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Submission on the Productivity Commission National Water Reform Inquiry 2020, Draft Report

Murray Lower Darling Rivers Indigenous Nations (MLDRIN) welcomes the opportunity to comment on and provide further information to the Nation Water Reform Inquiry Draft Report.

Opening statement

MLDRIN acknowledges and appreciates that the Productivity Commission has recognised the absence of elements, objectives and provisions for First Nations and Traditional Owners in the original National Water Initiative (NWI). The Productivity Commission's recommendation to develop a new NWI element dedicated to Aboriginal and Torres Strait Islander peoples' interests in water and involvement in water management is welcomed, and long overdue. Some of the recommendations in the Draft Report go further than previous national reviews and inquiries, and this is encouraging.

Overall, however, MLDRIN considers that the Draft Report and its recommendations are not strong enough or significant enough to recognise or advance First Nations' water rights and interests. In preparing the Final Report, we strongly recommend that the Productivity Commission reconsider the substantial evidence and examples provided in MLDRIN's original submission responding to the Issues Paper of this inquiry (and attached to this submission).

We offer a number of overarching observations. First, a number of previous works by First Nations and Indigenous peoples are available that establish clear advice and practical options around recognising and activating First Nations' rights to access, own, manage and care for water. These include, for example, the Indigenous Peoples Kyoto Water Declaration (2003), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), the Garma Declaration (2008), the Echuca Declaration (2007, 2010), the First Peoples Water Engagement Council's Advice to the National Water Commission (2012), and outputs from the National Cultural Flows Research Project (2018). Some of these have been included in Table 1 of the Productivity Commission's Supporting Paper D (p. 22), but engagement beyond this appears quite limited, and does not seem to have strongly influenced the renewal advice. Others are not acknowledged at all. Overall, MLDRIN sees that the Draft Report insufficiently incorporates and builds on this substantial existing body of research, work and advice.

Second, the rich body of research that examines and analyses Indigenous water in/justices in Australia comprises the best available evidence, and there has been extremely limited engagement with this scholarship in the Draft Report. In particular, MLDRIN expected to see much greater engagement with works from leading First Nations water experts in Chapter 9 of the Draft Report (and Supporting Paper D), including, for example, Dr Virginia Marshall, Assoc Prof Brad Moggridge, Dr Anne Poelina, Prof Daryle Rigney and Grant Rigney. MLDRIN recommends that the Productivity Commission more seriously consider and take stronger direction from the wealth of leading research that is already available, as an important step in advance of establishing processes for co-designed policy.

Third, the Productivity Commission has a significant opportunity – and responsibility – to shape and inform the next tranche of Australia’s water reform and governance. In light of this, MLDRIN is disappointed to see that the Productivity Commission’s draft response has not adequately comprehended or responded to the colonial and structural context that underpin deep historic *and* contemporary First Nations water injustices (see Jackson et al. 2021), including ongoing water dispossession (Hartwig et al. 2020). This is evident by its reliance on upholding current water management frameworks, the continued separation of land and water, and the integrity of water markets without problematising how these very frameworks, their predecessors, and their underpinning assumptions are major contributors to ongoing injustice (Hartwig et al. 2020; Jackson 2017; Marshall 2017; Taylor et al. 2016). The Productivity Commission (and Australian governments) must grapple with, acknowledge and respond to the historical and ongoing processes of water theft, exclusion, and disconnection, and the associated trauma this creates for First Nations peoples (Hartwig et al. 2021).

As a specific example of the opportunity to shape water governance, MLDRIN requests that the Productivity Commission revise and significantly strengthen its recommendations on state commitments to increasing water access for Traditional Owners and First Nations to explicitly include water reallocations and hand backs. First Nations have long argued for the return of water rights to them in a form that supports their agency as decision-makers on water use. Indeed, this is central to the Echuca Declaration (2010), and MLDRIN’s recent work in Victoria (O’Donnell et al. 2021; see attached) shows that these demands are front and centre to water aspirations (see also Moggridge & Thompson 2021).

Despite these consistent and clearly articulated demands, MLDRIN has repeatedly encountered resistance from governments to allocate water to Traditional Owners, especially in fully or overallocated water systems. This relative unwillingness continues despite the fact that clearly identified pathways for water reallocation exist within current law and policy frameworks, without the need for significant water reform (see O’Donnell et al. 2021). As such, MLDRIN sees a clear role for a strong directive from the Productivity Commission to shift state and territory governments’ appetites for water reallocations.

MLDRIN’s final overarching concern is that the recommendations offered in our original submission to this inquiry have not been substantially addressed in the Productivity Commission’s Draft Report. The recommendations we compiled were informed by decades of research, engagement and investigation to identify the steps needed to advance water justice and restore First Nations peoples’ inherent rights. They are informed by our direct

engagement with Traditional Owners across the southern Murray-Darling Basin (MDB), collaborations with numerous state and Federal government agencies, and our years of work on water-related projects and programs. Therefore, we ask the Productivity Commission to more seriously consider and adopt these recommendations for national water reform in its Final Report. We argue that the Productivity Commission's advice can identify baseline reform recommendations that reflect the extensive scholarship, advocacy and position statements produced by First Nations over several decades, and which can be adopted and augmented through the work of the Committee on Aboriginal Water Interests.

In addition to these overarching comments, MLDRIN offers the following more detailed and specific observations and advice.

**Draft NWI Renewal Advice 3.1: Modernise the NWI goal &
Draft NWI Renewal Advice 3.2: Modernise overarching objectives &
Draft NWI Renewal Advice 3.3: Modernise objectives**

MLDRIN supports explicit inclusion of First Nations and Traditional Owners as rights holders in water. However, we note that this recognition must not be limited to Nations that have received native title determinations (or similar under relevant state legislation), and must explicitly include Nations that have not been formally recognised by state or territory governments.

The addition of a reference recognising the significance of water to First Nations in the overarching goal of the NWI is necessary and welcome. However, the wording presented in Draft NWI Renewal Advice 3.1, regarding “the importance of water to the lives” of First Nation people as ancillary or secondary to the primary pursuits of productive water use and improved river health. It presents recognition of First Nations water rights, interests and obligations as a kind of footnote to the real business of water management. The goal would be significantly strengthened by embedding an understanding of First Nations water knowledge, and a commitment to recognise First Nations water rights and interests, as a central concern of a national approach to water management. As such, MLDRIN suggests a change of wording in the modernised goal proposed in Draft NWI Renewal Advice 3.1 to state: “In committing to this agreement, the Parties recognise First Nations peoples’ reverence and responsibility for rivers and groundwater systems, and their enduring rights to manage and access water resources.”

MLDRIN also strongly supports the inclusion of climate change in the Refreshed NWI as a key future challenge. The decline in water availability not only poses significant risks to the health of Country and people, but it also increases the urgency for water reallocation to address the ongoing exclusion of First Nations and Traditional Owners from water ownership and management across Australia.

MLDRIN welcomes inclusion of a fourth “cultural” category in the modernised overarching objective in Draft NWI Renewal Advice 3.2, providing a “quadruple bottom line”. The term “cultural” is used as shorthand for outcomes arising from the unique connection for First Nations people with their Country. It may be advisable to qualify that by stipulating “First Nations cultural outcomes”.

Under the proposed revised objectives in Draft NWI Renewal Advice 3.3, MLDRIN also suggests amending the text for point A.4 to read: “Full implementation of this Agreement will result in... 4. secure and effective pathways to enable Aboriginal and Torres Strait Islander people to strengthen their influence in water planning and natural resource management that affect Country and access to water consistent with the 2020 National Agreement on Closing the Gap”.

Draft NWI Renewal Advice 9.1: Co-design a new NWI element dedicated to Aboriginal and Torres Strait Islander people’s interests in water and involvement in water management

As noted, MLDRIN is pleased to see the recommendation that a Refreshed NWI include a modernised goal, as well as an objective and element that relate to Traditional Owners’ interests in water. MLDRIN also supports the advice that these new inclusions should be co-designed with First Nations representatives, like the recently established Committee on Aboriginal Water Interests (CAWI). With leading First Nations water experts from around the country, CAWI has the capacity and potential to advance significant water reform across Australia, and benefits for First Nations people. However, a much clearer pathway to impact needs to be outlined for the work of CAWI, especially in shaping and designing the Refreshed NWI. At present, it is unclear who will carry the responsibility for implementing the recommendations of CAWI. There needs to be an in-principle commitment from all NWI signatories to adopt the outcomes of the co-designed process.

Relatedly, it should be expected that this co-design process would begin with a commitment from the Productivity Commission and Federal government agencies that the work will build on the best available evidence, including previous declarations, statements, and scholarship. Effective policy-making includes learning lessons from analyses of past and relatively recent government actions in this space, and we have provided a list of key texts at the close of this submission that offer such analyses.

Draft NWI Renewal Advice 9.2: Improve cultural outcomes using existing frameworks & Draft NWI Renewal Advice 9.3: Improve access to water for economic development

It is useful to explicitly acknowledge that First Nations have the right to use water for economic development (which was included in the Echuca Declaration, 2010), as this has been absent from Australian water policy for too long. However, it is inconsistent with First Nations’ cultural protocols to treat water for “cultural outcomes” and “economic development” separately (O’Donnell et al. 2021). The critical question here is whether First Nations have agency and decision-making power over how water is used. These two elements should therefore be combined, and strengthened, to include a recommendation to return control of water use to First Nations, via partnerships with environmental water managers and/or the explicit return of water rights to First Nations for them to manage for any purpose.

The Productivity Commission Draft Report does acknowledge that “Understanding of Traditional Owners’ aspirations [for water] has evolved, and it has become clear that cultural values include the potential for economic development” (p. 114). Further, the Draft

Report acknowledges Articles 25 and 26 of the UNDRIP, and that Indigenous peoples have the right to own, use and develop water resources. However, the right to self-determination underpins the whole UNDRIP, and this crucial factor has been missed in the Productivity Commission's Draft Report:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (Article 3, UNDRIP)

In other words, it is for First Nations people to freely self-determine their own water-related aspirations, including uses and outcomes, not governments.

Despite these acknowledgments and inclusions, the Productivity Commission confusingly treats "cultural" and "economic development" outcomes from First Nations water access and use separately in Draft NWI Renewal Advice 9.2 and 9.3. Moreover, the fact that Draft NWI Renewal Advice 9.3 leaves reallocation of water as optional and up to each state governments' own discretion, is deeply problematic and could be interpreted as paternalistic. The content and nature of these recommendations contradicts First Nations' water aspirations as recognised by the Productivity Commission in the same Draft Report.

MLDRIN's position is that these Draft Renewal Advice statements require amendment to better align with First Nations' well-established aspirations and demands. Again, *agency* or the ability to make decisions about water, must be the central issue underpinning recommended reforms. Put another way, the Productivity Commission's priority should be advancing water hand backs to First Nations people to own and manage independently, without uninvited government intervention or restrictions.

Importantly, pathways for this kind of water access already exist, and should be activated as a matter of urgency. MLDRIN's recent work in Victoria in partnership with the University of Melbourne identifies and explores four key water access pathways for Traditional Owners that already exist (O'Donnell et al. 2021). These are presented in detail in the Part 4 of the attached *Cultural Water for Cultural Economies Report*, but briefly are:

1. Increased use of **existing water rights**, by amending these rights to make them fit for purpose. An example is the section 8A water right under the *Water Act 1989* (Vic) which permits water to be taken for personal (domestic) and stock uses from lands that Indigenous people have rights to under the *Traditional Owner Settlement Act 2010* (Vic) (see also O'Bryan 2019). At present, none of the eligible Traditional Owners in Victoria are using this right to access water, indicating that it is not fit for purpose and requires reform. Native title rights to water are a broader example here (see Duff 2017).
2. Transferring **unallocated water** to First Nations. Although some water systems in Australia are fully or over-allocated (such as the MDB), there are some volumes of water that are considered available for use but currently are unallocated. Following this pathway led to Victoria's first ever water hand back to Traditional Owners (the

GunaiKurnai Land and Waters Aboriginal Corporation) in March 2021 (see McDonald & O'Donnell 2020).

3. **Water reallocation** via the water market or other agreements. In the MDB, the only pathway for substantive surface water access for Aboriginal people is water reallocation. This can be achieved via the water market, and the Commonwealth Government has committed \$40 million to acquire water for Aboriginal people in the MDB.
4. Treated, fit-for-purpose **recycled water**. Recycled water can be used to substitute for existing water extractions from rivers (which then enables this water to be transferred to Traditional Owners), or the rights to use the recycled water can be transferred directly to the Traditional Owners. This is not an optimal solution, but both options were of interest in some cases in Victoria.

Although identifying these pathways also revealed barriers to progressing Aboriginal water access, these pathways are broadly applicable across other Basin states.

Traditional Owners and First Nations have consistently expressed their scepticism about governments' commitments to advancing water reforms, policies and decisions that are aligned with their aspirations, especially when it comes to handing back substantial water resources. Such concerns have been repeatedly raised in the media (see list of *Sydney Morning Herald* articles at the close of this report), and were also widely shared by participants in the *Cultural Water for Cultural Economies Report* (see Part 7). These concerns emphasise the urgency for the Productivity Commission to act boldly and use this NWI Refresh as an opportunity to action reforms that will commit state governments to progress water hand backs to First Nations people. Further, directives or mechanisms to reallocate water will help Australian governments achieve the new Closing the Gap inland water interests targets that are currently in development.

Information Request 13.1: How could a refreshed National Water Initiative ensure that major water infrastructure investments most effectively promote the aspirations of Traditional Owners and protect Aboriginal and Torres Strait Islander people's heritage and cultural values?

Australia is currently experiencing a crisis in cultural heritage protection. Cultural heritage protection laws are manifestly inadequate, and this is being reflected in the current Warragamba and Wyangala Dam proposals. All water infrastructure should be required to avoid, minimise and mitigate any impacts to culture and heritage, both tangible and intangible. MLDRIN urges the Productivity Commission to link this information request to existing cultural heritage review processes under way in each state and territory, as well as at the Federal level. There is a real opportunity for the Productivity Commission to require water management (including infrastructure) to be formally assessed under heritage protection laws, and there should be a strong recommendation from the Productivity Commission to require all jurisdictions to address the existing weaknesses in their laws, including the poor connection between water laws and cultural heritage protection laws.

MLDRIN's recommendation in our submission to this Inquiry's Issues Paper on this matter was that a refreshed NWI should include "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."

Establishing a standard of "quadruple bottom line" assessment for any new water infrastructure projects is essential. Such assessments would need to consider the cumulative and downstream impacts of new infrastructure on First Nations culture and heritage (not just the immediate impact at the project footprint). MLDRIN is aware that options assessment frameworks for new infrastructure programs in NSW include First Nations cultural "criteria" for consideration of impacts. Applying conventional options assessment or cost-benefit analysis approaches to determine impacts of infrastructure development on cultural outcomes can be problematic, due to limited data, culturally sensitive information and the need for extensive community involvement.

Critically, the development of new water infrastructure must include protocols centring First Nations as decision makers and procedures for seeking the free, prior and informed consent of affected First Nations. A process of deep consultation, where Nations are supported with the information, resources and decision-making power to make informed choices is needed.

The Akwe:Kon Guidelines are an international standard 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 First Nations communities (Secretariat of the Convention on Biological Diversity, 2004). The Guidelines were agreed by the Conference of the Parties to the Convention on Biological Diversity. The Guidelines suggest a ten-step process for impact assessment of proposed development including:

- Establishment of effective mechanisms for Indigenous and local community participation, including for the participation of women, the youth, the elderly and other vulnerable groups, in the impact assessment processes;
- Establishment of an agreed process for recording the views and concerns of the members of the indigenous or local community whose interests are likely to be impacted by a proposed development;
- Establishment of a process whereby local and Indigenous communities may have the option to accept or oppose a proposed development that may impact on their community;
- Identification and provision of sufficient human, financial, technical and legal resources for effective Indigenous and local community participation in all phases of impact assessment procedures;
- Establishment of an environmental management or monitoring plan (EMP), including contingency plans regarding possible adverse cultural, environmental and social impacts resulting from a proposed development;

- Identification of actors responsible for liability, redress, insurance and compensation;
- Conclusion, as appropriate, of agreements, or action plans, on mutually agreed terms, between the proponent of the proposed development and the affected indigenous and local communities, for the implementation of measures to prevent or mitigate any negative impacts of the proposed development;
- Establishment of a review and appeals process.

These Akwe:Kon Guidelines provide useful guidance on the kinds of steps necessary to support free, prior and informed consent and ensure the cultural impacts of new infrastructure projects are understood and mitigated. The guidance should be adopted as a standard in any new water infrastructure development processes and incorporated into Australian legislation.

MLDRIN also strongly supports the extension of culturally responsive principles such as the quadruple bottom line (and Brad Moggridge's (2021) "quintuple bottom line": cultural, spiritual, social, economic, and environmental) to all water planning, use and management. However, we argue that the best way to achieve this is via strong support for Nations' self-determination and sovereignty, including ownership of water.

Finally, attached to this submission is MLDRIN's submission to the NSW's "Inquiry into the Rationale for, and impacts of, new dams and other water infrastructure". This offers further comments and concerns of relevance to the Productivity Commission's Information Request 13.1.

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Other important materials for consideration – a good starting point and not exhaustive

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Attachments

- 1.** MLDRIN's original Submission on the Productivity Commission National Water Reform Inquiry 2020 Issues Paper
- 2.** *Cultural Water for Cultural Economies* report
- 3.** MLDRIN's submission to NSW's Inquiry into the rationale for, and impacts of, new dams and other water infrastructure