may not even have workshops, given the constrained timelines. DPI staff have also indicated that it is likely that some draft WRPs will go out for public

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exhibition before consultation with relevant First Nations has been completed.

88. MLDRIN has repeatedly advised the NSW Water Minister Niall Blair, and relevant staff within the MDBA of our concerns regarding the constrained timelines and poor quality of consultation for WRP development in NSW.
89. Challenges have also arisen through the development of WRPs in other States. In Victoria, delayed consultation activity, due to competing priorities and policy development, meant inclusion of First Nations objectives and outcomes in the Wimmera-Mallee WRP (WMWRP) occurred in an ad-hoc and unsatisfactory way.
90. Some relevant First Nations were not included in consultation schedules for the WMWRP, because their primary water-dependent values were deemed to be outside the WRP area. This resulted in cursory, last-minute engagement with individuals that does not meet the requirement for 'proper, genuine and realistic consideration'.
91. Challenges with establishing detailed First Nations Objectives and Outcomes for inclusion in the WMWRP led to the inclusion of generic objectives that were transferred from actions in other Victorian Government policy documents. These objectives were not the product of meaningful engagement or deliberations with First Nations in the region.
92. A minimalistic approach to meeting Chapter 10, Part 14 requirements has meant that the treatment of First Nations rights and interests through the creditable text of the WMWRP is inadequate. There is no creditable text included for key requirements (including 10.52 (2), 10.53 (1) and 10.54). The Victorian government has taken the view that the requirement to 'have regard to' matters equates to a requirement for general consideration only, with no substantive response or measures provided in the formal text of the WRP. This minimalistic approach has the effect of weakening the efficacy of the WRP.
93. Conversely, the South Australian Government has taken a more expansive approach. Consultation for the South Australian Murray Region WRP took place over several years, with inclusive scoping meetings involving a range of Nations of Aboriginal organisations from within the WRP area and adjacent regions.

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94. The text of the South Australian Murray Region WRP includes commitments in accredited text across the range of requirements under Chapter 10, Part 14. These commitments include establishing principles for ongoing consultation in reviews of Water Allocation Plans and Wetland Management Plans.

Cultural flows

95. In 2007 MLDRIN delegates developed and endorsed the Echuca Declaration which defined cultural flows as 'water entitlements that are legally and beneficially owned by Indigenous Nations of a sufficient and adequate quantity and quality, to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. That is our inherent right'. The Echuca Declaration also detailed a series of mechanisms to achieve and manage cultural flows.

96. MLDRIN is a principle research partner in the National Cultural Flows Research Project. The project was established in 2011 to investigate and demonstrate processes required to quantify Aboriginal water needs (for cultural, social, economic and environmental purposes) and to identify options for acquiring water to provide cultural flows.

97. In June 2017, the products of this research project were finalised and are scheduled for imminent public release. The research findings provide 1) a step-by-step guide for First Nations to document cultural flow objectives and determine volumes and quantities of water required and 2) a comprehensive review of legal and policy mechanisms and reforms needed to give effect to cultural flows.

98. Basin States are required to have regard to Indigenous people's views about cultural flows in the development of water resource plans. Water resource plans represent an opportunity to accommodate First Nations law, interests and aspirations through provision of cultural flow entitlements, or other commitments to progress provision of cultural flows. To date, States have not allocated water resources or funding to acquire water entitlements to address the rights and aspirations asserted in the Echuca Declaration.