

27<sup>th</sup> April 2018



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### **Submission to the Productivity Commission: Murray Darling Basin Plan, Five-Year Assessment**

MLDRIN welcomes the opportunity to provide input into the Productivity Commission's Five Year assessment of the Murray Darling Basin Plan. We recognize that the Basin Plan is a complex instrument and that this assessment covers a broad range of matters related to Basin Plan implementation. This submission will focus on matters of specific relevance to MLDRIN's membership: First Nations within the Southern part of the Basin.

#### **About MLDRIN**

The Murray Lower Darling Rivers Indigenous Nations (MLDRIN) is a confederation of Sovereign First Nations from the Southern part of the Murray Darling Basin (MDB). The group currently includes Delegates from 24 Nations across Victoria, NSW, the ACT and South Australia.

Our core work includes:

- Advising the Murray Darling Basin Authority (MDBA) on all matters relevant to Traditional Owners and Aboriginal people in the Southern Murray Darling Basin, in particular, the implementation of the Basin Plan
- Undertaking projects and having an active role in Natural Resource Management and water planning
- Providing a forum for our member Nations to keep informed, deliberate on issues and provide feedback and advice to decision makers across all levels of government
- Advocating for our member Nations' rights and interests in land and water, specifically to progress the recognition of Aboriginal water rights and Cultural Flows
- Providing leadership and capacity building for our member nations

## **Assessment approach**

MLDRIN supports the Commission's assessment approach. An inclusive Stakeholder Working Group and opportunities for public input through workshops and regional forums help to ensure a rigorous process.

In evaluating the effectiveness of the Basin Plan, the Commission is assessing the effectiveness of current arrangements in meeting the objectives and outcomes of the Plan.

It is important to note that First Nation's rights, interests and cultural obligations receive only passing mention in the objectives and outcomes contained in Chapter Five of the Plan. The 'whole of Basin' outcome, (5.02 (2)(a)) and objectives for water quality (5.04 (1)) make reference to 'cultural' uses and activities. As section 5.02 (2), (a) outlines, the outcome of a 'healthy and working' Basin includes 'communities with sufficient and reliable water supplies that are fit for a range of intended purposes including...cultural use'. As a general comment, MLDRIN argues that to date, implementation of the Plan is not supporting the delivery of this outcome. First Nations communities across the Basin continue to experience the erosion of their cultural rights and traditions as a result of unsustainable extraction limits, poor compliance and inadequate consultation and engagement.

We recognize the merit of assessing performance by reviewing progress on required targets and actions. We note that, in some cases, actions required by the Basin Plan are not sufficient to support the outcome of 'sufficient and reliable water supplies that are fit for a range of intended purposes including...cultural use', specified in Chapter 5. Recognition of First Nations water related rights and interests is in most cases, discretionary, and is absent from some requirements (such as the methodology used to determine adjustments to the Sustainable Diversion Limit).

We urge the Commission to recognize that actions and targets included within the Plan do not go far enough to support the outcome of Aboriginal communities with 'sufficient and reliable water supplies' fit for cultural purposes. The scheduled review of the Basin Plan in 2026 offers an opportunity to strengthen actions that contribute to this important outcome.

## **The SDL Adjustment Mechanism**

MLDRIN and its member Nations have articulated concerns regarding the potential impacts of supply measure projects and the SDLAM to all Southern Basin states and Federal agencies. These communications include:

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- Written correspondence to the MDBA and Basin Officials Committee (27<sup>th</sup> Nov 2015 and 23<sup>rd</sup> August 2016)
- Written correspondence to NSW, Victoria and South Australian Water Ministers (March-April 2017)
- In dedicated meetings: Peak Bodies briefing, August 2015 (Canberra), 7<sup>th</sup> February 2017 (Melbourne), 30<sup>th</sup> August 2017 (Adelaide)
- In various MLDRIN Full Delegation and Executive Meetings (between 2015-2018)

Our correspondence has highlighted the significant risks to cultural and environmental outcomes relating to the implementation of the SDLAM. We would be happy to make any of this material available to the Commission if requested.

We oppose the proposed amendments to the Basin Plan that would give effect to the MDBA's SDLAM Draft Determination. MLDRIN believes that the suite of supply measure projects and the proposed reduction in water recovery pose significant risks to First Nations tangible and intangible cultural heritage and water-related cultural values and uses. These concerns have been detailed in our submission to the MDBA which is attached and should be read in conjunction with this submission. Critically, MLDRIN is concerned that the SDLAM fails to account for impacts on First Nations values and uses, due to the uneven distribution of 'benefits' and 'dis-benefits' arising from the use of supply measures as an offset for real water recovery. Considering the compromise that was made in the initial determination of water recovery targets in the Basin Plan,<sup>1</sup> the SDLAM represents a compromise on top of a compromise, which disregards First Nation's vision for a healthy river system.

MLDRIN understands that 'successful implementation' of supply measure projects equates to:

- achieving the environmental outcomes that the projects were designed to achieve
- achieving predicted 'offsets' of water recovery in a cost-effective way
- timely completion and successful operation of projects

An independent study of 37 infrastructure projects for the Southern Basin SDL Adjustment Mechanism (SDLAM) found that all but one project did not satisfy, or only partially satisfied, 12 key conditions required under the Basin Plan.<sup>2</sup> The Murray

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<sup>1</sup> MDBA, 2010. *The Guide to the proposed Basin Plan: Technical background Part 1*. Murray-Darling Basin Authority. p. 114.

<sup>2</sup> Wentworth Group of Concerned Scientists (2017), *Review of Water Reform in the Murray Darling Basin*. <http://wentworthgroup.org/wp-content/uploads/2017/12/Wentworth-Group-Review-of-water-reform-in-MDB-Nov-2017.pdf>

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Darling Basin Authority has also provided a critical assessment of one major proposed NSW water supply measure proposal, the Menindee Lakes project. MDBA's report found that the proponent had provided no substantiation for claims that the proposed changes to the wetting and drying cycle of the lakes would improve the environment.<sup>3</sup> Supply measures risk ecological impacts if implemented without appropriate environmental criteria and safeguards.<sup>4</sup> MLDRIN contends that the prospect of these projects failing to meet predicted environmental outcomes, generating unintended environmental and cultural impacts and failing to meet conditions required in the Basin Plan, represent a major risk to successful implementation.

MLDRIN is also aware of challenges to the implementation of supply measures projects due to unforeseen cultural heritage impacts. Destruction of Aboriginal cultural heritage, including numerous burial sites, was recorded during the construction of the Koondrook-Perricoota Flood Enhancement works, at a considerable psychological toll on local communities. Even with appropriate cultural heritage assessments and planning, further impacts are highly likely given the cultural significance of floodplain landscapes throughout the Southern basin.

MLDRIN is also aware that concerns about third party impacts and agitation by 'influential community members' has undermined the operation of environmental watering infrastructure in at least one site: the Koondrook- Perricoota Flood Enhancement works.<sup>5</sup> We understand that all watering proposed for July-August 2016 was suspended due to sensitivities around potential third party impacts. If agitation by landowners can suspend the operation of this expensive and complex infrastructure, there is a clear risk to the successful implementation and operation of supply measures, which undermines the calculation on which the SDL Adjustment has been made.

MLDRIN believes that the SDL Adjustment Mechanism lacks transparency and that there is a major risk that the proposed projects will be subject to delays and impediments and will fail to achieve 'environmental equivalence'. Risks to cultural

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<sup>3</sup> Davis, A. 'The Menindee Lakes Project: who loses and who really wins?' *The Guardian*. 11<sup>th</sup> April, 2018. <https://www.theguardian.com/environment/2018/apr/11/the-menindee-lakes-project-who-loses-and-who-really-wins>

<sup>4</sup> Bond, N. *et al.* 'Ecological risks and opportunities from engineered artificial flooding as a means of achieving environmental flow objectives,' *Frontiers in Ecology and the Environment*, 2014; 12(7): 386–394. And Dr Martin Mallen Cooper. Transcript: 'Carp enjoying near perfect breeding conditions in the River Murray'. *ABC Radio: 'The World Today'* <http://www.abc.net.au/radio/programs/worldtoday/carp-enjoying-near-perfect-breeding-conditions-in/8667726>

<sup>5</sup> Communication from NSW Office of Environment and Heritage staff to Murray Lower Darling Environmental Water Advisory Group members, email 17<sup>th</sup> June 2016

heritage and First Nation's values and uses represent a further risk that has not even been considered in the overall design of the mechanism.

MLDRIN is also concerned about the lack of progress on efficiency measures and the impacts this poses on the progress of water recovery. While the proposed amendment to the Basin Plan would require the Commonwealth to recover a minimum of 62GL to address the gap to the 5% adjustment limit, there is no reliable pathway to secure the benefits of the 'up-water' in order to protect and restore water-dependent ecosystems of the Murray-Darling Basin. Delays and opposition to progressing efficiency measures risk locking in a water recovery target of 2140 GL, which is patently insufficient to meet the objectives and outcomes of the Plan. MLDRIN is very concerned that the SDLAM will result in a reduced water recovery target that compromises the achievement of environmental and cultural outcomes.

### **Northern Basin and Groundwater amendments**

MLDRIN opposed the proposed increase to the SDL in the Northern Basin and increased SDLs for Groundwater resources in the Southern Basin. Our concerns and recommendations are included in a submission provided to the Murray Darling Basin Authority in November 2017, which should be read in conjunction with this submission.

The Socio-Cultural survey<sup>6</sup> conducted as part of the Northern Basin Review by the MDBA and the Northern Basin Aboriginal Nations (NBAN) in 2017, documents the links between adequate environmental flows and cultural values and uses in the Northern Basin. Across the Basin, current recovery targets are insufficient to protect and sustain Aboriginal cultural values in most cases.<sup>7</sup> Further reductions will critically compromise Traditional Owner's ability to maintain cultural practices and transfer traditional ecological knowledge. Reducing water recovery in these already stressed systems runs counter to the Basin Plan outcome listed at section 5.02 (2) (a) and the outcome for water quality.

We note that a recently released Module to the National Water Initiative Policy Guidelines for Water Planning and Management highlights that '[q]uantifying the volume, flow and timing of water required to realise cultural outcomes is

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<sup>6</sup> NBAN and MDBA (2016) *Our water, our life: An Aboriginal study in the Northern Basin*.

<sup>7</sup> Jackson et al 2014 found that flows regimes under a 2750 GL recovery scenario would not meet Aboriginal objectives in most cases. Jackson, S. *et al*, 'Meeting Indigenous peoples' objectives in environmental flow assessments: Case studies from an Australian multi-jurisdictional water sharing initiative', *Journal of Hydrology*, Vol. 522 (2015) pp. 141–151

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fundamental if Indigenous peoples' needs for water are to be met through water planning and management processes.'<sup>8</sup>

MLDRIN contends that the proposed amendments for both the Northern Basin and Groundwater resources fundamentally disregard the cultural rights and obligations of First Nations and threaten to further entrench the disadvantage already experienced by Aboriginal people in the Basin.

The proposed amendments and the evidence provided to justify a change in the SDL did not satisfy the Australian Senate. Therefore the Australian Government is bound to progress the water recovery to comply with the SDL. MLDRIN does not have specific advice on the best approach to achieve compliance with the SDL. We note, however, that recovering water to achieve the 390GL target is consistent with the Basin Plan settings as agreed in 2012.

It is critical that any future review of SDLs in the Northern Basin incorporate a thorough cultural impact assessment<sup>9</sup> and take account of First Nations water requirements for cultural and economic-development outcomes. Relevant jurisdictions should provide resources for First Nations to identify their cultural flow requirements (using the methodology recently developed as part of the National Cultural Flows Research Project) and incorporate these requirements into decision-making.

### **Water Recovery**

MLDRIN is concerned that barriers imposed by a Federal government cap on water buybacks, purchases of unreliable entitlements at above market rates and resistance to achieving water recovery by purchases from willing sellers are increasing the cost and complexity of meeting recovery targets. In all cases, these are arbitrary and politicized approaches that impose increased costs to the taxpayer. Surrogating water recovery with unproven 'offsets' pursued through supply measures adds further uncertainty and risk to meeting Basin Plan outcomes. Some jurisdictions have ruled out achieving recovery through purchases from willing sellers, positioning offsets as the only means to achieve environmental outcomes. These policy and legislative barriers represent a significant risk to achieving water recovery that supports the outcomes and objectives of the Basin Plan. Some recent transactions made by the Commonwealth Government to secure water recovery are risky,

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<sup>8</sup> Government of Australia (2016), *Engaging Indigenous People in Water Planning and Management*. Module to the National Water Initiative (NWI) Policy Guidelines for Water Planning and Management. p. 15.

<sup>9</sup> As outlined in the *Akwe:Kon Guidelines* Part II, 6. (a) p. 6.

unreliable and represent extraordinarily poor value for money.<sup>10</sup>

### **Structural Adjustment and Supporting Communities**

Aboriginal people have arguably borne the worst impacts and benefited the least from the exploitation and commodification of Basin water resources. Support for community adjustment has focused on addressing impacts on affected portions of the irrigation industry.

Evolving approaches to best practice in water governance highlight that 'using the market to ensure that water is allocated to the "highest and best" use has intrinsic social implications'<sup>11</sup> and that unresolved questions of social justice must be considered, alongside 'economics and the environment' to support a genuine triple bottom line approach.

Structural adjustment and community support funding should be deployed to ensure that all Basin community members can more equally share the benefits of participation in water markets and to build more resilient and equitable communities. Structural adjustment funding should look at building more equity into the allocation and management of water.

### **Water Resource Plan development and Accreditation**

The failure of some states to design and implement appropriate strategies for consultation with First Nations is a critical risk to the timely completion and accreditation of water resource plans. Basin States have had nearly five years to initiate and undertake Basin Plan compliant consultation. Despite this, some states are only now finalizing programs of engagement to identify First Nations objectives and outcomes. MDBA has highlighted the stalled progress of WRP development in its Compliance Review report and noted concern at the rate of progress in NSW and Victoria.<sup>12</sup> At the time of writing, only one plan has been accredited. The stalled progress of WRP development has created compressed timelines that impose unreasonable and culturally inappropriate pressures on First Nations. Aboriginal people are now being expected to provide hasty input to sub-optimal consultation

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<sup>10</sup> Davies, A. 'Government likely to have bought 'ghost water' in \$78m deal'. *The Guardian*. 27<sup>th</sup> October 2017. Viewed at: <https://www.theguardian.com/australia-news/2017/oct/27/government-likely-to-have-bought-ghost-water-in-78m-deal>

<sup>11</sup> Martin, P. (2016) 'Creating the next generation of water governance' *Law Journal* (Volume 33 Part 4) pp. 388-401

<sup>12</sup> Murray Darling Basin Authority, *The Murray–Darling Basin Water Compliance Review*. 2017. p. 65. Viewed at: <https://www.mdba.gov.au/sites/default/files/pubs/MDB-Compliance-Review-Final-Report.pdf>

processes that are being run at short notice to ensure minimal compliance with Basin Plan requirements. There is a serious risk that States will not be able to complete consultation that meets the requirements of the Plan, not to mention the more detailed guidelines and advice for accreditation developed by the MDBA.

NSW has twenty-two WRPs to complete by June 2019. In 2012, the NSW Department of Primary Industries (DPI Water) established the NSW Aboriginal Water Initiative, partly to meet the requirements of the Murray-Darling Basin Plan. At the highest level of employment there were 11 staff with 10 Identified Aboriginal members of the AWI.<sup>13</sup> New departmental leadership in 2015-16 was accompanied by department restructuring. In late 2016, the AWI team was reduced to three identified Aboriginal positions which were integrated into operational branches. The AWI was subsequently dismantled leaving NSW with no capacity for culturally appropriate engagement with Aboriginal people. In June 2017, MLDRIN met with then [Group Director of Water Planning & Policy, and other DPI staff to discuss approaches to address the major gap in consultation capacity](#). MLDRIN understands that, as of April 2018, consultation has only just been initiated for the Gwydir WRP. MLDRIN has grave concerns about the ability of NSW to complete consultation and to undertake consultation in a culturally appropriate manner that maximizes opportunities for First Nations through the water resource planning process.

### **‘Streamlining’ WRPs**

There is a great risk of streamlining WRP preparation and accreditation where consultation with First Nations is concerned. Put simply, meaningful and genuine consultation cannot be streamlined. Relationships are key to good engagement and these can take years to establish. We are concerned about the trend, in some states, to develop and incorporate ‘generic’ objectives and outcomes that can be inserted into plans in response to Chapter 10, Part 14 requirements. This approach contravenes the MDBA’s guidance and Position Statements on WRP accreditation.

MLDRIN and the Northern Basin Aboriginal Nations have a statutory role in the assessment of WRPs (see note at Basin Plan, Chapter 10, Part 14). This role requires the organizations to provide an informed view to the MDBA as to whether the requirements of Chapter 10, Part 14 of the Basin Plan have been met. Developing this advice requires considerable engagement, research and technical review of Plans. Assessing state’s performance against the requirement to ‘have regard to’

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<sup>13</sup> Taylor, S. Moggridge, B and Poelina, A. ‘Australian Indigenous Water Policy and the Impacts of the Ever-changing Political Cycle’. Australian Journal of Water Resources. Published online: 17 Jul 2017. <https://www.tandfonline.com/doi/abs/10.1080/13241583.2017.1348887?journalCode=twar20>



various matters requires thorough review of plans. It is not possible to undertake a simple quantification of performance against the requirements.

MLDRIN is concerned that pressures to streamline this aspect of accreditation, given the compressed timeframes, may compromise the important oversight and scrutiny roles that our organization has been entrusted with by the Basin Plan provisions. Appropriate resourcing, reasonable timelines and technical support are critical to ensure thorough assessment can be undertaken.

### **Supporting better outcomes through Water Resource Plans**

The requirements in Basin Plan Chapter 10, Part 14 need to be strengthened. States should be specifically required to identify strategies to support First Nations' objectives and outcomes and to improve the protection of First Nations' values and uses. The current, discretionary provisions in Chapter 10 allow states to avoid taking genuine steps towards recognizing or addressing First Nations' rights and interests by adopting legalistic interpretation of the requirements and including the bare minimum in accredited text. Again, the 2026 review of the Basin Plan present an opportunity to improve these requirements.

### **Environmental Water**

Including First Nations cultural objectives in the management of environmental water will contribute to the progress of Basin Plan outcomes and objectives by ensuring valuable Traditional Ecological Knowledge (TEK) can be incorporated into planning and by helping to ensure Aboriginal communities have sufficient and reliable water supplies suitable for cultural use. A National Water Initiative module on Indigenous Engagement has provided advice to all water managers on incorporating Aboriginal objectives in water planning. Methods have been developed that enable environmental and Indigenous values to be determined independently, and then integrated into Environmental Flow Assessments.<sup>14</sup>

Inclusion of cultural objectives in environmental water planning can be achieved by establishing processes for assessment and quantification of watering objectives, representation of First Nations in water planning decision making and appropriate institutional and governance arrangements. The Basin Plan requires MDBA to have regard to Aboriginal values and uses in the development of the Basin Annual Environmental Watering Priorities and Basin Environmental Watering Strategy (BWS). Section 8.29 (3) of the Basin Plan stipulates that the Basin Annual

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<sup>14</sup> Government of Australia (2016), *Engaging Indigenous People in Water Planning and Management*. Module to the National Water Initiative (NWI) Policy Guidelines for Water Planning and Management. p. 15.

Environmental Watering Priorities must be prepared having regard to ‘Aboriginal Values and Indigenous Uses’, as well as ‘the views of local communities, including bodies established by a Basin State that express community views in relation to environmental watering’. This Basin-scale priority setting can guide delivery that supports Aboriginal Environmental Outcomes. MLDRIN continues to work with the MDBA to progress inclusion in the Priorities and BWS, however some gaps remain. The annual development of the Priorities and an updated BWS in 2019 represent important opportunities. Greater involvement of Traditional Owners in the development of State and regional watering priorities and site-specific environmental water management plans will also be critical.

At the December 2017 Ministerial Council Meeting, Basin State Ministers agreed to investigate pathways to better align the delivery of water for environmental purposes with indigenous cultural values and objectives.<sup>15</sup> We seek greater investment and support from all Federal and State agencies to address ongoing challenges and more effectively integrate Aboriginal objectives and outcomes into environmental water planning.

We note that a Bill currently before the Victorian Parliament will formalize the recognition of Aboriginal cultural outcomes in the State’s environmental water planning frameworks. The Water and Catchment Legislation Amendment Bill 2017 will require the Victorian Environmental Water Holder (VEWH), in performing its functions, to consider options to provide for Aboriginal cultural values and uses of waterways.<sup>16</sup> This is an important and positive addition to the functions of the VEWH. MLDRIN recommends that comparable amendments be considered to augment the functions and objectives of water holders in other jurisdictions.

MLDRIN endorse the detailed comments and recommendations provided by Environment Victoria and the Inland Rivers Network in relation to management of environmental water and the progress towards the environmental objectives and outcomes of the plan. MLDRIN recognizes the importance of a robust environmental management framework.

## **Water Quality**

MLDRIN is concerned that, in many cases, water quality across the Basin is not adequate to support cultural activities. In particular, the condition of water

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<sup>15</sup> Murray Darling Basin Ministerial Council Communiqué. December 2017 meeting, Albury 2017.

<https://www.mdba.gov.au/media/mr/communique-murray-darling-basin-ministers-meet-albury>

<sup>16</sup> Parliament of Victoria. Water and Catchment Legislation Amendment Bill 2017. Viewed at:

[http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/ea7eeff18171ea23ca2581ca00757cec/\\$FILE/581262bi1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/ea7eeff18171ea23ca2581ca00757cec/$FILE/581262bi1.pdf)

resources in the *Baarka* or Darling River, have been identified as a threat to the ability of Aboriginal communities to sustain cultural practices, share knowledge and use the river<sup>17</sup>.

## Conclusions and Recommendations

MLDRIN submits the following summary conclusions and recommendations.

- Basin Plan implementation to date has not achieved material progress towards an outcome of communities with sufficient and reliable water supplies fit for cultural use.
- Southern Basin Traditional Owners are still experiencing the erosion of their water-related cultural rights, interests and obligations.
- Water recovery targets are already insufficient to meet Aboriginal cultural objectives in many cases. Further reductions will critically compromise Traditional Owner's ability to maintain cultural practices and transfer traditional ecological knowledge
- There are significant risks to the achievement of the outcomes and objectives of the Basin Plan. These relate to:
  - a focus on risky and unproven 'offset' measures as a surrogate for water recovery
  - political barriers to the cost-efficient recovery of water and
  - lack of commitment and resourcing for consultation and engagement with Traditional Owners
- The progress and standards of water resource plan development and accreditation is at risk from inadequate consultation with First Nations
- The objectives and outcomes of the Basin Plan should be examined with a view to strengthening the recognition and protection of First Nations rights and interests in the 2026 review.
- All Basin jurisdictions and agencies should work together to improve the participation of First Nations and inclusion of First Nations objectives in the environmental watering management framework
- The findings of the National Cultural Flows Research Project provide a proven pathway for identifying First Nations' water needs and securing improved ownership and management. Coordinated implementation of methodologies and approaches developed through the research can help to address remaining gaps and improve recognition of First Nations' water rights.

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<sup>17</sup> 'Darling River water worries have landholders fearing for children's health and crop survival'. ABC Country Hour. 28<sup>th</sup> July 2016. Viewed at:  
<http://www.abc.net.au/news/rural/2016-07-28/concerns-about-darling-river-quality/7667378>