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Murray Lower Darling Rivers Indigenous Nations (MLDRIN)

Submission on Consultation paper - Sustainable Water Use for Australia's Future

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1. Introduction

For over twenty years, MLDRIN has led advocacy for reform of Australian water law and policy to recognise the rights, interests and cultural responsibilities of First Nations. In 2007, MLDRIN produced the foundational Echuca Declaration, which defined the concept of cultural flows and has acted as a blueprint for addressing the impacts of colonisation on First Nations water rights. MLDRIN has contributed to successive reviews of national water reform, undertaken by both the former National Water Commission and the Productivity Commission. These reviews have consistently and unequivocally highlighted that recognition of First Nations water rights remains the key unfinished business of national water reform. We welcome the development of a new national water agreement. We strongly argue that a new agreement must address the foundational injustice on which the Australian water management framework is predicated, namely the dispossession of First Nations water rights. A new agreement must elevate and empower First Nations people to own, manage and make decisions about water on their Country.

We urge DCCEEW, the National Water Reform Committee and the Committee on Aboriginal and Torres Strait Islander Water Interests to consider previous detailed advice that MLDRIN has provided to the Productivity Commission on elements of a new national water agreement. Our submission to the National Water Reform Inquiry 2020 provided detailed advice about the progress of, and barriers to, water reform to recognise First Nations water rights. Our submission also provided guidance on how a refreshed National Water Initiative could help First Nations realise their rights for access to water, including cultural and economic uses. Drawing on the National Cultural Flows Research Project law and policy reform model, we suggested that a reformed national agreement should provide for the following:

Water Rights

- A National-level funding model to address and advance water justice
- Measures to address the hidden costs of water ownership
- First Nations to have first right of refusal on any unallocated water
- First Nations to have first right of refusal on treated and recycled water
- 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

Influence in water landscapes

- 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.
- A requirement for jurisdictions to fund First Nations and their preferred self determined organisations 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 (if desired) in all water management plans
- 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 community

Transforming foundations

- A requirement that jurisdictions explicitly recognise and empower First Nations river management organisations and governance models wherever possible (e.g. Barka Water Commission, Gomeri Gubba Giirr Buggay Water Board)
- 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 water bills, water trade fees and water licenses.

a. Implementation and accountability

A key consideration in the development of any new national agreement must be implementation and accountability. While the NWI has provided a high-level mandate for recognition of First Nations water rights, implementation across jurisdictions has been disparate, discretionary and has occurred largely without ground truthing by First Nations. Best practice principles to implement the agreement must be developed early and must be robust, reflecting real input from First Nations. Action plans must include tangible, measurable and time bound commitments backed by adequate resources. Critically, First Nations, and their self-determined entities, must be resourced to be engaged by each jurisdiction to contribute to and review action plans. Jurisdictions must be held accountable for progress against commitments made in these action plans.

Guidelines and information to support implementation of a new agreement should be provided early and should be actively promoted. MLDRIN has made use of the NWI Module *Engaging Indigenous People in Water Planning and Management* (2017).¹ This provides valuable and detailed guidance about how to operationalise the NWI elements relevant to First Nations. However the module was finalised more than a decade after the NWI was instituted and had not been widely circulated or taken up. Many water planners that we engage with do not know of its existence. Much greater emphasis and support must be provided to ensure understanding and uptake on guidelines, such as are contained in the module.

2. Consultation questions

Please see responses to the consultation questions below.

Considering the 8 objectives, what outcomes would you like to see from a new national water agreement?

Since the NWI was signed in 2004, major developments in advocacy, law and policy have highlighted how Australia's water management framework has excluded and dispossessed First Nations. The 2007 Echuca Declaration² documented the theft and expropriation of First Nations water resources, through the process of colonization, and asserted First Nations sovereign responsibility to care for water and water spirits in the Murray Darling Basin. In 2009, Australia became a signatory to the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which confirmed First Nations rights to own and manage water on their traditional

¹ <https://www.dcceew.gov.au/sites/default/files/sitecollectiondocuments/water/indigenous-engagement.pdf>

² MLDRIN (2007) *Echuca Declaration*, <https://www.mldr.org.au/wp-content/uploads/2018/07/Echuca-Declaration-Final-PDF.pdf>

territory, and maintain their water-related culture and customs. The flagship National Cultural Flows Research Project (2011-2019) mapped out law and policy reforms needed to address water injustice³.

The unjust and illegitimate basis of Australia's water management framework has been powerfully evoked by the concept of *aqua nullius*.⁴ Just as the invasion of this continent's land and natural resources were authorised by the false legal doctrine of terra nullius, so the development of Australia's water resources has been founded on the denial of First Nations inherent rights and cultural connection to water.

A new national water agreement must explicitly name and address this injustice, as a step towards building a *fair and legitimate* water management framework. The principle of fairness and water justice should be included across the draft objectives.

A new national water agreement should advance the reform pathways articulated through the NCFRP law and policy reform model: water rights, influence in water landscapes and transformed foundations. Critically, development of a new agreement must consider the need for integration *between* these reforms to meaningfully support First Nations outcomes. In a practical sense, key outcomes that our members want to see from a new agreement include:

- First Nations empowered to own and manage water in line with their rights and cultural responsibilities for Country.
- A significant increase in levels of water ownership by First Nations, contributing to improved social, cultural, environmental and economic outcomes for First Nations.
- First Nations empowered to plan, manage and monitor water on their Country, including environmental water held by government water holders.
- Implementation of relevant articles of the UNDRIP in law and policy of all jurisdiction, underpinning a just water management framework.
- Water management that upholds the status of rivers and waterways as ancestral beings and living entities that nourish communities and Country
- New and revised institutional and power sharing arrangements that recognise the status of First Nations as the original and ongoing guardians of water and

³ See MLDRIN, NBAN and NAILSMA (2018) *Cultural Flows, a Multilayer Plan for Cultural Flows in Australia: Legal and Policy Design*.

<http://www.culturalflows.com.au/images/documents/Law%20and%20policy.pdf>

⁴ See Virginal Marshall (2017) *Overturing aqua nullius: securing Aboriginal water rights*. Aboriginal Studies Press, Canberra

waterways.

Do you think the objectives reflect the future direction for water management in Australia?

As outlined above, the future direction of water management in Australia includes addressing the injustice and illegitimacy of water allocation and management regimes that have dispossessed First Nations. The recent, and long overdue, inclusion of matters relevant to First Nations in the Objects of the Water Act 2007 highlight the evolving future direction of water law and policy. A new national agreement must set visionary and enduring objectives that map a course towards overturning *aqua nullius*. The draft objectives can go much further to set this agenda by including stronger provisions to promote First Nations water ownership and management rights.

The draft objectives reflect a dominant settler-colonial management mindset, which views water and rivers as resources to be administered for optimised economic outcomes. This mindset has driven the degradation of river systems across the continent since colonisation. First Nations relational and ancestral connection to waterways offers an alternative perspective that upholds the status of water and rivers as sacred, living, ancestral entities with rights to flow and flourish.

As a general comment we note that the term ‘Culture’ and ‘Cultural’ is used throughout the draft objectives. In only one objective, this term is qualified by the inclusion of ‘Aboriginal and Torres Strait Islander’. We assume that the capitalised terms ‘Culture/Cultural’ are intended to refer to Aboriginal and Torres Strait Islander people's outcomes and knowledge. However, this is not clear from the content of the objectives. We suggest that the “Aboriginal and Torres Strait Islander” should be used to clarify that these references refer to First Nations outcomes and knowledge, rather than ‘Culture’ or ‘Cultural’ in a general sense.

How can we ensure that Aboriginal and Torres Strait Islander Peoples’ Cultural, spiritual, social, environmental and economic rights are considered under each of the objectives?

Below we have offered only preliminary comments about each draft objective, based on an initial review. We reserve the right to amend this feedback following further deliberation amongst our member Nations. These comments are not an endorsement of the current draft objectives. New or revised objectives should be developed if necessary. We strongly urge the Australian Government to resource a program of consultation and engagement with First Nations to seek their detailed views and free, prior and informed consent regarding the content of a new national agreement.

1) The safe and secure supply of water sustains our natural environments, economic development, Culture, and all Australian communities.

MLDRIN is concerned that the objective of 'safe and secure' water supplies may not be compatible with the needs of natural environments and First Nations cultural values. River systems are inherently dynamic and variable. Ecosystems and living culture cannot be nourished by 'secure' water supplies alone, but have evolved and are dependent on complex, variable and dynamic systems. The focus on making water supplies 'secure' risks privileging greater control and manipulation, rather than restoring living, dynamic systems. Regulation and secure management of water supplies has contributed to the degradation of dynamic river ecosystems. Further, it is important to note that First Nations do not have safe and secure water supplies. In fact First Nations have been excluded from water access and ownership.

2) A water management framework that is underpinned by national and international human rights declarations, which protect and prioritise Aboriginal and Torres Strait Islander Peoples' Cultural, spiritual, social, environmental and economic water interests and values.

In principle, this objective establishes a strong platform for action to restore First Nations water rights and interests. The objective should be strengthened by explicit reference to the United Nations Declaration on the Rights of Indigenous People (UNDRIP). The reference to 'national...human rights declarations' in the draft objective is also unclear. There is no Human Rights Act or charter at the National level. We assume this passage refers to human rights acts and charters at State level, however only some jurisdictions have such instruments.⁵ This objective could be strengthened by more explicit reference to relevant declarations, acts or charters.

The UNDRIP, in particular Articles 26 and 32, is of direct relevance to the management of water resources and the rights of First Nations people. The Australian Government is a signatory to the UNDRIP, but has to date failed to ensure its implementation, despite strong juridical indications that Commonwealth powers extend to the application of UNDRIP in domestic law and policy.⁶ There has been recent acknowledgement,

⁵ We note that Table 4 of the Insights Paper attached to the consultation draft refers simply to 'declarations', so it is possible that First Nations declarations, such as the Echuca Declaration, may be relevant here.

⁶ Law Council of Australia (2023) Submission to the Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous People in Australia. <https://lawcouncil.au/publicassets/fbfd761e-43fe-ec11-945c-005056be13b5/2022%2006%2024%20-%20S%20-%20Inquiry%20into%20the%20Application%20of%20the%20UNDRIP%20in%20Australia.pdf>

however, that governments must consider UNDRIP as part of the framework for managing water resources in the Murray Darling Basin. Recent amendments to the Water Act 2007 include a requirement that the 2027 review of the Water Act 2007 must identify opportunities [under the Water Act] to promote the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples.⁷ A renewed national water agreement should include an explicit objective to ensure that water management is underpinned by relevant articles of UNDRIP.

Best practice principles should direct jurisdictions to develop action plans that progress domestic implementation of relevant UNDRIP articles. These explicit references and directions are needed to ensure this objective is actionable.

3) Adaptive, responsive and interconnected water management frameworks that can deal with changing circumstances, including climate change impacts and risks, and changes in water availability and demand.

The objective should be amended to include a reference to 'fair' or 'just' water management frameworks. Water management frameworks need to account for First Nations as new water market entrants, with new water needs. The water management framework, in dealing with climate change risks and impacts, must be able to do so in a just or fair way that protects and prioritises First Nations values and communities. Responses to change and evolving risk must be framed by a normative commitment to justice and fairness.

4) Sustainable water use is supported by evidence-based decision making and the robust and coordinated use of science, data and Cultural knowledge.

Better inclusion of cultural knowledge is critical to good water management. This objective must be amended, however, to recognise that cultural knowledge is embedded in communities and First Nations people. Cultural knowledge cannot be 'used' as an abstract input to decision making. First Nations people must be supported and empowered to lead decision making through the activation of their cultural knowledge. This objective does not adequately recognise that inclusion of cultural knowledge can only be achieved through revised governance and power sharing arrangements that empower and properly resource First Nations to activate their knowledge.

⁷ Water Act 2007 (Cth), section 253

5) Effective and strategic decision making for major water infrastructure investment that achieves sustainable, optimised cost/benefit outcomes in terms of environmental, economic, Cultural and social needs over its lifespan, transparent to public scrutiny.

Water infrastructure development has and continues to impose significant impacts on First Nations water related values, interests and cultural obligations. A new agreement should afford the right of free, prior and informed consent to First Nations, in line with the principles of UNDRIP and consultation mechanisms outlined in the Akwé: Kon guidelines⁸. The draft objective does not address this fundamental right to free, prior and informed consent. Cost benefit analysis often does not account for First Nations unique, non-monetary values or the impact on these. Methodologies to include First Nations considerations in cost benefit analysis are not well developed. The draft objective in its current form does not account for these complexities.

6) Sustained community trust and confidence in government and their water agencies' conduct of water management.

We agree that trust and confidence is critical. First Nations often do not have trust in water management because governments do not do what they said they would do. Trust will be encouraged by greater accountability and improved power sharing arrangements.

7) Robust and transparent monitoring, reporting and evaluation of progress towards achieving water reform and management objectives.

We agree this is essential. First Nations have not been adequately supported to monitor outcomes of water management. Critically, First Nations cultural objectives cannot be monitored without First Nations people. In many cases, Traditional Owners are not even able to access waterways and private land to understand if cultural outcomes are being achieved. This objective could be strengthened by including a reference to empowerment First Nations to monitor, evaluate and report on objectives that matter to them.

⁸ The Akwé: Kon guidelines are voluntary guidelines for the conduct of cultural, environmental and social impact assessment 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. The guidelines were developed by the Conference of Parties to the Convention on Biological Diversity and have been adopted as a best practice model for consultation on water resource planning in the Murray Darling Basin. See <https://www.cbd.int/traditional/guidelines.shtml>

8) Sustainable water management through continued alignment with the intent and objectives of the 2004 Intergovernmental Agreement on a National Water Initiative.

How does your organisation use the current NWI and how has it been beneficial to you?

The current NWI objectives do not address First Nations rights and interests. The key elements 52-54 relate to Indigenous Access. Successive assessments by the National Water Commission and Productivity Commission have shown that implementation of the NWI objectives has been inadequate and inconsistent across jurisdictions. Put simply, the parties have not provided for Indigenous access to water resources. Nevertheless, the NWI has provided an important benchmark for policy development and advocacy for our organisation. We have used the NWI key elements to advocate for stronger approaches to water planning by Basin jurisdictions and stronger First Nations water policy. Our response to the Productivity Commission 2020 Water Reform Inquiry provides further detail on progress against the key elements.

What is the most important objective to your organisation for a new national water agreement and why?

As detailed above, draft objective 2 is specifically relevant to our membership. We support the inclusion of a stand-alone objective relating to First Nations outcomes. We believe that the UNDRIP rights framework should be explicitly identified as an underpinning guide for improved water management.