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MLDRIN Submission on the Restoring Our Rivers: Draft framework for delivering the 450 GL of additional environmental water.

MLDRIN welcomes the opportunity to provide feedback on the Draft Framework. This submission focuses primarily on the land and water partnerships program with some additional comments on other matters.

1. Land and water partnerships feedback

1.1. Introduction

First Nations speak of land and water as Country. Nations in the Murray Darling Basin have faced dispossession of their rights to own, use, develop and control the lands and waters in their traditional territory.¹ The unjust and illegitimate basis of Australia's water management framework has been powerfully evoked by the concept of *aqua nullius*. First Nations people in the Murray Darling Basin own less than 0.2% of available surface water entitlements.² Nonetheless, First Nations have maintained cultural connections, knowledge, practices and responsibilities for Country, and are increasingly asserting and activating their land and water rights. The Albanese Government has also committed to increasing First Nations ownership of water entitlements and participation in decision making in the Murray Darling Basin.³

Direct purchase and divestment to Traditional Owners offers a practical avenue for restoring land and water rights in the Basin, given the limitations of native title and other mechanisms.⁴ A

¹ Murray Lower Darling Rivers Indigenous Nations (MLDRIN) and Northern Basin Aboriginal Nations (NBAN), 2021, *Research into how much water is held by First Nations in and Traditional Owner Organisations in the Murray-Darling Basin in 2020: A First Nations Summary*.
https://www.mldrin.org.au/wp-content/uploads/2021/07/1342_MILDRIN-16pp-Report-Lana_v3-min-1.pdf

² MLDRIN, NBAN, 2021, *op cit*

³<https://anthonyalbanese.com.au/media-centre/labors-plan-to-future-proof-australias-water-resources-butler>

⁴ Given the colonial appropriation of land and water ownership in the Basin, the Native Title Act and the Traditional Owner Settlement Act (Victoria) can rarely return freehold land to First Nations ownership and generally only provide for minimal, non-consumptive water rights for 'traditional', domestic purposes.

significant investment in land and water acquisition is one step governments can take now to advance First Nations rights as outlined in the UNDRIP.

In principle, a land and water partnership program offers one pathway to advance First Nations rights to own and manage land and water on their Country. There are examples of successful projects, and interest in an expanded program from potential sellers, partners and First Nations entities. This submission highlights the need for adequate support and resourcing to enable a capability uplift that can position sovereign, self-determined First Nation entities to benefit from a land and water program and fulfill their cultural obligations to care for Country.

1.2. MLDRIN partnership capabilities

MLDRIN is a 100% Aboriginal member-owned not for profit, community controlled company with a decades-long track record of supporting Nations water rights and interests. MLDRIN would be willing to explore opportunities for partnerships with First Nations and other organisations to hold and manage land and water.

In considering such opportunities, MLDRIN would be guided by our member First Nations. MLDRIN's community controlled structure provides accountability to our membership, made up of representatives appointed by member Nations. This accountability ensures that any ownership or management role would operate within a framework of cultural authority, cultural governance and oversight.

MLDRIN could contribute to land and water partnerships through

- Land ownership: MLDRIN's company constitution and legal status allows for ownership of land and associated assets, and provides for direct accountability to members in a community controlled structure. MLDRIN could operate as a 'holding' body for land or water assets that are to be divested to Traditional Owner organisations, or as part of a partnership to hold and manage land in perpetuity.
- Water assessment and planning: MLDRIN has led application of water planning and assessment tools such as the Aboriginal Waterway Assessment (AWA) tool and Cultural Flows methodology. MLDRIN's industry-award winning⁵ AWA program has seen hundreds of Traditional Owners take part in water assessments and allowed First Nations to document water-related values, objectives and threats. MLDRIN could work

⁵ MLDRIN's Victorian AWA Program received the inaugural River Basin Management Society Award for Aboriginal and Torres Strait Islander Knowledge and Practice in Waterway Management in 2019. <https://www.rbms.org.au/awards-2019/>

with partners to apply the AWA and cultural flows planning methodologies to inform planning for land and water management.

- Collaboration and decision making: MLDRIN has led numerous projects bringing First Nations together to discuss shared priorities and make collective decisions. We have led hundreds of workshops and events covering system-scale planning for environmental water use, water access for economic development and water resource planning. Our experience in facilitating collaborative forums and workshops could support co-design of a land and water partnership program and assist First Nations and potential partners determine shared goals.
- Governance and project planning: MLDRIN has extensive experience delivering projects, managing budgets and developing policies and procedures to support successful programs. MLDRIN could provide support to Nations to develop proposals, produce budgets, undertake program evaluation and develop procedures.

MLDRIN would welcome the opportunity to elaborate on our capabilities through a detailed proposal and statement of relevant experience. Some MLDRIN Member Nations have requested support from MLDRIN to scope opportunities, develop proposals and partner in the holding and management of land and water.

1.3. Proposals and preparation

MLDRIN is aware of proposals for land and water acquisition that have been developed by First Nations, existing landholders and other interested parties. We understand that some of these proposals have been submitted as part of the current land and water program consultation.⁶ These proposals highlight strong and practical support for a dedicated land and water partnership program. However, it is likely that the submissions received in this round of consultation represent only the tip of the iceberg in terms of First Nations interests and aspirations. As discussed below, additional time and support would allow more First Nations to identify acquisition opportunities and potential partnerships.

An informal survey of MLDRIN Delegates and member Nations has also highlighted strong support for a land and water program. MLDRIN member Nations are broadly supportive of the concept as a pathway to activate their rights and meet cultural responsibilities. Many First Nations organisations would welcome the opportunity to leverage and build on existing land and water management activities, such as rangers programs, healthy country planning, water planning and assessment, cultural burning and conservation management. Nations foresee

⁶ For example, MLDRIN has seen proposals that highlight land and water acquisition opportunities at Werai Station and at a property near the Kerang Wetlands Ramsar site.

significant opportunities for restoring Country, sustainable tourism, cultural activities, healing and wellbeing.

First Nations, and their self-determined representative organisations should be empowered to co-design a land and water partnership program, through a shared decision making process consistent with Closing the Gap priority reform one. Given the diversity of water systems, land acquisition opportunities and First Nations across the Basin, consideration should be given to ensure *all* Nations can benefit from a land and water partnership program. In particular, land and water acquisition may offer unique opportunities for Nations whose Country is located above major storages or includes unregulated water sources, for example the Upper Murrumbidgee. First Nations in these areas may not be able to access or benefit from acquisition of water shares or entitlements in the major regulated rivers of the Southern Basin. Likewise, in the Northern Basin, where water rights are often only sold along with land, a land and water partnership program may be able to address barriers to First Nations water access.

- **Recommendation 1:** DCCEEW should determine dedicated funding and co-design the land and water partnership program with First Nations, and their self determined representative organisations, through a shared decision making process that ensures equity across the Basin.

It is also critical to point out that many First Nations have not had an opportunity to properly consider and investigate potential land and water partnerships opportunities to inform this scoping stage. Nations need time and support to identify opportunities and develop proposals to benefit from a program. Many First Nations organisations have strong relationships with regional NRM agencies, NGOs, landowners and private nature conservation bodies, but need time and support to consolidate partnerships. Support for Nations and their self determined organisations to develop detailed proposals and business cases for land and water partnerships would be a valuable investment. MLDRIN is aware of properties currently being offered for sale⁷ in the Southern Basin, which would merit strong consideration by First Nations if they could be supported to develop proposals.

- **Recommendation 2:** as part of scoping for a land and water partnership program, DCCEEW should provide support and advice for Nations to investigate acquisition opportunities, explore potential partnerships and develop detailed proposals.

⁷ For example, the currently listed property 'Prices's Run', adjacent to the Koondrook-Perricoota Ramsar site consists of 540 hectares with high biodiversity values and a 500ML water access license. See: https://www.raywhiterurallivestock.com.au/nsw/moama/3037036?fbclid=IwAR2q-D4skxUL_gLXs0IePmRRdoRoHfB7_W2VzuT8M80oO2CgtckzWkGJpFA_aem_AcqPBvmimdLeAuzPXTUpKDUO7w69q-O4a2VOLpt4DWEr67165-dXNhuiPkLMzC3v4wHHmjAVz9QlwKuBNdS9uW0K

The potential for a land and water partnership program also highlights the need for a capability uplift to enable First Nations to leverage existing land and water management skills and capitalise on new opportunities. While many Nations in the Basin have strong land and water management capabilities, Nations may need to scale-up their activities or develop new competencies to take on new opportunities. The funding model for a land and water partnership program would also need to account for costs and risks associated with land ownership and management. Beyond costs for purchase and transfer, secure, adequate funding would be required to cover infrastructure and maintenance costs, insurance and land/water management activities. A land and water partnership program must equip self-determined First Nations organizations for success.

- **Recommendation 3:** ensure that any funding model for a land and water partnership program provides targeted resourcing, support and advice for Nations and partner organisations to develop and scale-up capabilities to meet the opportunities offered.
- **Recommendation 4:** ensure that any funding model for a land and water partnership program addresses costs and risks associated with land ownership and management, to equip First Nations and their self-determined organisations for success.

1.4. Cultural flows and environmental outcomes

MLDRIN understands that any water entitlements acquired through a land and water partnership, as part of the Resilient Rivers program, would be transferred to the Commonwealth as held environmental water. This would entail restrictions on the way water is used and the outcomes that can be achieved. Water entitlements that are restricted to 'environmental' uses do not meet the Echuca Declaration definition of Cultural Flows, as they would not allow for self-determined use by First Nations. The consultation material provided by DCCEEW states that land and water partnership could "create opportunities for First Nations Peoples to own, access and benefit from cultural flows." Given the current program design and approach to water recovery, it is not clear how these benefits could be delivered.

- **Recommendation 5:** ensure consistent and accurate use of the term Cultural Flows in all consultation and communication material.

MLDRIN strongly argues that any water acquisition that takes place through land and water partnerships should provide for First Nations ownership of entitlements and First Nations self-determined use, consistent with the concept of Cultural Flows. This could be achieved by:

- Ensuring that First Nations organisations can hold water for the environment. MLDRIN understands from briefings provided by DCCEEW that it may be possible for First Nations entities to hold water entitlements that have been recovered to meet the Australian Government’s responsibilities under the Basin Plan. We note that the Victorian Government has also committed to recognise Traditional Owners as environmental water holder, by identifying barriers to Traditional Owner management of environmental water and considering any potential new legislative proposals.⁸
 - Ensuring that some, or all, water acquired through purchase is transferred to First Nations for their self-determined use as Cultural Flows. MLDRIN is aware that at least one proposal provided to DCCEEW as part of this scoping includes a commitment to donate 10% of water holdings to First Nations. A land and water partnership program *could* create opportunities for First Nations Peoples to own, access and benefit from cultural flows by requiring a share of all water purchased to be transferred to First Nations ownership, for self determined use. Supporting self determined use would contribute to First Nations social, economic and emotional well-being and align with Closing the Gap. A transfer of water to First Nations would also align with the Albanese Government’s election commitment to increase First Nations ownership of water entitlements.
- **Recommendation 6:** Identify barriers and genuinely pursue legislative⁹ reform to allow First Nations to hold environmental water recovered through land and water partnerships.
 - **Recommendation 7:** Ensure that all water acquisition through a land and water partnership program includes transfer of a share of water to First Nations for their self-determined use, as Cultural Flows.
 - **Recommendation 8:** Amend the program criteria to specify that land and water purchase offers must include a transfer of water to First Nations, for their self determined use.

First Nations have a direct interest in the improved health of Basin rivers and waterways. MLDRIN supports an approach to land and water partnerships that aligns with relaxing physical constraints to increase the deliverability of water across the Basin. If Basin governments are securing ownership or easements over land to address constraints, First Nations should be directly included and provided opportunities to hold and manage land.

⁸ <https://www.water.vic.gov.au/our-programs/aboriginal-water-program/water-is-life-roadmap>

⁹ MLDRIN’s submission on the Water Amendment (Restoring our River) Bill highlighted the need for reforms that would allow First Nations to hold and deliver environmental water to sustain and enhance their Country. Commitment to ongoing legislative and policy reform is needed to advance this outcome.

1.5. Potential criteria

MLDRIN is concerned that the proposed criterion relating to First Nations outcomes may not be consistent with the envisaged scope of the program. If water recovered through a land and water partnership program is to be restricted to environmental purposes only, the outcomes may not be consistent with enhancing First Nations self-determination or cultural economies. We strongly advise that the scope of the program should include providing First Nations water ownership and self-determined use, or Cultural Flows.

The proposed criteria could also be improved by strengthening and elevating the consideration of First Nations outcomes. Suggested improvements include:

- Include a requirement that land and water purchase offers must include a share of water to be transferred to First Nations ownership for self determined use (Cultural Flows)
- Include a requirement that all land and water packages must 1) identify the relevant First Nations people and self-determined organisations on whose Country the land occurs, 2) demonstrate the free, prior and informed consent of First Nations and 3) explain how relevant First Nations have been provided opportunities for involvement as partners.
- **Recommendation 9:** co-design the criteria with First Nations organisations, including MLDRIN, through a genuine partnership approach.

2. Framework for delivering the 450GL - other matters

2.1. Draft community adjustment assistance principles

The principles, and the approach to delivering adjustment funding must be consistent with the National Agreement on Closing the Gap. First Nations people are among the most disadvantaged community members in many Basin regions. First Nations are also well placed to lead development and diversification for sustainable regional economies and should be prioritised in the delivery of adjustment funding. Place based and co-designed approach to delivering community adjustment funding must be consistent with Closing the Gap Priority Reform One (“Formal partnerships and shared decision making”).

To ensure certainty and equity for First Nations, a portion of community adjustment funding should be dedicated for First Nations-led projects and activities.

- **Recommendation 10:** amend the draft community adjustment assistance principles, and set clear requirements for Basin State delivery partners, to ensure planning and delivery of community adjustment funding aligns with Closing the Gap priority reform one.
- **Recommendation 11:** dedicate a portion of community adjustment funding to First Nations-led projects and activities.

2.2. Resilient Rivers Program - opportunities for First Nations through infrastructure projects

There are significant opportunities to advance First Nations water ownership through water infrastructure projects delivered under the Resilient Rivers Program (RRP). Infrastructure projects provide an opportunity for Basin states to create water entitlements for Traditional Owners, while recovering water for the environment in compliance with agreed criteria.

The attached paper¹⁰, co-authored by MLDRIN and the former Victorian Department of Environment, Land, Water and Planning (DELWP) and presented to the Basin Officials Committee (BOC 87) in 2022, outlines a process whereby dedicated water savings from infrastructure projects under the Off-Farm Efficiency Program (OFEP) could be transferred to First Nations to advance Cultural Flows, without impacting existing entitlement holders. The paper also provides a valuable case study of how water savings for First Nations were achieved through the Lower Murray Water (LMW) Water Efficiency Project. The BOC paper highlights that:

“Allocating a negotiated share of water savings under OFEP projects to Traditional Owners provides upfront certainty on process and sets clear expectations for water users, stakeholders and communities. It also strengthens, and provides pathways for delivering, the commitments of Basin governments to Traditional Owners owning and managing water in the Basin.”

MLDRIN urges DCCEEW to review the BOC paper and case study and apply these learnings to the delivery of the RRP.

- **Recommendation 12:** review the BOC paper attached to this submission and determine an approach for applying the pathways and opportunities outlined to the delivery of the Resilient Rivers Program.

¹⁰ See Attachment 1: Progressing Traditional Owner Water Ownership in the Basin: A Case Study (Water Efficiency Projects)