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National Water Reform Public Inquiry – Issues Paper Murray Lower Darling Rivers Indigenous Nations (MLDRIN) submission

Thank you for the opportunity to comment on the Productivity Commission Issues Paper prepared for the Inquiry into progress with the reform of Australia's water resources sector.

We welcome this opportunity to comment on the Issues Paper and address specific questions framed by the Commission. For simplicity, our comments are organised in line with the structure and questions included in the Issues Paper.

We look forward to being able to elaborate on these points in further direct consultation, leading up to the release of the final report in December 2017.

About MLDRIN

The Murray Lower Darling Rivers Indigenous Nations (MLDRIN) is a confederation of Sovereign First Nations from the Southern part of the Murray Darling Basin (MDB). The group currently includes Delegates from 24 Nations across Victoria, NSW, the ACT and South Australia.

Our core work includes:

- Advising the Murray Darling Basin Authority (MDBA) on all matters relevant to Traditional Owners and Aboriginal people in the Southern Murray Darling Basin, in particular, the implementation of the Basin Plan
- Undertaking projects and having an active role in Natural Resource Management and water planning
- Providing a forum for our member Nations to keep informed, deliberate on issues and provide feedback and advice to decision makers across all levels of government
- Advocating for our member Nations' rights and interests in land and water, specifically to progress the recognition of Aboriginal water rights and Cultural Flows
- Providing leadership and capacity building for our member nations

Context

2017 marks an important year in the evolution of Australia's approach to dealing with the water rights of Aboriginal people. In November, we celebrate the ten year anniversary of the *Echuca Declaration*: a ground-breaking statement, prepared by united Aboriginal Nations from along the Murray River, that defined the concept of cultural flows and has generated significant momentum for reform. MLDRIN recognises that the concept of cultural flows has made a powerful and valuable contribution to the public conversation about water management in this country. The concept has been recognised in policy and legislation at the State and Commonwealth levels. MLDRIN reiterates the definition of cultural flows as articulated in the Declaration and affirms the commitment of our member Nations to pursue this objective.

Cultural flows are defined as: 'water entitlements that are legally and beneficially owned by Indigenous Nations of a sufficient and adequate quantity and quality, to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations'. This is our inherent right.'¹

2017 is also significant because, this year, key findings from the National Cultural Flows Research Project (NCFRP), will contribute further to establishing practical pathways to achieve cultural flows. The NCFRP will develop and trial modelling methodologies and watering strategies that can provide a rigorous evidence base for potential future cultural flow needs assessments. The project will also recommend policy, legal and institutional changes that will enable the implementation of Cultural Flows for the economic, social and cultural benefit of Indigenous communities.²

MLDRIN believes it is critical to build the institutional and public support for further reforms that may stem from this ground-breaking research. There is a clear need to maintain the momentum on recognition of Aboriginal water rights in Australia, address continuing shortfalls in compliance with NWI principles and explore further options for reform.

Responses to the Issues Paper

Part 4 Assessing progress

¹ MLDRIN, 2007. *Echuca Declaration*, Part 1, Article 1. p. 2

² National Cultural Flows Research Project, Research Overview. 'Component 4' and 'Component 5' http://www.culturalflows.com.au/~culturalflowscom/index.php?option=com_content&view=article&id=17&Itemid=126

Developing and operating effective mechanisms to achieve Indigenous objectives through water planning remains a key area of unfinished business in national water reform.

We note that key findings of the National Water Commission's (NWC) 2014 national reform assessment remain fundamentally applicable in 2017, namely:

- Implementation of practical change remains variable, with most jurisdictions as yet not making specific provision for water access for Indigenous people
- While progress has been made in incorporating Indigenous social, spiritual and customary objectives into water plans, there has been no material increase in water allocation for Indigenous—social, economic or cultural purposes.
- Many jurisdictions assume that water for environmental purposes will achieve Indigenous cultural and spiritual objectives, and even though there may be substantial commonality, this is rarely investigated and demonstrated in practice.
- There has been very little take-up of provisions for Indigenous water use through cultural access licences in NSW and Indigenous water reserves contained in some Queensland water plans
- The knowledge and funds required to participate in the broader water market are still beyond the reach of most Indigenous communities.³

The 2014 assessment also provided direction on addressing shortfalls relating to Aboriginal participation in water planning. These points remain pertinent in 2017.

In its 2014 assessment, the NWC:

- Highlighted its ongoing support for the allocation of water entitlements to Indigenous Australians to facilitate economic development.
- Urged all Australian governments to ensure continuity and ongoing momentum for representative agencies to successfully integrate Indigenous water needs into water planning frameworks.
- Highlighted the need for continued and renewed support for Indigenous representation in water planning and management decisions, so that Indigenous voices can continue to be heard in the national water debate.⁴

³ National Water Commission (2014), *Australia's water blueprint: national reform assessment 2014*

⁴ National Water Commission (2014)

Progress

There has been notable progress towards achieving NWI outcomes and actions relating to Indigenous access and management in some jurisdictions since the previous NWC assessment. Some State and Territory governments within the MDB have initiated improvements through new structures, roles, funding and inclusive decision-making. However, vital elements of an effective 'pathway' for the realisation of Aboriginal rights and aspirations in water remain missing. Unfortunately, there has also been retrograde action in New South Wales, contributing to major concerns regarding that State's ability to complete consultation requirements included in the Basin Plan.

Progress in Victoria is most notable given the launch of the *Water for Victoria* plan in 2016. The plan includes funding and makes provision for:

- Establishing an Aboriginal Water Unit and Aboriginal Project Control Group within the Department of Environment, Land, Water and Planning (DELWP)
- Employment of Aboriginal Water Policy Officers
- Investment in local projects to identify water related cultural values
- Establishment of a 'roadmap' for access to water for economic development.

South Australia has also taken steps to better define a pathway for Aboriginal objectives to be incorporated into water planning. Key progress includes:

- Development of a country-based planning approach
- Support for individual and multi-Nation meetings to discuss water planning requirements and inputs
- Improved funding for Aboriginal engagement staff working through the Department of Environmental Water and Natural Resources and in Aboriginal organisations

In the Australian Capital Territory, there has been positive progress since 2016, despite earlier shortfalls in engagement. Workshops and cultural assessments of local waterways have built more positive relationships between the Environment and Planning Directorate and local Traditional Owners.

At the Commonwealth level, MLDRIN maintains ongoing, constructive engagement with the MDBA, specifically around Aboriginal inclusion in the development of water resource plans, environmental water planning and evaluation of Basin Plan impacts. Forums for MDBA staff, Basin state water planners and Aboriginal representatives have helped to clarify roles and

responsibilities in water resource planning. The MDBA have collaborated with MLDRIN and the Northern Basin Aboriginal Nations (NBAN) on research and engagement projects to gather information and communicate Aboriginal people's perspectives to government.⁵ However, these projects have not necessarily contributed to practical outcomes or policy changes that benefit Aboriginal people.

Ongoing Challenges

While MLDRIN welcomes the progress noted above, there is still considerable improvement and effort required, in all jurisdictions, to realise effective pathways to achieve Aboriginal rights, objectives and aspirations in water planning.

Key challenges include:

- Positive policy commitments and improved frameworks are important, but implementation takes time and reforms mentioned above are already facing delays and hurdles. Funding and policy improvements must be backed by long-term commitment to demonstrate success and build community confidence.
- Developing and implementing methodologies that allow for translation of Aboriginal values and priorities into specific water planning inputs remains a challenge. Defining flow volume and timing that achieve Aboriginal objectives is a complex exercise. We note that the recently released Module to the National Water Initiative Policy Guidelines for Water Planning and Management highlights 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.'⁶
- Addressing the need for formal approaches, and decision support systems, to allow for input of cultural values and priorities to environmental water management and delivery.

⁵ See for example: *Our water, our life: An Aboriginal study in the northern basin*. Murray–Darling Basin Authority, Canberra, 2016. https://www.mdba.gov.au/sites/default/files/pubs/Aboriginal-sociocultural-survey-report_0.docx https://www.mdba.gov.au/sites/default/files/pubs/Aboriginal-sociocultural-survey-report_0.docx

⁶ Government of Australia (2016), *Engaging Indigenous People in Water Planning and Management*. Module to the National Water Initiative (NWI) Policy Guidelines for Water Planning and Management. p. 15.

- Addressing barriers to entry to the water market. Even if objectives for Aboriginal water access are clearly defined, the financial cost, infrastructure requirements and technical complexity of accessing the water market are an effective barrier to Aboriginal participation.
- Addressing the ‘water literacy’ gap within Aboriginal communities. Aboriginal people have been marginalised from water planning until recent decades and significant work is required to build expertise and confidence to participate on a level playing field with other stakeholders.
- Responding to the lack of consideration of impacts on Aboriginal cultural values and outcomes arising from amendments to sustainable diversion limits (SDLs) through the Northern Basin Review⁷ and SDL Adjustment Mechanism.⁸

Recent regressive changes in NSW illustrate some of the ongoing challenges to achieving NWI objectives and actions. While the establishment of the Aboriginal Water Initiative (NWI) within NSW DPI Water had been identified as establishing a benchmark in good engagement⁹, a ‘change management plan’ implemented in 2016 has resulted in severe cuts to Aboriginal identified staff¹⁰ within the AWI and a significantly reduced capacity to undertake direct engagement with Aboriginal communities. MLDRIN has written formally to the NSW Water Minister and NSW Premier to outline the concerns of our membership including:

- Impacts of cuts to Aboriginal staff on NSW’s ability to undertake consultation and meet the requirements for development of water resource plans
- Lack of inclusion of Aboriginal people in Stakeholder Advisory Panels (SAPs) for WRPs¹¹
- Lack of consultation and inclusion of generic Aboriginal values, objectives and issues in Status and Issues Papers for NSW WRPs.
- Failure to respond to repeated requests for meetings with DPI Water Staff to address these issues

⁷ MLDRIN, Basin Plan Amendments submission. February 2017. http://www.mldr.in.org.au/wp-content/uploads/2013/06/MLDRIN_NBR_Submission.pdf

⁸ Correspondence from Russel James, MDBA Executive Director Policy and Planning to Darren Perry, Chair – MLDRIN, 25 January 2016. Unpublished. Available on request.

⁹ National Water Commission (2014) p. 31.

¹⁰ Niall Blair MLC, correspondence with Rene Woods (MLDRIN) 7 March 2017. Unpublished. Available on request.

¹¹ As of March 2017, NSW has invited Traditional Owners to nominate delegates for SAPs

While a dialogue has now been established with DPI Water on some of these concerns, MLDRIN wishes to highlight the impact that political change, funding cuts and fluctuating management priorities can have on the implementation of NWI-compliant policies and processes.

Recent consultation and decision-making processes associated with proposed amendments to the Basin Plan further illustrate the challenges faced by Aboriginal people in having our interests and aspirations recognised in water planning.¹²

We wish to stress that, while some positive progress is underway in some jurisdictions, there are still significant challenges to be addressed before Aboriginal people can enjoy the benefits of effective mechanisms that respond and give effect to our rights, objectives and aspirations.

Developing Future Reform priorities Policy Goal, Framework and assessment criteria

As stated above, we believe there is still significant progress required to meet the objectives and actions of the NWI in relation to Aboriginal water rights. In formulating future reform priorities, we urge the Commission to ensure that the overall policy goal, preliminary framework and assessment criteria provide for a consideration of the unique rights, interests and challenges relating to Aboriginal people's involvement in water resource management.

The overall policy goal identified at page 8 of the Issues Paper should address the issue of equity or fairness in water use and allocation. To date, water allocation and sharing arrangements determined via state entitlement frameworks and market mechanisms have resulted in very limited participation of Aboriginal people in water ownership.¹³ Aboriginal people's interests represent an unmet demand on the water resource and there are significant barriers to entry for Aboriginal people into the water market.¹⁴ Evolving approaches to best practice in water governance highlight that 'using the market to ensure that water is allocated to the "highest and best" use has intrinsic social implications'¹⁵ and that unresolved questions of social justice

¹² MLDRIN, Basin Plan Amendments submission. February 2017. http://www.mldr.in.org.au/wp-content/uploads/2013/06/MLDRIN_NBR_Submission.pdf

¹³ W.S (Bill) Arthur (2010) *The Murray-Darling Basin Regional and Basin Plans: Indigenous water and land data*. Murray Darling Basin Authority, Commonwealth of Australia. MDBA Publication No 20/12

¹⁴ Jackson, S. 'Enduring and persistent injustices in water access in Australia' in Anna Lukasiewicz (et al) (eds.) *Natural Resources and Environmental Justice*, CSIRO, pp.121-132, 2017.

¹⁵ Martin, P. (2016) 'Creating the next generation of water governance' *Environmental and Planning Law Journal* (Volume 33 Part 4) pp. 388-401

must be considered, alongside 'economics and the environment' to support a genuine triple bottom line approach.

If these issues cannot be addressed, then the water entitlement and allocation framework will continue to reproduce inequitable outcomes (winners and losers). In order to support the identification of reform priorities that address this evolving consideration, we urge the Commission to augment the overall policy goal with a reference to equity, fairness or distributive justice.

Similarly, the framework and assessment criteria (Issues Paper p. 9) should be supplemented by the inclusion of an equity consideration. We welcome the focus on transparent and inclusive processes for determining allocations and sharing of water. However, transparency and inclusion alone fail to account for disparities of power, influence, expertise and financial capital that are driving inequitable distribution of water resources.

We urge the commission to include an objective and associated assessment criteria, within the framework, that addresses the evolving recognition of social equity considerations as a critical factor in water governance.

5. Water Resource Management

Recognising Indigenous values

MLDRIN welcome's the Commissions request for information: *How can the interests and needs of Indigenous people be better accommodated and represented in water planning processes?*

We note that there has been extensive research on this topic. In 2016 MLDRIN released a discussion paper, *Ensuring equity in the development and assessment of water resource plans*¹⁶, which outlines our Membership's perspectives and key research. A copy is attached to this submission. The focus of the Discussion Paper is on the principles of procedural, distributive and representative justice.

- Procedural justice is concerned with making and implementing decisions according to fair processes that ensure "fair treatment." In this context it relates to the way in which engagement and consultation with Aboriginal people is carried out.

¹⁶ Murray Lower Darling Rivers Indigenous Nations (MLDRIN) (2016). *Ensuring equity in the development and assessment of water resource plans*. Discussion Paper. http://www.mldrin.org.au/wp-content/uploads/2013/06/MLDRIN_WRP_DiscussionPaper_May2016.pdf

- Distributive justice is concerned with giving all members of society a "fair share" of the benefits and resources available. In this context it relates to the content of water plans and the way they contribute to equitable allocation of water resources.
- Representative justice is concerned with the inclusion of historically disenfranchised or under-represented communities in decision-making structures and hierarchies. In this context it relates to the inclusion of Aboriginal people in decision-making roles relevant to water planning.

We note that the recently released *Module To The National Water Initiative (NWI) Policy Guidelines For Water Planning And Management - Engaging Indigenous Peoples In Water Planning And Management*, also provides strong guidance, based on relevant research, regarding appropriate principles for inclusion of Aboriginal interests and needs in water planning.

We contend that, while *principles* for ensuring the accommodation and representation of Aboriginal people in water planning processes are relatively well developed, the challenge is now in putting principles and best-practice into effect. This includes refining and implementing methodologies to identify Aboriginal interest and needs, securing funding and access to water and achieving policy and legislative reform to underpin progress.

Practical examples of steps required to ensure that Aboriginal needs and interests are better accommodated and represented include:

- Explicit and long-term policy commitments from all level of government, including genuine commitment to acknowledge and address the impacts of marginalisation from water resource use and development
- Integrated models of participation in water planning (from on-ground project level to Board, departmental and higher decision-making level)
- Adequate, recurring funding to support participation and secure positions for Aboriginal-identified staff
- Long-term support for capacity building, expertise and entrepreneurship in Aboriginal communities
- Research partnerships and research led by Aboriginal organisations (including research into quantifying Aboriginal water needs, achieving Aboriginal environmental outcomes, as well as the development of business cases for economic development opportunities)
- Providing special dispensation for Aboriginal access to unallocated water in relevant systems (including creation of Strategic Indigenous

Reserves to support future access and use - consistent with NWC Guidance¹⁷⁾

- Providing adequate funding for Aboriginal people and organisations to acquire water for economic development purposes, in fully allocated systems (consistent with NWC Guidance¹⁸⁾)
- Developing institutional and governance arrangements for co-management of environmental water¹⁹⁾
- Addressing the limited land base of Aboriginal communities and the lack of adequate infrastructure to utilise existing water rights

There are a number of active research projects and field studies that will support better inclusion of Aboriginal people in local water planning as well as providing further guidance on improved participation. Localised projects involving Traditional Owners and water planners offer an effective way to establish pathways for engagement and positive outcomes, especially when underpinned by higher-level policy commitments to ensure that projects findings are implemented.

Environmental management

MLDRIN supports opportunities to achieve 'shared benefits' from the delivery of environmental water. Environmental water can be used to achieve cultural outcomes in some cases. However environmental water holdings cannot be relied upon to support the full suite of Aboriginal values and aspirations. MLDRIN uses the terminology of 'Aboriginal Environmental Outcomes' to differentiate between the cultural outcomes of environmental water delivery, and benefits derived from Aboriginal ownership of water entitlements, or cultural flows.

There is still much work to do to refine approaches to incorporating Aboriginal environmental outcomes into decision-making about the use of environmental water. Consultation mechanisms, such as Environmental Watering Advisory Groups (EWAGs) in NSW allow for some input, but many do not have Traditional Owner participants. Localised projects and cultural mapping can allow Aboriginal values and priorities to be incorporated into the planning framework through seasonal watering proposals and environmental water management plans. 'Co-management' of environmental water holdings (see dot points above) offers the additional benefit of supporting Aboriginal

¹⁷ National Water Commission (2012) Position Statement: Indigenous Access to Water Resources.

¹⁸ National Water Commission (2012) Position Statement: Indigenous Access to Water Resources.

¹⁹ See for example, the Environmental water delivery agreement between the Commonwealth Environmental Water Holder and Ngarrindjeri Regional Authority.

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

organisations' capabilities and experience in water planning and delivery. In Victoria, the recently announced commitment to appoint an Aboriginal Commissioner to the Victorian Environmental Water Holder will help to advance Traditional Owner input into State-wide planning for environmental water delivery.²⁰

A remaining gap is the development of formal criteria and decision support systems to guide priority setting for environmental water planning and delivery, in order to achieve cultural outcomes. Developing and testing such approaches is a key ongoing task for environmental water managers.

The MDBA continues to work with MLDRIN and NBAN on developing approaches to incorporate Aboriginal cultural values in the Basin Annual Environmental Watering Priorities. Case studies of previous watering events are being used to build greater understanding of Aboriginal environmental outcomes, but it is not expected that the Priorities will identify specific targets for Aboriginal environmental outcomes until 2019-20 Priorities document.

7 Achieving reform

Should further water reform be pursued through an improved NWI?

The NWI has been critical in providing a mandate for the recognition of Aboriginal rights and aspirations in water planning in Australia. However, implementation of reform within jurisdictions has been driven by effective advocacy, research and engagement by Aboriginal people and organisations.

A strengthened NWI will provide invaluable support for Aboriginal people working to ensure an equitable share of the benefits accruing from water reform and development of water resources. In its 2014 report, the Independent Panel charged with reviewing the *Water Act 2007* (Cth) identified the NWI as an appropriate framework for addressing Aboriginal requests for greater statutory recognition of water rights. The Panel found that 'that a national approach, through the National Water Initiative, is required to deliver on the aspirations of all Indigenous peoples relevant to water.'²¹

The Panel, in its report, further highlighted key challenges to the achievement of Aboriginal aspirations; namely the barriers to access faced by Aboriginal people in fully allocated systems, where the allocation of water resources is restricted to current entitlement holders under water planning instruments with

²⁰ <https://www2.delwp.vic.gov.au/boards-and-governance/board-vacancies>

²¹ Report of the Independent Review of the Water Act 2007, Commonwealth of Australia 2014. p. 6

long lifespans.²²

The NWC's 2013 *Review of Indigenous Involvement in Water Planning* mirrored this perspective:

'Little progress has been observed in the allocation or licensing of water for Indigenous social, economic, spiritual or cultural purposes... Indigenous needs for water in over-allocated catchments are still not accounted for in water planning, and a gap remains in the actual provision of water to Indigenous people to be managed by them.'²³

An improved NWI could help to address these challenges by mandating best-practice approaches, consistent with National Water Commission advice and recent reforms in some States. For example, in its 2012 position Statement on Indigenous access to resources the NWC urged all governments to 'implement approaches to provide water for Indigenous economic development, so that mechanisms exist to support Indigenous enterprises and related business opportunities.' The Commission specified effective measures including 'the creation of a fund to acquire appropriate water rights' in fully allocated systems and 'alternative approaches such as Strategic Indigenous Reserves... set aside in water planning processes,' in systems not fully allocated.²⁴

Recent reforms and developments in the State of Victoria highlight options for improvement. The allocation of \$5 Million to establish a 'road map' towards Aboriginal access to water for economic development provides practical impetus to filling a critical gap. An improved set of NWI actions, which stipulate reforms needed to establish viable roadmaps to address key remaining gaps and challenges, will help drive reform in this key area of 'unfinished business'.

We urge the Commission to continue to engage with jurisdictions and relevant stakeholders to progress practical changes and improvements to the NWI that will strengthen pathways to access to water for Aboriginal people. MLDRIN looks forward to providing further practical advice and relevant research to support improvements.

²² Report of the Independent Review of the Water Act 2007, Commonwealth of Australia 2014. p. 6

²³ *A review of Indigenous involvement in water planning*, National Water Commission, 2013.

²⁴ National Water Commission (2012) Position Statement: Indigenous Access to Water Resources.