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## **Murray Lower Darling Rivers Indigenous Nations (MLDRIN)**

### **Supplementary submission to Royal Commission into the Murray Darling Basin.**

Dear Commissioners,

Thank you for the opportunity to provide further comments for your consideration, as part of the Royal Commission. This supplementary submission largely covers proposals for amendments and improvements to the Water Act 2007 and Murray Darling Basin Plan.

1. These submissions are made in addition to earlier submissions made by MLDRIN to the Royal Commission.

#### **Amendments to the Water Act and Basin Plan**

##### *Participation, recognition and protections very limited under Water Act and Basin Plan*

2. Scope for indigenous participation in water resources management and for the protection of First Nations' rights and interests in water resources in the MDB is very limited under the Water Act and the Basin Plan. MLDRIN has made reference to these points in its earlier submissions.

##### *Inconsistency with international obligations*

3. MLDRIN has also submitted that the current legislative provisions are substantively inconsistent with Australia's international obligations under the Biodiversity Convention and the Ramsar Convention:
  - a. They are not directed to the subject, status of and benefit of First Nations' communities directly in the use and management of water-related biodiversity, including for example the cultural, social, economic and spiritual conditions of and outcomes for First Nations;
  - b. They establish weak procedural standards for indigenous participation in water resources decision-making and fall short of standards of robust involvement (including First Nations' approval and co-management) that are required under international obligations.
4. In the practical and legal absence of native title to water in the MDB, water management under the Water Act and Basin Plan will be the principal national

statutory scheme for recognition and exercise First Nations rights and interests in waters on traditional Country.

*First Nations' relationships to water special and distinctive*

5. First Nations in the MDB maintain their special and distinctive relationship to rivers, wetlands and other waters in the MDB.<sup>1</sup> This is an expression of a distinctive sovereign (juridical) authority.<sup>2</sup> First Nations' rights and interests in respect of water should proceed on the basis of this distinctive relationship and authority. The Water Act and Basin Plan should be amended to give effect to this relationship and authority.

*A new Part for the Water Act concerning First Nations*

6. A new Part should be incorporated into the Water Act 2007 relating to recognition and First Nations' (indigenous) rights and interests in waters of the MDB and First Nations' participation in water resources management.

*Statutory facts underpinning new Part*

7. Under this new Part, certain statements of fact should be enacted, drafted in the form of 'statutory facts' similar to those under section 21(2)(a) of the Water Act 2007. These 'statutory facts' include:
  - a. The relationship of First Nations to, and authority over, waters (water resources) of the MDB is distinctive. The Basin Plan should be amended so as to acknowledge, respect, maintain and promote this fact.
  - b. Under law and custom observed by First Nations waters are living beings and are to be treated accordingly. Ancestral beings live in and are created by waters. Laws and customs intrinsic to First Nations include obligations attached to waters. The health and integrity of waters is central to the well-being and vitality of First Nations' peoples, culture and authority. The Basin Plan should be amended so as to acknowledge, respect, maintain and promote this fact.
  - c. The capacity for First Nations within the MDB to exercise traditional and cultural obligations and connections in relation to waters is limited and constrained under native title. The Basin Plan should be amended to acknowledge this fact.

*Policy and principled basis of new Part*

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<sup>1</sup> As to the legal framing of this language, see UN Declaration of the Rights of Indigenous Peoples (2007), Article 25; Charter of Human Rights and Responsibilities Act 2006 (Vic), sub 19(2).

<sup>2</sup> See eg Echuca Declaration (2009); cf. Uluru Statement from the Heart (2017)

8. The policy basis of this Part should include obligations on the Crown to act with honour and in good faith, recognising First Nations' processes of self-determination,<sup>3</sup> and to promote reconciliation and co-existence of sovereign authorities.

*Expanded constitutional basis for Water Act*

9. The constitutional basis for the Water Act should be expanded to include section 51(xxvi) of the Constitution but only so far as it benefits and is not adverse to First Nations peoples.

*Water resources planning to be subject to 'deep consultation'*

10. Water resource plans made under the Water Act and Basin Plan must be prepared subject to 'deep' consultation with First Nations. This includes preparation subject to a duty to consult on and accommodate First Nations rights and interests. 'Rights and interests' should encompass the existing concepts of objectives and outcomes based on uses and values, but extend also to law, custom, heritage, traditions, practices, obligations, knowledge or innovations maintained or observed communally by First Nations (whether or not they have been modified since colonisation) and that relate to water resources in the MDB.

*Water resources need to support native title*

11. The Water Act should be amended to require Basin States or other relevant authorities to manage Basin water resources in such a manner so as to give effect to, further or enable (as the case may be) benefits, interests and rights recognised under native title or achievable under a native title claim.

*Water resource plans to design and deliver cultural flows*

12. Water resource plans must include a program, to be implemented over the life of the WRP, that designs and delivers cultural flows, being controls over water resources sufficient to improve the spiritual, cultural, environmental social and economic conditions of First Nations within the WRP area.

*Amended definition of 'relevant international agreement'*

13. The concept of 'relevant international agreement' should be amended to 'relevant international instruments' and include expressly the UN Declaration on the Rights of Indigenous Peoples.

*Ramsar sites to be subject to co-management*

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<sup>3</sup> Compare the framing of Canadian constitutional and common law policy. See also *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic)

14. The Water Act should be amended to give clearer and stronger protection to Ramsar sites, including requirements within the management arrangements for Ramsar sites for co-management with First Nations where relevant based on a collaborative program for such co-management.