

Submission in response to

Delivering the Murray-Darling Basin Plan

prepared by Environmental Justice Australia

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Submitted to: The Department of Climate Change, Energy, the Environment and Water (DCCEEW)

A. Introduction and summary

1. Environmental Justice Australia (**EJA**) is a public interest environmental law practice, based in Melbourne and undertaking work across our areas of expertise throughout Australia. We provide legal advice and support to the community on public interest environmental issues, advocate for better environmental laws, and provide legal education to the community on environment matters. We act primarily for community organisations, Traditional Owners groups and NGOs on matters concerning environment and natural resources law and policy.
2. EJA welcomes the Government's commitment to deliver the Murray-Darling Basin Plan in full. The purpose of this submission is to highlight, at a high-level, EJA's key recommendations to deliver the Murray-Darling Basin Plan to achieve ecological outcomes and environmental justice for First Nations communities within the Murray Darling Basin.

B. Recommendations

3. We have had the benefit of reading the submission made by Environment Victoria and support all of the recommendations advanced in that submission.
4. We make the following specific recommendations:
 - (a) The Federal Government must respond comprehensively, and in full, to all recommendations made by the South Australian Royal Commission¹ and provide adequate reasons if any recommendations are not intended to be implemented.
 - (b) The Federal Government should compel Basin States and Territories to fully investigate and progress the implementation of constraints relaxation measures to deliver and enhance natural flows and water recovery.
 - (c) The Federal Government and relevant Basin States must recognise, and as a matter of priority confirm abandonment of, failing Sustainable Diversion Limit Adjustment Mechanism (**SDLAM**) projects. The Federal Government must commence buybacks in targeted water basins to address the resulting shortcomings in water recovery for the environment.
 - (d) The review process and implementation of the Basin Plan must involve meaningful consultation with First Nations communities and proper consideration of Traditional Owner aspirations for country.

Comprehensively respond to the South Australian Royal Commission Report

5. In 2019, the South Australian Royal Commission into the Murray-Darling Basin Plan released its report calling for a complete overhaul of the Basin Plan. The report made 44 recommendations to improve the Basin Plan, in order to achieve the objects and purposes of the *Water Act 2007* (Cth) (**the Water Act**).

¹ Bret Walker, Murray-Darling Basin Royal Commission (Report, 29 January 2019) 71-75 ('*SA Royal Commission Report*').

6. Importantly, the Royal Commission found that the current Sustainable Diversion Limit (**SDL**) and SDLAM are unlawful² and in determining the environmentally sustainable level of take (**ESLT**) the MDBA failed to act on the best available scientific knowledge contrary to s 21(4)(b) of the Water Act.³ This should be the starting point for any review Basin Plan.
7. The Royal Commission concluded that the Water Act “provides a unique and sound framework within which to pursue the implementation of the Basin Plan, but, as with any complex process, must be the subject of continuous review and, where necessary, reform. With some readily achievable adjustments to the current governance arrangements, driven largely through legislative amendment, and provided the political will exists, necessary improvements will be achievable in the ongoing implementation of the Basin Plan. Those steps are likely to be essential to the task of rebuilding trust among Basin communities and stakeholders which have arisen, in part at least, due to failures by the MDBA to exercise good governance.”⁴
8. We refer specifically to the following recommendations made in the Royal Commission Report relating to the SDL and SDLAM:
 - (a) “New determinations of the ESLTs, and SDLs for both surface water and groundwater that reflect those ESLTs, should be carried out promptly. Those determinations must be made lawfully — that is, according to the proper construction of the Water Act as outlined in Chapter 3. [...]”⁵ (**Recommendation 1**)
 - (b) “The SDLAM should be modified so that:
 - a. To the extent that it incorporates provisions that are unlawful, those provisions should be repealed. This includes those parts of the Basin Plan that purport to allow adjustments to the SDL arising from unimplemented supply measures, such as sec 7.20(2).
 - b. There must be full disclosure in relation to the implementation of supply measures. The MDBA and Basin States should publish all relevant documents in relation to project design, risk assessment and ecological outcomes, and all material relevant to the [Basin Official Committee’s (**BOC**)] oversight of project implementation.
 - c. Any adjustment to the SDL arising from supply measure projects must be based on empirical observation of only those projects that have been completed and implemented. Reliance should not be placed on the highly uncertain Ecological Elements Scoring Method.
 - d. All supply measure projects must be assessed to determine whether they pose any environmental risks. No supply measure project that poses environmental risks should be implemented unless and until those risks are

² Ibid 25, 64 [12.1], 710.

³ Ibid 54 [5.4] and [5.5].

⁴ Ibid 699.

⁵ Ibid 71.

appropriately mitigated having regard to ESD and the precautionary principle. The Basin environment must not be subject to an uncontrolled experiment in order for less water to be recovered for the environment in the short-term.

- e. Any so-called reconciliation cannot wait until 2024. A review should be conducted immediately with reference to the monitored observations of the impacts of implemented projects and the research of the scientific community. Regard must be had to real-world environmental equivalence to the greatest extent possible, and not be a repeat of the narrow modelling undertaken in 2017.”⁶ (**Recommendation 5**)
- (c) “Future water recovery for the environment, including the 450 GL, should be purchased through buyback. This requires repeal of the 1500 GL cap on buybacks in sec 85C of the Water Act.”⁷ (**Recommendation 8**)
- (d) “Before any change to SDLs may be lawfully considered, the ESLT must be properly determined based on the watering requirements for floodplains. The MDBA must not rely only upon any change to [baseline diversion limits (**BDLs**)] proposed by States as a basis to increase SDLs.”⁸ (**Recommendation 30**)

Urgently prioritise constrains relaxation measures

- 9. The 36 SDLAM projects include 23 infrastructure construction projects, five constraints relaxation measures and eight rule change and system enhancement projects. Constraints relaxation refers to a range of measures including flood easements on private land and modification or adjustment of physical infrastructure to enable flows onto floodplains and enhance connectivity within the river system. State governments committed to implementing constraints relaxation measures under the Basin Plan, however little progress has been made despite the current June 2024 deadline.⁹
- 10. The Royal Commission Report confirmed that without the removal of constraints to the flow of sufficient water in the river systems:
 - “achieving so-called enhanced environmental outcomes will either not happen, or will result in limited outcomes”¹⁰; and
 - “enhancement of the environmental outcomes listed in subsec 86AA(3) of the Water Act and Sched 5 of the Basin Plan is unlikely to be achieved, or at least fully achieved.”¹¹

⁶ Ibid 71-72.

⁷ Ibid 72.

⁸ Ibid 74.

⁹ Ibid 60 [8.2]; ‘Project progress – adjusting limits’, *Murray Darling Basin Authority* (Web Page, 22 November 2022) <<https://www.mdba.gov.au/basin-plan/sustainable-diversion-limits/sustainable-diversion-limit-adjustment-mechanism>>.

¹⁰ Ibid 60 [8.1].

¹¹ Ibid 61 [9.1].

11. In its response to the Royal Commission Report, the Murray Darling Basin Authority (**MDBA**) agreed with both of these propositions.¹² The MDBA also agreed that more progress should have been made towards the implementation of relaxed constraints, as well as supply and efficiency measures, in the context of the June 2024 deadline. The MDBA encouraged all Basin States to accelerate work on the implementation of these measures.¹³
12. Since the MDBA's response in 2019, Basin States have made little progress towards the implementation of constraints relaxation measures. The main barriers to the implementation of these projects have been identified as resistance from landowners and stalled negotiations, as the current scheme requires the voluntary co-operation of those whose land will be impacted.¹⁴
13. It is uncontested that constraints relaxation measures are critical to achieving environmental outcomes under the Basin Plan. The Federal Government should appoint an independent panel to oversee negotiation processes with landowners to secure necessary easements to deliver these projects within reasonable timeframes, noting the original deadline of June 2024. In the event that those negotiations are unsuccessful, the Federal Government should oversee the compulsory acquisition of land.
14. As observed by the Royal Commission:

“[m]ajor infrastructure projects often involve the compulsory acquisition of property, on the basis they are one example of government action felt to be in the interest of the public at large. The removal of constraints as part of the implementation of the Basin Plan falls well within any sensible definition of a major infrastructure scheme. For progress to be made with landowners and others who will be impacted by constraint easing or removal, it is likely that the process will have to become compulsory in the national interest. This means, of course, an appropriate acquisition and compensation scheme will need to be put in place. Such a scheme should reflect the well-known concept of ‘just compensation’, and provide for mediated or arbitrated outcomes.”¹⁵
15. Constraints relaxation measures must be implemented before supply measures that are awaiting environmental assessment or construction, for example the Victorian Murray Floodplain Restoration Project (**VMFRP**). The VMFRP proposes to use infrastructure to reengineer nine floodplains along the Murray River in Victoria. Such a staggered approach to the implementation of the Basin Plan is consistent with the findings of the Royal Commission, that “the ability for some supply measures to achieve their modelled outcomes is either highly or wholly dependent on the full implementation of the five constraints measures proposals. [...] This greatly jeopardizes the ability of the package of supply measures to operate as supposedly intended, achieve its maximum benefit and thereby achieve or constitute environmental equivalence.”¹⁶

¹² Murray-Darling Basin Authority, *MDBA response to the South Australian Royal Commission* (MDBA Publication No 06/19, February 2019), 28, 30.

¹³ *Ibid* 28.

¹⁴ *Ibid* 61 [8.3].

¹⁵ *SA Royal Commission Report*, above n 1, 60 [8.4].

¹⁶ *Ibid* 310.

16. Concerns have been raised by multiple submitters in the Victorian environmental assessment processes for the Belsar-Yungera, Hattah Lakes North, Vinifera and Nyah VMFRP projects that environmental assessment documentation for these projects has not considered the impacts of constraints relaxation projects.¹⁷ This is of particular concern because incorporating the impact of constraint relaxation measures in project development could result in a reduction of destructive and costly artificial river engineering. Such engineering brings with it a raft of environmental impacts, including to fauna and native vegetation.
17. In relation to the delivery of constraints relaxation measures, we refer to the recommendation of the Royal Commission that “[a] properly funded, compulsory scheme for the removal or easing of constraints should be implemented.”¹⁸ (**Recommendation 7**)

Abandon failing SDLAM projects and commence buybacks in targeted water basins

18. The Federal Government and relevant Basin States must acknowledge, and factor into Basin Plan delivery, that many SDLAM projects will not be delivered in the form originally proposed, by the reconciliation date or at all. These projects include the NSW Menindee Lakes Project and Yanco Creek Modernisation Project.
19. It is unavoidable that the fact that no VMFRP projects have yet received environmental and other requisite approvals means that these projects will not be delivered by 30 June 2024. The Victorian Water Minister has confirmed that four VMFRP projects, proposed to deliver 60 GL of water back into the system, will not be completed by the 2024 deadline.¹⁹ It has been reported that work has now halted on the Guttrum-Benwell, Gunbower, Lindsay Island and Wallpolla Island projects.²⁰
20. The Federal Government must abandon failing SDLAM projects and commence water buybacks in targeted water basins to recover the equivalent amount of environmental water.

¹⁷ See, for example, Environment Victoria, Submission No 19 to the Victorian Murray Floodplain Restoration Project Standing Inquiry and Advisory Committee, *EES Central package - Hattah Lakes North and Belsar-Yungera* (14 November 2022) 11 [32], 16-18 [50], 23 [60]; Fenner School of Environment and Society (ANU), Submission No 17 to the Victorian Murray Floodplain Restoration Project Standing Inquiry and Advisory Committee, *EES Central package - Hattah Lakes North and Belsar-Yungera* (11 November 2022) 3-6; Friends of Nyah-Vinifera Park, Submission No 21 to the Victorian Murray Floodplain Restoration Project Standing Inquiry and Advisory Committee, *EES Central package - Hattah Lakes North and Belsar-Yungera* (12 December 2022) 10, 13, 17.

¹⁸ *SA Royal Commission Report*, above n 1, 72.

¹⁹ Warwick Long, ‘Victorian government puts hold on Murray-Darling Basin Plan projects’, *ABC News* (online, 20 April 2023) <<https://www.abc.net.au/news/rural/2023-04-20/victorian-government-hold-murray-darling-basin-projects/102247494>>.

²⁰ Fiona Lloyd, ‘Concerns as Victorian water projects halted’, *Shepparton News* (online, 24 April 2023) <<https://www.sheppnews.com.au/news/concerns-as-victorian-water-projects-halted/>>.

Meaningfully incorporate Traditional Owner aspirations

21. The implementation and development of projects, legislation and policy applying to the management of the Basin must be developed with First Nations communities and informed by Traditional Owner aspirations for country.
22. As just one example of the failings of the current system of river regulation in this regard, the Royal Commission found in support of the Murray Lower Darling Rivers Indigenous Nations' assessment that consultation failings in relation to the SDLAM "deprived First Nations of an opportunity to provide their informed views not only on individual projects, but on the system-wide impacts of a 605 GL reduction in recovery."²¹
23. Recent reports confirm that some Victorian Traditional Owners consider that the VMFRP are "being planned on First Nations' Country without our consent... [and] will entail major and lasting alterations to some of our most sacred and sensitive areas of Country."²²
24. The United Nations Declaration on the Rights of Indigenous Peoples²³ must guide the Federal Government in ensuring primacy of Traditional Owner views and aspirations for planning and decision-making in relation to the Murray-Darling Basin.
25. Additionally, in Victoria, the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) requires the Victorian State Government to act in accordance with the Guiding Principles set out in that legislation, which include working together in good faith, provision of benefits including cultural benefits to Traditional Owners and Aboriginal Victorians and shared commitment to self-determination.

C. Conclusion

26. References to particular recommendations from the Royal Commission Report in this document are not intended to be exhaustive in terms of what must be addressed to deliver the Basin Plan to achieve ecological outcomes. We reiterate our submission that the Federal Government must respond in full to all 44 recommendations made by the Royal Commission.
27. We would be pleased to expand on any of the matters raised in this Submission at any further opportunities after the conclusion of the public consultation period.

²¹ SA Royal Commission Report, above n 1, 325.

²² Miki Perkins, 'Going against the flow: the plan to engineer Victoria's wetlands', *The Sydney Morning Herald* (online, 1 April 2023) <<https://www.smh.com.au/environment/sustainability/going-against-the-flow-the-plan-to-engineer-victoria-s-wetlands-20230329-p5cwb7.html>>.

²³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 19.