



**NBAN AND MLDRIN SUBMISSION TO THE  
SENATE SELECT COMMITTEE INQUIRY INTO  
THE MULTI-JURISDICTIONAL MANAGEMENT  
AND EXECUTION OF THE MURRAY-DARLING  
BASIN PLAN, AND THE CONSTITUTION  
ALTERATION (WATER RESOURCES) 2019**



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## Summary

The Murray Darling Basin Plan established limited requirements for greater recognition of First Nations' water rights and interests, including in the preparation of water resource plans and environmental water planning. Implementation of these requirements is variable across Basin states, leading to significant disparities in opportunities and outcomes for First Nations.

Our organisations are concerned that Basin Plan implementation, particularly in some jurisdictions, has not afforded consideration of our members' interests and objectives commensurate with the recognised rights and enduring cultural obligations of First Nations people. These issues are most starkly demonstrated in decisions about water recovery and the implementation of the SDLAM program, which have marginalised and disadvantaged our members.

Our comments below relate to key areas of Basin Plan implementation of particular relevance to our member Nations and First Nations people generally. The recommendations set our pathways to address current inadequacies and inconsistencies in the implementation of the Plan and in the progress towards meeting the Plans' objectives.

It is critical to stress that the current Basin Plan provisions do not address the scope and content of First Nations' water rights. These rights are recognised in Australia's law and policy and in international agreements that the Australian government has ratified including; The United Nations Declaration on the Rights of Indigenous People, the Convention on Biological Diversity (Article 8J), the Ramsar Treaty (Resolutions of Conference of the Parties) and Australia's National Water Initiative.

The Basin Plan (and the Water Act) must be amended in 2026 to better address and give effect to these recognised rights. For the Senate Committee's reference, our organisations have also previously provided detailed recommendations on proposed amendments to the Basin Plan and Water Act 2007 as part of the South Australian Murray Darling Basin Royal Commission.



## Context

The First Nations of the MLDRIN and NBAN confederations have asserted our sovereignty, and articulated rights and responsibilities encompassing the lands and waters of our traditional territories.

Our water values and rights as Traditional Owners are expressed in the Echuca Declaration (2007), which states that:

*'water has a right to be recognised as an ecological entity, a being and a spirit and must treated accordingly.'*

The Echuca Declaration also highlights our position that Australian governments:

*'have been negligent in the management of the lands and waters of [First] Nations causing ecosystem collapse, severe water quality degradation, extreme stress upon river ecologies and species extinction at a scale and rate which is unprecedented.'*

First Nations hold the knowledge, stories, custodial obligations and cultural knowledge that have always ensured the health of waterways and river Country. Sovereignty over Country, land and waters has never been ceded. Each Nation holds the cultural authority to speak for water, rivers and river Country.

Our organisations have also provided extensive advice and recommendations to numerous inquiries and assessments relating to the implementation of the Murray Darling Basin Plan. References and links to these documents have been provided throughout this submission, for the Committee's reference.

This submission should be read in this context.



## Sustainable Diversion Limit Adjustment Mechanism (SDLAM)

First Nations in the Southern Basin and MLDRIN have repeatedly raised concerns about the operation of the SDLAM and the implementation of 'Supply Projects' in particular. These concerns have been raised in numerous public submissions and representations to the Murray Darling Basin Authority, States, Senate Inquiries and the SA Royal Commission.

Broadly, our concerns relate to the following gaps, risks and impacts:

- The “environmental equivalence” methodology used to assess Supply Measure projects and determine the Sustainable Diversion Limit (SDL) adjustment does not take into account impacts on water-dependent cultural values.
- Supply measure projects entail proven risk of significant impacts on tangible and intangible Aboriginal cultural heritage values.
- The ability for Supply Measure projects to achieve anticipated environmental outcomes is uncertain and there is no assurance that a thorough reconciliation process will be implemented to ‘make good’ any unmet outcomes through water recovery.
- Consultation approaches for Supply Measure projects are inconsistent and inadequate and undermine the principles of free, prior and informed consent and self-determination.
- There is a concerning lack of transparency and accountability for decision-making and approvals for Supply Measure projects.

These matters have been dealt with at length in MLDRIN’s submissions to the Murray-Darling Basin Authority’s (MDBA’s) SDLAM Draft Determination (2017), the South Australian Royal Commission (2018, p.12-14) the Productivity Commission’s *Murray-Darling Basin Plan 5 Year Assessment* and other written correspondence with Commonwealth and State Agencies. These submissions have been provided as appendices and we urge the Committee to consider them alongside our submission.

### **Current Situation**

As the statutory deadline for implementation of SDLAM projects approaches, we understand that First Nations are under increased pressure to participate in and endorse proposals for Supply Measure projects. At the same time, questions remain about the design and operation of the proposed projects, timeframes, project governance, approvals, and decision-making and consultation approaches. We are concerned that the delivery of Supply Measure projects will result in significant cultural impacts and disempowerment of First Nations unless these issues are urgently addressed.

We are aware of significant concerns and opposition from affected First Nations regarding the following Supply Measure projects:

- Belsar–Yungera floodplain management project
- Burra Creek floodplain management proposal
- Vinifera floodplain management project
- Nyah floodplain management project
- Hattah Lakes North floodplain management project
- Structural and operational changes at Menindee Lakes
- Improved flow management works at the Murrumbidgee River — Yanco Creek offtake
- Lindsay Island (Stage 2) floodplain management project
- Wallpolla Island floodplain management project

In some cases, concerns and opposition to these projects is on public record.<sup>1</sup> In other cases First Nations have advised MLDRIN and agencies responsible for the projects of their concerns. Wadi Wadi Nation, for example, has articulated concerns to Mallee CMA and the Victorian Department of Environment, Land, Water and Planning (DELWP) regarding the impacts of the Nyah and Vinifera Supply Measure projects on hydrology and cultural values in the Nyah, Vinifera and Wood Wood Forest/Park.

First Nations have highlighted concerns regarding the location, design and operation of Supply Measure projects and the likely impact on tangible and intangible cultural values. It is unclear what obligation project proponents have, to understand and address these concerns. Requirements under State cultural heritage legislation provide some checks, but archaeological surveys and site assessments alone cannot address all First Nations' concerns.

### **Timeframes**

MLDRIN understands that many Supply Measure projects are behind schedule. The complexity of these projects and the related cultural, social and environmental risks, mean timelines for implementation will continue to be stretched. We are aware that some Basin jurisdictions are seeking extensions beyond the 2024 implementation deadline. Our organisations do not support a recommendation made as part of the Productivity Commission's Five-year Assessment of the Basin Plan (2018). We contend that, if existing issues with Supply Measure projects cannot be resolved in the period up to 2024, in addition to the 8 years to 2020 that proponent governments have spent working on them since the Basin Plan was made, we do not have confidence that risks and issues can be effectively addressed. Furthermore, extending the 2024 deadline risks creating an open-ended process, without the clear timeframes and targets that are needed to provide certainty and

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<sup>1</sup> Barkandji Native Title Group Aboriginal Corporation have made public statements regarding their concerns about the Menindee Lakes project, see: 'No River, No Talks' *Barrier Daily Truth*, 12<sup>th</sup> February 2020. Tati Tati Wadi Wadi Nation have also included a statement outlining their concerns and opposition to Supply Measure projects in content for the Northern Victoria Water Resource Plan (WRP). The State of Victoria Department of Environment, Land, Water and Planning (2019) *Victoria's North and Murray Water Resource Plan*. p. 258 ([https://www.mdba.gov.au/sites/default/files/pubs/vic-north-and-murray-water-resource-plan-index-table-and-comprehensive-report-26-November-2019\\_0.PDF](https://www.mdba.gov.au/sites/default/files/pubs/vic-north-and-murray-water-resource-plan-index-table-and-comprehensive-report-26-November-2019_0.PDF)) concerns about the Menindee Lakes project, see: 'No River, No Talks' *Barrier Daily Truth*, 12<sup>th</sup> February 2020.

accountability for affected communities. The chaotic process surrounding completion of NSW Water Resource Plans, following an extension of the original June 2019 deadline, is a case in point. We do not believe that the timelines for Supply Measure should be extended beyond 2024.

### **Project Governance**

Governance for the projects lacks accountability and consistency. We understand that NSW has moved to establish Stakeholder Advisory Groups, including Aboriginal Advisory Groups, for SDLAM projects but the terms of reference, membership and function of these groups is not clear. We know of no such formal mechanisms established for community oversight and stakeholder involvement in Victoria. The *Project Agreement for Stage 1 Funding for SDL Adjustment Supply and Constraints Measures in the Murray-Darling Basin (MDB)*, between States and the Commonwealth, also requires States to establish 'project governance frameworks that include project management steering committees', but MLDRIN is not aware of how these committees operate or whether First Nations' views are considered as part of the provision of strategic direction on design and implementation. Likewise, the role and operation of an 'Adjustment Implementation Committee' established to oversee the implementation of the full package of supply and constraints measures, is unclear.<sup>2</sup>

### **Approvals and Decision-making**

It is unclear where accountability lies for ensuring that projects meet standards of engagement and consultation, including the informed consent of First Nations. A key challenge is understanding responsibilities across three layers of project management and delivery: regional proponents (such as CMAs in Victoria), Basin State governments and the Commonwealth Department of Agriculture, Water and the Environment. Under the abovementioned Project Agreement between Basin States and the Commonwealth, Basin States will conduct 'Stage 1' project development activities, including 'stakeholder consultation' and detailed technical design work. Proposals will be reviewed as part of a gateway assessment to be considered for implementation funding (Stage 2). Regional proponents are chiefly responsible to consult First Nations and seek their endorsement for project proposals and State governments coordinate program delivery. However, where local consultation is suboptimal or compromised, it is unclear whether First Nations have any recourse to State or Commonwealth review or assessment processes.

It is unclear how the Commonwealth's gateway assessment will consider the outcomes of First Nations consultation if First Nations have unresolved concerns. These First Nations face a worrying absence of defined accountability and transparency when seeking to navigate decision-making hierarchies and have their concerns or opposition addressed. Regional-based project proponents refer Nations to checks and balances incorporated in Commonwealth funding and approvals processes, while Commonwealth agencies defer all accountability for decision-making regarding potential impacts on cultural heritage to proponents and State-based legislation.

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<sup>2</sup> [http://www.federalfinancialrelations.gov.au/content/npa/environment/project-agreement/PA\\_for\\_Stage\\_1 SDL\\_Adjustment.pdf](http://www.federalfinancialrelations.gov.au/content/npa/environment/project-agreement/PA_for_Stage_1 SDL_Adjustment.pdf)

MLDRIN is concerned that deficiencies and inconsistencies between States and across projects mean that First Nations' concerns and preferences are not being adequately considered. Their issues were noted in a recent MDBA SDLAM Program Technical workshop. The workshop communiqué noted that "Participants felt that there was room for significant improvement in stakeholder engagement both at a program, and individual project level, particularly in relation to Traditional Owners. Traditional Owners expect to be involved in how the SDLAM projects are designed, implemented and monitored."<sup>3</sup>

In summary, the adjustment to the SDL (605GL) will lead to degradation of cultural and environmental values across reaches of the Southern Basin (compared to 2,750GL). The ability of registered Supply Measure projects to offset this impact is questionable at best, given major uncertainties about design and operation.<sup>4</sup> There is no guarantee of efficiency measures supporting recovery of the 450GL and the reconciliation process is compromised. Therefore, there is every reason to believe that the operation of the SDLAM will severely hamper the achievement of Basin Plan objectives.

**Recommendations:**

1. The express free, prior and informed consent of all affected First Nations must be made a condition of any Supply Measure projects proceeding through to Stage 2 of the Commonwealth's gateway funding assessment.
2. The MDBA and Basin States must collaborate to establish a southern-basin-scale First Nations' SDLAM Advisory and Oversight Group, as proposed by MLDRIN in 2018.<sup>5</sup> This Committee could help to drive consistency between States in the implementation of consultation for Supply Measure projects.
3. The MDBA must ensure a rigorous reconciliation process to determine whether the anticipated outcomes of Supply Measures have been met by 2024, as required by the Basin Plan.
4. The Commonwealth Water Minister must develop a strategy to recover any water volumes necessary to 'make good' anticipated outcomes that are not achieved by Supply Measures by 2024. The Minister will need to address any impediments imposed by the 1,500GL 'cap' on water buy-backs.
5. The Commonwealth Department of Agriculture, Water and the Environment and the responsible Minister must uphold the 2024 deadline for implementation of Supply Measures and States should abandon any projects which have not been completed by this deadline.

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<sup>3</sup> Murray Darling Basin Authority: *Sustainable Diversion Limit Adjustment Mechanism—March 5th 2020 Technical Workshop Outcomes*.

<sup>4</sup> Productivity Commission 2018, *Murray-Darling Basin Plan: Five-year assessment*, Final Report no. 90, Canberra "Past experience in building environmental works projects has shown that the costs and benefits of projects can diverge substantially from original estimates." p. 19.

(<https://www.pc.gov.au/inquiries/completed/basin-plan/report/basin-plan-overview.pdf>)

<sup>5</sup> SDL Adjustment Traditional Owner Advisory Committee briefing paper.





## Developing and Implementing WRPs

### Current Situation

Basin State governments are required to develop Water Resource Plans (WRPs) in accordance with a number of requirements in the Basin Plan, including Chapter 10, Part 14 – Aboriginal values and uses, in particular sections 10.52 – 10.55:

- s10.52 Objectives and outcomes based on Aboriginal values and uses.
- s10.53 Consultation and preparation of water resource plan.
- s10.54 Cultural flows.
- s10.55 Retention of current protection.

“Part 14 is included in the Basin Plan, in response to international obligations in relation to Aboriginal natural resource management and requirements of the National Water Initiative. The recent review of the Water Act 2007 (Cth) lends further support to this approach by recommending the use of the Convention on Biological Diversity’s Akwé: Kon Guidelines<sup>6</sup> as a basis to prepare guidelines for the development of water resource plans.”<sup>7</sup>

Part 14 also requires the MDBA to seek NBAN’s and MLDRIN’s advice as to whether the requirements of Part 14 have been met. While each state needs to meet the overarching requirements for WRP development set by the Basin Plan, each state is following its own methodology, to meet the requirements set by state legislation. The fact that each state has adopted its own methodology with respect to Part 14, has resulted in a lack of a unified approach to engagement across the Basin.

In the northern Basin, Queensland’s WRPs have already been developed, assessed by both the MDBA and NBAN, and accredited. They are therefore already in the implementation phase. NBAN worked closely with Queensland staff to facilitate culturally-appropriate engagement with its member Nations. A noteworthy component of Queensland’s approach was the effort made by Queensland staff to actively support First Nations in providing submissions to the draft WRPs. During NBAN’s assessment, NBAN Delegates representing their Nations agreed that the requirements for the Part 14 sections had been met however, both NBAN and the Delegates felt that there was at times inadequate culturally-appropriate information available to understand the process of developing the WRPs, let alone amending, implementing, monitoring and enforcing them. Further, NBAN clearly communicated the need for culturally-appropriate literature to be circulated via all media, regarding the First Nations’ outcomes Queensland have committed to achieving in the next five years. NBAN and the

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<sup>6</sup> Secretariat of the Convention on Biological Diversity (2004). *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, Montreal, 25p. (CBD Guidelines Series).

<sup>7</sup> MDBA (2015). Basin Plan Water Resource Plan Requirements *Position Statement 14A Aboriginal values and uses*. D15/29345.

Queensland have started engaging in discussions about WRP implementation and the way forward.

All Victorian Water WRPs have also been prepared, submitted and assessed by MLDRIN. All Victorian plans were recommended for accreditation. MLDRIN recommended against accreditation of an initial WRP for the Victorian Wimmera-Mallee assessed in August 2019, however, following additional engagement with all relevant Traditional Owners, a revised WRP has now been accredited.

The WRPs that remain outstanding, and for which the original deadline of 30 June 2019 and subsequent extension deadline of 31 December 2019 have both not been met, are all for areas in NSW. In failing to deliver its WRPs for accreditation and to meet agreements on SDL management, NSW has placed the Basin Plan under threat. Inaction with respect to the implementation of the water management rules set out in the Basin Plan is hampering the delivery of improved outcomes for First Nations and the environment.

NSW has outsourced its engagement with First Nations to consultants, which NBAN and MLDRIN have had no communication with. While our organisations have facilitated the state's engagement with our member Nations through the provision of contact details, engagement between our organisations and NSW itself has been sporadic and for the most part there has been limited information with respect to how the state has been progressing with engagement. Consultation with First Nations during the development of the WRPs has in large part been poor and inadequate, though it has improved over time. Three areas of particular concern with respect to the development of NSW's WRPs include:

### **1. Incomplete draft WRPs Released for Public Exhibition**

Many of the draft WRPs that were placed on public exhibition were incomplete and missing information relating First Nations values and uses, and objectives and outcomes.

### **2. Lack of Culturally-Appropriate Engagement with Respect to Draft WRPs**

In contrast to Queensland's efforts, NSW has neglected to actively seek feedback from Nations on draft WRPs. Draft WRPs have been placed on public exhibition, via NSW's website. This is the only method that NSW has used to solicit feedback on the draft WRPs, which for First Nations, is not culturally appropriate and reflected in the lack of submissions from First Nations on draft WRPs. NSW's groundwater WRPs have now been submitted to the MDBA, without ever having been taken to First Nations for feedback.

### **3. Delayed and Broken Timelines**

Missed deadlines and broken timelines have further confused First Nations' understanding of the process of WRP development. In early 2020, Minister for Water, Property and Housing (Minister Melinda Pavey) released the latest versions of NSW's WRPs for further comment and feedback. These WRPs are said to reflect changes that were made in response to submissions that were received during the public exhibition phases. However, the comments and feedback sought on these latest versions is only through Stakeholder Advisory Panels (SAPs), which are also not considered to be fully representative of First Nations and therefore not culturally appropriate.

## **Implementation and Compliance**

NBAN and Queensland have started engaging in discussions about WRP implementation and the way forward however, no information has been provided as to how the plans will be implemented alongside existing state arrangements nor what the compliance arrangements will be. No information has been provided to our organisations or our Nations as to how the accredited WRPs will be implemented by NSW (alongside existing state arrangements and how they will ensure compliance) or how Nations will be included in the implementation and compliance processes.

As our organisations' assessment of NSW WRPs with respect to Part 14 is yet to take place, we are not able to comment on the final quality of engagement and the quality of the values and uses, objectives and outcomes that have been captured in the WRPs, or whether adequate information was available for stakeholders to understand the process of WRP development, amendment, implementation, monitoring and enforcement. In general, water policy and the instruments which give effect to water policy are complex, technical and evolving, which makes culturally-appropriate, meaningful engagement difficult and near impossible with limited time and resources. In the event that NBAN or MLDRIN recommend that a WRP not be accredited, as a result of failing to meet the requirements of Part 14, we would expect that the Minister for Resources, Water and Northern Australia (Minister Keith Pitt) not accredit what would essentially be a sub-optimal plan.

Although discussions with the MDBA are currently centred around the Part 14 assessment of NSW's WRPs (specifically with respect to COVID-19 restrictions), our organisations have requested that the MDBA clarify its role in WRP implementation, monitoring and compliance, and are yet to receive a response. The MDBA's plan to establish an approach for monitoring and compliance on a plan-by-plan basis, while adding further complexity, if clearly communicated to our organisations, could be communicated to First Nations with Country in each of the plan areas.

### **Recommendations:**

- The MDBA must make adequate provision of time and resources to allow for a rigorous and culturally appropriate assessment of NSW WRPs, noting the significant delay in their submission. MLDRIN and NBAN must not be pressured to undertake hasty or cursory assessments to meet political demands and timelines.
- Where assessments by MLDRIN or NBAN identify that WRPs have not met the requirements of Chapter 10, Part 14 of the Basin Plan, the Minister for Resources, Water and Northern Australia should not accredit these sub-optimal WRPs.
- Implementation of WRPs, with respect to commitments made to achieving First Nations' objectives and outcomes, needs to be properly resourced by each state.
- Basin jurisdictions must adopt a standardised culturally-appropriate approach to communicating and disseminating information to First Nations, regarding amending, implementing, monitoring and enforcing WRPs.
- Wherever capacity exists within Nation groups, states should explore options to include First Nations in the 'co-management' of water, in recognition of Aboriginal water rights and interests, and to support self-determination.

- Any State or Territory-based Basin Plan and/or WRP implementation coordination committees should include First Nations' representation to ensure adequate opportunities and support for First Nations to meaningfully participate in water management decision-making.
- Resource an Aboriginal Compliance Officer within the MDBA, to ensure states are complying with WRP commitments made to achieving First Nations' objectives and outcomes.



## Water Recovery

MLDRIN and NBAN have consistently highlighted our concerns that the Basin Plan water recovery target is grossly inadequate to meet the objectives of the Basin Plan and to support the protection and restoration of First Nations' water dependent values. This inadequacy has been compounded by the establishment of a 1500 GL cap on buy backs of water from willing sellers and a compromised SDLAM program, which further constrain the ability of Basin governments to meet adjusted water recovery targets. Lack of progress on efficiency measures and lack of transparency regarding the reconciliation process for SDLAM underlie our concerns that further deterioration of cultural outcomes is likely.

### Current Situation

Further to the social impacts for First Nations, surface water extractions for irrigated agriculture have had large environmental costs, with over-allocation of water contributing to the degradation of water-dependent ecosystems. "In 2010, a major river sustainability audit classified twenty of the basin's twenty-three river valleys as either in a poor, or very poor, state of ecological health. The latest State of the Environment Report (2017) shows little improvement. Until recently, few of the basin's rivers and their floodplains, which have high conservation value and are of cultural significance, have had secure water supplies and climate models predict a decline in future inflows."<sup>8</sup>

In 2016, the MDBA conducted a review of the northern Basin SDL of 390GL. "The review report identified a number of scenarios from an increase in water recovery to 415GL to a decrease to 320GL. The final outcome of the Review, a reduction in water recovery by 70GL, is a major failing of Basin Plan implementation. The management of water extraction in northern tributaries, including large volumes of unmeasured floodplain harvesting, is an ongoing problem that is not being adequately addressed through WRPs. Connectivity with the Lower Darling and Lower Murray is a key issue that requires better management. This includes a higher level of water recovery from the northern Basin. The extraction of recent critical first flush flows in Queensland and NW NSW demonstrates a failure of the Basin Plan and its implementation to meet the objects of the Water Act."<sup>9</sup>

Following the series of mass fish deaths in the Lower Darling and Menindee Lakes in 2019, two investigations were undertaken, one by the Australian Academy of Science and the other by the MDBA, to determine the causes of the mass fish deaths. Both of these investigations found that water recovery and active management to protect environmental flows, already slated for action under the Plan, needed to be progressed as a matter of urgency.<sup>10</sup>

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<sup>8</sup> Jackson, S., Hatton MacDonald, D., & Bark, R. H. (2019). 'Public attitudes to inequality in water distribution: Insights from preferences for water reallocation from irrigators to Aboriginal Australians.' *Water Resources Research*, 55, 6033– 6048.

<sup>9</sup> *Submission to Senate Inquiry into the Multi-Jurisdictional Management and Execution of the Murray-Darling Basin Plan*, Lifeblood Alliance, 6 March 2020

<sup>10</sup> Keelty, M 2019, *Northern Basin Commissioner first year report 2019*, Northern Basin Commissioner, Canberra, December.

### **Environmentally Sustainable Level of Take**

In 2012, the Basin Plan established that 3,200GL of water needs to be returned, per year, to achieve an Environmentally Sustainable Level of Take. However, the gigalitre value is heavily disputed by independent scientists, including the Wentworth Group of Concerned Scientists (WGCS), who generally evaluate that the number should be well above 4,000GL. In their 2019 report, the WGCS found that the already contentiously low “environmental flow targets set by the MDBA, which are required to be met to produce environmental improvements, have failed to be achieved and that in general, observed flows are similar to, or less than, the baseline (pre-Basin Plan) model results, revealing that instead of an increase there has actually been no improvement or even a decline in water flows since the implementation of the Basin Plan.”

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### **Buy-backs**

“A severe drought that diminished flows in the River Murray during the first decade of this century catalysed action to secure environmental water supplies. The federal government passed legislation to improve the health of the basin’s ecosystems by setting SDLs and developing a Basin Plan to oversee recovery of water for the environment. Under current legislation, restoring more water to the environment is to be achieved by irrigation efficiencies and not through government purchases of irrigation entitlements. This policy change is a potential barrier to the development of a large-scale buy-back program to satisfy [First Nations’] claims for water, should they choose to direct it to the environment.”<sup>8</sup>

In 2017, the Productivity Commission reported on its concern about the Commonwealth government’s 2015 decision to limit buy-backs of water entitlements (buy-backs) to 1,500GL (sec 85C of the Water Act) across the MDB, which effectively dictated that higher cost water recovery options (such as infrastructure upgrades) be used, hence making implementation of the Basin Plan more expensive and more difficult. “There is no indication that the decision to invest in irrigation infrastructure in preference to water purchases was made on the basis of cost-effectiveness. The Productivity Commission found that there is evidence that recovering water through investment in new or updated irrigation infrastructure is more expensive than water purchases and that significant public funds have been spent on, and committed to, infrastructure projects which are unlikely to be cost-effective and risk being inefficient.”<sup>12</sup>

The purpose of the Murray-Darling Basin Plan is to improve the health of Australia’s largest river system for public benefit. The primary actions in the Plan are designed to reduce over-allocation of water. However current water recovery targets set in the Plan are inadequate and there has been a significant failure to meet even these existing water recovery targets; a shortfall of 47.5GL out of a reduced target of 2,075GL. The quickest, most efficient and economically responsible way to meet the overdue water recovery target is to purchase the outstanding 47.5GL of water from willing sellers via an open and transparent tender process. Recovering this volume through buy-backs would still be within the 1,500GL limit on buy-backs set by the Commonwealth government.

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<sup>11</sup> Wentworth Group of Concerned Scientists. *Water Flows in the Murray-Darling Basin: Observed versus expected*. Summary Report. February 2019.

<sup>12</sup> National Water Reform: Productivity Commission Inquiry Report, Productivity Commission, 19 December 2017

### **Recommendations**

- Commonwealth government must develop a plan to urgently progress purchase the remaining 47.5GL of water from willing sellers via an open and transparent tender process, to meet the remaining bridging the gap targets
- The 1500GL buy back cap should be overturned to ensure flexibility and cost-effectiveness in the recovery of water for environmental and cultural outcomes.
- Determine a single set of flow indicators for an Environmentally Sustainable Level of Take, that all Basin jurisdictions agree to use for environmental water planning, management and evaluation.



## Environmental Water

The report of the South Australian Royal Commission has aptly summarised First Nations' advocacy around environmental water planning. "Time and again First Nations' peoples reiterate how crucial environmental flows are to protecting and maintaining cultural values and supporting the well-being of Aboriginal people, with the importance of these flows captured in many reports<sup>13</sup>, including the MDBA's 'Our Water, Our Life' report, which demonstrated the cultural significance of natural surface water flows and groundwater resources."<sup>14</sup>

It is critical to note that First Nations are also pursuing water rights and interests through the framework of Cultural Flows. Environmental flows cannot be used as a surrogate for Aboriginal Water entitlements or cultural flows, as water management has assumed in the past.<sup>15</sup>

MLDRIN and NBAN have articulated views and recommendations on the management of environmental water in response to various reports including; the 2018 Inquiry into the Management and Use of Commonwealth Environmental Water, the 2017 Inquiry into the Management, Governance and Use of Environmental Water in Victoria, and in a recent submission on the Draft Basin-Wide Environmental Watering Strategy 2019.

Our position on environmental water management and First Nations' water rights and interests, in the context of the Basin Plan is as follows:

- Wherever possible, environmental water should be managed to support First Nations' cultural outcomes and custodianship of Country, while ensuring environmental objectives are met.
- First Nations objectives for use of environmental water should be included in both short- and long-term planning documents at the local, regional, State and Basin-scale (including wetland management plans, seasonal watering plans, Long-Term Watering Plans, the Basin Environmental Watering Strategy and Annual Environmental Watering Priorities).
- First Nations should be empowered to play an active role in the planning, delivery and monitoring of environmental water at all scales from local to Basin-wide.
- Water holders should work directly with First Nations to progress 'co-management' of environmental water to support self-determination and caring for Country.
- Adequate water recovery is essential to underpin improved cultural outcomes from use of environmental water.

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<sup>13</sup> Murray Lower Darling Rivers Indigenous Nations, *Submission to Murray-Darling Basin Royal Commission*, 7 June 2018 (RCE 125), [59].

<sup>14</sup> Murray Lower Darling Rivers Indigenous Nations, *Submission No 227 to Murray-Darling Basin Authority, Proposed Basin Plan Amendments*, 24 February 2017 (RCE 127), 3–4.

<sup>15</sup> Finn, M. & Jackson, S. (2011) 'Protecting Indigenous Values in Water Management: A Challenge to Conventional Environmental Flow Assessments'. *Ecosystems*, December 2011, Volume 14, Issue 8, pp 1232–1248



At present, environmental water holdings are a key resource available to support achievement of cultural outcomes for Basin First Nations. As Nations progress aspirations for ownership of water entitlements and cultural flows, this situation may change. However, the low rate of Aboriginal water ownership (estimated at less than 0.01 per cent of Australia's water diversions, as of 2012)<sup>16</sup> and the limited rights associated with Native Title determinations do not provide Nations with scope to manage water to meet cultural objectives.

### **Current Situation**

The National Water Initiative requirement for jurisdictions to 'incorporate Indigenous social, spiritual and customary objectives' into all water plans and the Basin Plan requirement to have regard to First Nations' values and uses in environmental water planning, have helped to drive positive reform in Commonwealth planning and also in State jurisdictions. For example, Victoria's 2016 Water for Victoria Plan, and the Water and Catchments Legislation Amendment Act (2019)<sup>17</sup> have embedded consideration of First Nations' water values and interests in many elements of the State's water planning, including the development of Sustainable Water Strategies. Monitoring of progress against the Basin Plan's "have regard" requirement has improved following a 2018 Direction: Water (Indigenous Values and Uses) by then Minister Littleproud, which directs the MDBA to report on how holders of held environmental water have considered Indigenous values and Indigenous uses, and involved Indigenous people in environmental watering.<sup>18</sup>

Nevertheless, progress towards this strengthened recognition has been slow. In 2015, MLDRIN wrote to the MDBA noting that there had been no engagement with MLDRIN or other First Nations groups in the development of the 2016 Basin Annual Environmental Watering Priorities. This omission led to a renewed commitment from the MDBA to make provisions for MLDRIN's and NBAN's input. In 2018, MLDRIN and NBAN commenced the First Nations Environmental Water Guidance (FNEWG) Project, with support from the MDBA and the CEWO. The FNEWG Project provides a structured program to ensure First Nations objectives for use of environmental water are considered in the development of the Basin Annual Environmental Watering Priorities. The CEWO has also approached our organisations about the development of a First Nations Engagement Strategy, however there has been little to no progress on this.

Despite these improvements, there is significant disparity between Basin jurisdictions regarding the implementation of mechanisms to ensure First Nations input. For example, in Victoria an Aboriginal Commissioner has been appointed to the Victorian Environmental Water Holder and a network of State-funded Aboriginal Water Officers support First Nations input into environmental water management plans and seasonal watering proposals. Progress towards greater self-determination is reflected in the aspiration put forward by some Nations, to independently produce Seasonal Watering Proposals and fulfil functions previously vested

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<sup>16</sup> Hartwig, L.D.; Jackson, S.; Osborne, N. Recognition of Barkandji Water Rights in Australian Settler-Colonial Water Regimes. *Resources* 2018, 7, 16

<sup>17</sup> [https://content.legislation.vic.gov.au/sites/default/files/2dd0230e-7f04-3924-bd01-cf1f23f67bf8\\_19-023aa%20authorised.pdf](https://content.legislation.vic.gov.au/sites/default/files/2dd0230e-7f04-3924-bd01-cf1f23f67bf8_19-023aa%20authorised.pdf)

<sup>18</sup> <https://www.legislation.gov.au/Details/F2018L00891>

in CMAs<sup>19</sup>. In New South Wales however, there is no formal strategy or mechanism for incorporating First Nations views into the environmental water planning framework. Where input has been sought (for example at Gayani Nimmie Caira with the Nari Nari Nation, and at Booberoi Creek with the Ngiyampaa Nation), this is largely driven by strong local partnerships and Traditional Owner initiative. While some efforts have been made to incorporate First Nations objectives into NSW's Long-Term Watering Plans, this has been sporadic and unsystematic. Environmental Watering Advisory Groups (EWAGs) have not provided an effective mechanism for First Nations input into water planning in most cases. The opportunities and recognition afforded to First Nations in environmental water planning vary significantly depending upon which jurisdiction their traditional Country falls within. The disparate implementation of requirements to incorporate First Nations' objectives and to have regard to First Nations' values and uses is producing inequitable outcomes.

NBAN is not aware of any "EWAG" mechanism nor any coordination committees for planning and decision-making with respect to environmental water delivery and the coordination of environmental watering in Queensland. Neither watering events nor the outcomes or impacts of environmental watering have ever been communicated to NBAN or its member Nations at a state level.

In addition to these disparities, six other key issues relating to the implementation of the Basin Plan's requirements to have regard to First Nations values and uses in environmental water planning include:

### **1. Trade-offs and Decision-making**

First Nations values and objectives are recognised as a legitimate input into environmental water planning but it is still unclear in many cases how these matters are factored into complex decision-making and trade-offs regarding environmental water use. How are First Nations values and objectives 'weighted' in relation to other considerations in determining where and how environmental water should be used? Our organisations are concerned that the MDBA did not follow act in accordance with a clear recommendation from the Productivity Commission<sup>20</sup> to include a specific secondary objective in the revised 2019 Basin-wide Environmental Watering Strategy that "environmental watering should seek to achieve social or cultural outcomes, to the extent that environmental outcomes are not compromised". While the MDBA committed to the inclusion of the objective in the 2022 edition of the Strategy, its omission in the current Strategy means that the importance of First Nations outcomes in Basin environmental water planning remains unclear.

### **2. Capacity Challenges and Gaps**

In the southern Basin, contrasting approaches to the implementation of Basin Plan requirements have contributed to disparities between First Nations in terms of their

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<sup>19</sup> 'Taungurung Land and Waters Council Aboriginal Corporation, Objectives and Outcome'. State of Victoria, *Victoria's North and Murray Water Resource Plan, Comprehensive Report*. P. 264-280.  
[https://www.mdba.gov.au/sites/default/files/pubs/vic-north-and-murray-water-resource-plan-index-table-and-comprehensive-report-26-November-2019\\_0.PDF](https://www.mdba.gov.au/sites/default/files/pubs/vic-north-and-murray-water-resource-plan-index-table-and-comprehensive-report-26-November-2019_0.PDF)

<sup>20</sup> Productivity Commission 2018, *Murray-Darling Basin Plan: Five-year assessment*, Final Report no. 90, Canberra. Recommendation 11.1, p.50

capacity to influence environmental water planning. While some First Nations have negotiated agreements with the CEWO<sup>21</sup>, analogous to co-management of environmental water, others struggle to be informed and engaged in government-led planning processes. These disparities have been documented in MLDRIN's *Stage 1 Collaborative Design Report* for the FNEWG Project. This report details findings of a review of Nations' capacity to participate in water planning, based on varying human resources (staff, decision-making structures, elders or experts available to contribute to the process), information (e.g. data about cultural values and objectives), financial resources (funding to convene working groups, undertake research and collaborate within the Nation) and expertise (familiarity with the technical aspects of water management).

In the northern Basin, to progress the consideration of First Nation's environmental watering objectives in the MDBA's and the CEWO's decision-making and trade-offs regarding environmental water use in 2020-21, NBAN agreed to progress with Stage 2 of the FNEWG 2020-21 Project, noting in the project plan that the project budget was not sufficient to provide for capacity building in Nations in terms of human and financial resources, information and expertise. With NBAN's support and using data largely collected through non-environmental watering related projects, 16 Nations have submitted over 10,000 environmental watering objectives, for 111 sites across the northern Basin. While this information will prove valuable for the MDBA and the CEWO, it is unclear how or whether the States will include this information and its exact influence on environmental water planning.

### **3. Reduced Water Recovery**

Adjustment of the SDL in 2018 and a reduced water recovery target will inevitably place pressure on limited environmental water holdings, reducing the flexibility of water holders to service diverse values and objectives. Unless action is taken to progress water recovery through buy-backs, efficiency measures or reconciliation under the SDLAM, MLDRIN is concerned that First Nations' values and objectives will be demoted in decision-making and compelled to compete against other ecological objectives. This issue would be best addressed by supporting direct allocation of sufficient water for Cultural Flows, owned and managed by First Nations.

### **4. Coordination Committees**

In spite of the Basin Plan providing a framework that seeks to benefit the entire system, planning and delivery arrangements for environmental water take place at a local, state and Commonwealth level. In NSW, a number of local Environmental Water Advisory Groups (EWAGs) operate at a catchment level. The EWAGs are used to engage with community to discuss watering events.

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<sup>21</sup> See for example Commonwealth Environmental Water Office and Ngarrindjeri Regional Authority (2015) *Environmental Water Delivery Agreement in relation to the delivery of environmental water to environmental assets in the Lower River Murray region, South Australia*.  
<https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/nra-water-delivery-agreement.pdf>

For our members, the value of coordination committees depends upon key factors including:

- Inclusivity: are committees truly inclusive and supportive of First Nations involvement or do Traditional Owners feel that their participation is tokenistic?
- Status: do committees have actual decision-making authority? Are committee decisions enacted and reported on?
- Information and support: are participants, including First Nations, provided with adequate information and guidance to support their informed input?

A number of our organisations' Nation members participate in NSW EWAGs. The value of these EWAGs, as a mechanism for First Nations' input, varies considerably. Many of our members report frustration and lack of support when participating in EWAGs. Representation is limited to one Traditional Owner per EWAG region, with limited support or capacity building for informed participation. Our organisations' members report difficulties participating in EWAG forums, due to the technical nature of conversations and strong representation of irrigator interests and agency staff. EWAGs may not be a culturally appropriate or empowering pathway for cultural knowledge to inform environmental watering. This could be improved by opening membership to allow representatives from each Nation group in an EWAG region and providing greater support and capacity building.

In 2015 MLDRIN wrote to then Minister for Water the Hon. Bob Baldwin MP requesting membership of the Southern Connected Basin Environmental Watering Committee (SCBEWC). The request was denied at that stage but in late 2019 MLDRIN was invited to participate as a member. MLDRIN is not able to comment on the value of this committee having only just taken up membership and wants to have the chance to understand how First Nations can contribute to coordinated decision-making, especially as Nations take up opportunities for water access and ownership.

NBAN is aware of a newly-formed northern Basin environmental watering group, believed to be the equivalent of SCBEWC however, NBAN have not formally been advised of this or been invited to participate.

## 5. Communication

First Nations have a strong understanding of the need for and value of environmental watering.<sup>22</sup> Our organisations communicate regularly and openly with the MDBA and the CEWO to understand how environmental water is being managed. Communication from the CEWO regarding coordinated watering events such as the northern fish and southern spring flow (both in 2019) has been regular and effective. For the northern fish flows, the CEWO held a number of community information drop-in sessions and provided a number of updates as well as a fact sheet for NBAN to distribute to its member Nations.

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<sup>22</sup> As noted in NBAN and MDBA (2016) *Our water, our life: An Aboriginal study in the Northern Basin*.

As mentioned above, we understand that the CEWO are in the process of developing a First Nations Engagement Strategy, but we are not clear how that is progressing. In general, there is a need for more communications products targeted to First Nations interests and outcomes. A recent brochure providing detail on ten case studies of *First Nations involvement in managing water for the environment in the Murray-Darling Basin* is a positive example of communications showcase First Nations outcomes.<sup>23</sup>

Our work on the FNEWG project has highlighted First Nations' needs for improved communication and engagement to highlight opportunities for participation, and to demonstrate how environmental water is being used to meet cultural outcomes. These include:

- Presentations and briefings to dedicated water advisory groups or steering committees, that include First Nations organisations.
- Nation meetings or workshops, including funding for Nations to hold workshops to discuss watering priorities.
- On-Country community discussions during watering events.
- Detailed information about priority-setting processes and the Basin environmental water management framework to support deliberations.
- Detailed information on cultural outcomes of watering.

MLDRIN communicates regularly and openly with Victorian and South Australian water holders and agencies responsible for water planning. Neither NBAN nor its member Nations have been engaged by NSW or Queensland with respect to environmental watering, in general nor with respect to each state's Annual Environmental Watering Priorities (AEWP). In spite of meaningful consultation with NBAN's Queensland-based Nations during the development of the Condamine-Balonne and Border Rivers Moonie Water Resource Plans, which included the identification of Aboriginal values and uses, as well as the linking of Aboriginal values and uses with ecological values and uses, there is no mention of Aboriginal objectives in Queensland's 2019-20 AEWPs.

## 6. Monitoring

First Nations organisations are well placed to contribute to monitoring of environmental and cultural outcomes from watering. A First Nations approach to caring for Country involves collection of 'data' about waterway health through extensive observation and interpretation, based on Traditional Ecological Knowledge. First Nations are evolving and adapting these techniques to integrate with western waterway management. MLDRIN and NBAN have taken the lead in utilising the Aboriginal Waterways Assessment (AWA) tool, allowing Nations to collect data on environmental conditions and cultural health at sites

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<sup>23</sup> *Rivers, the Veins of our Country - Ten case studies of First Nations involvement in managing water for the environment in the Murray-Darling Basin, 2018-19* (2020) <https://www.mdba.gov.au/publications/mdba-reports/first-nations-people-participation-environmental-watering>

across the Basin.<sup>24</sup> Trials are underway in Victoria to explore the effectiveness of the AWA as an input to a strategic framework for planning, communicating and implementing waterway work.<sup>25</sup> Nations have also independently developed monitoring frameworks to track cultural and environmental outcomes on Country, using identified objectives, indicators and targets.<sup>26</sup> The National Cultural Flows Research Project water-planning guide also outlines a structured approach to monitoring and evaluation, which will be incorporated into detailed Cultural Flows Management Plans.<sup>27</sup>

Greater support is needed for structured monitoring programs coordinated and undertaken by First Nations' people and organisations. In particular, the establishment of River Ranger programs could support more effective monitoring and provide opportunities for employment and capacity building for First Nations. Strong support for Aboriginal Ranger programs was found by the then Northern Basin Commissioner, in his 2019 Report.<sup>10</sup> Including cultural objectives, indicators and targets in watering plans will allow for transparent assessment of outcomes.

### Recommendations

1. All Basin jurisdictions must establish adequately resourced, formal mechanisms to support First Nations' input into environmental water planning, as required under the NWI. These mechanisms should include support for research, cultural assessments and input to watering plans at a local scale, backed by formal obligations on agencies responsible for annual and long-term planning.
2. Organisations representing First Nations should be included in coordination committees, to facilitate the dissemination of information relating to environmental watering processes and watering events, to improve understanding of environmental watering and its impacts.
3. The Basin Ministerial Council should drive greater consistency in provisions for First Nations' participation in environmental water planning across Basin jurisdictions.
4. Wherever capacity exists within Nation groups, water holders should explore options to devolve planning and management to First Nations and advance 'co-management' of environmental water to support self-determination and enhanced Caring for Country outcomes.
5. All watering plans (e.g. Wetland Management Plans, Environmental Water Management Plans) should include cultural objectives, targets and indicators, produced by or in partnership with relevant First Nations.
6. Greater support should be provided to establish and extend River Ranger programs and Aboriginal Water Officer networks to undertake First Nations-led monitoring of cultural and environmental outcomes of environmental watering.
7. The CEWO should complete its First Nations Engagement Strategy.

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<sup>24</sup> Will Mooney & Alex Cullen (2019) Implementing the Aboriginal Waterways Assessment tool: collaborations to engage and empower First Nations in waterway management, *Australasian Journal of Environmental Management*, 26:3, 197-215, DOI: [10.1080/14486563.2019.1645752](https://doi.org/10.1080/14486563.2019.1645752)

<sup>25</sup> Intrinsic Scope (2019) *Flagship Waterways, Cultural Indicators case study - Aboriginal Waterways Assessment (AWA)*. Unpublished report.

<sup>26</sup> *Barapa Barapa Nation, Objectives and Outcome*. State of Victoria, *Victoria's North and Murray Water Resource Plan, Comprehensive Report*. [https://www.mdba.gov.au/sites/default/files/pubs/vic-north-and-murray-water-resource-plan-index-table-and-comprehensive-report-26-November-2019\\_0.PDF](https://www.mdba.gov.au/sites/default/files/pubs/vic-north-and-murray-water-resource-plan-index-table-and-comprehensive-report-26-November-2019_0.PDF)

<sup>27</sup> National Cultural Flows Research Project (2019). *Cultural Flows, a Guide for First Nations*. <http://culturalflows.com.au/images/documents/Community%20Guide.pdf>

8. The membership and operation of coordination committees should be reviewed to ensure adequate opportunities and support are available to First Nations to meaningfully participate in environmental water decision-making.



## Water Trade

First Nations have been restricted from access to the water market and participation in water trade due to the impacts of colonisation, marginalisation and dispossession from land and water rights.<sup>28</sup> It is estimated that First Nations owned less than 0.01 per cent of Australia's water diversions, as of 2012. The legacies of colonisation and socio-economic marginalisation and the cultural connection that First Nations people have to water and waterways, mean that First Nations approach the issues of water markets and trade from a unique perspective, and with unique rights, which must be factored into the evolution of Basin frameworks. Our comments focus on addressing barriers to entry to water markets for First Nations.

MLDRIN and NBAN have detailed Basin First Nations rights and interests, as they relate to water markets and trade, in previous statements, reports and submissions including; The Echuca Declaration (2007), Sovereign First Nations of the Murray Darling Basin Water Statement (2016) and the ACCC Inquiry Submission.

Our key position on the issue of water markets and trade includes:

- First Nations have fundamental concerns about the commoditisation of water and the role of the market as a mechanism for distributing water resources.
- Water markets and trade are fundamentally at odds with First Nations water values, which emphasise the sacred and animate attributes of water and the interconnectedness of water, land, people and all other life forms as "Country".
- First Nations have rights, recognised in international law and Australia's domestic water policy to access and enjoy the benefits of water use on their traditional Country.
- First Nations may choose to take a pragmatic approach to advancing water access, given the current political economy governing water allocation and use.
- Nations want to be able to acquire water holdings and utilise the market to support outcomes across the spectrum of environmental, cultural, social and economic values.
- Australian jurisdictions must address these rights and this unmet demand on the water allocation framework by making provisions to support First Nations' ownership of water entitlements and participation in water markets.

### Current Situation

The National Water Commission and Productivity Commission have provided consistent advice to Basin jurisdictions on approaches to addressing limited First Nations' water access, including making provisions for access to unallocated water and establishing funds to support acquisition of water entitlements in fully allocated systems.<sup>29</sup> There has been no meaningful

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<sup>28</sup> Jackson, Sue (2017) 'Indigenous Peoples and Water Justice in a Globalizing World' in Conca, K and Weinthal, E. (eds) *The Oxford Handbook of Water Politics and Policy*.  
<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199335084.001.0001/oxfordhb-9780199335084>

<sup>29</sup> National Water Commission (2012) *Position Statement: Indigenous Access to Water Resources* and Productivity Commission (2018) *National Water Reform*, Report no. 87, Canberra, Recommendation 3.3 (a)



improvement in levels of First Nations' water access and ownership in the Basin since 2012. In fact, recent research suggests a reduction in ownership in NSW.<sup>30</sup>

Some Basin governments have taken steps to more formally recognise the dispossession of First Nations' water rights and ongoing barriers to entry to water markets, and to identify pathways to support greater water access and ownership. The announcement, in 2018, by then Commonwealth Water Minister the Hon David Littleproud MP, of a \$40M fund to support acquisition of water entitlements for cultural and economic purposes in the Basin was a historic recognition of the need for government to provide funding to support First Nations' entry to water markets. Progress on a delivery model for the funding has been slow and discussions are ongoing between key stakeholders.

In 2016 the Victorian Government committed \$5M to develop a 'roadmap' towards First Nations' water access for economic development. MLDRIN has coordinated a major Water Access for Traditional Owner Economic Development project, which will identify opportunities and barriers for First Nations' water access in Victoria. The project involves understanding the risks and benefits for First Nations for participation in water markets and trade, and the identification of options for water acquisition and governance. This research will inform future policy and funding commitments from the Victorian Government.

Other Basin jurisdictions have begun to consider options to support water market access. For example, NSW has publicly committed to developing an Aboriginal Water Policy, which may include provisions for substantive water access for consumptive purposes.

There is an urgent need to address the issue of water justice for First Nations in a meaningful and consistent way across all Basin jurisdictions. This includes addressing barriers to entry to water markets and the adverse effects of market operations on cultural values.

## **Recommendations**

1. Any adjustment to water market operation needs to acknowledge the historic exclusion of Aboriginal people from the water market, and actively seek to address this problem. This should include lowering barriers to entry for Aboriginal participants, such as time-limited exemptions to fees and charges, purchasing and reallocating of water entitlements, and other barriers.
2. Any adjustment to water market operations needs to strengthen the capacity for water markets to enable re-allocation of water to Aboriginal people. Any proposals that alter market operations should be assessed against this existing priority.
3. Where possible, any significant reforms for the Murray-Darling Basin water markets should incorporate findings from significant State-level projects, which are currently underway, including the Water Access for Economic Development project in Victoria. This project is being undertaken as a co-design process with Traditional Owners, peak bodies (MLDRIN and the Federation of Traditional Owner Corporations in Victoria), and the state

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<sup>30</sup> Hartwig, L. Griffith University: Australian Rivers Institute and School of Environment & Science. Unpublished PhD Research. See <https://law.unimelb.edu.au/centres/creel/news-and-events/conferences-and-seminars/2019/trends-in-aboriginal-water-ownership-in-new-south-wales,-australia-the-continuities-between-colonial-and-neoliberal-forms-of-dispossession>

government, and will provide a clear statement of Traditional Owner interests in and aspirations for water management in the Basin (see Appendix A for Stage 1 discussion paper).



## Compliance

### Current Situation

As with the majority of parties in the MDB, First Nations lack confidence in the compliance management of the MDB, particularly in the northern Basin. Not least because 26% of water take across the Basin is estimated, not measured<sup>31</sup> and further, because issues of non-compliance seem to be brought to the fore by investigative journalism rather than through Departmental compliance processes.

A complex policy environment, at both a Commonwealth and state level, promotes an inconsistent approach to the execution of the Basin Plan, including approaches taken to achieving compliance and good governance of water take. Further, because each state follows its own methodology in drafting its WRPs, compliance with respect to the commitments made in the WRPs will be difficult to measure. The fact that each jurisdiction works independently to meet the requirements of its own water-related legislation, frustrates First Nations' water literacy and makes it difficult for First Nations' to participate meaningfully in issues of compliance.

### Recommendations

1. Re-establishment of the National Water Commission or similar independent oversight body for national water reform that includes First Nation representatives. And the backing of such a Commission by an independent Commonwealth Basin Plan Regulator to deal with enforcement of WRPs and all other compliance issues in the MDB, separate from the MDBA.
2. First Nations representation in the MDBA's Office of Compliance and clear communication to First Nations organisations of the MDBA's compliance role, to promote water literacy.
3. Map and simplify Commonwealth and state water policies with a view to achieving a consistent and easily understood framework for all stakeholders, including First Nations.
4. Adopt a single approach to communication and coordination of activities across the Basin that provides a single site for relevant and accurate information regarding water entitlements and availability for all stakeholders, including First Nations.
5. Resource an Aboriginal Compliance Officer within NBAN and MLDRIN, to work with states to undertake First Nations-led compliance and monitoring, resourced through a Commonwealth agreement to improve First Nations' compliance literacy, and support employment and capacity building.

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<sup>31</sup> MDBA (November, 2019). *SDL Accounting Update*.