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## **Productivity Commission, Murray-Darling Basin Plan: Five-year assessment, Draft Report.**

### **Murray Lower Darling Rivers Indigenous Nations (MLDRIN) submission**

MLDRIN welcomes the opportunity to review the Commission's Draft Murray Darling Basin Plan: Five Year Assessment (Assessment Report). MLDRIN acknowledges the detailed research and inclusive public consultation which has contributed to the development of the report. This submission should be considered in conjunction with MLDRIN's earlier submission on the Issues Paper and participation in Stakeholder Working Group meetings.

MLDRIN acknowledges and supports a number of the findings of the assessment. In particular in relation to supply measures (4.1), efficiency measures (5.1), water resource planning (6.1), Indigenous values and uses (7.1), pre-requisite policy measures (11.1), Long-term watering plans (11.3) and evaluation (13.2). Overall, we agree with the Commission's call for a 'back to basics' approach to implementation and greater responsibility and agency of Basin State governments. Our submission provides comments and feedback on the findings and recommendations, with some suggested changes and improvements.

Our submission focuses on elements of the assessment that are most pertinent to our membership: the recognition, protection and advancement of First Nations rights, interests and objectives under the Basin Plan. We have organised comments and feedback under the relevant subject headings.

### **Summary of progress**

MLDRIN notes with concern that, while the recovery of 1995.8 GL of water from consumptive use represents positive progress, Basin jurisdictions are working towards recovery of a significantly reduced volume, based on an adjusted recovery target which is insufficient to meet the objectives and outcomes of the Plan. Furthermore, as the Draft Report highlights, we have no certainty that the projects designed to offset the additional 605GL recovery are going to achieve their intended outcomes or even be completed. The progress noted by the Commission is overshadowed by these major risks and uncertainties.

We agree with the Assessment Report (p.60) that 'Basin States have improved their formal processes for engagement with Traditional Owners as part of WRP

development,’ However, as noted elsewhere in the report, the momentum has been too slow. More than 5 years after the plan was signed into law, many Nations, particularly in NSW are only now just being approached to provide their views, with just eight months remaining before the June 2019 deadline. This stalled progress risks undermining the development of WRPs and delivering poor outcomes for First Nations in those plans.

We note that while there have been significant improvements in *consultation* with First Nations in some areas, results on the ground indicate that there has been poor progress towards achieving the objectives and outcomes stipulated at s. 5.02 (2) (a) and 5.04 (1) of the Basin Plan. In particular, Barkandji people on the Baarka, Darling River, are facing the impacts of declining flows, poor water quality and associated social/cultural dislocation. Unless water resource allocation and management under the Plan can address these kinds of impacts, MLDRIN believes implementation is inequitable and the Plan is not achieving its intended purposes.

### **First Nations rights and interests**

The Assessment Report notes (p.172) that ‘cultural water uses are specifically included within the outcomes and objectives of the Plan (s. 5.02(2)(a) and s. 5.04(1)).’ MLDRIN argued in our submission to the Issues Paper that a critical gap is that specific provisions in the Plan do not go far enough to address or support these objectives and outcomes. We understand that the Commission has taken the approach of assessing progress against the current provisions in the Plan. MLDRIN has developed proposals for improvements to the Basin Plan which we believe would strengthen the performance of the Plan against these objectives and outcomes. These proposals were part of MLDRIN’s submission to the South Australian Royal Commission on the Murray Darling Basin. They have been attached and should be considered alongside this submission. MLDRIN argues that the Plan should be amended in 2026 to include improved provisions that provide a basis to progress these objectives.

MLDRIN disagrees with the Commissions’ view that water for Aboriginal economic purposes should be dealt with as ‘a distinct issue’ in water planning (p.170). We are concerned about a tendency to dissect First Nations water interests between the consumptive and non-consumptive pools. By that model, First Nations cultural values and interests would be addressed by managing water held by governments in the environmental pool, whereas economic interests could be served by accessing and owning water within the consumptive pool. First Nations have articulated a right to Cultural Flows, which are entitlements owned and managed by Nations to progress cultural, social, spiritual, economic and environmental interests. The separation of cultural from economic interests and activities is arbitrary and based on a non-Aboriginal, utilitarian worldview that does not align with the views of our member Nations.

The Productivity Commission should revisit their advice regarding the separation of First Nations economic and cultural interests as issues in water planning. As Nations

move towards realising Cultural Flows, they will seek to manage portfolios of water across a spectrum of interests and activities.

### **Development and assessment of Water Resource Plans**

In general, MLDRIN agrees that the Water Resource Plans requirements have raised the standard for identifying the water related objectives, outcomes, values and uses of Indigenous Australians in the Basin.

Draft Finding 7.1 is accurate and reflects MLDRIN's key concerns regarding WRP development; with the qualification that optimal engagement is still a long way off in some cases and requires long-term commitments. Too much of the positive progress on engagement is reliant on proactive work by individuals within government agencies, rather than appropriately structured and funded programs embedded in State frameworks. Commitments to improve consultation during and beyond the development of the WRPs need to be properly defined and tangible, funded and implemented through formal policy or legislation. While the deficiencies are most stark in NSW, other states have many issues to negotiate including working with complex First Nations governance processes and accounting for overlapping requirements and agreements, such as consultation requirements associated with Traditional Owner Settlement Agreements in Victoria.

### **MDBA WRP Guidelines**

The report references Guidelines prepared by the MDBA, in consultation with MLDRIN and NBAN, for First Nations consultation for the development of WRPs. While these guidelines provide some positive direction, it is important to note that

- They are discretionary guidelines, lacking the status of the Basin Plan provisions
- They do not accord with the Akwe:Kon guidelines on the important point of free, prior and informed consent
- Are not consistently incorporated into State's consultation planning and activities
- Are not necessarily utilised by MDBA in its assessment of Water Resource Plans against the chapter 10, part 14 requirements.

The Commission could offer recommendations or practical advice on how these Guidelines could be incorporated into State's consultation activities, but their existence should not be considered as evidence of improved engagement.

MLDRIN is not clear how the Part 14 Guidelines and Position Statement 14A are considered in the MDBA's formal assessment of WRPs. The guidelines and position statement focus on procedure and appropriate consultation. MLDRIN has incorporated the Guidelines into a WRP assessment matrix. However in undertaking assessments, MDBA appears to take a more reductive, legalistic perspective focussed on whether submitted text addresses the Chapter 10, Part 14 requirements. MDBA's assessment does not appear to consider the matters

specified in its Guidelines. MLDRIN is concerned that MDBA could arrive at differing advice regarding how a WRP complies with Chapter 10, Part 14 requirements, due to their more rigid assessment criteria.

MDBA's assessment of WRPs against the Part 14 requirements should be undertaken according to transparent criteria that reflect the Position Statement 14A and the Part 14 Guidelines.

MLDRIN stresses the need for appropriate time and resourcing for assessment of WRPs. As timelines for preparation and assessment are compressed, MLDRIN and NBAN will be requested to undertake assessments rapidly and to assess plans concurrently. The Commission should highlight the importance of the rigorous and independent assessment performed by MLDRIN and NBAN and that this assessment needs to be supported with adequate time, technical advice and resources.

Draft Recommendation 6.1 proposes extensions of time for accrediting WRPs where there are outstanding issues to give sufficient time for adequate community engagement. In principle, MLDRIN agrees that extensions may be necessary and preferable to having poorly developed plans submitted. On the other hand, States should not be rewarded for intransigence in establishing appropriate processes. MLDRIN urges the Commission to qualify Draft Recommendation 6.1 with the condition that the provision of an extended timeline for WRPs would be contingent on the proponent providing a detailed Indigenous Engagement Strategy for the completion of the WRP, with appropriate commitments of staff and operational budgets.

Consideration will need to be given to how extending timelines impacts on the implementation of the SDL, requirements for assessment and any flow-on impacts to other aspects of Plan implementation.

### **Environmental water management provisions**

MLDRIN agrees that there has been some significant progress towards including First Nations cultural objectives into the Basin Plan environmental management framework, and associated planning and delivery activities. The Assessment Report lists progress on a range of fronts. There are some important qualifications to these reports, listed below:

*The MDBA (2018b) has committed to partnering with NBAN and MLDRIN to develop guidance on the outcomes Indigenous Nations would like environmental watering to achieve (p.176)*

A project plan has been submitted to the MDBA to support the inclusion of cultural objectives into the 2019-20 Basin Annual Priorities. However was insufficient to allow MLDRIN to undertake a preferred activity: mapping First Nations preferences and capabilities for recording and communicating their flow objectives. Without a long-term commitment to support culturally appropriate mechanisms for Traditional

Owners to identify their watering objectives, the effectiveness of Traditional Owner input could be limited.

*The New South Wales Government includes Indigenous representation on its Environmental Watering Advisory Groups (MDBA 2017I) (p. 177)*

Representation is limited to one Traditional Owner per EWAG region, with limited support or capacity building for informed participation. MLDRIN 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 objectives to inform 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.

*The Victorian Environmental Water Holder's (VEWH's) seasonal watering plan is informed by proposals by Catchment Management Authorities who undertake consultation with Traditional Owners (DAWR 2018f; VEWH 2018) (p.177)*

Seasonal watering proposals offer a productive pathway for local Traditional Owner inputs to flow into environmental water planning, but opportunities for Traditional Owner input to watering proposals are not consistent across CMA regions. CMA's should develop more systematic processes for including Traditional Owner cultural objectives in Environmental Watering Management Plans and watering proposals.

*The Living Murray program also includes an Indigenous Partnerships Program (IPP) (p.177)*

The Indigenous Partnership Program of TLM is inadequately funded, but could operate as an effective network if provided with more resourcing and support.

MLDRIN acknowledges the various requirements on Commonwealth agencies and the States to consider Aboriginal values and objectives in the management of environmental water. These requirements are providing a foothold for some positive progress towards meeting the objectives and outcomes of the Basin Plan. However, mechanisms for including TO perspectives in e-water planning, across *all* Basin jurisdictions require greater consistency and resourcing. A critical shortcoming is the weak requirements to 'have regard to' Aboriginal matters, as stipulated in the Basin Plan. As noted above, strengthening the relevant provisions in the Basin Plan will help ensure Aboriginal rights and interests are afforded appropriate consideration.

We also wish to note our disappointment that recent, high-level, discussions between the MDBA, Basin States and other Commonwealth Departments and agencies, focussed on establishing benchmarks in good Aboriginal engagement, have proceeded without any participation, notification or inclusion of Basin Traditional Owners or Indigenous organisations. This is contrary to the Principle of Engagement developed between MDBA, MLDRIN and NBAN and committed to by the MDBA in its Aboriginal Partnerships Action Plan.

MLDRIN is concerned that Long Term Watering Plans are not being prepared in a way that demonstrates proper, genuine and realistic consideration of Indigenous values, as required under Basin Plan ss 8.20 (1) & (3) and the Principles to be applied in environmental watering. MLDRIN understands that some States have not undertaken consulting with First Nations or incorporate Indigenous values and uses into the LTWPs.

The Commission should urge the MDBA, in partnership with MLDRIN and NBAN, to assist and advise States on appropriate consideration of Indigenous values in LTWPs (as anticipated in Basin Plan ss 8.20 (4)). Draft Recommendation 11.2 should be amended to identify the need for LTWPs to articulate Aboriginal cultural watering objectives for all priority assets and waterways.

MLDRIN supports Draft Recommendation 11.1 in principle. However, we note that a reduced water recovery target has limited opportunities for flexible management of environmental water to support cultural outcomes. Access to meaningful Cultural Flows entitlements, managed to complement environmental water delivery, is the preferred method to achieve cultural outcomes. This recommendation could provide stronger direction by requiring the MDBA to incorporate Aboriginal cultural objectives into the content of the Basin-wide Environmental Watering Strategy including in the Expected Outcomes, water management strategies and the process for determining Basin Annual Environmental Watering Priorities.

MLDRIN supports Draft Recommendation 11.6, while stressing that processes to engage Traditional Owners should already be in place and should be contributing to the development of the first round of LTWPs.

MLDRIN has sought membership of the Southern Connected Basin Environmental Watering Committee; in order to ensure Traditional Owner perspectives can be incorporated into environmental water decision-making and the management of TLM water. Given the recent \$40 million funding commitment, there is also a high likelihood that Aboriginal organisations will manage water holdings that can be managed to complement environment and cultural outcomes. Draft Recommendation 11.4 should be amended to advise inclusion of MLDRIN and NBAN in the Southern and Northern Connected Basin Environmental Watering Committees. In formalising the role, terms of reference and membership of the Committees, it is critical that greater Aboriginal participation in environmental water planning and delivery be considered.

We reiterate the concerns raised by many other organisations in their submissions relating to the omission of any reference in the Assessment Report to progress against a key objective of the Basin Plan as a whole: ‘to give effect to the relevant international agreements through the integrated management of Basin water resources’. The Assessment Report does not make any findings on how well this objective is being achieved nor the more detailed objectives set out in Chapter 8 of

the Basin Plan, including whether the ecological character of Ramsar listed wetlands is being maintained.

In giving affect to the Ramsar Convention, the Basin Plan should account for important decisions and resolutions adopted by the Contracting Parties related to the management of cultural values of wetlands. We refer the Commission to the attached 'Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands' adopted by the Contracting Parties to the Ramsar Convention in 1999. These guidelines establish a model of 'participatory management', analogous to joint or co-management with Indigenous peoples.

The Assessment Report must consider how the objective of giving affect to relevant international agreements is being progressed and, specifically, how the key processes and guidelines adopted by the parties to the Convention are being implemented through the provisions of the Plan.

### **Improving knowledge and Evaluating outcomes (Chapter 13)**

Page 178 of the Assessment Report indicates that MDBA 'has developed' a range of 'processes and research tools'. The report should note that *all* of these tools and processes have been developed in partnership with Aboriginal people and Indigenous organisations.

The Assessment Report should identify opportunities for new tools, processes and methodologies to be integrated into the implementation of Basin Plan provisions and activities. In particular, the National Cultural Flows Research Project represents a new benchmark in water planning to include cultural objectives. The outputs of the Cultural Flows research should be built into a range of processes related to the implementation of the Basin Plan, including environmental water planning, evaluation and reporting and risk assessment.

MLDRIN strongly agrees with the Commission that 'Basin States should utilise the frameworks and knowledge in state water policies, environmental management and planning, and the preparation of the next iteration of state water plans,' (p. 178).

We urge the Commission to develop a recommendation advising all Basin jurisdictions to make provisions to integrate the National Cultural Flows Research Project framework into key aspects of Basin Plan implementation, including environmental water planning and the development and implementation of water resource plans.

Draft Finding 7.2 notes the recent commitment of \$40m for a program to support Indigenous investment in cultural and economic water entitlements in the Basin. MLDRIN notes that the funding amount, while a welcome commitment, is an arbitrary figure that is insufficient to address the scale of First Nations water claims or achieve restorative justice. The rationale for restricting this funding to First

Nations within the Basin is clear: it was committed by the Federal Water Minister as part of a political agreement to progress a contentious component of the Basin Plan (SDL Adjustment determination). MLDRIN believes that a national Aboriginal Water Strategy is required to account for and address First Nations water needs at an appropriate scale.

The Assessment Report notes (p. 180) that the MDBA have developed and trialled 'a participatory and cross-cultural evaluation methodology that will be re-used between now and 2020 to track how the implementation of the Basin Plan is taking Aboriginal interests into account'. Based on ongoing conversations with MDBA officials, MLDRIN understands that the approach trialled in 2017 will *not* be used in any ongoing capacity or for the 2020 Evaluation of the Basin Plan. The Commission should investigate this before finalising the report.

MLDRIN agrees that it is critical to track the impacts and outcomes of the Plan for Aboriginal people. As noted, proper monitoring and evaluation will underpin ongoing development of policy and possible improvements to the Plan as part of the 2026 review.

In 2016, MLDRIN submitted a proposal to the MDBA for the development a Basin Aboriginal Report Card, which would track progress against a range of indicators related to Basin Plan implementation. While the proposal was not progressed, MLDRIN recognises the need for ongoing work to develop appropriate methodologies to measure the outcomes of the Plan. We agree with Draft recommendations 13.2 and 13.3. The Assessment Report notes three effective strategies to improve the monitoring and evaluation framework, namely considering:

- what is needed to hold governments to account for the commitments within the Plan related to Indigenous values and uses
- the role of the MDBA's cross-cultural evaluation methodology in evaluating Indigenous outcomes from the Basin Plan and programs that protect cultural values
- the wide range of projects being undertaken to ensure that there is an evidence-base to enable continuous improvement of programs and review of policies over time.

MLDRIN believes these are constructive strategies and we strongly urge the Commission to include them as specific suggestions in Draft recommendations 13.2 or 13.3.

MLDRIN strongly agrees with the Commission (p. 181) that 'With the benefit of greater knowledge about cultural values and how to effectively provide for them, the 2026 review of the Basin Plan may provide an opportunity to re-examine the provisions set in the Basin Plan related to Indigenous values and uses.' We refer the Commission to our attached detailed proposals for improvements to the Plan.



## **SDL Adjustment Supply Measure Projects**

We believe that the approach to achieving Basin Plan targets with offsets rather than water recovery poses inherent risks and impacts. This approach also entails a trade-off where risks and impacts are being transferred to the environment and First Nations rather than established rights holders or the irrigation sector. We do *not* support Draft Recommendation 4.2. If existing issues with Supply Measure projects cannot be resolved in the period up to 2024, in addition to the 7 years to 2019 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. We do not believe that the timelines for supply measures should be extended beyond 2024.

We strongly support Draft Recommendation 4.3, and stress that any extension, as anticipated under Draft Recommendation 4.2 could complicate the reconciliation process.

We strongly urge the Commission to include a clear recommendation that addresses the need for appropriate Traditional Owner engagement in the implementation of supply measures. As communicated to the Commission previously, impacts on cultural values are a key risk related to Supply Measure implementation.

The Assessment Report (p. 174) identifies the Akwé: Kon Guidelines as an appropriate framework to plan engagement mechanisms with Traditional Owners about the effects that projects could have on cultural values and uses. This is an excellent suggestion which we strongly support. We strongly urge the Commission to draft a Recommendation which advises all proponents to adopt the Akwe:Kon guidelines as a benchmark for Aboriginal engagement in supply measure implementation.

## **Efficiency and Constraints**

We support Draft Recommendation 5.2 and agree that urgent work is needed to address ongoing barriers to achieve recovery of 450GL of upwater and to address constraints. As part of any strategy to recovery the upwater:

- Buy-backs should be included as a fast and cost-effective approach to water recovery
- Eliminating socio-economic impacts should be recognised impractical and approaches should focus on minimising impacts.

We agree with the Assessment Report that there is a significant risk that the 450 GL of upwater will not be recovered by 2024 and that constraints projects are way behind schedule and may not be achieved at all. This situation is the result of the lack of commitment and cooperation between partner governments noted by the PC and a refusal by them to agree and progress projects.

Both the 450 GL of upwater and constraints are critical to progressing the objectives and outcomes of the Plan. They are also essential to support outcomes for First Nations, including through flexible management of environmental water. They are too important to be consigned to the 'too hard' basket. The Commission's recommendations must encourage a proactive approach from Basin jurisdictions. Landholder negotiation should not be regarded as an insuperable barrier and water buybacks should be considered as part of an appropriate mix of recovery strategies.

### **Water recovery**

We reiterate information provided by Environment Victoria detailing the requirement to recover 62GL of upwater by 30 June 2019 as part of the SDL adjustment. All references to a 2075GL water recovery target in the report should be changed to 2137 GL.

Including buyback as a tool would take a lot of pressure off the 2024 deadline for water recovery, in addition to relieving budget pressures. We suggest the PC makes a recommendation to lift the 1500GL cap on buyback to enable the achievement of water recovery targets and SDLs in the Basin Plan in a timely manner.