

Murray-Darling Basin Plan: Implementation Review 2023

Submission prepared by MLDRIN, August 2023

About MLDRIN

The Murray Lower Darling Rivers Indigenous Nations (MLDRIN) is a confederation of over 20 Sovereign First Nations with territories in the southern region of the Murray-Darling Basin (MDB). Central to MLDRIN's foundations is the sovereign stance that the waterways of the MDB have not been ceded and Basin Nations¹ are the rightful custodians, from headwaters to mouth, holding deep responsibilities, obligations, and relationships with these waterways.

Our core roles and endeavours include:

- Engaging with the Murray Darling Basin Authority (MDBA) on matters pertaining to Traditional Owners within the Southern MDB. This in part entails contributing to the execution and implementation of the Basin Plan via a statutory role in Chapter 10 Part 14 of the Basin Plan (discussed further below).
- Engaging in initiatives and assuming an active role in natural resource management and water planning.
- Organising a platform for our member Nations to stay informed, engage in deliberations on pertinent issues, and provide feedback and counsel to decision-makers at all tiers of government.
- Championing the rights and interests of our member Nations concerning water, with a specific focus on advancing the recognition of First Nations water rights and Cultural Flows – this includes both rights to use, access, and benefit from water resources and rights to stronger and more empowered decision-making authority in the governance of Nations' cultural water-scapes.
- Providing leadership and fostering the capacity of our member Nations.

This submission

Our submission focuses on elements of the Basin Plan and its implementation that are most pertinent to our membership: the recognition, protection, and advancement of First Nations rights, interests, and objectives. With that in mind, our submission largely addresses Question 5 from the call for submissions document: *How well is the Plan addressing the interests of Aboriginal people?* It also addresses and responds to some of the other questions and discussions embedded throughout this same document such as (but not limited to) those that relate to (a) Aboriginal peoples' involvement decision-making, (b) links to Closing the Gap, and (c) processes for evaluating how effectively Basin Nations' objectives and outcomes have been progressed by the Basin Plan.

This submission draws from and reiterates key points and contributions MLDRIN has made via previous Basin and water management inquiry and review submissions including, but not limited to:

- The Productivity Commission's previous (2018) five-year Basin Plan review;^{2,3}

¹ When this submission refers to Basin Nations, we are meaning those First Nations people with ancestral connection to Nations within the Basin and who are recognised by their communities as being from those Nation(s).

² MLDRIN, Submission No 72 to Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment* (27 April 2018) <https://www.pc.gov.au/data/assets/pdf_file/0006/227634/sub072-basin-plan.pdf>.

³ MLDRIN, Submission No DR139 to Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment* (19 October 2018) <https://www.pc.gov.au/data/assets/pdf_file/0004/232465/subdr139-basin-plan.pdf>.

- The Productivity Commission’s National Water Initiative review (2020);^{4,5}
- The South Australian Murray-Darling Basin Royal Commission.^{6,7}

Additionally, this submission draws from MLDRIN and Basin Nations’ experiences of Basin Plan implementation, including those recorded in WRP assessment reports produced since 2018, some of which are published on the MDBA’s website.⁸

We note that the Productivity Commission welcomes advice on both (a) how effective implementation has been so far and (b) what needs to change in the future. Overall, this submission predominantly offers observations, experiences, and insights relating to Basin Plan implementation, which we offer as important inputs and contributions that we believe the Productivity Commission must meaningfully engage with as part of this review. Some recommendations or suggestions for changes are also offered throughout, but that has not been the focus of preparing this submission. This submission is structured as follows:

1. Observations and evaluation of the Basin Plan’s implementation overall
2. Observations and evaluation of specific provisions of the Basin Plan
3. Key recommendations for change.

The Basin Plan overall is deficient

One way to evaluate and measure the Basin Plan’s implementation, is to examine and assess if and how the Plan is meeting its own objectives and outcomes. Basin Nations’ rights, interests, and cultural obligations receive only passing mention in the objectives and outcomes contained in Chapter Five of the Basin Plan. The ‘whole of Basin’ outcome (section 5.02(2)(a)) and objectives for water quality (section 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’.

In our submission as part of the Productivity Commission’s previous five year review of Basin Plan Implementation, we argued ‘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’.⁹

As far as MLDRIN can see, implementation of the Basin Plan is still not supporting the delivery of this important Basin Plan outcome. This is an important problem that requires genuine and considered examination and urgent remedial action especially given the evidence that, contrary to this intended Basin Plan outcome, Basin Nations’ rights are instead being ignored, overridden, and silenced.

⁴ MLDRIN, Submission No 105 to Productivity Commission, *National Water Reform 2020 Inquiry* (4 September 2020) <https://www.pc.gov.au/data/assets/pdf_file/0003/257250/sub105-water-reform-2020.pdf>.

⁵ MLDRIN, Submission No DR185 to Productivity Commission, *National Water Reform 2020 Inquiry* (1 April 2021) <https://www.pc.gov.au/data/assets/pdf_file/0009/274968/subdr185-water-reform-2020.pdf>.

⁶ MLDRIN, Submission to South Australia’s Murray-Darling Basin Royal Commission (7 June 2018) <<https://cdn.environment.sa.gov.au/environment/docs/will-mooney-murraylowerdarlingriversindigenounations-vic-mdb-rc-gen.pdf>>.

⁷ MLDRIN, Supplementary Submission to South Australia’s Murray-Darling Basin Royal Commission <https://www.pc.gov.au/data/assets/pdf_file/0006/232467/subdr139-basin-plan-attachment2.pdf>.

⁸ First Nations WRP assessment reports are published by the MDBA once the Federal Water Minister accredits a WRP. See MDBA, ‘List of state water resource plans’ (Web Page, 3 July 2023) <<https://www.mdba.gov.au/water-management/basin-plan/water-resource-plans/list-state-water-resource-plans>>.

⁹ MLDRIN (n 2) p. 2.

We also raise this fundamental issue to demonstrate that asking how well the Basin Plan addresses the interests of Aboriginal people (as posed by Question 5 of the Productivity Commission’s Call for Submissions document) is not the same as querying how well or effectively the Basin Plan is being implemented. This is because the benchmarks or intended outcomes of the Basin Plan and its substantive actions, provisions, and mechanisms provide minimal recognition of Basin Nations rights and interests, at best. In fact, the Basin Plan as a whole, and its individual provisions, largely override or ignore Basin Nations’ rights and obligations relating to waters and rivers. They are inconsistent with the principles enshrined in the United Nations Declaration on the Rights of Indigenous People and are not helping to advance relevant Sustainable Development Goals. Similarly, the Plan’s provisions pertaining to Basin Nations are substantively inconsistent with Australia’s international obligations under the Ramsar Convention and the Biodiversity Convention, which are the first two listed ‘relevant international agreements’ listed in the *Water Act 2007* (Cth).¹⁰ As we’ve set out before,¹¹ this is because:

- a. They are not directed to the subject, status, and benefit of First Nations’ communities directly in the use and management of water-related biodiversity, including for example the cultural, social, economic and spiritual conditions of and outcomes for First Nations;
- b. They establish weak procedural standards for First Nations participation in water resources decision-making and fall short of standards of robust involvement (including First Nations’ approval and co-management) that are required under international obligations.

Accordingly, we urge the Productivity Commission to recognise that the Basin Plan’s requirements do not go far enough to support or address the interests of Basin Nations.

Our concerns about the deficiencies of the Basin Plan are not new; we have put forward similar concerns as have many others during the last 10 or so years of Basin Plan implementation.¹² To be clear, this is not a matter of opinion, but one informed by legal and empirical evidence that can no longer be overlooked, ignored, or explained away. We stress that Basin Nations’ rights and interests in water and waterways are holistic and distinct, and they are affected by multiple aspects of the plan implementation. Basin Nations’ rights and interests are both *sovereign* and *central* to water management in the Basin.¹³ A key message from this submission is that because the Basin Plan fails to recognise this to start with, it is impossible for Basin Plan *implementation* to address Basin Nations’ rights and interests.

Indeed, even the MDBA is aware of the limitations of the Basin Plan when it comes to Basin Nations’ rights. For example, the MDBA CEO remarks that better, respectful and culturally appropriate inclusion of First Nations people and knowledge in water management decision making is ‘the great unfinished business of water management in the Murray-Darling Basin’.¹⁴ Further, the MDBA

¹⁰ *Water Act 2007* (Cth) s 4.

¹¹ MLDRIN (n 7) p. 1.

¹² For example Virginia Marshall, *Overturning Aqua Nullius* (Aboriginal Studies Press, 2017); Sue Jackson, Emma Carmody and Lana D Hartwig, ‘Treading water on Indigenous water rights: The serious deficiencies of water allocation planning and management in NSW under the Murray Darling Basin Plan’ [2021] *Pandora’s Box* 72.

¹³ Bradley J Moggridge and Ross M Thompson, ‘Cultural value of water and western water management: An Australian Indigenous perspective’ (2021) 25(1) *Australasian Journal of Water Resources* 4; Lana D Hartwig et al, ‘Water colonialism and Indigenous water justice in south-eastern Australia’ (2022) 38(1) *International Journal of Water Resources Development* 30; Erin O’Donnell, Katie O’Byrne and Lee Godden, ‘Cultural Water for Cultural Economies: Final report for the Accessing water to meet Aboriginal economic development needs project’ (University of Melbourne, 2021) <https://law.unimelb.edu.au/data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>.

¹⁴ Andrew McConville, ‘Address to the National and Rural Press Club on the 10th anniversary of the Basin Plan’ (Speech, 22 November 2022) <<https://www.mdba.gov.au/news-and-events/newsroom/address-national-and-rural-press-club>>.

recognises that the forthcoming 2026 Basin Plan Review needs to ask ‘How can the Basin Plan be improved to better recognise First Nations’ values in water management and enhance their involvement?’.¹⁵

Specific provisions of the Basin Plan

In what follows, we examine a number of specific provisions within the Basin Plan to identify a range of issues that are affecting the ways in which the Plan is (or is not) addressing the interests of Basin Nations people. Some of our advice relates to the implementation of the Basin Plan (as it is written), while some more broadly concerns the (in)ability of the Plan (as written) to address Nations’ interests and priorities. Where possible, we look at each separately. In other cases, it is too difficult to disaggregate one from the other.

Our submission could easily have considered the impacts of additional Basin Plan provisions on First Nations interests, but resource and staff constraints have limited this.

1. Chapter 10 Part 14 - Indigenous values and uses

Chapter 10, Part 14 of the Basin Plan sets requirements regarding Indigenous values and uses for Basin states and territories (‘Basin States’ - i.e., South Australia, Victoria, ACT, NSW, and Queensland) when developing water resource plans (WRPs). It is one of limited Basin Plan provisions that directly address First Nations’ rights and interests. These requirements can lead to a mixture of consultation outcomes and/or water planning (i.e., WRP and/or Basin Plan) outcomes; we consider both in this section.

At the time of writing, most WRPs across the Basin have already been developed by Basin States and accredited by the Federal Water Minister. The NSW WRPs that have not reached this stage are either under accreditation assessment by the MDBA,¹⁶ or are in the final stages of development for re-submission for such assessment¹⁷ and are unlikely to be significantly reworked. We also note that the Basin Plan and Water Act currently set very little direction or legal requirements about reviewing, amending, or re-producing WRPs (see more on this later in section 4 of this submission).

Given this status, we offer the following insights and observations regarding Chapter 10 Part 14 for two key reasons. Firstly, looking back in time and currently, because the development and accreditation of WRPs are core elements of Basin Plan implementation and are therefore fundamental to the focus of this review. Second, more looking to the future, because the limits and restrictions inherent throughout Chapter 10 Part 14 (as detailed here and elsewhere) must be avoided in any future iterations of the Basin Plan and WRPs. As such, our insights and recommendations must be prioritised and enacted when designing any amendments involving the Basin Plan.

Previous MLDRIN submissions have raised concerns with the weaknesses and limitations inherent in Chapter 10 Part 14, how these requirements have been applied by Basin States, and how they have been upheld and reviewed by the MDBA. Now, these concerns have largely been realised as Basin States have produced more WRPs and the MDBA considered their compliance with the Basin Plan, though there are some exceptions as we detail below.

¹⁵ MDBA, ‘Roadmap to the 2026 Basin Plan Review’ (15 June 2023)

<<https://www.mdba.gov.au/sites/default/files/publications/bpr-review-a5-landscape-webpage.pdf>> p. 13.

¹⁶ MDBA (n 8).

¹⁷ NSW Department of Planning & Environment [DPE], ‘Water Resource Plans: Updates and engagement’ (Web page, 2023) <<https://www.industry.nsw.gov.au/water/plans-programs/water-resource-plans/updates-and-engagement>>.

(a) Consultation

The Chapter 10 Part 14 requirements that relate to consultation and consultation outcomes are targeted at two different entities. First, are those for Basin States to consult with ‘relevant Indigenous organisations’ (sections 10.52-10.53) and ‘Indigenous people’ (section 10.54) as part of preparing WRPs. MLDRIN and the MDBA¹⁸ have long set expectations that this consultation is to specifically be with the relevant Traditional Owners that are associated with and have interests in each WRP area.

The second, are those for the MDBA (legal note to Chapter 10, Part 14) to consult with ‘relevant Indigenous organisations in relation to whether the requirements of this Part have been met’ when assessing each WRP against the Basin Plan’s WRP requirements (i.e. Chapter 10). *Position Statement 14A* further clarifies the MDBA’s position on this: ‘MDBA will consult with ... MLDRIN ... to assist in determining ... whether the water resource plan has been prepared having regard to the things specified in sections 10.52, 10.53 and 10.54, and the requirements of section 10.55 have been met’.¹⁹

Where the combination of these consultation requirements has been implemented correctly and fairly, some positive outcomes have been achieved. Some Basin States have been driven to advance and improve their approach to consultation with appropriate First Nations about water resource planning and management beyond that which was previously set in their own legal frameworks. For example, MLDRIN’s assessment of the Victorian Government’s first attempt at its Wimmera Mallee WRP in 2018 found that it contained numerous gaps and errors. In particular, some Nations with interests in the WRP area had not been consulted at all, and some water resources with deep cultural significance had been excluded from the Plan. For these (and several other) reasons, MLDRIN recommended that the WRP should not be accredited. The MDBA’s assessment reached the same overall conclusion and ultimately, the Victorian Government withdrew the WRP from assessment.

The MDBA then helped to facilitate dialogue with the Victorian Government and MLDRIN to address these gaps. This included MLDRIN offering recommendations to progress consultation moving forward, and the Victorian Government responding in writing with how it would address each. From this process, the Victorian Government reviewed its engagement approach in a way that was responsive to, and respectful of, the advice captured in MLDRIN’s Wimmera Mallee WRP assessment report. For example, the Victorian Government sought to engage with the Nations that it originally missed, and supported and resourced Nations to write their own content for inclusion in the WRPs.

This responsiveness saw Nations’ procedural rights respected and led to better consultation outcomes. It also led to better WRP outcomes (i.e., Nations’ own materials published), so much so that Traditional Owners assessed that the second version of the WRP (and the other Victorian WRPs) adequately met most of the Chapter 10 Part 14 requirements and associated consultation requirements during MLDRIN’s assessment in 2019.²⁰ Arguably, the relationships and improved processes that were developed between Nations and the Victorian Government during this period

¹⁸ Via MDBA, ‘Water Resource Plans Part 14 guidelines’ <<https://www.mdba.gov.au/sites/default/files/publications/wrp-guidelines-part140.pdf>> p. 4.

¹⁹ MDBA, ‘Basin Plan Water Resource Plan Requirements Position Statement 14A Aboriginal values and uses’ (14 August 2015) <<https://www.mdba.gov.au/sites/default/files/publications/wrp-position-statement-14a-aboriginal-objectives-and-outcomes1.pdf>>.

²⁰ MLDRIN notes that in many cases, the Victorian Government’s approaches to consultation and the preparation of these WRPs still fell short of best practice guidelines. See MLDRIN’s detailed WRP assessment reports for Victorian WRPs published by the MDBA (n 8).

have contributed to other ongoing positive outcomes beyond the Basin Plan, such as ensuring a good foundation for more recent work including the development of the Victorian Government's recent *Water is Life: Traditional Owner Access to Water Roadmap* policy.²¹

These positive outcomes – both for Nations and for the accreditation of the WRP – would not have been possible without (a) MLDRIN's formal assessment role, and (b) the Chapter 10 Part 14 legal requirements that MLDRIN and Nations' assessment was based upon. These outcomes are arguably, though, limited to consultation only. Broader water planning and Basin wide outcomes, such as supporting cultural water uses and activities as set in section 5 of the Basin Plan, were not advanced.

Despite this positive example, these consultation requirements have not always been implemented correctly or fairly in most of the Basin (i.e., across the state of NSW). As just one example from NSW WRPs,²² MLDRIN's assessments of the first proposed versions (~2020) highlighted that consultation did not have a clear or transparent scope. In particular, some Traditional Owners were unaware that their WRP consultation was supposed to address both surface waters and groundwaters relevant to multiple WRPs. Instead, the NSW Government used outcomes from what Nations understood to be surface water-focused consultation to meet Basin Plan requirements of its groundwater WRPs. MLDRIN's assessments of these 2020 versions of groundwater WRPs stressed that this is a major breach of Free, Prior and Informed Consent principles and emphasised the NSW Government needed to undertake further consultation to address this gap (and others – see further examples below).

The NSW Government withdrew all its WRPs by late 2021 due to their non-compliance with the Basin Plan but, unlike the Victorian Government, it did not pursue a meaningful process of further consultation to address the known gaps. As such, many of the same issues remained unaddressed in NSW's 2022 proposed versions of groundwater WRPs. MLDRIN's assessment reports for these most recent WRPs are again raising this core issue as evidence for how these WRPs do not comply with Chapter 10 Part 14 requirements (which are linked specifically to the water resources of the WRP area), and concluding that the WRPs should not be accredited.²³

An additional failure by the NSW Government to implement the Basin Plan via these consultation requirements is that it did not consult with all Nations. Several were not consulted at all by the NSW Government (e.g., Tati Tati and Weki Weki) and several others' consultation outcomes are not included in WRPs (e.g., Gomeroi/Kamilaroi and Barkandji). MLDRIN understands that the Gomeroi/Kamilaroi Nation requested the NSW Government withdraw their Nation's consultation report and outcomes from relevant (10) WRPs due to being dissatisfied with a number of aspects with the report²⁴ and the underpinning consultation process itself.²⁵ Of particular note, four of these

²¹ See Victorian Department of Energy, Environment, Climate Action, 'The Aboriginal Water Program: Water is Life: Traditional Owner Access to Water Roadmap' (2023) <<https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>>.

²² There are many examples of poor consultation processes and outcomes from the NSW experience that MLDRIN could list in this submission that are documented extensively elsewhere. See, generally, MLDRIN's WRP assessment reports for the recently accredited NSW MDB Porous Rock WRP, NSW MDB Fractured Rock WRP, and the Macquarie-Castlereagh Alluvium WRP, published by the MDBA (n 8).

²³ Ibid.

²⁴ Email from NSW Director Inland Water Planning, 29 March 2022. Accessed via MDBA Freedom of Information Request Reference No FOI122 (Document 8).

²⁵ See Gomeroi/Kamilaroi Nation's specific feedback on the NSW MDB Porous Rock WRP attached to the end of: MLDRIN, 'Murray Lower Darling Rivers Indigenous Nations advice on the NSW Murray–Darling Basin Porous Rock water resource plan' (October 2022) <<https://www.mdba.gov.au/sites/default/files/publications/first-nations-advice-on-nsw-mdb-porous-rock-wrp.pdf>>.

WRPs²⁶ intersect only with Gomeroi/Kamilaroi Country and, therefore, have been developed without any Indigenous consultation (despite the Basin Plan requirements). It is not clear if or how these WRPs will satisfy the Basin Plan requirements.

What makes this situation worse is that there seems to have been no recourse or accountability for the NSW Government. Traditional Owners²⁷ and MLDRIN have raised issues and concerns with NSW's consultation approach and actions for many years. This includes both informally and on the public record with numerous entities including (but not limited to) the NSW Department itself, the MDBA, the NSW Natural Resources Commission, the Productivity Commission, the SA MDB Royal Commission, the NSW Natural Resources Commission, several NSW State and Federal Water Ministers, and the Inspector General of Water Compliance. Despite this, the NSW Department and Government at large have not been held to account, and there has been minimal meaningful acknowledgement of its fundamental failures. This is best demonstrated by the fact that the MDBA has recommended the Federal Water Minister accredit several WRPs that MLDRIN and Basin Nations have advised were developed based on poor or incomplete consultation, and the Minister acting in accordance with the MDBA's advice. MLDRIN is concerned about the precedent this sets for other WRPs.

Not only has there been no recourse or accountability, but the NSW Government has instead been granted considerable allowances and concessions. For example, the NSW Government was granted extensions by the Federal Government to submit its WRPs for assessment.²⁸ Additionally, in the accredited text of NSW WRPs, the NSW Government states it is 'committed to furthering the discussion to meet the requirements of Part 14 of Chapter 10 of the Basin Plan through engaging with Aboriginal people, including Traditional Owners and Aboriginal organisations, over the coming 12 months'²⁹ (emphasis added). Now that some of these WRPs have been accredited by the Federal Water Minister, the NSW Government has in effect been granted further extensions to conduct consultation that, by NSW's own acknowledgement, is necessary to meet the Basin Plan's requirements and, therefore, core to implementing the Basin Plan. These allowances (whether intentional or not) enable the NSW Government to continue its problematic practices, and signal that Basin Nations interests are of little to no importance.

Anecdotally, these differences in the application of the Chapter 10 Part 14 consultation requirements seem to be linked to the goodwill and positive work of individuals within government agencies, rather than appropriate or effective structures and resourcing within departments or frameworks. Differences in political will and priorities both at Government leadership and within relevant state water departments are also likely to have contributed to these differences. For

²⁶ Gwydir Surface Water WRP, Gwydir Alluvium WRP, Namoi Surface Water WRP, and Namoi Alluvium WRP. The two Alluvium WRPs are under assessment by the MDBA; the two surface water WRPs have been withdrawn by the NSW Government for further re-work, though the NSW Government has not indicated that it will undertake further consultation with the Gomeroi/Kamilaroi Nation prior to resubmission. See NSW DPE (n 17).

²⁷ See, for example, Letter to the Hon Tanya Plibersek and Sir Angus Houston, 21 September 2022. Accessed via MDBA Freedom of Information Request Reference No FOI122 (Document 10).

²⁸ I.e., NSW's WRPs were first submitted to the MDBA for assessment in April and June 2020, up to a year after the original statutory deadline of 30 June 2019.

²⁹ E.g., NSW DPE, *NSW Murray-Darling Basin Porous Rock Water Resource Plan* (July 2022) <<https://www.mdba.gov.au/sites/default/files/publications/new-south-wales-murray%20%93darling-basin-porous-rock-proposed-water-resource-plan.pdf>> p. 19 ('NSW MDB Porous Rock WRP'); NSW DPE, *NSW Murray-Darling Basin Fractured Rock Water Resource Plan* (June 2022) <<https://www.mdba.gov.au/sites/default/files/publications/nsw-murray-darling-basin-fractured-rock-water-resource-plan.pdf>> p. 28 ('NSW MDB Fractured Rock WRP'); NSW DPE, *Macquarie-Castlereagh Alluvium Water Resource Plan* (June 2022) <<https://www.mdba.gov.au/sites/default/files/publications/new-south-wales-macquarie%20%93castlereagh-alluvium-water-resource-plan.pdf>> p. 15 ('Macquarie-Castlereagh Alluvium WRP').

example, in Victoria, the renewed engagement approach described above coincided with a strong commitment to act in accordance with *Water for Victoria*, the new policy at the time that prioritised First Nations' outcomes.

Chapter 10 Part 14 sets three types of actions on states in preparing its WRPs: (a) 'identify', (b) 'have regard to', and (c) 'provide the same level of protection'. The first two of these are intimately linked to consultation and consultation outcomes. We consider the implementation of each in turn below.

(b) “Identify” (section 10.52(1))

Section 10.52(1) of the Basin Plan requires WRPs to identify objectives and outcomes as desired by Indigenous peoples in relation to management of the water resources of the WRP area. This requirement is inherently linked to consultation; that is, identification of objectives and outcomes is not possible without consultation with Traditional Owners first occurring (and section 10.52(2) makes a direct link to consultation).³⁰ Therefore, the quality of consultation inherently constrains or enables the identification of objectives and outcomes within a WRP.

MLDRIN wishes to bring to the Productivity Commission's attention that, despite this legal identification requirement, some NSW Groundwater WRPs – including several that are now accredited by the Federal Water Minister and, therefore, are operational – do not identify objectives and outcomes that relate to the groundwater resources of the WRP areas. Instead, objectives and outcomes identified in these WRPs³¹ were compiled from NSW consultation activities that the majority of Nations understood to be surface water focused (see details earlier in this submission).

This fundamental issue was raised in MLDRIN's assessment advice about the 2020 versions of NSW's groundwater WRPs. Rather than conduct further consultation and/or seek express permission from Nations to use original consultation outcomes in the groundwater WRPs, the NSW Government has added the following new text to its 2022 versions of groundwater WRPs: 'While some of the examples provided in the First Nation reports relate to surface water, Aboriginal people see all water as one and the cultural connection Aboriginal people have to water is not limited by where the water sits in the landscape. These examples have therefore been included in this groundwater WRP'.³² MLDRIN has heard that while some Nation representatives agree with some elements of this statement, many found its addition in this context to be highly presumptuous. Some see that the NSW Government has conveniently used Traditional Owners' concepts of interconnectedness to justify not returning to complete consultation, and to excuse or mask its lack of transparency to begin with. This is especially the case given that this statement has only been added *after* the MLDRIN's assessments of the 2020 versions of NSW's groundwater WRPs raised the fact that it was not made clear to all Nations that consultation was supposed to cover surface water and groundwater. Despite MLDRIN raising these concerns in assessments of 2022 versions of groundwater WRPs, several NSW groundwater WRPs were accredited by the Federal Water Minister in 2022.

³⁰ I.e., *Basin Plan 2012* (Cth) s 10.52(2) requires that, in identifying the matters set out in 10.52(1), regard must be had to the social, spiritual and cultural values and uses of Indigenous people that relate to the water resources of the water resource plan area *as determined through consultation* with relevant Indigenous organisations (emphasis added).

³¹ NSW Government's WRP consultation was Nation focused, and produced standalone Nation-specific Consultation Reports which document each Nations' objectives and outcomes as discussed during consultation. This same Nation Consultation Report (and therefore, the same set of identified objectives and outcomes) is attached to each WRP that intersects with that Nation's Country. Nations Consultation Reports are not published online.

³² E.g., NSW DPE, *NSW MDB Porous Rock WRP* (n 29) p. 24; NSW DPE, *NSW MDB Fractured Rock WRP* (n 29) p. 33; NSW DPE, *Macquarie-Castlereagh Alluvium WRP* (n 29) p. 19.

Additionally, the objectives and outcomes for four First Nations (Tati Tati, Weki Weki, Barkandji, and Gomeroi/Kamilaroi) are not identified in any NSW WRPs because consultation either did not occur, or the NSW Government does not have consent to use consultation outcomes. Notably, the four aforementioned NSW WRPs that intersect only with Gomeroi/Kamilaroi Country do not identify *any* Indigenous objectives and outcomes.³³

(c) “Have regard to” (section 10.52(2), 10.53, and 10.54)

Sections 10.52(2), 10.53, and 10.54 of the Basin Plan require Basin States to have regard to a number of matters (including ‘views’) as determined through consultation. MLDRIN understands that ‘have regard to’ means ‘proper, genuine, and realistic consideration’ but even this phrase can have different meanings to different people and departments.

The MDBA has several policies that set its minimum expectations to address or satisfy these Chapter 10 Part 14 requirements. First, the MDBA’s *Position Statement 1B* sets out how to interpret ‘have regard to’ depending on the section of the Basin Plan for the purposes of developing WRPs.³⁴ In this Position Statement, the MDBA states that ‘have regard to’ in Chapter 10 s 52- 54 requires the weakest level of obligation from Basin States: ‘Category A - a requirement to have regard to a specified matter, with no additional requirements’. In other words, Basin States need to only include a statement in their WRPs that explains the approach used to ‘have regard to’ these matters. No further consequential outcomes, actions, or additions are required according to this policy. In several communications with the MDBA, staff have stressed this low level of obligation is a minimum legal standard as set by the Basin Plan, when in reality, it was set by the MDBA.

This level of obligation is much lower than with the MDBA’s Part 14 Guidelines document,³⁵ prepared in consultation with MLDRIN and NBAN. As MLDRIN has stressed before, this document is discretionary both for States’ consultation planning and activities, and for the MDBA in assessing WRPs. As just one example, under ‘assessment considerations’ for section 10.53, the Guidelines state that WRPs should include ‘an explanation of the approach, tools or information used in the preparation of the WRP to give proper, genuine and realistic consideration to each matter should be provided as supporting evidence’.³⁶ It *also* states that ‘The WRP should describe any changes to water resource management (e.g. ‘existing’ or pre-WRP) that have or have not been made in the WRP as a result of consultation on these matters, and if possible an explanation of why this was the case’.³⁷ MLDRIN is yet to see a WRP that describes how its substantive rules or content (beyond the specific material addressing the Chapter 10 Part 14 requirements) were or were not changed as a result of Basin Nations WRP consultation.

In other words, sections 10.52(2), 10.53, and 10.54 of the Basin Plan compel Basin States to carry out consultation with and collect information from Traditional Owners without any binding duty or obligation to respond tangibly or meaningfully; consequential action is instead left to the discretion of Basin States. This approach undermines the sovereignty of Basin Nations and fails to give their knowledge necessary protection that should be afforded to Indigenous Cultural & Intellectual Property (ICIP). It also has been extremely disenfranchising and demoralising for Basin Nations that have participated in consultation processes in good faith for no benefit or outcome at the state level,

³³ For example, the Gwydir Alluvium WRP and Namoi Alluvium WRP available at MDBA (n 8).

³⁴ MDBA, ‘Basin Plan Water Resource Plan Requirements Position Statement 1B Interpreting “have regard to”’ (23 March 2017) <<https://www.mdba.gov.au/sites/default/files/publications/wrp-position-statement-1b-interpreting-have-regard-to0.pdf>>.

³⁵ MDBA (n 18).

³⁶ *Ibid* pp. 7-8.

³⁷ *Ibid* p. 8.

especially when that is effectively validated by the MDBA and Federal Water Minister. As Wolgalu Delegate and MLDRIN Director has explained to MLDRIN, “Have regard” is just a tick box process but we keep chasing our tails when looking for outcomes for our people, but it’s not happening’.

MLDRIN is aware of several instances where a state did not have regard to certain matters as required by the Basin Plan and MDBA policy, even with this very low bar for demonstrating compliance. The clearest example is the NSW Government’s failure to have regard to Nations’ views about native title as required by section 10.53(1)(a) because it failed to consult or seek Nations’ relevant views on this matter. By way of explanation, the 2022 versions of NSW Government’s WRP materials now state that: ‘The department decided that it was not appropriate to conduct general discussions about Native Title where a Nation had not lodged an application or received a determination. It is therefore not considered appropriate for the Nation report[s] to state the details of the discussions’.³⁸ This is an admission by NSW that it did not consult about native title matters and therefore could not have had regard to the majority of Nations’ views (noting the limited native title determinations and applications in NSW).³⁹ MLDRIN has raised and justified this clear Basin Plan non-compliance in our WRP assessment reports to date, but the MDBA has alternatively concluded that WRPs with these sentiments do comply.

For those four First Nations without consultation reports, it is simply not possible for the NSW Government to have had regard to those Nations’ values and uses regarding water resources (section 10.52(2)) or views on the matters set out in sections 10.53 and 10.54. Again, despite MLDRIN raising these further examples of non-compliance, the MDBA has reached different conclusions and recommended that the Federal Water Minister accredit these same WRPs, which the Minister has acted on.

Thus, we are seeing instances of WRPs being accredited that do not meet even the very weak minimum that the MDBA has set as required to meet the Basin Plan requirement – a statement about *how* regard was had. In this way, even *implementation* of the Basin Plan’s weak requirements is not addressing Basin Nations’ rights and interests.

(d) “Provide the same level of protection” (section 10.55)

Section 10.55 of the Basin Plan requires that a WRP must provide at least the same level of protection of Indigenous values and uses as provided in transitional and interim WRPs (i.e., state water management plans and arrangements that existed prior to the Basin Plan commencing and specifically listed in the Basin Plan legal framework⁴⁰).

The MDBA’s *Position Statement 14A* sets expectations for addressing the requirement, simply requiring ‘a statement outlining the level of protection (if any) of Aboriginal values and uses in transitional or interim water resource plans and how these are maintained or enhanced’.⁴¹ This sets a low bar for evidence and justification. Similarly, the MDBA’s assessment reports of now accredited

³⁸ For example, NSW DPE, *NSW MDB Porous Rock WRP Consultation Report: Schedule C* (July 2022) <<https://www.mdba.gov.au/sites/default/files/publications/schedule-c-new-south-wales-murray-darling-basin-porous-rock-consultation-report.pdf>> p. 12; NSW DPE, *NSW MDB Fractured Rock WRP Consultation Report: Schedule C* (April 2022) <<https://www.mdba.gov.au/sites/default/files/publications/schedule-c-nsw-murray-darling-basin-fractured-rock-consultation-report.pdf>> p. 15; NSW DPE, *Macquarie-Castlereagh Alluvium WRP Consultation Report: Schedule C* (June 2022) <<https://www.mdba.gov.au/sites/default/files/publications/schedule-c-new-south-wales-macquarie%E2%80%93castlereagh-alluvium-water-resource-plan-consultation-report.pdf>> p. 10.

³⁹ It is also worth noting that this NSW commentary explaining the lack of native title consultation did not appear in its original 2020 versions of its WRP, which said discussions about native title had occurred. See MLDRIN (n 25) pp. 35-36.

⁴⁰ I.e., Schedule 4 of the *Water Act 2007* or as prescribed in Schedule 5 of the *Water Regulations 2008*.

⁴¹ MDBA (n 18).

WRPs also show a low degree of interrogation is necessary to determine Basin Plan compliance. For example, MDBA assessments for the NSW MDB Fractured Rock WRP, NSW MDB Porous Rock WRP and Macquarie-Castlereagh Alluvium show that the MDBA does not deeply interrogate the accuracy of the ‘satisfying’ statements offered by the NSW Government, even when Basin Nations provide compelling evidence to the contrary (discussed further below).⁴²

Just how low these levels of obligation and consideration are, is further emphasised when the comparable obligations set in MDBA policy for similarly worded WRP requirements are examined. For example, section 10.28 of the Basin Plan requires that a WRP must ensure that there is no net reduction in the protection of planned environmental water. The MDBA’s *Position Statement 6A* (for this Basin Plan requirement) requires much more than only a ‘statement’ of compliance; indeed, Basin States must supply supporting documentation that *demonstrates* the level of legal protection, and the effectiveness, of planned environmental water is maintained (where the associated rules change).⁴³ For NSW WRPs, this tends to appear as a standalone schedule to the WRP.⁴⁴ The MDBA’s assessment of this material is significant too, using, for example, ‘multiple lines of evidence to analyse changes to the protection... that would arise from the proposed WRP’,⁴⁵ also producing a standalone planned environmental water specific assessment document.⁴⁶

In other words, a much greater level of justification is required by states to address the requirement and greater level of scrutiny is deployed by the MDBA when conducting their assessment of WRPs against this Basin Plan requirement. These different standards show an unequal implementation of the Basin Plan that is unjustified and unexplained; they enable the effects of water colonialism to continue.⁴⁷ These disparities should be corrected in any revisions to the MDBA’s position statements or equivalent policies used to implement the Basin Plan into the future.

As an additional concern about the application and implementation of section 10.55, MLDRIN’s assessments have revealed instances where some NSW WRPs make false claims about ‘improvements’ to levels of protection and/or do not offer the same level of protection (and therefore are not compliant). For example, our assessment of the NSW MDB Porous Rock WRP found that the transitional WRP⁴⁸ sought to ‘protect, preserve, maintain and enhance’ Aboriginal values and uses, whereas the proposed WRP⁴⁹ seeks to only ‘maintain’ them. This is clear evidence of a *reduced* level of protection, rather than an ‘improvement’ as claimed in the WRP.⁵⁰ MLDRIN’s assessment report clearly identifies and justifies this position, making the case that the WRP does not comply with 10.55.⁵¹ The MDBA, however, states that the proposed WRP ‘includes the specific ...

⁴² See, generally, MDBA (n 8).

⁴³ MDBA, ‘Basin Plan Water Resource Plan Requirements Position Statement 6A Change in PEW protection’ <<https://www.mdba.gov.au/sites/default/files/publications/WRP-position-statement-6A-planned-environmental-water.pdf>>.

⁴⁴ See, generally, MDBA (n 8).

⁴⁵ For example, MDBA, ‘Proposed NSW Murray-Darling Basin Porous Rock Water Resource Plan: Planned environmental water: Assessment of no net reduction (s10.28) in the level of protection’ (29 November 2022) <<https://www.mdba.gov.au/sites/default/files/publications/mdba-assessment-of-no-net-reduction-in-the-level-of-protection-of-planned-environmental-water-for-the-nsw-mdb-porous-rock-wrp.pdf>> p. 1.

⁴⁶ Ibid. See also, generally, MDBA (n 8).

⁴⁷ Jason Robison et al, ‘Indigenous water justice’ (2018) 22(3) *Lewis & Clark Law Review* 841.

⁴⁸ Via *Water Sharing Plan for the NSW MDB Porous Rock Groundwater Sources 2011* (NSW) cl 9. Note that the NSW Government purports that ‘specific provisions [of Water Sharing Plans] ... are fundamental components’ of WRPs, such as here. See, for example, NSW DPE, *NSW MDB Porous Rock WRP* (n 29) p. 4.

⁴⁹ Via *Water Sharing Plan for the NSW MDB Porous Rock Groundwater Sources Order 2020* (NSW) cl 11 <<https://www.mdba.gov.au/sites/default/files/publications/schedule-a-new-south-wales-water-sharing-plan-nsw-murray%E2%80%93darling-basin-porous-rock-groundwater-sources-2020.pdf>>.

⁵⁰ NSW DPE, *NSW MDB Porous Rock WRP* (n 29) p. 71.

⁵¹ MLDRIN (n 25) pp. 72-73.

identification of Indigenous cultural objectives’ and that this represents ‘an improvement relative to the protections in the transitional WRP’, and ultimately concludes that the WRP addresses requirement 10.55.⁵² This is an example of how even the low bar set by the Basin Plan requirements and the MDBA’s associated policies are not being fairly implemented.

A final point MLDRIN and our member Nations wish to raise regarding section 10.55 speaks to its inherent assumptions. Specifically, it assumes that (a) there is any level of protection of Indigenous values and uses to begin with, (b) Basin States have the authority to protect Indigenous values and uses, and (c) Basin States have the authority to determine or measure levels of protection, and can assess that a level of protection is sufficient. These roles and obligations instead sit squarely with First Nations people. As a Tati Tati MLDRIN Delegate explains, this requirement positions ‘colonisers [as] telling us what the level [of protection] is, and implying that’s sufficient. ... It’s also about [states’] interpretation of protection, informed without any advice or input from us. How can they know? Our values and uses were “protected” before [colonisation]. The state cannot maintain our level of protection with their words in the plan’.

(e) Inconsistent and unclear approach to assessment

MLDRIN has previously raised some concerns and uncertainties with the Productivity Commission in relation to the MDBA’s assessment of WRPs against the requirements of Chapter 10 Part 14.⁵³ Now that time has passed, and more WRPs have been assessed – some accredited, and some not – we wish to reflect on these concerns further. This submission has already touched on this in some ways, but here we offer more focused observations and insights.

First, the assessment role for Basin Nations provided in the legal note to Chapter 10 Part 14 is incredibly unique; it provides a specific avenue for Traditional Owners to provide direct advice on and input into the MDBA’s assessments of WRPs, a process some of our Delegates describe as ‘marking the states’ homework’. Through this role, MLDRIN endeavours to produce rigorous, evidence-based independent assessments. Importantly, our assessment reports are provided unaltered and in full to the MDBA Board and the Federal Water Minister. MLDRIN is unaware of a comparable direct decision-making advisory role for Traditional Owners in water management or broader natural resources management in Australia.

As already detailed in this submission, where the advice is listened to and respected by Basin States and the MDBA, this invaluable assessment role has helped lead to some positive consultation-related outcomes for Basin Nations and Basin States. While we cannot overstate the value and importance of this statutory role for Traditional Owners and MLDRIN, we are of the view that it can and should be strengthened. This is because our advice is not always followed by the MDBA or the Federal Water Minister, even when Basin Nations have expressed serious concerns with the quality and content of the Plans, as highlighted in our submission already.

Second, we wish to raise concerns around the transparency of the MDBA’s approach to formally assessing WRPs against Chapter 10 Part 14 of the Basin Plan. The MDBA’s *Position Statement 14A* sets five consultation and procedural based criteria.⁵⁴ These criteria are what ‘the MDBA will use to determine if genuine consultation has been undertaken by States, to satisfy requirements about

⁵² MDBA, *Water Resource Plan assessment report: Proposed NSW Murray-Darling Basin Porous Rock Water Resource Plan* (November 2022) <<https://www.mdba.gov.au/sites/default/files/publications/mdba-assessment-report-nsw-mdb-porous-rock-wrp.pdf>>, pp. 269-270.

⁵³ MLDRIN (n 2); MLDRIN (n 3).

⁵⁴ MDBA (n 19).

Aboriginal values and uses in line with Basin Plan Chapter 10 Part 14'.⁵⁵ As the MDBA were not privy to the consultation that took place in order to determine how states performed against each criteria, the MDBA has stressed to MLDRIN and to participating Basin Nation representatives on numerous occasions, the importance of First Nations input and experiences for informing their assessment (as collected and reported in MLDRIN's assessment reports).

Based on such assertions, it would be reasonable to expect that the MDBA's formal WRP assessments consider and engage with MLDRIN's assessments of these five criteria, but this is not the case. Instead, the MDBA assessments take a more reductive, legalistic perspective focused on whether WRP text addresses the Chapter 10, Part 14 requirements (though, we have noted several examples earlier in this submission where WRP text does *not* address the requirements, but the MDBA has given a positive assessment). Greater upfront transparency about how exactly the MDBA would assess WRPs was needed. The impact of this opacity should be considered in updates to the Basin Plan and MDBA policy moving forward.

Third, and relatedly, we wish to highlight that the degree to which the MDBA has relied upon or been guided by MLDRIN's assessment advice in its formal assessments of WRPs appears to have changed over time. For example, the MDBA's 'notice of grounds' on which the Authority considered that the Federal Water Minister should not accredit the 2020 versions of four NSW groundwater WRPs⁵⁶ and three surface water WRPs⁵⁷ relies significantly on advice from MLDRIN. Indeed, MLDRIN's advice and/or concerns are the most frequently cited reasons (alongside others⁵⁸) for the MDBA concluding these WRPs did not meet the Chapter 10 Part 14 requirements. It is worth noting that most of these MLDRIN concerns related to the quality of the NSW Government's First Nations consultation approach, including issues of unclear scope (described earlier).

By contrast, the published MDBA assessments of recently accredited NSW WRPs (i.e. versions submitted in 2022 for assessment) give little to no weight to MLDRIN's assessment advice. This is despite our advice reiterating the same consultation gaps and flaws identified in our assessments of 2020 versions of WRPs given that the NSW Government did not address these fundamental issues. This time around, the MDBA at best 'acknowledges' or 'notes' MLDRIN's advice and concerns in its assessment of each and every WRP requirements but then also states that 'the Authority is satisfied that this requirement has been met'.⁵⁹ This treatment of MLDRIN and Basin Nations' advice seems to imply that the MDBA's own assessment is sufficient, much to the frustration of the representatives from Basin Nations who have participated in and contributed to MLDRIN's assessment in good faith. The lack of transparency and inconsistency of the MDBA's approach to assessing WRPs should be scrutinised by the Productivity Commission given its direct connection to Basin Plan implementation.

MLDRIN is resourced by MDBA to undertake these WRP assessments via a contract agreement. However, the planning for these assessments has been difficult to manage with timing dictated by governments. Generally, MLDRIN is given 6 weeks from the date the WRP is provided to complete a

⁵⁵ MDBA (n 18) p. 4.

⁵⁶ MDBA's Notice of grounds for 2020 proposed versions of the NSW MDB Porous Rock WRP, Lachlan Alluvium WRP, Murrumbidgee Alluvium WRP, and Murray Alluvium WRP. Accessed via MDBA Freedom of Information Request Reference No FOI123.

⁵⁷ MDBA's Notice of grounds for 2020 proposed versions of the Lachlan Surface Water WRP, Murrumbidgee Surface Water WRP, and the NSW Murray and Lower Darling Surface Water WRP. Accessed via NSW Parliament Legislative Council's Order for Papers under Standing Order 52.

⁵⁸ Other recurring issues include referencing issues; and the MDBA's inability to confirm whether the views of Nations whose consultation reports were not attached to WRPs were sought or given proper, genuine, or realistic consideration in preparing the WRP.

⁵⁹ See, for example, MDBA (n 52) pp. 221-271, but also more generally MDBA (n 8).

WRP assessment from start to finish – including organising and arranging logistics for a two-day workshop, running the workshop, and then completing the detailed reporting. Where possible, the MDBA had tried to give additional warning of forthcoming WRPs but this is not always possible, and depends completely on Basin States' submission of WRPs. This has created resourcing challenges for MLDRIN, with staff by necessity having to stop any other project obligations and supporting Basin Nations to recommence WRP assessments with little to no advance notice. Adequate resourcing from the MDBA for additional staffing during these crunch times has, to date, been unavailable. Similarly, it assumes that Traditional Owner representatives can also put their other commitments and obligations on hold to participate in assessment workshops, sometimes without much notice. This is frustrating, made worse now by the fact that the assessment advice seems to be having no impact on the MDBA's formal assessments.

MLDRIN has observed first-hand how frustrating and disenfranchising the application of these minimal legal requirements by some Basin States *and* the extremely low level of expectation required by the MDBA has been for some Southern Basin Nations. Consultation experiences for some NSW Traditional Owners has been so poor that it has nearly completely undermined their trust in the NSW Government, the MDBA, and any other water related consultation processes more broadly. In some cases, these processes have been so damaging and demoralising that some MLDRIN delegates have raised concerns that their continued participation in WRP assessments poses risks to their cultural safety. We have raised this concern with the MDBA via formal correspondence to the CEO.

The trauma, frustrations, and impacts from participating in WRP assessment processes to only be disregarded by the MDBA and Federal Water Minister is best expressed by Traditional Owners themselves. As one example, a Wolgalu Delegate and MLDRIN Director shared the following during a recent MLDRIN-led WRP assessment workshop: 'The whole process has been flawed from the start. We've continued in good faith.... We've had lots of meetings with MDBA since 2019 but our advice is not being considered. We're being disregarded. [Water Resource] Plans being approved against our advice feels token again. We're not being listened to. We've been duped in this process – we thought this [assessment role] was a good process and we were keen to be part of it. Now we have nothing really to show for it. There's disregard for us. We've never ceded our rights to water and there's no recognition of that anywhere. We're pretty disappointed.' Many other MLDRIN Delegates and Basin Nations representatives across NSW have shared similar sentiments with MLDRIN over the last 12 months especially.

The role of Basin Nations advice into the formal assessment process of new and amended WRPs must be secured and strengthened moving forward. This is necessary not only to ensure the integrity and consistency of WRP accreditation and Basin Plan roll out, but to avoid further trauma and damage to Basin Nations. Opportunities for First Basin to provide input and direction to water resources management and decision-making must be empowering and respectful of Nations' cultural authority.

(f) Other comments and observations

In MLDRIN's submission to the last 5 year Basin Plan review when only one WRP had been accredited, we said that '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'.⁶⁰ Since then, many more WRPs have been assessed by the MDBA and accredited by the Federal Water Minister, and these concerns have largely been reinforced as detailed above.

During the last 5 years, MLDRIN has heard and recorded Traditional Owners' concerns with Chapter 10 Part 14 both in terms of its content and what it requires of Basin States. Some of these matters have been raised in this submission already, but some further points are included below. We acknowledge that these points extent beyond implementation of the Basin Plan in its current form, but we offer them given their relevance to this review's question about how well the plan addresses Basin Nations' rights and interests:

- The MDBA has advised MLDRIN previously that section 10.52(3) imposes 'no obligations' on Basin States because it is a requirement that 'may' be responded to. This wording is incredibly weak and of great dissatisfaction to Southern Basin Nations.
- The focus within Chapter 10 Part 14 is too narrow: focus is only on the social, spiritual and cultural values and uses (section 10.52(2)) and objectives and strategies (section 10.53(1)(d)). Traditional Owners have expressed deep dissatisfaction that this scope excludes economic or environmental values, uses, and objectives from consultation conversations and legal consideration in water resource planning.
- The isolated nature of only considering First Nations matters within Chapter 10 Part 14 is not appropriate nor reflective of Nations' views about water and Country: There should be opportunities or requirements for Basin States to consult Basin Nations about, and for Basin Nations to provide input into, any and all parts of WRPs should they choose, not just the 'Indigenous values and uses' components. The narrow and isolated focus of Chapter 10 Part 14 has meant Nations were consulted on only a very small subset of water management related matters. It also empowered Basin States to minimally include section(s) in their WRPs that reflect Basin Nations consultation outcomes with little to no substantive impact on the WRP or water resource management at large. Basin Nations' rights and interests need to be embedded throughout WRPs *and* throughout the Basin Plan.
- As currently written, the legal note providing for Basin Nations and MLDRIN's formal assessment role is limited to when states propose new WRPs for accreditation.⁶¹ Additional provisions are needed to ensure that similar advice is sought by the MDBA when it considers amendments to already accredited WRPs.⁶²
- Consultation for the purposes of developing WRPs should not be the end point. Some states, including NSW, commit to improving consultation moving forward. But, we stress as we have previously that 'Commitments to improve consultation ... beyond the development of the WRPs need to be properly defined and tangible, funded and implemented through formal policy or legislation'.⁶³ Further advice about consultation moving forward is detailed later in this submission.

2. Cultural flows

The Basin Plan includes cultural flows as a requirement for WRPs. Specifically, section 10.54 states that 'a water resource plan must be prepared having regard to the views of Indigenous people with respect to cultural flows'. The Basin Plan is guided by the Echuca Declaration's definition for cultural flows, as outlined in Schedule 1 of the Plan: 'water entitlements that are legally and beneficially

⁶⁰ MLDRIN (n 2) p. 9.

⁶¹ I.e., *Water Act 2007* (Cth) s 63.

⁶² I.e., *Water Act 2007* (Cth) s 65.

⁶³ MLDRIN (n 3) p. 3.

owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right'.⁶⁴ Despite the presence of these provisions seemingly supporting cultural flows, as defined by Basin Nations and further developed through the First Nations-led National Cultural Flows Research Project (NCFRP),⁶⁵ MLDRIN has concerns regarding their effectiveness and implementation.

There are two major issues with the provisions for cultural flows within the Basin Plan. First, the provision does not compel Basin States to act on, develop, or progress cultural flows in ways that mirror or promote the interests of Basin Nations. Second, the weakness of section 10.54 and lack of accountability are effectively enabling Basin States to misinterpret and manipulate the lexicon and philosophy of cultural flows in a manner contrary to the Basin Nations' developed and articulated construct. This compounds how section 10.54 of the Basin Plan is failing the interests of Basin Nations.

These issues underscore the need for more robust and inclusive measures within the Basin Plan that genuinely support and prioritise the interests of Basin Nations. Merely having provisions in place without adequate implementation falls short of addressing and creating a pathway for Basin Nations, and the Basin itself, to benefit from the unique opportunities that the cultural flows framework provides.

(a) Inadequacy of the Basin Plan's language and requirement relative to cultural flows

As outlined above, the MDBA's policy position about the meaning of 'have regard to' in Chapter 10 Part 14 and the associated obligations on Basin States⁶⁶ has limited the effectiveness and capacity of WRPs and the Basin Plan more broadly to address Basin Nations' rights and interests. This has been particularly clear to MLDRIN in relation to the way that cultural flows are treated in section 10.54. The established minimum standard merely necessitates Basin States to 'have regard to' the views of Indigenous people with respect to cultural flows without any consequential action.

MLDRIN member Nations have experienced how this weak requirement has been detrimental to the advancement of their self-determination and priorities for cultural flows. In particular, it has had an adverse influence on the progress of policy and legal modifications needed to facilitate cultural flows entitlements within the Basin. Understood in accordance with the Echuca Declaration definition, there is currently no Basin Nation who holds a cultural flow entitlement nor is there a legal mechanism in place (federal or state based) that enables a cultural flow entitlement to be applied for, let alone attained, by any Nation. Any future iterations of the Basin Plan and WRPs must push all levels of government to invest time, resources, and effort to make the policy and legal reforms needed to make cultural flows possible. As long as the current weak provisions prevail, Basin Nations' interests will not be advanced.

(b) Basin States misinterpreting cultural flows

Recently, Southern Basin Nations and MLDRIN have become concerned that Basin States can pursue activities that deviate from, or are contrary to, Nations' perspectives on cultural flows as enshrined in the Echuca Declaration and recognised in the Basin Plan. This is a problem for consideration by

⁶⁴ See <<https://www.mdba.gov.au/sites/default/files/pubs/sa-mldrin-echuca-declaration-2009.PDF>>.

⁶⁵ The NCFRP was First Nations-designed and -delivered program of work that ran for a seven year period from 2011-18 and produced a series of outputs including a methodology outlining the necessary steps for securing Cultural Flows. For more information see the NCFRP website <<https://culturalflows.com.au/>>.

⁶⁶ MDBA (n 19).

this review because these activities are stemming from commitments or content included in their WRPs to address section 10.54 of the Basin Plan and gain accreditation. The low obligation put on states by this requirement and the lack of state accountability after accreditation (see discussion about this later) has created an environment in which this can occur.

A clear example of this happening can be seen in NSW. NSW's most recent WRPs include statements in their accredited text that NSW will adopt the processes and guides developed through the NCFRP.⁶⁷ In MLDRIN's initial WRP assessment workshops, Southern Basin Nation representatives considered this a positive step, in principle. More recently, it has become apparent that the NSW Government is acting on this commitment via its rollout of the NSW Cultural Watering Plan program.⁶⁸ Designed by the NSW Government as a platform for First Nations communities to have their cultural watering aspirations stated and delivered, the program is utilising the NCFRP methodology and guides to design and implement these plans.⁶⁹

Although the NSW Government aligns this program with the Cultural Flows methodology in its rhetoric – at times even claiming that this program *is* cultural flows – it specifically prohibits Nations from exploring economic-based water aspirations.⁷⁰ This government-imposed restriction is at complete odds with the cultural flows concept as developed and defined by Basin Nations in the Echuca Declaration, advanced via the NCFRP, and recognised in the Basin Plan.⁷¹ Accordingly, any application of the NCFRP methodology or guides in advancing this program represents a misuse of those tools and cannot be considered evidence of regard for Basin Nations' views about cultural flows; arguably, it shows disregard.

This matter is of significant concern for several reasons. First, and central to this review, this misconception or misrepresentation about cultural flows is falsely legitimised via the accreditation of WRPs and therefore, the implementation of the Basin Plan. We are also concerned that the NSW Government's interpretation and manifestation of cultural flows as 'cultural watering plans' will detrimentally contribute to broader confusion and misconceptions about cultural flows. Unfortunately, the ultimate losers in this situation are the members of the First Nations who designed and entrusted the Cultural Flows framework as a means to achieve water justice and self-determination. Whether these deviations stem from misunderstandings or deliberate choices, the outcome remains detrimental to the intended purpose and objectives of the Cultural Flows framework, and in effect fail to meet the intent set in the Basin Plan.

MLDRIN contends that these issues have arisen due to the inherent weaknesses of requirement 10.54. Specifically, its lack of obligation for states to deliver concrete actions and measures that are genuinely dedicated to the delivery of cultural flows in a manner that respects the self-determination of First Nations and the Echuca Declaration. This lack of tangibility places the concept of cultural flows in a precarious position. Without concrete and definitive actions, the Basin States have the ability to manipulate and reinterpret the essence of cultural flows and its methodology in an unchecked manner, potentially deviating from its original intentions and priorities as a First Nations led and determined concept and methodology. This situation poses a significant risk to the

⁶⁷ E.g., NSW DPE, *NSW MDB Porous Rock WRP* (n 29) p. 66; NSW DPE, *NSW MDB Fractured Rock WRP* (n 29) p. 83; NSW DPE, *Macquarie-Castlereagh Alluvium WRP* (n 29) p. 61.

⁶⁸ NSW DPE, 'Cultural Watering Plans' (Web Page, 2023) <<https://water.dppe.nsw.gov.au/plans-and-programs/aboriginal-water-program/cultural-watering-plans>>.

⁶⁹ Based on advice from NSW Director Aboriginal Water Program (pers comms, 17 February 2023).

⁷⁰ Confirmed with advice from NSW Director Aboriginal Water Program (per comms, 7 March 2023).

⁷¹ I.e., water entitlements that can be used for purposes as determined by the Nations, including to improve their spiritual, cultural, environmental, social and economic conditions.

cultural flows framework,⁷² undermining its very purpose and jeopardising the interests of the First Nations it aims to empower.

The Basin Plan needs to ensure that Basin States comprehend and approach cultural flows in a manner consistent with the principles of the Echuca Declaration, and consequently formulate implementation strategies that uphold Basin Nations' visions of cultural flows. One effective approach to achieve this would involve granting Nations the authority to determine and drive the progress of cultural flows implementation efforts, rather than being forced to accept State based definitions of cultural flows and how they can be implemented.

Another suggestion, is that the Basin Plan instils stronger accountability on Basin States, including how they are acting on commitments and statements contained in their WRPs, especially those within accredited text and which were crucial to their accreditation. In regard to section 10.54, this includes requiring Basin States to show how cultural flows (in alignment with the Echuca Declaration) are implemented and the measured outcomes. Traditional Owners must be empowered and resourced to, at a minimum, review and evaluate any self-reporting by Basin States about such activities.

One suggestion for how these outcomes can be measured is to draw from the 'Cultural Benefits Framework', which was developed by Traditional Owners outside the MDB, and shows how to assess the multiple outcomes of cultural flows, including sovereignty and self-determination, healthy Country, and healthy people, and the way these outcomes flow to Indigenous and non-Indigenous communities and governments.⁷³ As this framework was developed by Traditional Owners in southern Victoria, it should not be directly applied to the MDB without working with each Nation to adapt the approach to meet their needs. The major benefit of this framework, though, is that it shifts the focus away from the extraction of information about Indigenous values and interests (as is the current focus of the Basin Plan), and instead focuses on creating a system that delivers broader outcomes to First Nations, wider communities, ecosystems, and governments.

3. Environmental Water

Basin Nations' involvement and leadership in environmental water management has continued to progress since the last Productivity Commission assessment. However, Basin Plan Chapter 8 provisions relating to Basin Nations involvement in environmental water planning are inadequate and not consistent with evolving policy and practice. The Basin Plan provisions need to be updated to reflect evolving expectations and set more ambitious targets and requirements. Critically, First Nations ongoing efforts to secure water ownership, or cultural flows, cannot be satisfied through participation in planning for use of environmental water held by governments alone.

(a) Basin Plan Chapter 8

Basin Plan Chapter 8 establishes the framework for managing environmental water to meet the Objects of the Plan and Water Act. This framework sets up requirements for the MDBA, the

⁷² MLDRIN, NBAN and NAILSMA, *Cultural Flows: A guide for water managers* (2017) <<http://culturalflows.com.au/images/documents/Water%20Managers%20Guide.pdf>>.

⁷³ Traditional Owner Partnership and Alluvium. *Framework: Multiple benefits of ownership and management of water by Traditional Owners*, Report produced for Traditional Owner Partnership, Central and Gippsland Region Sustainable Water Strategy (Final Report, February 2022) <https://www.water.vic.gov.au/_data/assets/pdf_file/0037/593866/20220901_BenefitsFramework_FinalReport_V04b.pdf>.

Commonwealth Environmental Water Holder (CEWH) and Basin States. Chapter 8 is thus critical for determining the outcomes from environmental water use in the Basin.

None of the overall environmental objectives or specific objectives in Chapter 8 address First Nations interests or outcomes. Section 8.15(4)(e) requires the MDBA to have regard to Indigenous values and Indigenous uses in the preparation of the Basin-wide Environmental Watering Strategy (BWS). Section 8.29(3)(g) requires the MDBA to have regard to Indigenous values and Indigenous uses in the preparation of the Basin Annual Environmental Watering Priorities. The CEWH must also have regard to the Basin Annual Watering Priorities and exercise its functions in accordance with the BWS.

Division 6 of Chapter 8 sets out ‘principles to be applied in environmental watering’, including that ‘environmental watering is to be undertaken in a way that... maximises its benefits and effectiveness by... having regard to Indigenous values’ (section 8.35(b)(iv)). The BWS, prepared by the MDBA, and Long Term Watering Plans prepared by Basin States must be prepared in a manner consistent with these principles to be applied in environmental watering.

These provisions are limited to the weak procedural requirement to ‘have regard to’. The inherent weakness of these kinds of requirements has been addressed at length in this submission, above. In relation to environmental water planning, the weakness of these provisions means that Basin Nations interests, objectives, and outcomes can be easily relegated or ignored in the implementation of the Basin environmental water planning framework.

Basin Nations’ interest and involvement in environmental water management has grown significantly since 2012. Basin Nations’ capabilities and aspirations now far exceed the limited scope of engagement or ‘regard’ anticipated in the Basin Plan requirements. For example, the Victorian Government’s *Water is Life* policy document commits to recognising First Nations as environmental water holders in their own right.⁷⁴ The Victorian Government is also working to develop new guidelines for Traditional Owners to submit seasonal watering proposals directly to the Victorian Environmental Water Holder.⁷⁵ In NSW, the Nari Nari Nation has established a formal partnership with the CEWH, focused on delivering environmental water for cultural outcomes on Country managed by the Nation. These, and other, projects and activities recognise First Nations’ agency and self-determination in relation to the use of environmental water on their Country. Chapter 8 of the Basin Plan, and the policies, strategies, and approaches that it mandates, must be updated to explicitly enable and empower greater Basin Nations influence over the management of environmental water.

In 2019, the MDBA commissioned consultancy firm Alluvium to undertake an external review of Chapter 8 of the Basin Plan. Alluvium’s report included recommendations to amend the provisions of Chapter 8 to more explicitly include First Nations values and interests in the environmental water management framework:

- Recommendation 5 proposed that ‘Following engagement, facilitation and agreement on Indigenous ecological values with Traditional Owners, the Authority propose amendments to the overall environmental objectives for water-dependent ecosystems in Part 2 of Chapter 8 to incorporate Indigenous ecological values’.

⁷⁴ Victorian Department of Energy, Environment, Climate Action (n 21).

⁷⁵ Ibid.

- Recommendation 7 proposed that ‘The Authority consider proposing amendment to Chapter 8 to include a requirement to disclose the methodology taken to give effect to the clauses concerning “having regard to” Indigenous values and Indigenous uses’.⁷⁶

MLDRIN does not suggest that these recommendations provide a solution to the deficiencies in the framework, but these amendments would have demonstrated stronger recognition of Basin Nations’ rights and interests. Neither of these recommendations were enacted and the MDBA proposed, instead, to improve recognition of Basin Nations’ interests through review and update of the BWS and annual priorities (see below).

Notwithstanding these deficiencies in the environmental water management framework, MLDRIN and other First Nations organisations have been actively supporting implementation by advancing Basin Nations input to the BWS, Annual Priorities, Long Term Watering Plans and CEWH annual planning.

(b) Basin-wide Watering Strategy (BWS)

The BWS was originally prepared in 2014, and subsequently reviewed in 2019. The 2014 BWS made only passing mention of First Nations’ rights and interests. The MDBA was required to undertake a 5-year review of the BWS in 2019, but chose not to make substantive amendments to avoid triggering a review of state Long Term Watering Plans. A more substantive review was to be undertaken in 2022, but this will now be completed in 2024.

Despite being a critical component of the Basin watering framework, the BWS has not demonstrated proper, genuine, and realistic consideration of Basin Nations’ rights and interests in relation to environmental water management. The current BWS provides general commentary on the benefits of engaging First Nations in environmental water planning and points to areas of ‘Future Work’ to be addressed in more detail through future revisions of the strategy. The BWS does not include any substantive provisions to guide inclusion of Basin Nations, or consideration of Basin Nations outcomes, in environmental water planning by the CEWH or Basin States.

MLDRIN is specifically concerned that the 2019 BWS did not address an important, positive recommendation arising from the Productivity Commission’s previous Five-year assessment of the Basin Plan. Specifically, Recommendation 11.1 was:

‘The Murray Darling Basin Authority, when developing the next five-year Basin-wide environmental watering strategy in 2019, should strengthen its value as the key strategic plan governing environmental watering across the Basin by...including a secondary objective that, where environmental outcomes are not compromised, environmental watering should seek to contribute to social or cultural outcomes’.⁷⁷

Including this objective would provide clear direction to water managers to address Basin Nations’ cultural outcomes in environmental water planning. As it stands, the BWS does not provide an authorising policy environment to drive improved recognition of Basin Nations’ objectives.

A thorough and substantive review of the BWS is warranted, after a ‘soft’ review in 2019. The 2024 review should be broad ranging and set updated requirements and guidance for the development of Long term watering plans. All future reviews and amendments to the BWS must be informed by Basin Nations through direct and substantive engagement. The MDBA should act on previous

⁷⁶ Alluvium, *External review of Chapter 8 of the Basin Plan* (Final report for the Murray-Darling Basin Authority 2019).

⁷⁷ Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment* (Final Report no. 90, 2018) <<https://www.pc.gov.au/inquiries/completed/basin-plan/report/basin-plan.pdf>> p. 50.

recommendations of the Productivity Commission when amending the BWS⁷⁸ and include explicit directions and guidance for water holders and managers to include Basin Nations objectives and outcomes in environmental water planning.

(c) Annual Watering Priorities

As noted, the Basin Plan requires that the MDBA must have regard to Indigenous values and Indigenous uses when preparing the Annual watering priorities (section 8.29(3)(g)). Between 2018-2020, MLDRIN worked with the MDBA and CEWH to complete the First Nations Environmental Water Guidance (FNEWG) project to inform the development of the annual priorities. The aim of the FNEWG project was to develop a defined and transparent methodology for Basin Nations' environmental watering objectives to be included in the annual priorities and CEWH's environmental water planning and delivery. MLDRIN produced reports and input, drawing on contributions from sixteen Nations, to inform the annual priorities for the 2019-20 and 2020-21 watering years.

Following the completion of a report to contribute to the development of the 2020-21 annual priorities, MLDRIN completed a review of the project to take stock of learnings, successes, and challenges. MLDRIN's review noted that it was not clear how the MDBA had given genuine, proper, and realistic consideration of Basin Nations' values and uses in substantive parts of the annual priorities documents. MLDRIN found that, while the overall priorities document included a standalone section for Nations' priorities, it was not clear how the actual high-level guidance or rolling priorities set for each year had had regard to Nations' inputs. First Nations Delegates stressed that there should be a more active role for MLDRIN and/or Nations in 'co-designing' and writing the annual priorities, including establishing a First Nations 'champion' within the MDBA writing process who can advocate for inclusion of identified priorities. MLDRIN developed a revised plan for future iterations of the FNEWG project, to build on the findings of our review.

In 2020-21 the MDBA revised its approach to development of the annual priorities, focussing on longer term 'rolling' priorities. MDBA informed MLDRIN that information needs for developing the priorities had changed and detailed input from Basin Nations would no longer be appropriate. The FNEWG project was adapted to focus on providing input to the CEWH's annual management plans.

At this stage, it is not clear how the MDBA is having regard to Indigenous values and Indigenous uses in the preparation of the annual priorities, as required by the Basin Plan. The current 2023-24 Basin annual environmental watering priorities document includes only a high-level description of engagement and research activities with Basin Nations. Basin Nations input is not reflected in the substantive annual or rolling priorities. It is also not clear what the intent of the MDBA is to implement Basin Plan requirement 8.29(3)(g) given the revised format of the priorities. The 2023-24 annual priorities document states that 'the MDBA expects to continue with this work of First Nations engagement via the Basin-wide Watering Strategy to be progressed over the second half of 2023'.⁷⁹ While MLDRIN has had some discussions with the CEWH and MDBA about supporting Basin Nations input to the Basin-wide Watering Strategy review, it is unclear how this would support direct input to the priorities.

There is an explicit requirement for the MDBA to give genuine, proper, and realistic consideration of First Nations' values and uses in the preparation of the annual priorities. Long term resourcing and

⁷⁸ We note that the current (2019) BWS commits to implementing the Productivity Commission's recommendation to add a secondary objective that environmental watering should seek to achieve social or cultural outcomes through the 2022 review of the BWS. That commitment must be carried through to the anticipated 2024 review.

⁷⁹ MDBA, *Basin annual environmental watering priorities 2023–2024* (MDBA publication no: 10/23, June 2023) <<https://www.mdba.gov.au/sites/default/files/publications/environmental-watering-priorities-2023-2024.pdf>> p. 12.

support for First Nations organisations is needed to meet and implement this Basin Plan requirement.

(d) State water planning and LTWPs

States must prepare Long Term Watering Plans (LTWPs) in a manner consistent with the principles to be applied in environmental watering. States must also produce annual priorities and plans for environmental water use. Most engagement with First Nations that informs environmental water planning, including at the Commonwealth level, occurs through these state-based annual planning processes.

Existing LTWPs were published or updated in 2020 for most Southern Basin States. In South Australia, the preparation of LTWPs in 2015, and updates in 2020, included consultation with First Nations. The LTWP for the South Australian Murray includes detail on First Nations values and watering objectives.⁸⁰ Victorian LTWPs were prepared in 2015 and updated in 2020, with some direct consultation with First Nations and input through the water resource planning process.⁸¹ First Nations in Victoria have also contributed to the development of Environmental Water Management Plans (EWMPs) for some key assets.

A desktop assessment of NSW LTWPs undertaken by MLDRIN identified only one instance where substantive input from direct engagement with First Nations people informed plan content.⁸² Conversely, most other NSW LTWPs relied on data on cultural heritage features extracted from the Aboriginal Heritage Information Management System (AHIMS) database and included no actual consultation with First Nations people or organisations. This is despite the fact that Basin Plan section 8.20(1)(e) requires Basin States to prepare long-term watering plans ‘in consultation with ... persons materially affected by the management of environmental water’, which MLDRIN strongly argues includes First Nations.

Overall, while some LTWPs included consultation with Basin Nations, and some include content describing Nations’ values and objectives, it is generally not clear if, or how, Basin Nations’ inputs have informed the substantive components of the Plans (e.g., objectives, targets, and environmental water requirements). Most state LTWPs are due for a scheduled review in 2024-25. A planned substantive review of the BWS in 2024 should also be a trigger for review.

There are significant opportunities to improve the preparation and content of LTWPs to include values, objectives, targets, and flow requirements relevant to Basin Nations. Given the growing body of Nations-led water research and planning information (including Aboriginal Waterway Assessments and Cultural Flow plans), updates of LTWPs must demonstrate genuine, proper, and realistic consideration of First Nations interests as a bare minimum. Including Basin Nations objectives and watering requirements in LTWPs will provide a valuable mechanism for monitoring the protection and restoration of cultural values.

(e) Southern Connected Basin Environmental Watering Committee (SCBEWC)

⁸⁰ South Australian Department for Environment and Water, *Long-term environmental watering plan for the South Australian River Murray water resource plan area* (November 2020)

<<https://cdn.environment.sa.gov.au/environment/docs/long-term-watering-plan-sa-river-murray.pdf>> pp. 17; 66-71.

⁸¹ Victorian Department of Environment, Land, Water and Planning, *Victorian Murray long-term watering plan* (2021) pp. 64-65.

⁸² NSW Department of Planning, Industry and Environment. *Murray-Lower Darling Long Term Water Plan Part B: Murray-Lower Darling planning units* (2020) <<https://www.environment.nsw.gov.au/research-and-publications/publications-search/murray-lower-darling-long-term-water-plan-part-b-planning-units>> pp. 31-32.

MLDRIN has an observer role on the Southern Connected Basin Environmental Watering Committee (SCBEWC). SCBEWC has a role in Basin Plan implementation, through coordination of environmental water delivery between states, the MDBA and CEWH. MLDRIN recognises the value of participating in SCBEWC, to improve understanding of coordinated water management and raise awareness about Basin Nations' rights and interests. However, SCBEWC also represents a challenging environment for Basin Nations participants, with a strong focus on technical river operations and 'western' science planning. MLDRIN representatives have reported cultural safety concerns regarding SCBEWC and MDBA has put in place some measures to address and improve cultural safety across the Committee. A key issue remains the marginal status of Basin Nations in decision-making and water ownership. MLDRIN's observer status means it does not have any decision-making authority. Similarly, First Nations' historic exclusion from water and land ownership means participants in SCBEWC are always talking about, as one MLDRIN Director explains it, 'putting someone else's' water on 'Country that someone else owns'. Further work and dialogue are needed to ensure MLDRIN and Basin Nations are empowered through participation in SCBEWC and other decision-making committees.

In addition to the policies, strategies and programs described above, there are a range of projects and activities being run by Basin Nations, in collaboration with Basin States, to support improved involvement in environmental water planning. Across Victoria, NSW, South Australia and the ACT, First Nations are increasingly involved through conducting waterway assessments, documenting watering values and identifying objectives and watering requirements (see Cultural Flows section above). These projects are most successful when Nations are resourced and empowered to build their own capacity, control their own data, and engage with the water planning framework on their own terms.

Most recently MLDRIN has worked closely with the CEWH to develop an enduring agreement to support Basin Nations input to the CEWH's annual planning processes and water delivery. MLDRIN is hopeful that properly resourced, enduring partnerships can provide a basis for more effectively realising Basin Nations' rights and interests in environmental water management.

4. Other matters

(a) Right people speaking for Country, on their terms

The Basin Plan does not afford recognition to Basin Nations or Traditional Owners specifically, but only to 'Indigenous People' or 'relevant Indigenous organisations'. The Basin Plan must elevate the rights and interests of Basin Nations and Traditional Owners, the self-governing, sovereign entities that have the right to speak for Country due to ancestral and custodial connections and obligations, rather than the values and interests of any Aboriginal or Torres Strait Islander person living in the Basin. The MDBA, CEWH, and Basin States need to support and resource Basin Nations in fair partnerships about water related matters. This must involve several elements such as:

- a) *Respect for Basin Nations as sovereign entities with their own governance arrangements.* The MDBA needs to prioritise working and sharing power directly with Basin Nations (self-identified or as established through Native Title, Traditional Owner Settlement Agreement, or other settler state process) in ways that respect their governance. Although Aboriginal peak bodies and national entities such as the Committee on Aboriginal Water Interests can provide relevant high-level advice to governments, this must not be at the expense of direct partnerships with Basin Nations. MLDRIN comprises Nation-appointed representatives to conduct this kind of work.

- b) *Respect for Basin Nations as sovereign entities whose territories do not match government boundaries.* Many Nations' territories traverse multiple settler state jurisdictions across the MDB. Some Traditional Owner representatives have described feeling 'segmented' by different jurisdictions' approaches to WRP engagement, which lacked synergies and collaboration. The MDBA and Basin States need to work together to reduce this in the future, ideally by seeking advice and direction from each Nation they need to work with.
- c) *Support to enable Basin Nations to participate in partnerships as equal partners.* Similar to MLDRIN, many First Nations lack any ongoing funding sources to support their engagement with government agencies and efforts to influence policy and legislation, which means that they are often dependent on volunteers and cannot invest in building internal institutional capacity. In some cases, First Nations also lack the necessary organisational structures that governments require of them to receive funding directly. Nation-building requires ongoing funding as well as the opportunity to work together, Nation to Nation. The MDBA needs to establish respectful funded partnership arrangements directly with Nations as well as with their preferred peak bodies, such as MLDRIN and NBAN. Basin Nations and their peak bodies need to be set up for genuine and sustained success in working with dominant settler state agencies, including ongoing, sustainable investment that is commensurate with Nation-determined functions. This includes ensuring that basic organisational foundations (such as administration, accounting, IT support, HR, etc.) are covered alongside supporting policy, program, and research staff.

(b) Monitoring, evaluating, reporting and reviewing WRPs, and Basin State accountability

We note that the Productivity Commission states that 'Basin states must also prepare annual reports about compliance with their water resource plans. The Commission is interested in whether these reporting arrangements are operating effectively'.⁸³ MLDRIN is only aware of the annual water take reporting from Basin States as part of Sustainable Diversion Limit (SDL) compliance processes. If there has been any other (broader) annual WRP reporting by states beyond this, it is inaccessible and/or has not been communicated to MLDRIN and/or Basin Nations. Alternatively, if Basin States have not prepared annual reports as the Productivity Commission suggests, this is either a failure of implementation of the Basin Plan *or* a failure of the requirements in the Basin Plan for states to monitor and/or report their compliance with WRPs beyond SDLs.

MLDRIN understands that there is no set maximum period for the accreditation of a WRP, nor are any mandatory WRP review or revision timeframes set in legislation or policy.⁸⁴ As far as MLDRIN is aware, this was not communicated to any Southern Basin Nations during Basin States' WRP consultation. States, in theory, will amend their WRPs (subject to MDBA accreditation assessment)⁸⁵ to reflect changes to state-based water management rules and regulations. However, without a firm maximum timeline specifically for WRP accreditation, some Traditional Owners are concerned that WRPs have been accredited indefinitely and, by extension, states can use and rely on the materials provided during (sometimes sub-par) consultation indefinitely.

For example, a MLDRIN Director and Ngunnawal Delegate only learned about this lack of expiration date or review period during a recent WRP assessment workshop, and reported: 'this is giving me anxiety.' This representative explained this severity by saying that 'our communities should have

⁸³ Productivity Commission, *Murray-Darling Basin Plan: Implementation review 2023 Call for submissions* (May 2023) <<https://www.pc.gov.au/inquiries/current/basin-plan-2023/call-for-submissions/basin-plan-2023-call-for-submissions.pdf>> p. 9.

⁸⁴ *Water Act 2007* (Cth) s 64.

⁸⁵ *Ibid* s 65 and 66.

been told the full extent of what we were being asked to participate in and contribute to, including how long our information was going to be used for. We can't agree to something that effectively lasts forever. It's almost like we were tricked by the government. This is a real problem.' This experience and sentiment not only raise questions about the adequacy of the requirements and rules in the Basin Plan to support effective review of Basin Plan implementation, but it also raises questions about the free, prior, and informed consent arrangements of WRP consultation.

In short, Basin States need to be held accountable for the commitments they have made in their WRPs, especially where those commitments were instrumental to the MDBA recommending accreditation and are, therefore, core to the Basin Plan's implementation. As such, MLDRIN recommends that Basin States' implementation of WRPs should be reviewed at regular intervals against both (a) the Basin Plan objectives and (b) the commitments/statements in those WRPs. Review processes need to be set in legislation, including at a minimum the responsible reviewing entity, the maximum review period, and the role of Traditional Owners in any such review to help hold Basin States to account. Any such reviews must include Traditional Owner input – it will not be acceptable to only rely on Basin States' self-assessments (or an independent entity like the MDBA or IGWC asking the jurisdiction about their progress).

(c) Critical human water needs

Indigenous water values and interests currently play no role in the assessment of critical human water needs, or the risk framework for determining when these critical human water needs may not be met. This is a significant oversight for the Plan implementation.

MDBA needs to incorporate Chapter 10 Part 14 information into the Chapter 11 Part 3 monitoring, assessment, and risk management for critical human water needs. This includes not only the water needed to maintain sacred sites and areas of cultural significance, but also the human rights of Indigenous people. Inadequate water supply and water quality disproportionately affect rural communities with high Indigenous populations throughout Australia,⁸⁶ including the MDB.

MLDRIN recommends that Indigenous values and interests be expressly considered as part of critical human water needs within the Basin Plan framework.

(d) Climate change impacts and considerations

The Basin Plan has very limited tools with which to respond to the climate emergency. Basin communities and river ecosystems are still suffering the impacts of the 2022-23 extreme floods, and as Australia re-enters the El Niño cycle, water scarcity will rapidly increase. The MDBA needs capacity to respond to black water events that threaten fish populations, as well as ensuring that water continues to flow during dry periods to protect the health of rivers and the well-being of First Nations people.

The MDBA needs to include climate change as a key focus for funded partnership agreements with Basin Nations. Solutions to the climate crisis must be informed by the knowledge and wisdom of cultures that have survived (and thrived) during significant changes to the climate over the past 60,000 years. Rather than seeking infrastructure-based solutions that increase impacts to river ecosystems and cultural heritage, climate responses in the Plan must be genuinely co-designed with Basin Nations.

⁸⁶ Paul R Wyrwoll et al, 'Measuring the gaps in drinking water quality and policy across regional and remote Australia' (2022) *Npj Clean Water* 5(1) Article 32.

(e) Exclusion of the Snowy system from the Basin Plan

MLDRIN member Nations are becoming increasingly uneasy about the fragmented strategy employed in the management of their waterways. This apprehension is particularly strong regarding the Murrumbidgee River, but also resonates with Nations across the Southern Basin more broadly. At the core of this challenge lies the insufficient recognition by State, Territory, and Federal entities of the intricate interdependencies among rivers, their tributaries, their groundwater systems, surrounding Country, and their custodians.

A glaring problem, closely tied to the Murrumbidgee, manifests in the inability of the Basin Plan to effectively oversee and hold Snowy Hydro Limited accountable for its water management. Astonishingly, despite the significant impact of Snowy Hydro Limited's activities on the waterways within the MDB, no substantial accountability measures are in place within the Basin Plan relative to Snowy Hydro. This unsettling reality deeply troubles and impacts multiple MLDRIN member Nations.

This situation must be rectified for the health of Country and of the Nations responsible for its care. A comprehensive revision of the prevailing rules, regulations, and licensing frameworks that permit Snowy Hydro Limited to operate independently of the Basin Plan is imperative. The paramount goal is to safeguard these invaluable waterways impacted by Snowy Hydro Limited, through adhering at the very least to the standards laid out in the Basin Plan.

Conclusions and key recommendations

In this submission, we have offered observations, experiences, and insights relating to Basin Plan implementation with a desire to guide and provide important inputs into the Productivity Commission's review. Where appropriate, we have also offered some recommendations and suggestions for moving forward. These recommendations supplement other more significant proposals and suggestions that we have put forward to a number of other reviews and inquiries over the last five years that would see the Basin Plan better give effect to First Nations' rights and interests.⁸⁷ Very few of these proposals have been actioned or implemented by governments to date.

MLDRIN notes that a comprehensive series of evaluations and reviews are on the horizon in the Basin.⁸⁸ The breadth and scope of these reviews, including about the future of WRPs and the Basin Plan, are not entirely clear at this time. Wary of not wanting to pre-empt any Basin Nations decision making or recommendations to be offered through these formal review processes, we are apprehensive about making any additional detailed recommendations here. What we are certain of, though, is that there are strong reasons for urgently revising the Basin Plan and improving its provisions to better advance (or at the very least, stop ignoring and silencing) Basin Nations' rights and interests.

To support the Productivity Commission's work – and other entities' initial work on reviewing and revising the Basin Plan as part of other reviews – we reiterate key areas for reform as already identified by First Nations as reflected in the NCFRP's legal and policy review.⁸⁹ We note that the

⁸⁷ See especially, proposals in MLDRIN (n 6 and 7).

⁸⁸ For example, the MDBA recently launched its three-year program of review, analysis, and research in the lead up to the 2025 Basin Plan Evaluation and 2026 Basin Plan Review. See MDBA (n 15). The *Water Act 2007* (Cth) will also be subject to a statutory review in 2024.

⁸⁹ Rebecca Nelson, Lee Godden and Bruce Lindsay, *Cultural Flows: A multi-layer plan for cultural flows in Australia: Legal & Policy Design* (MLDRIN, NBAN & NAILSMA, 2018) <<http://culturalflows.com.au/images/documents/Law%20and%20policy.pdf>>.

Productivity Commission embraced this model in its National Water Reform Inquiry Final Report in 2021. Critically, this is not a ‘pick and choose’ arrangement; reform across all three areas is essential to address Basin Nations’ interests:

1. Nations want water rights: The Basin Plan needs to be reformed to explicitly recover water for Basin Nations ownership and control such as via cultural flows.
2. Empower Nation-led decision making about and over water landscapes: The Basin Plan needs to be reformed so that the decision-making authority of Traditional Owners is recognised, respected, and accommodated. Important, here, is resourcing Basin Nations to be part of and to help guide review processes and the development of any new policy or legislation, not waiting until policy options have been developed and *then* consulting about them.
3. Broader transformative legal frameworks are also necessary: The Basin Plan (and water management framework at large) needs to be reformed to enable more effective co-existence of sovereign Basin Nations voices alongside ‘settler’ voices.

Finally, we note that these three targets for reform each strongly link to the National Agreement on Closing the Gap. The first area of reform (water rights) directly links to Outcome 15 ‘Aboriginal and Torres Strait Islander people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters’ and a new inland waters specific target currently under negotiation.⁹⁰ The second and third areas for reform link to Closing the Gap’s four priority reform areas, particularly those that speak to shared decision-making, formal agreements, and transforming government organisations.⁹¹

We welcome the opportunity to further discuss any concerns and issues raised in this submission.

⁹⁰ Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, *National Agreement on Closing the Gap* (July 2020) <https://www.closingthegap.gov.au/sites/default/files/2022-09/ctg-national-agreement_apr-21-comm-infra-targets-updated-24-august-2022_0.pdf>.

⁹¹ Ibid.