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Submission on the Productivity Commission National Water Reform Inquiry 2020, Issues paper

Thank you for the opportunity to provide input to the National Water Reform Inquiry. MLDRIN acknowledges the time that the Commissioners have made to consider our members' rights, interests and perspectives on water reform through a number of briefings and a focussed roundtable on First Nations' water access.

Context

We wish to stress that this submission highlights issues relating to the Murray Darling Basin only. We recognise that there are related, yet unique, issues in other regions. Our commentary should not be taken as advice about how First Nation rights and interests are being considered outside the Basin.

Our submission provides commentary on opportunities to update the National Water Initiative and to ensure that existing water allocation and management frameworks address FNs water rights and interests. However, we must reiterate that our advice on these matters does not constitute consent to, or endorsement of, laws, policies and instruments which have been instituted by successive settler-colonial governments over our Country and waterways. We have never ceded our rights to water, fulfilment of our cultural obligations and maintenance of our unique and enduring cultural connections to water and river Country. Our procedural and substantive rights relating to water and other natural resources are recognised through the United Nations Declaration on the Rights of Indigenous Peoples, to which the Australian Government is a signatory.

Progress on inclusion of First Nations water interests in planning

The issues paper has invited comment on the question: What progress are States and Territories making on including Indigenous cultural values in water plans, and how are they reporting progress?

The NWI (section 52) requires all Australian jurisdictions to provide for 'indigenous access to water resources' through planning processes that ensure: i) inclusion of indigenous representation in water planning wherever possible; and ii) water plans will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed. A module jointly developed by the Australian and state and territory governments in 2017¹ also provides further detailed guidance on how to implement these requirements. MLDRIN considers it instructive to review progress against these requirements by considering the provisions and actions made by each jurisdiction in relation to

- 1) Environmental water planning
- 2) Water allocation and sharing plans
- 3) Water resource development and infrastructure planning; and
- 4) Water resource plans

Environmental water planning

There is growing recognition, across the Basin, of the principle that environmental water planning must include First Nations people and account for First Nations' values, objectives and priorities. This recognition has been achieved through consistent advocacy by First Nations organisations, implementation of Basin Plan requirements, policy shifts in some states and the 2018 Water (Indigenous Values and Uses) Direction.² Influencing the management of environmental water held by state and commonwealth agencies remains a key way that First Nations can pursue our water-related objectives and ensure protection and restoration of our rights and interests.

Within the basin, there is significant inconsistency and disparity between states in terms of the ways that this principle of inclusion is implemented and supported. We note that basin water holders, and state governments, are now required to self report on how they have engaged with and supported First Nations outcomes through environmental watering, under the 2018 Water (Indigenous Values and Uses) Direction. The first 'First Nations People participation in environmental watering' report was released in 2019.³ It is valuable to have a reporting mechanism

¹ Australian and state and territory governments (2017) Module to the National Water Initiative (NWI) Policy Guidelines for Water Planning and Management, *Engaging Indigenous Peoples in Water Planning and Management*.

<https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/water/indigenous-engagement.pdf>

² Minister for Agriculture and Water Resources, 2018. Water (Indigenous Values and Uses) Direction 2018. <https://www.legislation.gov.au/Details/F2018L00891>

³ Murray Darling Basin Authority, 2019. *First Nations People participation in environmental watering*,

which requires states and agencies to demonstrate progress on this front. The inclusion of case-studies prepared in collaboration with First Nations also helps to provide models of good practice. MLDRIN was disappointed in 2019, however, to receive a draft of the plan for review with only four days allowed for our response.⁴ This points to an important gap in the reporting approach: fact checking and ground-truthing by First Nations water practitioners (or an independent body) is required to ensure the veracity of claims made by states about their engagement efforts and outcomes.

In Victoria, reforms initiated by the Water for Victoria water plan (2016) have formalised responsibilities and strengthen the status of First Nations as partners in environmental water planning. An Aboriginal Commissioner has been appointed to the Victorian Environmental Water Holder and a network of State-funded Aboriginal Water Officers support First Nations input into environmental water management plans (EWMPs) and seasonal watering proposals. MLDRIN understands that new guidelines for the development for EWMPs by CMAs will include greater emphasis on documenting and incorporating cultural objectives into environmental water planning.

There are some positive examples of environmental water delivery actions informed by cultural objectives and undertaken in close collaboration with local Traditional Owners.⁵ Many Nations have been able to access funding committed by the Victorian Government to conduct Aboriginal Waterways Assessments (AWAs) and other planning activities that provide detailed and substantive information about values, threats and objectives to environmental water planning.⁶ Progress towards greater self-determination is reflected in the aspiration put forward by some Nations, to independently produce Seasonal Watering Proposals and fulfil functions previously vested in CMAs⁷. Most importantly, inclusion of First Nations is mandated in policy⁸, legislation⁹ and formal guidelines¹⁰ for water management agencies.

<https://www.mdba.gov.au/sites/default/files/pubs/First%20Nation%20People%20participation%20in%20environmental%20watering%20report%202018-19.pdf>

⁴ MLDRIN Received a draft of the report on 18th November 2019, feedback was required on the 21st November.

⁵ See for examples: 'Watering of Ranch Billabong, a first for culture and environment'

<https://www.vewh.vic.gov.au/news-and-publications/stories/watering-of-ranch-billabong>

⁶ Will Mooney & Alex Cullen (2019): 'Implementing the Aboriginal Waterways Assessment tool: collaborations to engage and empower First Nations in waterway management', *Australasian Journal of Environmental Management*, DOI: 10.1080/14486563.2019.1645752

⁷ 'Taungurung Land and Waters Council Aboriginal Corporation, Objectives and Outcome'. State of Victoria, *Victoria's North and Murray Water Resource Plan, Comprehensive Report*. P. 264-280.

https://www.mdba.gov.au/sites/default/files/pubs/vic-north-and-murray-water-resource-plan-index-table-and-comprehensive-report-26-November-2019_0.PDF

⁸ State of Victoria (2016). *Water for Victoria*, water plan. See chapter 6

First Nations in Victoria have driven the development of a framework to ensure coordinated influence and oversight of environmental water planning and delivery from the local through to the state-wide scale.

In New South Wales, while there have been some recent movements towards improving inclusion, there is no formal strategy or mechanism for incorporating First Nations views into the environmental water planning framework. Most importantly, NSW has not, to date, actively supported the development of pathways to allow First Nations to inform objective setting at a local level, and ensure their interests are reflected through various stages of the planning and decision-making framework. Consistent feedback from MLDRIN delegates and First Nations participants indicates that the Environmental Watering Advisory Groups (EWAGs) have not provided an effective mechanism for First Nations input into water planning in NSW in most cases. While individual Traditional Owners have participated on a number of valley-scale EWAG, these forums have not provided a culturally safe, empowering and inclusive way for First Nations to be involved, nor do they account for the status and significance of First Nations rights and custodial responsibilities.

MLDRIN notes that there have been some recent high-level shifts in the policy context informing environmental water management in NSW. These include completion of the DPIE 'Our Place on Country Aboriginal Outcomes Strategy'¹¹. The strategy includes a priority action to develop an Aboriginal Water Strategy to progress 'recognition of the rights, culture and economic aspirations of Aboriginal people and communities' relating to water. The Strategy aims to ensure that 'Aboriginal people and communities have greater choice, access and control over land and water...'. While details regarding implementation of these goals and targets are unclear, MLDRIN is aware that the Biodiversity and Conservation Division in the Department of Planning, Industry and Environment (DPIE) Environment, Energy and Science (EES) have produced a draft Action Plan detailing how the division will implement the overall Departmental strategy and 'will focus on incorporating Aboriginal customary knowledge into the management and application of water for the environment.'¹²

⁹ State of Victoria, Water and Catchment Legislation Amendment Act 2019
https://content.legislation.vic.gov.au/sites/default/files/2dd0230e-7f04-3924-bd01-cf1f23f67bf8_19-023aa%20authorised.pdf

¹⁰ State of Victoria, *Aboriginal Participation Guidelines for Catchment Management Authorities*
https://www.water.vic.gov.au/_data/assets/pdf_file/0027/119808/aboriginal-participation-guideline-vic-cma.pdf

¹¹ NSW DPIE (2020) *Our Place on Country Aboriginal Outcomes Strategy*.
https://www.dpie.nsw.gov.au/_data/assets/pdf_file/0005/315680/Aboriginal-Outcomes-Strategy-Plan-on-a-page.pdf

¹² NSW DPIE EES, Biodiversity and Conservation Division (2020), *Action Plan: Advancing the aspirations of Aboriginal people through the Water for the Environment Program*. Unpublished Draft

In addition, MLDRIN understands that there are some signs of progress towards support for active participation of First Nations in the environmental water planning framework. For example, the Biodiversity and Conservation Division (BCD) is exploring inclusion of a 'Cultural' criterion in the priority setting framework to determine watering options for the Annual Water for the Environment Plans. At this stage, the criterion is crude and lacks sufficient input from First Nations'-led research and planning to be operational. BCD has also committed some initial funds to support implementation of Aboriginal Waterways Assessments or cultural flows studies for some NSW First Nations and made references to outcomes from the FNEWG project (see below) in planning discussions. Despite these indications, key instruments and processes governing the management of environmental water in NSW are still largely silent on measures to address First Nations objectives. For example, current Annual Water for the Environment Plans and Annual Environmental Watering Priorities documents make only passing mention of First Nations interests.¹³ Where active partnerships and recognition has been progressed (for example at Gayani Nimmie Caira with the Nari Nari Nation, and at Booberoi Creek with the Ngiyampaa Nation), this is largely driven by strong local partnerships and Traditional Owner initiative. There is a lack of systematic support, resourcing and meaningful pathways to ensure First Nations across the NSW Basin can collate information about values and objectives in a self-determining way and see these inputs meaningfully reflected in environmental water planning.

The disparate implementation of requirements to incorporate First Nations' objectives and to have regard to First Nations' values and uses is producing inequitable outcomes.

At the Commonwealth level, 2019-20 saw the first coordinated effort at research and engagement to collate detailed input of First Nations' priorities to the Basin Annual Environmental Watering priorities. The First Nations Environmental Water Guidance (FNEWG) project was delivered by MLDRIN and NBAN, engaging with 32 Nations across the Basin. Key results from the FNEWG project were incorporated into the Annual Priorities document and into CEWO Annual Water Management Plans.¹⁴ MLDRIN has, since April 2020, had observer status on the Southern

¹³ A scan of Annual Environmental Watering priorities documents publicly available on the NSW Water for the Environment website highlights that only one (the Lachlan Valley) specifically mentions watering actions that address First Nations' objectives

(<https://www.environment.nsw.gov.au/topics/water/water-for-the-environment>)

¹⁴ 'Commonwealth Environmental Water Office Water Management Plan 2020-21, Commonwealth of Australia, 2020'. (see p. 190 for example)

<https://www.environment.gov.au/system/files/resources/fa59d94f-fc17-4391-a1e3-a8c3da947d26/files/water-mgt-plan-2020-21-chapter-3-12-river-murray-valley.pdf>

Connected Basin Environmental Watering Committee (SCBEWC), which allows for understanding and informal input on key water delivery decisions, in line with the guidance provided by FNEWG outputs.

Despite these positive milestones, it is still unclear in many cases how First Nations' inputs are factored into complex decision-making and trade-offs regarding environmental water use. In most cases, the MDBA and water holders are required only to 'have regard to' First Nations values and uses. This weak and opaque terminology can result in confusion and cynicism, with First Nations disappointed that plans and strategies do not necessarily need to reflect their substantive inputs. External reviews and inquiries have recommended improvements to the Basin environmental water planning framework that would strengthen the status of First Nations objectives. However, there has sometimes been reluctance to progress these. We note that the MDBA did not implement a clear recommendation from the Productivity Commission¹⁵ to include a specific secondary objective in the revised 2019 Basin-wide Environmental Watering Strategy that 'environmental watering should seek to achieve social or cultural outcomes, to the extent that environmental outcomes are not compromised'. While the MDBA committed to exploring the inclusion of the objective in the 2022 review of the Strategy, its omission means that the importance of First Nations outcomes in Basin environmental water planning remains unclear. Further, options for legislative amendments that would have strengthened provisions relating to First Nations watering outcomes and clarified obligations for basin jurisdictions were included in a 2020 external review of the Basin Plan Environmental Watering chapter¹⁶ (Chapter 8), but were not adopted in a final report by the MDBA.¹⁷ Strengthening of legislative and policy provisions is needed to ensure that requirements in key basin-level instruments keep pace with Nations' local level involvement, procedural rights and aspirations.

The Commonwealth Environmental Water Officer (CEWO) informed MLDRIN in April 2019 that it was committed to co-design a comprehensive First Nations Engagement Strategy that would ensure a more structured and broadly inclusive approach to ensuring input to its water planning. To date there has been no progress on this work. There is still a strong need for the CEWO to develop a more transparent and structured engagement approach so that all Nations are informed of options to participate and influence planning. There are some promising examples of direct

¹⁵ Productivity Commission 2018, *Murray-Darling Basin Plan: Five-year assessment*, Final Report no. 90, Canberra. Recommendation 11.1, p.50

¹⁶ Alluvium (2019) *External review of Chapter 8 of the Basin Plan*. Final report by Alluvium Consulting Australia for the Murray-Darling Basin Authority.

¹⁷ Murray Darling Basin Authority, 2020. Review of the Environmental Watering Plan, Draft Report.

collaboration between Nations and the CEWO, including an Environmental water delivery agreement with the Ngarrindjeri regional authority.¹⁸

MLDRIN and NBAN's submission to the recent Senate Select Committee on the Multi-Jurisdictional Management and Execution of the Murray-Darling Basin Plan¹⁹ provides additional detail on challenges and shortcomings in environmental water planning, as well as a set of recommendations for improving inclusion of First Nations values and objectives. A key recommendation made to the committee was that 'All Basin jurisdictions must establish adequately resourced, formal mechanisms to support First Nations' input into environmental water planning, as required under the NWI. These mechanisms should include support for research, cultural assessments and input to watering plans at a local scale, backed by formal obligations on agencies responsible for annual and long-term planning'.

Two reports prepared by MLDRIN for the FNEWG project also provide valuable information about capacity gaps and challenges facing Nations and recommendations for improved participation. These reports have been included as appendices to this submission.

Water Sharing and Water Allocation Plans

Plans that set out water allocation, security and sharing arrangements for Basin water resources are critical instruments that should give effect to the NWI requirements and secure water rights for First Nations. The 'Engaging Indigenous Peoples in Water Planning and Management' module prepared by Australian governments notes that '[q]uantifying the volume, flow and timing of water required to realise cultural outcomes is fundamental if Indigenous peoples' needs for water are to be met through water planning and management processes,' and identifies a number of approaches to improving water access through statutory water allocation plans including:

- Rules based approaches
- Water licencing arrangements and

¹⁸ Commonwealth Environmental Water Office and Ngarrindjeri Regional Authority (2015) *Environmental Water Delivery Agreement in relation to the delivery of environmental water to environmental assets in the Lower River Murray region, South Australia.*

<https://www.environment.gov.au/system/files/resources/3b3f1e09-3b50-4640-b205-08464e77aec8/files/nra-water-delivery-agreement.pdf>

¹⁹ MLDRIN and NBAN's joint submission can be viewed through the Committee's website: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Management_and_Execution_of_the_Murray_Darling_Basin_Plan/MurrayDarlingBasinPlan/Submissions

- Water for economic purposes including strategic indigenous reserves²⁰

The module also notes that: ‘water planners should take account of the possible existence of native title rights to water in developing water plans, and may do so by... ensuring appropriate water has been set aside to meet Indigenous needs in relation to water access and management in areas where native title rights to water have been recognised.’

Despite this clear and valuable advice, MLDRIN notes that progress against this aspect of the NWI requirements and guidance remains deeply disappointing. Water Sharing Plans (WSPs) in NSW, Water Allocation Plans (WAPs) in South Australia and Sustainable Water Strategies (SWSs) in Victoria are some key statutory plans. In some cases there has been active engagement of First Nations in the review and development of these plans²¹. Some plans also include principles, objectives and strategies to recognise and protect First Nations water-dependent values and outcomes.²² However, to the best of our knowledge few, if any, statutory allocation or water sharing plans in the Basin provide rules for the protection of culturally significant water dependent values or clear, secure or meaningful volumetric allocations of water for cultural purposes or even for the purposes of exercising limited Native Title rights to water²³. This points to a significant shortfall against the NWI requirements and the need to address a key area of unfinished business in water reform. First Nations water rights are still being marginalised in water allocation frameworks reflecting out-dated and restricted conceptualisations of these rights as pertaining to ‘traditional’ and non-consumptive purposes. Plans do not adequately identify or provide security for water allocations for First Nations use and also impose limitations and conditions that effectively restrict access.

In NSW the absence of volumetric allocations to satisfy Native title rights in WSPs remains despite a strong recommendation from the Natural Resources Commission in a 2019 review of the Barwon-Darling plan that the NSW Government should ‘identify Aboriginal water-related values, objectives and outcomes, and develop final

²⁰ Australian and state and territory governments (2017) Module to the National Water Initiative (NWI) Policy Guidelines for Water Planning and Management, Engaging Indigenous Peoples in Water Planning and Management.

²¹ For example The South Australian Government engaged with Traditional Owners through a recent review of WAPs (as part of the WRP preparation process) and the Victorian Government is committed to engage with Traditional Owner in review of SWSs.

²² For example, amended SWSs in NSW include Objectives, Strategies and Performance Indicators relating to First Nations water interests. The practical value of these provisions is unclear. WAPs in SA also include extensive description and recognition of First Nations water interests.

²³ WSPs in NSW provide a vague and circular definition, identifying water volumes required to satisfy Native Title rights only as ‘the water that may be taken in the exercise of native title rights’. WAPs in SA have lumped water available for native title purposes, along with stock and domestic rights under a ‘general purposes’ consumptive category.

agreed flow allocations in consultation with all relevant Aboriginal organizations, including traditional owners and Aboriginal Land Councils.²⁴ Similarly, the draft report to the assessment of the management of the 2020 northern Murray-Darling Basin first flush event conceded that there were no objectives, principles or targets relating to Native Title of cultural water rights guiding management of the significant ‘first flush’ event that occurred on the Barwon-Darling in February 2020. The assessment panel noted that integration of management rules for first flush events into WSPs would ‘require quantifying native title / cultural rights and developing reasonable use guidelines’²⁵. There is no program in place to address this requirement. We also note that a recently released NRC review of the Peel River WSP noted that:

‘Across the whole state, meaningful access to water for Aboriginal peoples has been precluded by concepts of water tenure and property rights, and the narrow definitions of cultural values and the use of water for ‘traditional purposes’ only. In the case of water sharing plans, this limitation is reinforced both as part of cultural water access licences, and under native title and other land-based rights and agreements’

These frank assessments by the NRC and other independent reviews highlight deficiencies in the NSW allocation framework and indicate that, if NSW WSPs are to deliver on their own objectives and the objectives of the Water Management Act they need to

- determine and identify flow allocations for the protection of Aboriginal values and uses and to satisfy Native Title rights and
- Address the limited and prohibitive provisions for water access under existing licence categories and process.

Similarly, in Victoria there are no flow allocations for the exercise of Native Title rights or Traditional Owner rights recognised in Section 8A of the Water Act 1989. The Victorian Government has committed to develop a ‘roadmap’ to achieving water access for First Nations for economic development purposes, in partnership with Aboriginal organisations. Implementation of this roadmap would necessarily include forms of transfer, recovery or re-allocation of water to First Nations. Such restorative actions would need to be reflected and, in some cases, enacted through state water instruments. MLDRIN is not aware of any process for the identification and inclusion

²⁴ NSW Natural Resources Commission (2019) *Final report: Review of the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012*. P. 12.

²⁵ Draft Report, Independent Panel Assessment of the Management of the 2020 Northern Basin First Flush Event, 2020. https://www.industry.nsw.gov.au/_data/assets/pdf_file/0020/314543/draft-report-iap.pdf

of First Nations water requirements (for economic development and other purposes) in statutory water sharing or allocation plans in Victoria.

MLDRIN's work as part of the Water Access for Traditional Owner Economic Development project has identified as yet unallocated and 'underutilised' water volumes in some regions in Victoria, which are sought by First Nations to support economic development, caring for country and environmental outcomes. The Victorian Government has undertaken some initial work on a state Unallocated Water Policy, which would determine processes for the management and potential transfer of unallocated water volumes. However, MLDRIN has not been provided with information on this policy since February 2020 and is unaware what, if any, provisions are being made for the transfer of specified water volumes to First Nations.

Some Water Allocation Plans (WAPs) in South Australia do identify water required to satisfy native title rights. However, they offer little security or clarity in terms of water available and how Native Title rights are protected in relation to other basic rights such as stock and domestic. The WAP for the River Murray Prescribed water course, for example, bundles water available for native title purposes, along with stock and domestic rights under a 'general purposes' consumptive category.²⁶ There is no identified volume for the native title component of this pool, raising questions about how much water is actually available to satisfy native title rights.

Basin governments' failure to include defined allocations for cultural purposes and for the exercise of rights defines under the Native Title Act in these plans highlights a key deficiency in the NWI requirements.

Water Resource Plans

Water Resource Plans are a key component of the Basin Plan, which require States to identify First Nations' objectives and outcomes relating to water resources, and have regard to a range of other matters. WRPs for Victoria, Queensland, South Australia and the ACT have been accredited by the Commonwealth Water Minister following assessment by MLDRIN and NBAN against the Basin Plan Chapter 10 Part 14 requirements. All plans identify objectives and outcomes for the management of water resources in the WRP area informed by consultation with First Nations. The detail of objectives and outcomes included in WRPs varies between jurisdictions. In

²⁶ Government of South Australia (2020), Water Allocation Plan for the River Murray Prescribed Water Course. [file:///Users/willmooney/Downloads/river-murray-wap-adopted-150420-plan%20\(1\).pdf](file:///Users/willmooney/Downloads/river-murray-wap-adopted-150420-plan%20(1).pdf) p. 93

some cases, a number of iterations and additional consultation activities were required before States could demonstrate compliance with the Chapter 10, Part 14 requirements. NSW has submitted all groundwater and surface water WRPs to the MDBA for assessment, up to a year past the original statutory deadline of June 30 2019.

Strategies included in the WRPs to address First Nations' objectives and outcomes range from broad principles of engagement to a re-commitment to existing policies and programs. WRPs have not instituted any substantive change to the management or allocation of water in the respective regions of the Basin. In many cases, there does not appear to be clear strategies for implementation of the objectives and outcomes identified by First Nations. This reflects the very weak procedural requirements in the Basin Plan.

MLDRIN notes that a critical deficiency in the NWI agreement and its implementation to date is that *water planning* processes and First Nations inclusion in those processes have not led to improved *water access*, as the as NWI section 52 intimates. Despite broad improvements in inclusion in water planning, substantive access to water resources has not improved. In fact recent research led by Griffith University indicates that, in some parts of the Basin, First Nations water ownership has actually declined over the last ten years.²⁷

This is clear evidence of the need for reform of the NWI requirements to address the economic and political barriers to water accesses, as well as just procedural requirements for inclusion and recognition.

Water resource development and infrastructure planning

The development and operation of water management infrastructure has profound implications for the protection and rejuvenation of water dependent cultural values and uses. Water management infrastructure development has detrimentally affected First Nations cultural traditions and connection to Country through alterations to flow regimes which have co-evolved alongside Aboriginal land use practices and science over tens of thousands of years. Major infrastructure works entail severe and lasting impacts on Country.

Two key examples of water infrastructure development and concerns regarding First Nations participation are the Sustainable Diversion Limit Adjustment Mechanism

²⁷ Lana Hartwig, Sue Jackson, Natalie Osborne (2020), 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession,' *Land Use Policy*, Volume 99, December 2020

(SDLAM) and NSW new dam proposals. A fundamental issue in both cases is the lack of commitment to adequate engagement and free, prior and informed consent.

MLDRIN has produced extensive submissions and advice detailing First Nations concerns about SDLAM supply measure projects. We are aware of significant concerns and opposition from affected First Nations regarding *all* Supply Measure projects.

In some cases, concerns and opposition to these projects is on the public record.²⁸ First Nations have highlighted concerns regarding the location, design and operation of Supply Measure projects and the likely impact on tangible and intangible cultural values. It is unclear what obligation project proponents have, to understand and address these concerns. First Nations feel marginalised from planning and governance processes. For example, Nations were dismayed in early 2020 when the Victorian Government referred a number of Supply Measure projects for assessment under the Federal EPBC Act, without informing affected Traditional Owner groups. Requirements under State cultural heritage legislation provide some checks, but archaeological surveys and site assessments alone cannot address all First Nations' concerns. There remains urgent concerns and deep suspicion regarding the development of Supply Measure infrastructure projects. Current engagement and planning processes are grossly inadequate to address these concerns.

In NSW a series of new dam projects have highlighted deficiencies in First Nations consultation. Despite an announcement that pre-construction works on the Wyangala Dam wall-raising project will commence in October 2020, the NSW Government has not undertaken any meaningful consultation with Wiradjuri and other First Nations. Traditional Owners have also highlighted concerns regarding poor consultation for the 'Macquarie River Re-regulating storage'. In fact, a Facebook event for consultation on the Macquarie River Re-regulating storage failed to identify First Nations in a list of organisations with a 'primary connection to the Macquarie River'²⁹

²⁸ Barkandji Native Title Group Aboriginal Corporation have made public statements regarding their concerns about the Menindee Lakes project, see: 'No River, No Talks' *Barrier Daily Truth*, 12th February 2020. Tati Tati Wadi Wadi Nation have also included a statement outlining their concerns and opposition to Supply Measure projects in content for the Northern Victoria Water Resource Plan (WRP). The State of Victoria Department of Environment, Land, Water and Planning (2019) *Victoria's North and Murray Water Resource Plan*. p. 258

(https://www.mdba.gov.au/sites/default/files/pubs/vic-north-and-murray-water-resource-plan-index-table-and-comprehensive-report-26-November-2019_0.PDF) concerns about the Menindee Lakes project, see: 'No River, No Talks' *Barrier Daily Truth*, 12th February 2020.

²⁹ <https://twitter.com/MLDRIN/status/1295540511231504384>

Refreshing the NWI

The issues paper has invited comment on the question How could a refreshed NWI help Indigenous Australians realise their aspirations for access to water, including cultural and economic uses?

MLDRIN strongly supports a review and amendments to the NWI to mandate more meaningful progress in First Nations water access and to ensure that the flagship national water agreement is setting ambitious benchmarks for jurisdictional performance. There is growing community understanding and support for the principles of improving First Nations water access, and even reallocating water to Aboriginal communities.³⁰ MLDRIN believes that many Australians have an expectation that governments should act to ensure that First Nations' values, uses, wellbeing and connection to Country are supported through the management and allocation of water resources. We believe there is a broad consensus that more should, and can, be done to ensure the NWI recognises the fundamental rights of First Nations.

A 'refresh' of the NWI Indigenous water requirements must be informed by the wealth of First Nations-led research and policy advocacy which has occurred since the existing requirements were developed.³¹ Foremost among this work is the landmark National Cultural Flows Research Project (NCFRP) water law and policy review.³² The NCFRP law and policy reform model maps out a comprehensive approach to ensuring Australian water law and policy is responsive to First Nations water rights and interests, as well as enabling the evolution and formalisation of knowledge systems and governance approaches. The NCFRP model identifies three fields of inter-dependent reform and progress: 1) water rights, 2) influence in water landscapes and 3) transforming foundations. Practical amendments to the NWI should be made in line with these categories.

³⁰ Sue Jackson, Darla Hatton MacDonald, Rosalind H. Bark (2019) 'Public Attitudes to Inequality in Water Distribution: Insights From Preferences for Water Reallocation From Irrigators to Aboriginal Australians'. *Volume 55, Issue 7 July 2019, Pages 6033-6048*
<https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2019WR025011>

³¹ Taylor, S., B. Moggridge, and A. Poelina. 2017. "Australian Indigenous Water Policy and the Impacts of the Ever-Changing Political Cycle." *Australian Journal of Water Resources* 20: 132–147.

³² National Cultural Flows Research Project (2018). *Cultural Flows - a Multi-Layer Plan for Cultural Flows in Australia: Legal and Policy Design*.
<http://culturalflows.com.au/images/documents/Law%20and%20policy.pdf>

Water rights

At the core of reforms needed to recognise First Nations water rights are provisions to support dedicated allocations of water for First Nations' use and benefit. The NWI should require all jurisdictions to develop mechanisms to re-activate First Nations water rights within the context of 'water justice' or restoring inherent rights that have been interrupted through colonisation and displacement of First Nations people. Providing allocations can be achieved through:

- Transfer or acquisition of water licences, entitlements and other water 'products'
- Protection of volumes and flows in water plans in recognition of TO rights and cultural rights
- Reservation of water volumes for later use or activation (such as Strategic Indigenous Reserves)

First Nations have been marginalised from water ownership and the various benefits of access to water resources. First Nations face ongoing financial, legal and other barriers to participation in water markets and in influencing decisions about how water should be allocated between different uses. Further, recent research highlights that there has actually been a decline in First Nations water ownership in some parts of the Basin: with almost one fifth of Aboriginal water holdings by volume lost over 2009–18 (at least 17.2 % in standardized terms) in the NSW portion of the Murray Darling Basin.³³ These stark figures reinforce the need for a bold policy direction from the NWI.

Advice from the former First Peoples Water Engagement Council and National Water Commission provided some practical options for providing First Nations water access. This guidance should be considered and expanded upon to inform amendments to the NWI.

A refreshed NWI should provide for:

- *A National-level funding model to address and advance water justice*
 - In many catchments, access to water rights can only be secured by 'recovery' or acquisition from existing entitlement holders. In order to address disparities and inconsistencies between state and the complexities of various water systems, a national-level funding model is needed to underpin equitable progress. The NWI should be the

³³ Lana Hartwig, Sue Jackson, Natalie Osborne (2020), 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession,' *Land Use Policy*, Volume 99, December 2020

vehicle for agreement on a First Nations water trust or fund with adequate, dedicated resourcing to address water justice on a National scale.

- *Measures to address the hidden costs of water ownership*
 - A national funding model must also include provision for supporting Nations to manage the costs of water ownership and address any technical and capacity barriers to fully realise the benefits of water access

- *First Nations to have first right of refusal on any unallocated water*
 - The NWI should mandate that any processes for the management and apportionment of unallocated water should include a first right of refusal to First Nations who have rights and cultural obligations associated with a given water source.

- *First Nations to have first right of refusal on treated and recycled water*
 - As states move to incorporate treated and recycled water into their water management frameworks, there may be opportunities to address First Nations unmet water demands. The NWI should mandate that any process for the distribution or licencing of treated and recycled water must prioritise First Nations rights and aspirations.

- *All water plans to include secure allocations or rules to protect flows for the purpose of Native Title rights and other recognised Traditional Owner rights*
 - A refreshed NWI must make clear the obligation that water plans should establish dedicated allocations or rules-based measures to secure water for the purpose of Native Title and other basic Traditional Owner water rights.

Influence in water landscapes

The NWI must also strengthen requirements for partnerships and power sharing arrangements to support First Nations influence in water landscapes. While there have been significant advances in First Nations participation and recognition of procedural rights in some states, a refreshed NWI must move beyond a model of 'inclusion' to one of genuine power sharing. Influencing water landscapes entails greater agency and authority for First Nations in a range of processes including:

- Planning and management arrangements for environmental water held by state and commonwealth water holders
- Planning and construction of water management infrastructure

- Protection and restoration of cultural heritage
- Land management planning that affects water landscapes
- Management and restoration of threatened species

Specific amendments to the NWI should include:

- *A requirement for legislative recognition of First Nations' procedural rights in the management of environmental water, and commitment to advance co-management or power sharing arrangements.*
 - MLDRIN's 2020-2025 Strategic Plan includes the objective 'Nations co-managing water held for the environment' with strategies 'Pursue agreements with all water holders and river operators (including the CEWO, VEWH, MDBA) to provide for co-management of held environmental water' and 'Build political and institutional support for co-management of environmental water'
- *A requirement for jurisdictions to fund First Nations to develop their own Country and Water Plans and set their own priorities, and include ongoing funding to participate in water management*
- *A requirement for jurisdictions to include First Nations' key water principles and language in all water management plans*
 - Water plans must contend with and support the unique knowledge systems, science and language of First nations relating to water.
- *A requirement for jurisdictions to address risks to culture and heritage (tangible and intangible aspects) arising from the use and management of water resources and establish formal roles for First Nations and agreed processes for developing and implementing strategies to address risks.*
- *A requirement that consultation for development of water infrastructure must conform to a standard of 'deep consultation', equivalent to a form of negotiation, and establish processes whereby First Nations may have the option to accept or oppose a proposed development that may impact on their community³⁴*

³⁴ See for example Secretariat of the Convention on Biological Diversity (2004) *Akwe:Kon*: Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities

- *A requirement for jurisdictions to provide secure and adequate resourcing for Traditional Owner led waterway assessments, objective setting and water planning.*

Transforming Foundations

Finally, the NWI should provide an enabling framework for the establishment of First Nations-led water governance models that are informed by Indigenous water principles and knowledge and embed language and cultural obligations. First Nations must be supported to active their roles as leaders of water management on Country. As Australian society evolves to embrace the leadership of First Nations, water policy must shift to embed this status and central role. Transforming the foundations of water management must be progressed by a recognition that current frameworks for allocation and management are the product of a colonial system and are premised on the abrogation of First Nations inherent rights relating to water and river Country.

Some options for the NWI refresh include:

- *A requirement that jurisdictions explicitly recognise and empower First Nations river management organisations and governance models wherever possible (e.g. Barka Water Commission, Martuwarra Fitzroy River Council)*
- *A requirement that all water management agencies enter into partnership agreements with First Nations to co-manage water on Country and;*
- *Establishment of a 'pay the rent' style funding model, using an environmental contribution levy-style percentage allocation from of water bills or water trade fees*