

Submission in response to

## Inquiry into the Water Amendment (Restoring Our Rivers) Bill 2023

prepared by Environmental Justice Australia

28 September 2023

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## 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 Federal Government's commitment to deliver the Murray-Darling Basin Plan in full. The purpose of this submission is to respond to the *Water Amendment (Restoring Our Rivers) Bill 2023* (Cth) (**the Bill**) and provide additional recommendations as to the inclusion of further amendments to the *Water Act 2007* (Cth) (**the Water Act**) and *Basin Plan 2012* (Cth) (**the Basin Plan**) to achieve cultural flows and delivery of the Basin Plan in full.

## B. Recommendations

3. We urge the Federal Government to enact amendments in relation to the Water Act and Basin Plan that will deliver:
  - (a) First Nations' water rights and cultural flows.
  - (b) Transparency and accountability measures.
  - (c) Achieving the recovery of 450GL and constraints measures.
  - (d) Climate change and environmental justice.

## C. First Nations' Water Rights

4. In the Second Reading Speech for the Bill, the Commonwealth Environment Minister emphasised that "a healthy and sustainable river system is important for Basin communities, agriculture, industry and First Nations."<sup>1</sup>
5. The commentary surrounding the Bill makes repeated references to the significance of the Murray-Darling Basin and river system to First Nations peoples. Accordingly, it is unacceptable that the Bill itself is silent on specific amendments that will deliver cultural flows or enhance the participation and substantive rights of Traditional Owners to facilitate their ongoing management of and connection to Country.
6. We are aware that Murray Lower Darling River Indigenous Nations (**MLDRIN**) will make a submission to this Inquiry. We support the recommendations proposed by MLDRIN to strengthen First Nations' water rights and achieve cultural flows. MLDRIN is a key stakeholder that the Inquiry and Government must meaningfully engage with in this reform process.

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<sup>1</sup> Commonwealth, *Second Reading Speech for the Water Amendment (Restoring Our Rivers) Bill 2023*, Senate, 6 September 2023 (Tanya Plibersek) 12.

7. In 2009, the Australian Government endorsed the United Nations Declaration on the Rights of Indigenous Peoples<sup>2</sup> (**UNDRIP**) and committed to be guided by the benchmarks and standards in that Declaration.<sup>3</sup> UNDRIP is the leading instrument that sets out global rights and standards for the realisation and protection of self-determination of Indigenous Peoples.<sup>4</sup> Since 2009, Australia has committed to take actions to implement UNDRIP in domestic law and promote the rights of First Nations' peoples.<sup>5</sup>
8. Accordingly, UNDRIP must guide the Federal Government in ensuring primacy of Traditional Owner views and aspirations for planning and decision-making in relation to the Basin. The Water Act must give effect to important principles in UNDRIP to improve First Nations' recognition, procedural and substantive rights and import the legal standard of free, prior and informed consent (**FPIC**) in decision-making frameworks. The external affairs power in the Australian Constitution can be relied upon to make these necessary amendments.<sup>6</sup>
9. Section 21 of the Water Act must be amended to explicitly recognise and promote the rights of Traditional Owners in relation to the management and use of water in the Basin.
10. 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 Royal Commission Report**). The Royal Commission Report made similar observations, and recommended that the words "have regard to" should be removed from section 21(4) of the Water Act, as "there is a danger in the legislation simply requiring that governments 'have regard' to Indigenous views about specific matters in preparing [Water Resource Plans] without providing any procedural requirements or safeguards, or creating any obligation to give any weight to the views expressed."<sup>7</sup> The Commissioner considered that the danger had been realised in the insufficient allocation of time and resources to facilitate procedurally fair consultation with Traditional Owners.
11. Key concerns raised in recent submissions to the Department of Climate Change, Energy and the Environment (**DCCEEW**) on Delivering the Basin Plan included the need for greater community involvement including with First Nations in decision-making and program design, addressing socioeconomic impacts of water recovery.<sup>8</sup>
12. If these matters are not sufficiently addressed in this review process, we submit that the review of the Water Act in relation to the delivery of cultural flows and guarantee of First Nations' water rights must not wait until 2027. Instead, a separate process should be

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<sup>2</sup> *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).

<sup>3</sup> Megan Davis, 'Indigenous Struggles in Standard-Setting: the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*; Australian Human Rights Commission, 'Implementing UNDRIP' (2021).

<sup>6</sup> *Australian Constitution* s 51(xxix); see also Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) [77]-[88].

<sup>7</sup> Bret Walker, Murray-Darling Basin Royal Commission (Report, 29 January 2019) 73 [16], 488.

<sup>8</sup> Australian Government, Department of Climate Change, Energy, the Environment and Water, 'Delivering the Murray-Darling Basin Plan – Consultation: What We Heard Report' (August 2023) 7 ('*What We Heard Report*').

proposed as a priority and prior to the Basin Plan review, such that the review may be informed by that process rather than the opposite approach.

13. In relation to specific amendments to increase the substantive rights of First Nations communities within the Basin, the Water for the Environment Special Account (**WESA**) provisions must be amended to:
  - (a) explicitly permit the use of WESA funds to deliver cultural flows in proposed new section 86AD of the Water Act; and
  - (b) direct that any surplus amount referred to in proposed new section 86AH be applied for the benefit of Indigenous Australians, rather than returned to Commonwealth's Consolidated Revenue Fund.

## D. Transparency and accountability

14. A stated purpose of the Bill is to “increase the transparency and accountability of Basin States if they fail to meet [a sustainable diversion limit (**SDL**)].<sup>9</sup>
15. It is critical that accountability frameworks and mechanisms are strengthened to ensure that Basin States fulfil their obligations to the implement the Basin Plan in full. Below we suggest some targeted reforms and amendments that would go some way to achieving this aim.

### Inspector-General's powers

16. We note that the purpose of the Inspector-General of Water Compliance (**Inspector-General**) is to “ensure various government bodies, water managers and users in the Murray-Darling Basin comply with their obligations under the Water Act and the Basin Plan and drive governments and water managers to uphold high standards of integrity and performance.”<sup>10</sup>
17. We support the expansion of the Inspector-General's powers to enhance accountability and oversight to ensure that Basin States are committed to the implementation of the Basin Plan.
18. However, we submit that this framework must be strengthened to ensure that it is adequately utilised to achieve its aims. For example, we refer to the proposed new section 135R relating to audits, which provides as follows:
  - (1) The Inspector-General may conduct, or appoint or establish a person or body (an **auditor**) to conduct, periodic audits to assess the performance of obligations under this Part.
  - (2) In conducting an audit, the auditor must have regard to the following:
    - (a) guidelines (if any) issued by the Inspector-General relating to the conduct of an audit;

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<sup>9</sup> What We Heard Report 5.

<sup>10</sup> Australian Government, Inspector-General of Water Compliance, ‘Sustainable Diversion Limit Compliance Statement for 2021-22’ (September 2023) 3.

- (b) any applicable guidelines issued by the Inspector-General under section 215V;
- (c) any applicable standards issued by the Inspector-General under section 215VA.

(3) The auditor must:

(a) prepare a report setting out the findings of the audit and any recommendations arising from the audit; and

(b) before the report is finalised, provide any person or body to 19 which the audit relates with an opportunity to comment on 20 the proposed findings and recommendations.

(4) After a report prepared under subsection (3) is finalised, the Inspector-General may publish a copy of the report on the Inspector-General's website.

19. We propose that this section should be amended to confer a duty on the Inspector-General to conduct an audit, rather than a discretion, and, additionally, a duty to publish a copy of the report on the Inspector-General's website. To that end, the proposed provision should be amended to provide that the Inspector-General:
- (a) must conduct, or appoint or establish a person or body (an auditor) to conduct, periodic audits to assess the performance of obligations under Part (s 135R(1));
  - (b) after a report prepared under subsection (3) is finalised, the Inspector-General must publish a copy of the report on the Inspector-General's website (s 135R(4)).
20. New sections 6.08A and 6.08C of the Basin Plan propose to empower the Inspector-General with the discretion to publish guidelines in relation to the content of the action plans and Basin State progress reports, respectively. If such guidelines are published, Basin States must have regard to them.<sup>11</sup>
21. This provision should instead require the Inspector-General to publish guidelines and require Basin States to respond to, rather than have regard to, those guidelines.
22. Finally, we note that the Inspector-General is empowered under the Water Act to decide whether a Basin State has a "reasonable excuse" for noncompliance. The lack of publicly available guidance or standards as to what constitutes a reasonable excuse leave this open to abuse and overuse.
23. For example, the New South Wales Government made a reasonable excuse claim for exceeding permitted take by more than 20% during the 2020/21 compliance period.<sup>12</sup> The "reasonable excuse" related to the state government's failure to adequately calibrate the model it used to match data recorded by new metres it had installed to measure pumping events.<sup>13</sup>
24. The term "reasonable excuse" must be constrained by way of inclusion of a defined term in the Bill or guidance must be developed and made publicly available as to what

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<sup>11</sup> *Basin Plan 2012* (Cth), s 6.08C(2).

<sup>12</sup> NSW Government, Planning, Industry & Environment, '2020/21 Reasonable Excuse Report: Barwon-Darling Sustainable Diversion Limit Compliance' (2020-21) 1.

<sup>13</sup> *Ibid.*

constitutes a “reasonable excuse” to ensure that similarly avoidable scenarios are not repeated, and to enhance accountability and transparency.

#### Federal Government’s powers

25. New section 77A proposes to allow the Federal Government to request that a Basin State provide information about water access entitlements. To strengthen accountability, this section should be amended to allow the Commonwealth to require a Basin State to provide this information.
26. Further, we note that the proposed consequence of noncompliance with the request/requirement to provide information by the Federal Government is to prepare an Action Plan. Stronger sanctions must be made available to ensure that Basin States comply with these requests.
27. To enhance transparency, we refer to the recommendation of the Royal Commission that the provisions in Subdivisions E and F of Part 2 of the Water Act should be amended to expressly provide that “all science is to be made available completely and in full, to the scientific community and general public, prior to the [Murray Darling Basin Authority]] making determinations for the consideration of the Minister.”<sup>14</sup>
28. We propose a power similar to that provided in section 4C of the *Flora and Fauna Guarantee Act 1989* (Vic), which vests the Victorian Minister for Environment with the power to require from public authorities information that the Minister considered is necessary and reasonable to ensure that the objectives of the Act are being considered.
29. We suggest that a similar power could be conferred on the Commonwealth Water Minister to ensure that Basin States are complying with the objects and purposes of the Water Act and Basin Plan.

## E. Achieving the recovery of 450GL and constraints measures

30. We support the proposal to lift the cap on the amount of environmental water able to be purchased by the Commonwealth in Division 5 of Part 2 in the Water Act. The recovery of the full 450GL is a key commitment and priority that must be reflected in the Water Act and Basin Plan, and this is an important step towards achieving this. However, reforms to the Water Act and Basin Plan must go further in order to prevent further delays.
31. The 36 sustainable diversion limit adjustment mechanism (**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

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<sup>14</sup> Bret Walker, Murray-Darling Basin Royal Commission (Report, 29 January 2019) 75 [37].

measures under the Basin Plan, however little progress has been made despite the current June 2024 deadline.<sup>15</sup>

32. The Royal Commission Report was clear 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”<sup>16</sup>; and
  - “enhancement of the environmental outcomes listed in [subsection] 86AA(3) of the Water Act and [Schedule] 5 of the Basin Plan is unlikely to be achieved, or at least fully achieved.”<sup>17</sup>
33. It is uncontested that constraints relaxation measures are critical to achieving environmental outcomes under the Basin Plan.
34. In its response to the Royal Commission Report, the Murray Darling Basin Authority (**MDBA**) agreed with both of these propositions.<sup>18</sup> 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.<sup>19</sup>
35. 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.<sup>20</sup>
36. 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.”<sup>21</sup>

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<sup>15</sup> 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>>.

<sup>16</sup> Bret Walker, *Murray-Darling Basin Royal Commission* (Report, 29 January 2019) 60 [8.1].

<sup>17</sup> Ibid 61 [9.1].

<sup>18</sup> Murray-Darling Basin Authority, *MDBA response to the South Australian Royal Commission* (MDBA Publication No 06/19, February 2019), 28, 30.

<sup>19</sup> Ibid 28.

<sup>20</sup> Ibid 61 [8.3].

<sup>21</sup> Ibid 310.



37. Further, the Commonwealth must immediately withdraw funding for failing or stalled SDLAM projects and commence water buybacks in targeted water basins to recover the equivalent amount of environmental water. For example, VMFRP projects, the New South Wales Menindee Lakes Project and Yanco Creek Modernisation Project.
38. The constraints roadmaps proposed in the Bill seeks to establish a common approach on a range of issues, including reporting, transparency, implementation and governance, and identifying opportunities for acceleration of measures towards program implementation by 31 December 2026.
39. This mechanism alone is insufficient to ensure that these measures will be delivered on time.
40. Instead, the Federal Government must create a framework that would empower it to appoint an independent panel to oversee negotiation processes with landowners to secure necessary easements to deliver these projects, if the progress of Basin States continues to stall. In the event that those negotiations are unsuccessful, we submit that the Commonwealth should oversee the compulsory acquisition of land in accordance with the Commonwealth Procurement Rules.<sup>22</sup>
41. 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.”<sup>23</sup>
42. In relation to the delivery of constraints relaxation measures to achieve full recovery of environmental water under the Basin Plan, we support the recommendation of the Royal Commission that “[a] properly funded, compulsory scheme for the removal or easing of constraints should be implemented.”<sup>24</sup>
43. The proposed amended to allow Basin States to enter contacts for new projects until 31 December 2027 will divert resources and funds away from completing constraints measures and other projects intended to achieve environmental outcomes. It should be removed. However, if this provision remains, we support the proposal to not subject the new projects to the socioeconomic test set out in section 7.17 of the Basin Plan.

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<sup>22</sup> Australian Government, Department of Finance, *Commonwealth Procurement Rules* (13 June 2023).

<sup>23</sup> Bret Walker, Murray-Darling Basin Royal Commission (Report, 29 January 2019) 60 [8.4].

<sup>24</sup> *Ibid* 72.



## F. Climate change and environmental justice

44. In the Second Reading Speech for the Bill, the Commonwealth Water Minister acknowledged that climate change “means we’ll see more variable rain in the north and less rain in the south-east” and “that means that basin flows could fall by as much as 30 per cent by 2050.”<sup>25</sup>
45. Despite this acknowledgement, the Bill is silent on targeted reforms that will ensure climate change projections and impacts are adequately accounted for in the implementation of the Basin Plan.
46. The Water Act requires the Basin Plan to be developed on the basis of the best available scientific knowledge, however the SDL mechanism fails to account for climate change projections or adopt a proactive, precautionary approach to water availability in anticipation of the future impacts of climate change.<sup>26</sup>
47. The term “historical climate conditions” is defined in section 1.07 of the Basin Plan, and means the climatic conditions for the period July 1895 to June 2009 represented by the best available records of hydrological and meteorological information for that period. That data does not account for the most recent severe drought on record, nor does it reflect future climate change projections.<sup>27</sup>
48. To that end, section 7.15(1)(a) must be amended to refer to climate change projections, rather than “a repeat of historical climate conditions”. This is consistent with the proposed amendments to expand the role of the Bureau of Meteorology.
49. The Bill proposes to amend the definition of “applicable method” in section 7.15 of the Basin Plan to “provide the [MDBA] with flexibility to incorporate the best available science and ensure the method used for reconciliation is fit-for-purpose.” This is insufficient. Instead, section 7.15 must include an express requirement for the MDBA to incorporate best available science in these calculations, including climate science.
50. We urge the Commission to properly engage with the extensive analysis on the failure of the Basin Plan to rely on the best available scientific knowledge that is set out in the Royal Commission Report.<sup>28</sup>
51. Environmental justice is the fair treatment and meaningful involvement of all people in the development, implementation, and enforcement of environmental laws, regulations, and policies, regardless of race, colour, national origin or income.<sup>29</sup> It means addressing the inequitable distribution of environmental risks and harm, including the harm caused by a changing climate.<sup>30</sup>

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<sup>25</sup> Commonwealth, *Second Reading Speech for the Water Amendment (Restoring Our Rivers) Bill 2023*, Senate, 6 September 2023 (Tanya Plibersek) 3.

<sup>26</sup> Bret Walker, Murray-Darling Basin Royal Commission (Report, 29 January 2019) 25, 64 [12.1], 710.

<sup>27</sup> Wentworth Group, *Report* (Report 8 September 2023) 5 <<https://wentworthgroup.org/wp-content/uploads/2023/09/MDB-EWR-Report-8-Sept-2023-1.pdf>>.

<sup>28</sup> Bret Walker, Murray-Darling Basin Royal Commission (Report, 29 January 2019) 605.

<sup>29</sup> David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007).

<sup>30</sup> *Ibid.*

52. We refer to the proposed amendments to the WESA provisions to enable the Federal Government to use funds flexibility to invest in Basin communities impacted by further water recovery to support social and economic outcomes while also delivering progress toward the target. Specifically, the Bill proposes to substitute a new paragraph 86AD(2)(c) which would allow payments made from the WESA to include payments that address any detrimental social or economic impact on the wellbeing of any community in the Murray Darling-Basin that is associated with a project or purchase.
53. This provision should be further amended to expressly allow separate transitional funding to be made available to Basin communities that are disproportionately affected by climate change and reduced water availability.

## G. Conclusion

54. The Royal Commission Report speaks to what has been lost as a result of poor management of the Basin and over-extraction of water resources since colonisation.<sup>31</sup> Environmental degradation, reduced river connectivity and loss suffered by First Nations' communities are ongoing risks and challenges that the Water Act and Basin Plan must urgently engage with and take robust steps to remedy.
55. We urge the Federal Government to take this opportunity to strengthen and enhance the legislative framework governing the management of the Basin to ensure that cultural flows and environmental outcomes are achieved without further delay.
56. We would be pleased to expand on any of the matters raised in this Submission at any further opportunities.

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<sup>31</sup> Bret Walker, Murray-Darling Basin Royal Commission (Report, 29 January 2019) 473-478.